DE JURE

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With another year coming to a halt, *De Jure* has pleasure in presenting the second volume of 2017. The contributors have once again paved the way for interesting discussions on a wide variety of topics. Interesting discussions are provided pertaining to the importance of the conservation of birds within the context of environmental law; the protection of stakeholders; aspects relating to business rescue proceedings available to rehabilitate companies; an assessment of the right of prisoners to adequate medical treatment as well as a discussion relating to the transplant of organs from HIV positive dead donors to HIV negative recipients to mention but a few as well as 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 express our gratitude to our editorial assistant Daniel Du Plessis 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.

Prof GP Stevens
Editor

The Harpy Eagle and the Amazon rainforest in Brazilian federal law – thoughts on environmental law and the conservation of birds of prey and their habitat*

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OPSOMMING

Die Harpy-arend en die Amasone-reënwoud in die Brasiliaanse federale reg – gedagtes oor die omgewingsreg en die bewaring van roofvoëls en hulle habitat

Die regsbeskerming van die Harpy-arend en die Amasone-reënwoud in die Brasiliaanse federale reg word krities in oorsig geneem en insigte wat van algemene toepassing op die regsbeskerming van roofvoëls en hulle habitat is, word daaruit geput. Die Harpy-arend word bedreig deurdat individuele voëls gejag en gevang word en deur habitatvernietiging. Die Amasone-reënwoud word onder andere deur ontbossing en aardverwarming bedreig. Die Harpy-arend se bewaringstatus ingevolge die Brasiliaanse federale reg is bevredigend. Omvattende wetgewing is ook in plek om vir die bewaring van die Amasone-reënwoud voorsiening te maak, maar daar is vraagtekens oor die effektiwiteit daarvan, veral na die promulgering van 'n nuwe *Código Florestal* (Woud-kode), wat swakker beskerming as sy voorganger bied. Teenstand van 'n invloedryke landbou-belangegroep en soms gebrekkige regshandhawing ondermyn die effektiwiteit van die Woud-kode. Aan die ander kant het omgewingsowerhede daarin geslaag om die tempo van ontbossing te verlaag, onder andere deur die effektiewe benutting van tegnologiese hulpmiddele en deur die aanwending van strafregtelike sanksies waarvoor Brasiliaanse wetgewing voorsiening maak. Regsgeleerdes, soos lede van die *Ministério Público* (die openbare vervolgingsgesag) en die regbank, speel 'n positiewe rol in die implementering van die omgewingreg in Brasilië. Omdat reënwoude aardverwarming teenwerk, is die regsbeskerming van die Amasone van internasionale belang. Die effektiewe regsbeskerming van groot roofvoëls verg 'n tweeledige aanslag: regsbeskerming teen direkte bedreigings soos jag, asook regsbeskerming van habitat. Die regsbeskerming van roofvoëls kan ook die bewaring van woudhabitatte bevorder, enersyds deur die roofvoëls se ekologiese rol as karnivore, en andersyds as vlagskipspesies in bewaringsinisiatiewe. Die doeltreffende regsbeskerming van spesies en hulle habitatte sal toenemend internasionale samewerking verg.

* Valuable critical comments by anonymous reviewers and financial support by the National Research Foundation of South Africa are gratefully acknowledged.

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1 Introduction

The Harpy Eagle[1] has been described by ornithologists as the most formidable avian predator in the world.[2] It is one of the largest and probably the most powerful of all the actively hunting[3] raptors, or birds of prey.[4] Its main habitat is South and Central American rainforest.[5] The Amazon is the largest tropical rainforest in the world. It occupies an estimated 5 500 000 square kilometers, which constitute 56 per cent of all the broadleaf forests on earth.[6] It spans across 9 South American countries,[7] with the largest portion situated in Brazil.[8] As one of the world's largest hunting raptors and the largest tropical rainforest respectively, the Harpy Eagle and the Amazon rainforest may both be described as giants of nature. They are intimately connected, insofar as the Harpy Eagle is an apex predator in the Amazonian ecosystem, and the Amazon is the most important forest for the global conservation of the Harpy Eagle.[9]

1 *Harpia harpyja*. See in general Brown and Amadon *Eagles, Hawks And Falcons Of The World Vol 2* (1968) 632-636; Del Hoyo, Elliot and Sargatal (eds) *Handbook Of The Birds Of The World Vol 2* (1994) 191; Ferguson-Lees and Christie *Raptors Of The World* (2001) 717-719; BirdLife International 2017 http://datazone.birdlife.org/species/factsheet/harpy-eagle-harpia-harpyja (accessed 2017-03-03); Global Raptor Information Network 2017 http://www.globalraptors.org/grin/SpeciesResults.asp?specID = 8040 (accessed 2017-03-03); International Union for Conservation of Nature and Natural Resources 2016 http://dx.doi.org/10.2305/IUCN.UK.2016-3.RLTS.T22695998A93537912.en (accessed 2017-03-03).

2 Brown and Amadon 632; Ferguson-Lees and Christie 718. The recorded weight of the Harpy Eagle is 4-9 kg (Ferguson-Lees and Christie 718). The two eagle species that are closest in terms of weight are Steller's Sea Eagle *Haliaeetus pelagicus* at 4.9-9 kg (Ferguson-Lees and Christie 408) and the Philippine Eagle *Pithecophaga jefferyi* at 4.7-8 kg (Ferguson-Lees and Christie 722). Scientific and English names used here follow Dickinson and Remsen *The Howard Moore Complete Checklist Of The Birds Of The World Vol 1* (2013).

3 As opposed to scavenging, see eg Del Hoyo, Elliot and Sargatal (eds) 69.

4 Kemp 'What is a raptor?' in Newton (ed) *Birds Of Prey* (1990) 14.

5 Brown and Amadon 632; Del Hoyo, Elliot and Sargatal (eds) 191; Ferguson-Lees and Christie 717-718; BirdLife International 2017 http://datazone.birdlife.org/species/factsheet/harpy-eagle-harpia-harpyja (accessed 2017-03-03); Global Raptor Information Network 2017 http://www.globalraptors.org/grin/SpeciesResults.asp?specID = 8040 (accessed 2017-03-03); International Union for Conservation of Nature and Natural Resources 2016 http://dx.doi.org/10.2305/IUCN.UK.2016-3.RLTS.T22695998A93537912.en (accessed 2017-03-03).

6 Barbosa *Guardians of the Amazon Rainforest: Environmental organizations and development* (2015) 1.

7 Bolivia, Brazil, Colombia, Ecuador, French Guyana, Guyana, Peru, Surinam and Venezuela.

8 Brazil contains 69% of the Amazon drainage basin, in which the Amazon rainforest is situated; *supra* n 6 at 1.

9 Ferguson-Lees and Christie 719; International Union for Conservation of Nature and Natural Resources 2016 http://dx.doi.org/10.2305/IUCN.UK.2016-3.RLTS.T22695998A93537912.en (accessed 2017-03-03).

Both the Harpy Eagle and the Amazon Rainforest are under threat. The Harpy Eagle has disappeared from vast parts of its historically known range of distribution,[10] and millions of hectares of the Amazon have been lost to human development or destruction.[11]

This contribution provides a critical overview of the protection that has been bestowed upon the Harpy Eagle and the Amazon rainforest under Brazilian federal law.[12] To provide context, the overview is preceded by an introductory account of the basic, and interrelated, conservation challenges faced by the Harpy Eagle and the Amazon rainforest in Brazil. Overviews of enforcement and compliance realities and challenges follow and lead on to a discussion of pertinent aspects of the legal protection of the Harpy Eagle and the Amazon, with the aim of producing important insights of general application in respect of the legal conservation of birds of prey and their habitats.

2 Conservation Challenges

2 1 Conservation Challenges Facing the Harpy Eagle

In global terms, the Harpy Eagle probably has a population in the range of 20 000 to 50 000 individuals and is not currently regarded as an Endangered Species on a global scale. However, Harpy Eagle populations are suspected to be declining 'moderately rapidly' and its worldwide distribution range is shrinking. In Brazil, the Amazon still harbours an apparently substantial Harpy Eagle population.[13] The International Union for Conservation of Nature and Natural Resources (IUCN), in consultation with BirdLife International, lists the Harpy Eagle as globally Near-Threatened in its Red List. These conservation non-governmental organisations furthermore project that the Harpy Eagle will suffer a habitat loss of 27.6 to 45.5% and that the species is likely to decline by

10 Ferguson-Lees and Christie 717; International Union for Conservation of Nature and Natural Resources 2016 http://dx.doi.org/10.2305/IUCN.UK.2016-3.RLTS.T22695998A93537912.en (accessed 2017-03-03).

11 Roughly 1 299 593 sq km of the Amazon have been cleared by 2012; *supra* n 6 at 1.

12 Brazil is a federation of 26 states, a federal district and municipalities. Federal law, rather than state law, generally plays a more dominant part in environmental conservation, especially in the Amazonian states; see McAllister *Making Law Matter: Environmental Protection And Legal Institutions In Brazil* (2008) 22.

13 BirdLife International 2017 http://datazone.birdlife.org/species/factsheet/harpy-eagle-harpia-harpyja (accessed 2017-03-03); International Union for Conservation of Nature and Natural Resources 2016 http://dx.doi.org/10.2305/IUCN.UK.2016-3.RLTS.T22695998A93537912.en (accessed 2017-03-03). The Harpy Eagle also occurs in smaller numbers in other habitats, such as the Pantanal floodplain and forest enclaves in *Cerrado* (woody savanna). In the species-rich, but highly fragmented, Atlantic Forest of Brazil, Harpy Eagle numbers have been severely reduced. See Aguiar-Silva, Sanaiotti and Luz 'Food habits of the Harpy Eagle, a top predator from the Amazonian forest canopy' 2014 48(1) *Journal of Raptor Research* 25.

25 to 30% over three generations.[14] Therefore, the Harpy Eagle's population and distribution trends warrant concern and legal and other conservation responses are appropriate.

The most important known anthropogenic threats experienced by the Harpy Eagle may be broadly classified into direct threats, that is, by hunting and live capture of individual birds; and indirect threats, mainly habitat destruction.[15] The hunting and live capture of Harpy Eagles may be motivated by such diverse objectives as the securing of trophies, obtaining live specimens for zoos or as pets, retaliation for and prevention of domestic stock losses, and so forth.[16] Even curiosity on the part of persons who have never or seldom seen Harpy Eagles has been recorded as a motive to kill the eagles.[17]

Habitat destruction is regarded as the most serious general threat faced by wildlife.[18] The Harpy Eagle has not escaped this trend. Because the Amazon rainforest is a globally important component of the worldwide distribution of the Harpy Eagle, the conservation challenges faced by the Amazon will now be considered.

2 2 Conservation Challenges Facing the Amazon Rainforest

The Amazon is so much larger than any other rainforest that it is probably further away from total destruction than any other rainforest on earth. Historically, the interior of the Amazon has been largely inaccessible, and the forest enjoyed a comparatively large measure of immunity against the destructive activities of human populations for a long time.[19] Human access was originally largely limited to waterborne transport along rivers. However, in more recent times, the Amazon has become vulnerable to deforestation and degradation. In 2001, scientists claimed that the Amazon had the highest absolute rate of forest destruction in the world, averaging nearly 200 million hectares per year.[20] By 2012, an estimated 757 661 square kilometres of the Brazilian part of the Amazon have been cleared, representing 18.6 percent of the

14 BirdLife International 2017 http://datazone.birdlife.org/species/factsheet/harpy-eagle-harpia-harpyja (accessed 2017-03-03); International Union for Conservation of Nature and Natural Resources 2016 http://dx.doi.org/10.2305/IUCN.UK.2016-3.RLTS.T22695998A93537912.en (accessed 2017-03-03).

15 Aguiar-Silva, Sanaiotti and Luz 2014 48(1) *Journal of Raptor Research supra* n 13 at 25.

16 Global Raptor Information Network 2017 http://www.globalraptors.org/grin/SpeciesResults.asp?specID = 8040 (accessed 2017-03-03).

17 Trinca, Ferrari and Lees 'Curiosity killed the bird: arbitrary hunting of Harpy Eagles *Harpia harpyja* on an agricultural frontier in southern Brazilian Amazonia' 2008 30 *Cotinga* 12-15.

18 Owens and Bennett 'Ecological basis of extinction risk in birds: habitat loss versus human persecution and introduced predators' 2000 79 *Proceedings of the National Academy of Sciences* 12145.

19 Bryner 'Brazil's green court: environmental law in the Superior Tribunal de Justiça (High Court of Brazil)' 2012 *Pace Envtl L Rev* 473.

20 Laurance *et al* 'The future of the Brazilian Amazon' 2001 291 *Science* 438.

Brazilian Amazon.[21] Advancement of agricultural interests such as the acquisition of ranchland for livestock and large-scale cropland cultivation,[22] road construction, human settlement and the construction of dams for hydro-electrical schemes constitute some of the major causes of deforestation.[23] The construction of new roads continues to open up vast new areas to human exploration and exploitation.[24]

3 Legal Protection Under Brazilian Federal Law

3 1 Protection of the Harpy Eagle in Brazilian Federal Law

A chapter of the Constitution[25] of Brazil is devoted to the environment.[26] It states that all have the right to an ecologically balanced environment, and the state and the citizenry have a duty to defend and preserve it for present and future generations.[27] To ensure the effectiveness of this right, the state has the responsibility to protect the fauna and flora by

21 *Supra* n 6 at 1. Combined with the estimated deforestation in Bolivia, Colombia, Ecuador, French Guyana, Guyana, Peru, Surinam and Venezuela, roughly 1 299 593 square kilometers of the entire Amazon have been cleared by 2012.

22 Soy beans and beef are two of the most important agricultural products in Brazil and both are produced at the expense of rainforest in many areas; see Crawford and Pignataro 'The insistent (and unrelenting) challenges of protecting biodiversity in Brazil: finding 'the law that sticks'' 2007 39(1) *University of Miami Inter-American Law Review* 16-19.

23 Crawford and Pignataro 2007 39(1) *University of Miami Inter-American Law Review supra* n 22 at 6; Fearnside 'Environmental and social impacts of hydroelectric dams in Brazilian Amazonia: implications for the aluminum industry' 2016 77 *World Development* 48-65; Mongabay 2016 https://news.mongabay.com/2016/03/bndes-a-bank-loans-billions-to-tame-south-americas-wild-waters/ (accessed 2017-03-23).

24 Barber *et al* 'Roads, deforestation and the mitigating effect of protected areas in the Amazon' 2014 177 *Biological Conservation* 203-208. A long-term study on the biological dynamics of forest fragments conducted near Manaus in the Brazilian Amazon has shown that the more fragmented a forest becomes and the smaller the forest fragments become as a result of deforestation, the greater the loss of biodiversity becomes inside the forest fragments; see eg Laurance *et al* 'The fate of Amazonian forest fragments: a 32-year investigation' 2011 144 *Biological Conservation* 56-65.

25 See, on the role of the Constitution in respect of the environment, Bryner 2012 *Pace Envtl L Rev supra* n 19 at 480-481; Drummond and Barros-Platiau 'Brazilian environmental laws and policies, 1934-2002: a critical overview' 2006 28(1) *Law and Policy* 95; Daibert 'Historical views on environment and environmental law in Brazil' 2009 *Geo Wash Intl L Rev* 836-837; Fernandes 'Law, politics and environmental protection in Brazil' 1992 4(1) *Journal of Environmental Law* 52-53; McAllister 24-25; Patriota 'An introduction to Brazilian environmental law' 2009 *Geo Wash Intnl L Rev* 612-614.

26 Chapter VI.

27 Article 225; see also Michigan State University College of Law 2016 https://www.animallaw.info/intro/brazil (accessed 2017-03-03); Michigan State University College of Law 2016 https://www.animallaw.info/statute/brazil-constitutional-provision-animal (accessed 2017-03-03).

legislation that prohibits practices which are a risk to their ecological function, cause the extinction of species or subject animals to cruelty.[28]

Law 5.197 of 1967 established comprehensive protection for indigenous fauna.[29] It provided that wild animals, as well as their nests, shelters and natural breeding sites are property of the state, and their use, persecution, destruction, hunting or harvesting is prohibited.[30] This protection was strengthened by the *Environmental Crimes Law*,[31] which criminalises and establishes penalties for the killing, pursuing, hunting, catching and use of resident or migratory wildlife animal species without authorisation or a licence.[32] Wildlife animal species are defined as all indigenous species, migratory or otherwise, terrestrial or aquatic, whose life cycle takes place, in whole or partially, within the Brazilian territory or in Brazilian jurisdictional waters.[33] The penalty is imprisonment of six months to one year and a fine.[34] Other acts that attract the same penalties are the obstructing of the procreation of fauna; modification, damaging or destruction of nests, refuges or natural breeding areas; and trading in wild animals.[35] The penalties will be increased by 50 percent under certain circumstances, *inter alia* if the crime is committed against a rare species or one considered to be endangered, even if this pertains only at the site where the crime is committed; if the crime is committed in a conservation area; or if the crime is committed using methods or equipment capable of causing mass destruction.[36] If the crime is committed in the form of professional hunting, the penalty may increase threefold.[37] Killing an animal is not a crime if it is done in necessity to satisfy the hunger of the perpetrator or his family; to protect agriculture,

28 Article 225 par 1(vii); see also Michigan State University College of Law 2016 https://www.animallaw.info/statute/brazil-constitutional-provision-animal (accessed 2017-03-03).

29 Daibert 2009 *Geo Wash Intl L Rev supra* n 25 838.

30 Article 1; art 2 also prohibits professional hunting. Some exceptions are made in subsequent provisions.

31 *Law 9.605* of 1998. See in general Benjamin 'Criminal law and the protection of the environment in Brazil' 1998 *Fifth International Conference on Environmental Compliance and Enforcement* 227 https://www.inece.org/assets/Publications/579f99e064d12_ThemeCriminalLawAndTheProtectionOf_Full.pdf (accessed 2017-03-20); Drummond and Barros-Platiau 2006 28(1) *Law and Policy supra* n 25 at 100; Michigan State University College of Law 2016 https://www.animallaw.info/intro/brazil (accessed 2017-03-03). An English translation of the Environmental Crimes Law is available at Michigan State University College of Law 2016 https://www.animallaw.info/statute/brazil-crimes-brazilian-environmental-crimes-law (accessed 2017-03-03). The predecessor of *Law 9.605* in the field of the conservation of fauna was the *Animal Protection Act*, *Law 5.197* of 03/01/1967; see Drummond and Barros-Platiau 2006 28(1) *Law and Policy supra* n 25 at 90-91.

32 Article 29.

33 Article 29(3).

34 Article 29.

35 Article 29(1).

36 Article 29(4).

37 Article 29(5); Benjamin 1998 *Fifth International Conference on Environmental Compliance and Enforcement supra* n 31 at 230.

orchards and herds if authority has been granted by a competent authority; or in case of dangerous animals.[38]

The Harpy Eagle is classified as 'Vulnerable' in the *National List of Brazilian Fauna Species Threatened With Extinction*,[39] which has been compiled by the Chico Mendes Institute for Nature Conservation, an office of the Brazilian Ministry of the Environment. This Brazilian list, therefore, allocates the Harpy Eagle to a more serious category of threat than the IUCN Red List.[40] The inclusion of the Harpy Eagle in the Brazilian list will *inter alia* mean that crimes under the *Environmental Crimes Law* against the Harpy Eagle will attract the harsher penalties provided for in respect of crimes to rare or endangered species.

Because the Harpy Eagle occurs naturally in low densities and is a slow breeder, even a small decline in the annual survival rate of adult birds can have a large negative effect on the size of the population.[41] Large bird species with slow reproductive rates may be lost from otherwise suitable habitat if hunting and other anthropogenic factors reduce the average annual survival of adults and causing a population decline.[42] For this reason, the targeted legal protection of the Harpy Eagle against human persecution, as detailed above, is important for its survival.

3 2 Protection of the Amazon Rainforest in Brazilian Federal Law

The Constitution of Brazil provides that the Brazilian Amazonian forest is a part of the national patrimony and that it shall be used under conditions prescribed by law that will ensure the preservation of the environment.[43]

38 Article 37.

39 *Ordinance 444* of 17/12/2014, see http://www.icmbio.gov.br/portal/images/stories/biodiversidade/fauna-brasileira/avaliacao-do-risco/PORTARIA_N%C2%BA_444_DE_17_DE_DEZEMBRO_DE_2014.pdf (accessed 2017-03-20). See further the Ministry of the Environment 2017 http://www.mma.gov.br/biodiversidade/especies-ameacadas-de-extincao/fauna-ameacada (accessed 2017-03-20).

40 As seen in par 2 1 above, the IUCN lists the Harpy Eagle as Near-threatened. According to IUCN criteria, Vulnerable is a more serious category. Taxa that are classified as Vulnerable are regarded to face a high risk of extinction; see IUCN 2016 http://www.iucnredlist.org/static/categories_criteria_3_1 (accessed 2017-03-20).

41 Watson *et al* 'Trial restoration of the Harpy Eagle, a large, long-lived, tropical forest raptor, in Belize and Panama' 2016 50(1) *Journal of Raptor Research* 4.

42 Watson *et al* 2016 50(1) *Journal of Raptor Research supra* n 41 at 4; Owens and Bennett 2000 (79) *Proceedings of the National Academy of Sciences supra* n 18 at 144-147.

43 Article 225 par 4; see also Michigan State University College of Law 2016 https://www.animallaw.info/statute/brazil-constitutional-provision-animal (accessed 2017-03-03).

Since 2001, the *Código Florestal* (Forest Code)[44] requires landowners who own land in the Amazon to conserve the indigenous vegetation in so-called Legal Reserves that must constitute 80% of their land.[45] If a greater portion of the land has already been deforested, the native vegetation must be restored at the landowners' expense to meet the required percentage.[46] In addition, certain parts of the land, such as riparian land and hilltops and steep slopes, are designated as Areas of Permanent Preservation to conserve water resources and to combat erosion.[47] According to this requirement, buffer strips of indigenous riparian vegetation (Riparian Protection Areas) must be left intact along watercourses.[48] In rural areas, protection areas must also be left intact around natural ponds or lakes.[49] Where land in the aforementioned zones have already been deforested by human occupation, the landowners have a duty to restore the native vegetation at their own

44 Originally *Law 4.771* of 09/15/1965 modified by *Provisional Measures 1.1511* of 06/25/1996 and *2.166-67* of 08/24/2001; currently *Law 12.651* of 05/25/2012, modified by *Law 12.727* and *Decree 7.830* of 10/17/2012. *Law 4.771* was promulgated in 1965 and was transformed into a conservation-oriented body of legislation by a series of presidential decrees; see Soares-Filho *et al* 'Cracking Brazil's Forest Code' 2014 344 *Science* 363. *Law 4.771* was preceded by *Decree 23.793* of 23/01/1934, which was also popularly known as the 'Forest Code'. While it stated in art 1 that forests were of common interest to all Brazilians, *Decree 23.793* contained few preservationist provisions; see Drummond and Barros-Platiau 2006 28(1) *Law and Policy supra* n 25 at 87. Despite its name, the 'Code' is not a codification of statutes and is more accurately referred to as the 'Forest Law'. For historical background and evaluation, see Drummond and Barros-Platiau 2006 28(1) *supra* n 25 at 87-90; Patriota 2009 *Geo Wash Intnl L Rev supra* n 25 at 614-615; Daibert 2009 *Geo Wash Intnl L Rev supra* n 25 at 825 831-832.

45 Originally *Law 4.771* of 09/15/1965 art 16; currently *Law 12.651* of 05/25/2012 art 12; see further Soares-Filho *et al* 2014 344 *Science supra* n 44 at 363. In spite of the name 'Forest Code' this statute also applies to other forms of native vegetation, such as grassland and Cerrado (savanna). Land situated in the Amazon receives a significantly higher degree of protection insofar as the Legal Reserve on land in most other biomes is required to constitute 20% of the property and in the Cerrado biome 35%.

46 Originally under *Law 4.771* of 09/15/1965 art 16(5) to the full size of the Legal Reserve or to 50% if the property has been designated as a consolidation zone. Under the new Forest Code the restoration requirements differ; see below.

47 Soares-Filho *et al* 2014 344 *Science supra* n 44 at 363.

48 The width of the Riparian Protection Areas depends on the width of the watercourses: 30 m for watercourses less than 10 m wide, 50 m for watercourses 10-50 m wide, 100 m for watercourses 50-200 m wide, 200 m for watercourses 200-600 m wide, and 500 m for watercourses wider than 600 m; originally *Law 4.771* of 09/15/1965 art 2; currently *Law 12.651* of 05/25/2012 art 4.

49 Such strips must be 100 m wide, unless the waterbodies have a surface area of 20 ha or smaller, in which case the required width of the protected zone is 50 m; originally *Law 4.771* of 09/15/1965 art 2; currently *Law 12.651* of 05/25/2012 art 4.

expense.[50] Similar provisions require the setting aside of Areas of Permanent Preservation on hilltops and steep slopes (Hilltop Preservation Areas). For instance, native vegetation must be kept intact or, under the old Forest Code, restored on hilltops complying with certain criteria. Hilltops are defined as the areas situated higher than the lower two-thirds of the slope of the hill.[51] The *Environmental Crimes Law* boosted compliance with the provisions of the Forest Code by providing for penalties for specific criminal offences against flora.[52]

After an agribusiness backlash,[53] a new Forest Code[54] was adopted that provides weaker protection for native vegetation. The provisions pertaining to the size of Legal Reserves and Riparian Protection Areas remain the same as under the previous code, but the restoration duty of the landowners in respect of illegally cleared vegetation no longer extends to the entire area of Legal Reserves.[55] The Legal Reserve of Amazonian municipalities is also significantly reduced from 80% to 50% of the landholding if more than half of their surface area consists of protected areas.[56] The parts of Riparian Protection Areas that need to be restored, are measured differently and are narrower than the Riparian Protection Areas themselves.[57] The restoration duties of smaller

50 Originally *Law 4.771* of 09/15/1965 art 2; currently *Law 12.651* of 05/25/2012 art 16(6). See Crawford and Pignataro 2007 39(1) *University of Miami Inter-American Law Review supra* n 22 at 25-27 for more detail on the position under *Law 4.771*.

51 Originally *CONAMA resolution 303* of 03/20/2002; currently *Law 12.651* of 05/25/2012 art 4. CONAMA is the National Environmental Council; see Drummond and Barros-Platiau 2006 28(1) *Law and Policy supra* n 25 at 93-94. Under the old Code, the first category of Hilltop Protection Areas are hilltops with a minimum height of 50 m measured from their base, a maximum height of 300 m and a mean slope of 17% or more. Similar provisions regulate the position for higher hills, mesas and escarpments complying with specified physical characteristics such as height, surface area and slope; see further Soares-Filho *et al* 2014 'Supplementary materials' http://science.sciencemag.org/content/suppl/2014/04/23/344.6182.363.DC1 (accessed 2017-03-15).

52 *Law 9.605* of 1998; see eg arts 40 and 49; Benjamin 1998 *Fifth International Conference on Environmental Compliance and Enforcement supra* n 31 at 230; Nepstad *et al* 'Frontier governance in Amazonia' 2002 295 *Science* 631.

53 See par 4 2 below.

54 *Law 12.651* of 05/25/2012, modified by *Law 12.727* and *Decree 7.830* of 10/17/2012.

55 For instance, if the property adheres to a Rural Environmental Registry, the Riparian Protection Areas count towards the Legal Reserves; *Law 12.651* of 05/25/2012 art 15; Soares-Filho *et al* 2014 http://science.sciencemag.org/content/suppl/2014/04/23/344.6182.363.DC1 (accessed 2017-03-15).

56 *Law 12.651* of 05/25/2012 art 12; Soares-Filho *et al* 2014 344 *Science supra* n 44 at 363; Soares-Filho *et al* 2014 http://science.sciencemag.org/content/suppl/2014/04/23/344.6182.363.DC1 (accessed 2017-03-15).

57 *Law 12.651* of 05/25/2012 arts 61(6) and 61B; see further Soares-Filho *et al* 2014 http://science.sciencemag.org/content/suppl/2014/04/23/344.6182.363.DC1 (accessed 2017-03-15).

properties in respect of Protected Riparian Properties are also more lenient.[58] Hilltop Protection Areas are also defined differently in the new Forest Code[59] and this change is calculated to have reduced the Hilltop Preservation Areas in Brazil by 87%.[60] There is furthermore no longer a restoration requirement in respect of Hilltop Preservation Areas.[61]

In addition, smaller properties, which may be as big as 440 hectares in the Amazon, receive amnesty for illegal deforestation of Legal Reserves up to 2008 under the new Code and the owners of such properties are relieved of the restoration duty that they had under the original Forest Code.[62] The impact of this concession is considerable, as 90% of rural properties in Brazil now enjoy amnesty.[63] In combination, the various concessions provided for under the new Forest Code are calculated to have reduced Brazil's 'environmental debt' in respect of Legal Reserves and Riparian Protection Areas, which have been cleared before 2008, by 58%.[64] The total surface area that had to be restored has been reduced from 50 ± 6 million hectares to 21 ± 1 million hectares, of which a disproportionately large part is situated in the Amazon.[65]

4 Aspects of Enforcement and Compliance

4 1 Enforcement and Compliance Realities

Commentators agree that the Brazilian laws protecting biodiversity and natural vegetation are of a high standard or even trend-setting.[66] However, opinions vary on the standard of enforcement of and compliance with these laws, and accordingly, opinions differ on the effectiveness of this legal protection. On the one hand, some commentators point out that Brazil shares in a phenomenon that is

58 *Law 12.651* of 05/25/2012 arts 61(6) and 61B; Soares-Filho *et al* 2014 344 *Science supra* n 44 at 363; Soares-Filho *et al* 2014 http://science.sciencemag.org/content/suppl/2014/04/23/344.6182.363.DC1 (accessed 2017-03-15).

59 For instance, hilltops must now be higher than 100 m and have a slope of 25% or steeper to qualify for protection; *Law 12.651* of 05/25/2012 art 4; see further Soares-Filho *et al* 2014 http://science.sciencemag.org/content/suppl/2014/04/23/344.6182.363.DC1 (accessed 2017-03-15).

60 Soares-Filho *et al* 2014 344 *Science supra* n 44 at 363.

61 *Law 12.651* of 05/25/2012 art 4; see further Soares-Filho *et al* 2014 http://science.sciencemag.org/content/suppl/2014/04/23/344.6182.363.DC1 (accessed 2017-03-15).

62 *Law 12.651* of 05/25/2012 art 67; see also art 12 and Soares-Filho *et al* 2014 http://science.sciencemag.org/content/suppl/2014/04/23/344.6182.363.DC1 (accessed 2017-03-15).

63 Soares-Filho *et al* 2014 344 *Science supra* n 44 at 363.

64 Soares-Filho *et al* 2014 344 *Science supra* n 44 at 363.

65 Soares-Filho *et al* 2014 344 *Science supra* n 44 at 363; Soares-Filho *et al* 2014 http://science.sciencemag.org/content/suppl/2014/04/23/344.6182.363.DC1 (accessed 2017-03-15).

66 Drummond and Barros-Platiau 2006 28(1) *Law and Policy supra* n 25 at 100-102; Fernandes 1992 4(1) *Journal of Environmental Law supra* n 25 at 42; McAllister 4 20.

typical of environmental protection in many developing countries: the laws are adequate, but enforcement and compliance are weak.[67] One author typifies the prevailing scenario as one characterised by strong laws, but weak agencies.[68]

On the other hand, authors also point out positive trends. Several government agencies play an important part in enforcing environmental law and policy.[69] Modern technology is used extensively and effectively to gather evidence of transgressions. To detect illegal logging of natural forest vegetation, remote sensing is employed.[70] Molecular forensics have been employed in wildlife crime cases.[71] In respect of illegal hunting, capture and trading of animals, transgressors are tracked down *inter alia* by using the internet, particularly Facebook and YouTube.[72]

A very interesting positive aspect of enforcement and compliance, and one that is all too frequently lacking in developing and some developed countries, is the active and positive part played by lawyers in the enforcement of environmental law in Brazil. In this regard, McAllister highlights the role of the *Ministério Pûblico*, the federal prosecuting authority in Brazil.[73] McAllister argues that the *Ministério Público* has contributed in three important ways to the effectiveness of environmental enforcement in Brazil. First, it has replaced a culture of impunity, which had been undermining compliance, with a perception

67 See eg Bryner 2012 *Pace Envtl L Rev supra* n 19 at 534; Drummond and Barros-Platiau 2006 28(1) *Law and Policy supra* n 25 at 100-102; Da Silva and Bernard 'Inefficiency in the fight against wildlife crime in Brazil' 2016 50(3) *Oryx* 468-473; Guedes 'The environmental issue in Brazil: a matter of principles' 2014 2 *Panorama of Brazilian Law* 263-264; Hirakuri *Can Law Save The Forest? Lessons From Finland And Brazil* (2002) 2.

68 McAllister 20 and further.

69 See eg Banerjee and Macpherson 'Towards a policy of sustainable forest management in Brazil: a historical analysis' 2009 18(2) *Journal of Environment and Development* 142-144; Drummond and Barros-Platiau 2006 28(1) *Law and Policy supra* n 25 at 91-96; McAllister 'Sustainable consumption governance in the Amazon' 2008 38 *Environmental Law Reporter* 10876-10877.

70 Assunçao, Gandour and Rocha 'Deterring deforestation in the Brazilian Amazon: environmental monitoring and law enforcement' 2013 Climate Policy Initiative https://climatepolicyinitiative.org/wp-content/uploads/2013/05/DETERring-Deforestation-in-the-Brazilian-Amazon-Environmental-Monitoring-and-Law-Enforcement-Executive-Summary.pdf (accessed 2017-03-20); Nepstad *et al* 2002 295 *Science supra* n 52 at 631.

71 Sanches 'Illegal hunting cases detected with molecular forensics in Brazil' 2012 3(17) *Investigative Genetics* http://investigativegenetics.biomedcentral.com/articles/10.1186/2041-2223-3-17 (accessed 2017-03-23).

72 IBAMA 2017 http://www.ibama.gov.br/index.php?option=com_content&view=article&id=99:crimes-ambientais-identificados-pela-internet-somam-r-3-milhoes-em-multas&catid=58&Itemid=271 (accessed 2017-03-20).

73 McAllister 4 20 *et seq*; for a critical evaluation see Crawford 'Defending public prosecutors and defining Brazil's environmental 'public interest': a review of Lesley McAllister's *Making Law Matter: Environmental Protection And Legal Institutions In Brazil*'' 2009 *Geo Wash Intl L Rev* 627 *et seq*. See further Hochstetler and Keck *Greening Brazil: Environmental Activism In State And Society* (2007) 51-57.

that even the powerful in government and the private sector could be held accountable for environmental wrongs.[74] Second, it has assumed the function of holding even the environmental agencies themselves, which constitute a part of the executive arm of government, accountable.[75] Third, it has improved access to the courts in environmental matters and has itself served as a forum for the resolution of environmental disputes.[76] Another contribution of jurists to the enforcement of environmental law, highlighted by Benjamin and Bryner, is the role of the judiciary.[77] Members of the judiciary have interpreted and applied environmental laws in a manner that maximises environmental protection.[78] In essence, the rule of law may be said to have been strengthened in the field of environmental protection.[79]

Brazilian environmental law and policy have been shown by scientific analysis to have contributed to a lowering of deforestation rates in the Amazon.[80] The activities of the environmental police, such as the issuing of fines, have also had an impact in lowering deforestation rates.[81] In particular, the penalties provided for by the *Environmental Crimes Law* have been credited as contributing to effective enforcement.[82]

4 2 Opposition Against Conservation Initiatives

From the outset, conservation efforts in the Amazon were met with opposition. Advocating rainforest conservation in the Amazon could even endanger human life, as exemplified by the murder of activist Chico Mendes.[83] Mendes pioneered a concept of so-called extractive reserves, where indigent forest-living people could make a living from the

74 McAllister 85 *et seq*; McAllister 'Of environmental enforcement and compliance: a reply to Professor Crawford's review of *Making Law Matter: Environmental Protection And Legal Institutions In Brazil*' 2009 *Geo Wash Intl L Rev* 659.

75 McAllister 121 *et seq*; McAllister 2009 *Geo Wash Intl L Rev supra* n 74 at 660.

76 McAllister 152 *et seq*; McAllister 2009 *Geo Wash Intl L Rev supra* n 74 at 659.

77 Benjamin 'We, the judges, and the environment' 2012 *Pace Envtl L Rev* 582; Bryner 2012 *Pace Envtl L Rev supra* n 19 at 470.

78 Bryner 2012 *Pace Envtl L Rev supra* n 19 at 485-531.

79 McAllister 12-13.

80 Assunçao, Gandour and Rocha 2012 http://climatepolicyinitiative.org/wp-content/uploads/2012/03/Deforestation-Prices-or-Policies-Working-Paper.pdf (accessed 2017-03-03); Nepstad *et al* 'Slowing Amazon deforestation through public policy and interventions in beef and soy supply chains' 2014 344 *Science supra* 1120.

81 Hargrave and Kis-Katos 'Economic causes of deforestation in the Brazilian Amazon; a panel data analysis for the 2000s' 2013 54 *Environmental and Resource Economics* 498-490.

82 Nepstad *et al* 2002 295 *Science supra* n 52 at 631.

83 Daibert 2009 *Geo Wash Intnl L Rev supra* n 25 at 836; Environmental Defense Fund 2017 https://www.edf.org/climate/chico-mendes-legacy (accessed 2017-03-17); Evans 2013 http://blog.cifor.org/17295/martyr-of-the-amazon-the-legacy-of-chico-mendes?fnl=en (accessed 2017-03-17); Keck 'Social equity and environmental politics in Brazil: lessons from the rubber tappers of Acre' 1995 27(4) *Comparative Politics* 409-412. Since

sustainable extraction of natural resources, in that case rubber, from indigenous rainforest. He initiated a movement that has been described as the 'world's first tropical forest conservation initiative advanced by forest peoples themselves'.[84] Mendes's activism was in conflict with government policy that favoured forest clearing at the time and also antagonised powerful businesspeople with vested interests in forest clearing. Mendes was shot dead in 1988. His murder was highly publicised and this gave the conservation movement, which had been initiated by him, a further impetus.[85]

It is self-evident that the Forest Code dramatically limits landowner's rights in respect of their properties, and that it places a heavy burden on landowners by imposing a duty to restore native vegetation at own cost.[86] These inroads into the rights of landowners followed in the wake of Brazilian land reform legislation which provided that private property attained its full social function only if it combined fair distribution, adequate use and conservation of natural resources.[87] This meant that the wasteful use of natural resources became a legal reason to restrict private rights over land, which was revolutionary in Brazil at the time.[88] However, these measures could not make the legal protection of rainforest on private land unassailable.

A politically powerful agribusiness lobby, referred to colloquially as the *ruralistas*, exerted pressure for changes to the far-reaching provisions of the Forest Code of 1965.[89] The resignation, in 2008, of an environmental minister with a strong record of rainforest conservation was probably symptomatic of a loss of momentum on the side of conservationists in the face of the growing agribusiness backlash.[90] The new Forest Code,

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1985, almost 1 000 persons have reputedly been murdered in land disputes in the Brazilian Amazon; Evans 2013 http://blog.cifor.org/17295/martyr-of-the-amazon-the-legacy-of-chico-mendes?fnl=en (accessed 2017-03-17); see further The Guardian 2013 https://www.theguardian.com/environment/blog/2013/apr/02/chico-mendes-killings-amazon (accessed 2017-03-17).

84 Environmental Defense Fund 2017 https://www.edf.org/climate/chico-mendes-legacy (accessed 2017-03-17). See further Keck 1995 27(4) *Comparative Politics supra* n 83 at 417.

85 Evans 2013 http://blog.cifor.org/17295/martyr-of-the-amazon-the-legacy-of-chico-mendes?fnl=en accessed 2017/03/17).

86 For a discussion of the problematic interface between traditional concepts of property and nature conservation in Brazil; see Crawford and Pignataro 2007 39(1) *University of Miami Inter-American Law Review supra* n 22 at 19-27; Fernandes 1992 4(1) *Journal of Environmental Law supra* n 26 at 46-47; Sarlet and Fensterseifer 'Brazil' in Kotzé and Paterson (eds) *The Role Of The Judiciary In Environmental Governance* (2009) 257-258.

87 *Law 4.504* of 30/11/1962, popularly known as the Land Statute, see Drummond and Barros-Platiau 2006 28(1) *Law and Policy supra* n 25 at 89; Daibert 2009 *Geo Wash Intnl L Rev supra* n 25 at 830-831.

88 Drummond and Barros-Platiau 2006 28(1) *Law and Policy supra* n 25 at 89.

89 EcoAméricas 2012 ''Ruralistas' prevail in Brazil's Forest Code battle http://www.ecoamericas.com/en/story.aspx?id=1338 (accessed 2017-03-23).

90 New York Times 2008 http://www.nytimes.com/2008/05/16/world/americas/16brazil.html?ref=world&_r=0 (accessed 2017-03-20).

with its significant concessions in favour of development and deforestation at the cost of rainforest conservation, was adopted in 2012.[91] The new Forest Code has drawn criticism from non-governmental organisations and the scientific community.[92]

5 Discussion

The conservation status of the Harpy Eagle, contextualised against the conservation threats it faces, confirms a key premise for the legal protection of birds of prey in general. It illustrates clearly that effective legal protection of large birds of prey usually requires a two-pronged approach. First, effective legal protection of the habitat of the birds of prey is essential. No legal intervention on behalf of a bird of prey species is likely to succeed in the long run if effective habitat protection is lacking. How difficult the conservation of habitat can be, is clearly demonstrated by the struggle to ascertain a secure, legally protected future for the Amazon rainforest. Second, the legal protection of habitat must be supplemented by more species-specific legal provisions protecting species against specific threats such as killing and capturing. The mobility of birds often make such species-specific protection for birds arguably more important than, for instance, in the case of large mammals, which may to a greater or lesser degree be confined to protected areas by physical barriers such as fences.

The importance of the conservation of the Amazon for the survival of the Harpy Eagle should be self-evident. However, effective legal conservation of the Harpy Eagle may also strengthen the conservation of the Amazon. The eagle fulfils a key role in the Amazon ecology as an apex predator, and removal of the eagle from the ecosystem could impact negatively on the health of the system in currently unforeseen ways. In most regions where it occurs, the Harpy Eagle preys primarily on arboreal herbivorous mammals that feed on the leaves of forest trees. Such herbivorous animals can have a significant impact on forest regeneration and this means that predators such as the Harpy Eagle render an important ecosystem service.[93] To safeguard the long-term health of the Amazon ecology, the effective legal protection of the eagle

91 See par 3 2 above.

92 Metzger *et al* 'Brazilian law: full speed in reverse?' 2010 329 *Science* 276-277; Purdom and Nokes 2014 'Brazil repeals Forest Code and deforestation accelerates' https://eponline.com/articles/2014/01/08/brazil-repeals-forest-code-and-deforestation-accelerates.aspx (accessed 2017-03-03).

93 Aguiar-Silva, Sanaiotti and Luz 2014 48(1) *Journal of Raptor Research supra* n 13 at 30. A study in Venezuela found an association between and absence of large predators and decreased tree diversity and concluded that a viable guild of predators was fundamental to maintaining biodiversity; Terborgh *et al* 'Vegetation dynamics of predator-free land-bridge islands' 2006 94 *Journal of Ecology* 262. On the other hand, the fact that the Harpy Eagle also preys on fruit-eating animals, which may perform a valuable service as seed-dispersing agents, should perhaps also be taken into account to avoid a too simplistic analysis.

is arguably prudent and in accordance with the precautionary principle.[94]

Conservation of the Harpy Eagle could furthermore contribute to the conservation of the Amazon by fulfilling the role of a so-called flagship species.[95] A flagship species is a species that is sufficiently charismatic in the eyes of the public that it can become a powerful symbol and leading element in a conservation campaign.[96] Conservation initiatives can, and often are, driven from the top by governments and they typically employ legislation as a coercive means to do this. However, conservation initiatives, including conservation laws, are most likely to succeed if they are perceived to be legitimate by a substantial percentage of the citizenry.[97] Experience has shown that arguments for the conservation of ecosystems or ecological processes often fail to find favour with a broad base of citizens engaged in the cares and intricacies of day-to-day living. In a striking contrast, experience has shown that the fate of certain species, especially large predators[98] and other species with a perceived magnificence, may often succeed to capture the imagination of the public. The use of such a well-chosen species as a flagship of a broader conservation initiative may contribute to the harnessing of significant political and popular support. As an apex predator in the Amazon, and as the largest eagle species in the world, the Harpy Eagle is a suitable flagship species for the Amazon. It has the potential to capture the imagination of indigenous people living in the Amazon, policy-makers at state and national level, and conservationists and ecotourists internationally.[99]

94 Glazewski and Du Toit *Environmental Law in South Africa* (2013) par 1 4 7; Kidd *Environmental Law* (2011) 9.

95 Donázar *et al* 'Roles of raptors in a changing world: from flagships to providers of key ecosystem services' 2016 63(1) *Ardeola* 191-195; Simberloff 'Flagships, umbrellas and keystones: is single-species management passé in the landscape era?' 1998 *Biological Conservation* 248-251.

96 Simberloff 1998 *Biological Conservation supra* n 95 at 250.

97 Crawford and Pignataro 2007 39(1) *University of Miami Inter-American Law Review supra* n 22 at 64-65.

98 In a North American context, Simberloff 1998 *Biological Conservation supra* n 95 at 250 mentions the Florida panther *Puma concolor coryi* as a quintessential flagship species.

99 See eg Trinca, Ferrari and Lees 2008 30 *Cotinga supra* n 17 at 13; Beletsky *Global Birding* (2010) 121; Couzens *Top 100 Birding Sites of the World* (2015) 226-227. It is noteworthy that Stone, in his controversial yet influential essay 'Should trees have standing – toward legal rights for natural objects' 1972 45 *S Cal LR* 476 found it expedient to bring eagles into a habitat-centred argument: 'I am proposing we do the same with eagles and wilderness areas as we do with copyrighted works, patented inventions, and privacy: make the violation of rights in them to be a cost by declaring the 'pirating' of them to be the invasion of a property interest. If we do so, the net social costs the polluter would be confronted with would include not only the extended homocentric costs of his pollution ... but also to the environment *per se*.'

Incidentally, a focus on the intrinsic value of the Amazon as the world's largest rainforest, and its importance as habitat of the Harpy Eagle and many other species, should not obscure an important international dimension of the conservation of rainforests in general and the Amazon in particular. Scientists have presented evidence that rainforests can play an important role in the mitigation of climate change by storing carbon on a large scale.[100] The benefit of effective conservation of the Amazon would, therefore, reach far beyond the borders of Brazil and its South American neighbours.[101] The conservation of the Amazon is really in the interest of all the nations of the world.[102]

6 Conclusion

Reflecting on the Harpy Eagle and the Amazon rainforest, two giants of nature, and their vulnerability to the exploits of humans, produces key insights in respect of the conservation of birds of prey and their habitats. In respect of the legal conservation of birds of prey in general, one could conclude that the legal protection of habitat will benefit the conservation of birds of prey, while the legal protection of 'charismatic' bird of prey species, whether in their ecological role of apex predators or their emblematic role as flagship species, may well benefit the conservation of habitats.

100 Malhi *et al* 'Climate change, deforestation, and the fate of the Amazon' 2008 319 *Science* 169-172; Shukla, Nobre and Sellers 'Amazon deforestation and climate change' 1990 247 *Science* 1322-1325. The other side to the coin is that rainforests of the world are themselves negatively impacted by climate change; Malhi 'Exploring the likelihood and mechanism of a climate-change-induced dieback of the Amazon rainforest' 2009 106 *Proceedings of the National Academy of Science* 20610-20615; Nazareno *et al* 'Serious new threat to Brazilian forests' 2011 26(1) *Conservation Biology* 6; Phillips and Brienen 2015 'Amazon carbon sink is in decline as trees die off faster' http://theconversation.com/amazon-carbon-sink-is-in-decline-as-trees-die-off-faster-38946 (accessed 2017-03-23).

101 *Supra* n 6 at 2.

102 This simply-stated proposition gives rise to a magnitude of conceptual and practical legal challenges that are beyond the scope of this contribution, but see eg Atapattu 'Climate change, differentiated responsibilities and state responsibility: devising novel legal strategies for damage caused by climate change' in Richardson *et al* (eds) *Climate Law And Developing Countries* (2009) 37-58; *supra* n 6 at 1-3; Garcia *The Amazon From An International Law Perspective* (2011) 74-326; Eikermann *Forests In International Law: Is There Really A Need For An International Forest Convention?* (2015) 27-188; Gillespie *Conservation, Biodiversity And International Law* (2011) 167; Sand 'A century of green lessons: the contribution of nature conservation regimes to global governance' 2001 1 *International Environmental Agreements: Politics, Law And Economics* 33-72; Sindico 'Climate and trade in a divided world: can measures adopted in the North end up shaping climate change legislative frameworks in the South?' in Richardson *et al* (eds) *Climate Law And Developing Countries* (2009) 361-379; Wiener 'Something borrowed for something blue: legal transplants and the evolution of global environmental law' 2001 *Ecology Law Quarterly* 1295-1371.

As seen, the legal conservation status of the Harpy Eagle as a species in Brazilian federal law is satisfactory. A comprehensive body of legislation is in place to regulate utilisation and conservation of the Amazon and other biomes, but concerns over its effectiveness have arisen, especially in the wake of the new Forest Code. A healthy legal status does not necessarily imply a healthy factual conservation status. The agribusiness backlash and the subsequent downgrading of protection under the Forest Code, as well as shortcomings in enforcement, illustrate clearly that the effect of good environmental law and policy can be diluted or neutralised if state and citizen do not act in concert and with dedication. In Brazil, such dilution has produced a rather ironic outcome in so far as the law makes it easier, in many instances, lawfully to destroy rainforest habitat than to shoot a wild animal.

Finally, the conservation threats against the Amazon rainforest should be a matter of concern to the international community. The new frontier in the legal conservation of species and their habitat is one that transcends the boundaries of states and national legal systems. Effective legal protection of species and habitats will increasingly require international cooperation. Eagles and other birds of prey, that can cross international boundaries so effortlessly, should remind us of this reality.

The protection of stakeholders: the South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2*

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OPSOMMING

Die beskerming van belanghebbendes: die Suid-Afrikaanse sosiaal en etiek komitee en die Verenigde Koninkryk se ingeligte aandeelhouer waarde benadering: Deel II

In hierdie tweede deel van die artikel word die toepassing van CSR in praktyk nagegaan, met die sosiaal en etiese komitee as Suid-Afrikaanse model en die statutêre sosiaal en etiese komitee wat gebruik word in die Verenigde Koninkryk. Ondersoek word ingestel of sodanige komitee, of 'n statutêre benadering, soos vervat in artikel 172 van die VK Maatskappyewet, verkieslik is.

* Continued from 2017 *De Jure* 17(1).

1 The Social and Ethics Committee

Sections 72(4), (8), (9) and (10) of the 2008 Companies Act provide as follows:

72. Board committees. –
(4) The Minister, by regulation, may prescribe –
(*a*) a category of companies that must each have a social and ethics committee, if it is desirable in the public interest, having regard to –
(i) annual turnover;
(ii) workforce size; or
(iii) the nature and extent of the activities of such companies;
(*b*) the functions to be performed by social and ethics committees required by this subsection; and
(*c*) rules governing the composition and conduct of social and ethics committees.
(8) A social and ethics committee of a company is entitled to –

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(*a*) require from any director or prescribed officer of the company any information or explanation necessary for the performance of the committee's functions;
(*b*) request from any employee of the company any information or explanation necessary for the performance of the committee's functions;
(*c*) attend any general shareholders meeting;
(*d*) receive all notices of and other communications relating to any general shareholders meeting; and
(*e*) be heard at any general shareholders meeting contemplated in this paragraph on any part of the business of the meeting that concerns the committee's functions.

(9) A company must pay all the expenses reasonably incurred by its social and ethics committee, including, if the social and ethics committee considers it appropriate, the costs or the fees of any consultant or specialist engaged by the social and ethics committee in the performance of its functions.

(10) Section 84 (6) and (7), read with the changes required by the context, apply with respect to a company that fails to appoint a social and ethics committee, as required by this section and the regulations.

1 1 Composition and Appointment

Regulation 43[1] deals with the social and ethics committee as referred to in section 72 of the Act.[2]

This regulation applies to all state-owned companies, public companies that are listed[3] or any other company that complies with

1 In terms of section 223 and Item 14 of Schedule 5 of the 2008 Companies Act the Minister of Trade and Industry publishes regulations relating to the functions of the Companies and Intellectual Property Commission, the Takeover Regulation Panel and the Companies Tribunal, and other matters relating to the regulation of companies.

2 This requirement is in line with *King III* recommendations. Principle 1.1 of *King III* states that the board should provide effective leadership with an ethical foundation, which includes the responsibility to promote the stakeholder-inclusive model of corporate governance. Principle 8 of *King IV* concerns committees of the governing body and Recommended Practices 68-70 deal with the social and ethics committee. Paragraph 50 deals with disclosure in relation to this committee. *King IV* especially expands on the ethics role of this committee. It recommends that this committee should expand beyond mere compliance to contribute to the creation of value (page 29).

3 Reg 43(1). The fact that state-owned companies and public companies that are listed must, automatically, have social and ethics committees seems to imply that it is accepted that these companies comply with the criteria in s 72(4)(a)-(c). While this may be true in respect of listed public companies, it does not follow logically in respect of state-owned companies. Section 72(4) requires expressly that the three criteria (or one of them) must be present and the type of company is irrelevant. To apply the section, by way of regulations, automatically to certain types of companies does not seem to comply with the powers to make those regulations as in s 72(4): See *Henochsberg* 277 but also De Lange 'The social and ethics committee in terms of the 2008 Companies Act: Some observations regarding the exemptions and the role of the Companies Tribunal' 2015 *SA MercLJ* 507-539.

certain criteria.[4] A public interest score of more than 500 points (in any 2 of the preceding 5 financial years) will be relevant in this regard. The 'public interest score' is calculated at the end of a financial year as the sum of a number of things. It is the aggregate of the number of points equal to the average number of employees of the company during the financial year (contract workers are annualised over the particular financial year); one point for every R1 million (or portion thereof) in third party liability of the company, at the financial year end; one point for every R1 million (or portion thereof) in turnover during the financial year; and one point for every individual who, at the end of the financial year, is known by the company, in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities; or, in the case of a non-profit company, to be a member of the company, or a member of an association that is a member of the company.[5] The public interest score is thus a method used to determine whether a company must comply with enhanced accountability requirements based on its social and economic impact.

A minimum of three directors or prescribed officers[6] must serve on a company's social and ethics committee. At least one must be a director who has, at least for the previous three financial years, not have been involved in the day-to-day management of the company's business.[7]

From the literature available it seems if there is some disagreement as to the exact legal status of this committee. In *Henochsberg* it is argued that the social and ethics committee is not a board committee, but a separate organ of the company.[8] It is stated that, based on an interpretation of the Regulations, the committee is a company

4 Reg 43(1)(c).

5 Regulation 26(2). Certain companies are exempted, such as when the company is required in terms of other legislation to have, and does have, some form of formal mechanism within its structures that substantially performs the function that would otherwise be performed by the social and ethics committee (section 72(5)(a)) and if it is a subsidiary of another company (as defined in section 3 of the Companies Act) and if the holding company has a social and ethics committee that will perform the functions of the social and ethics committee for the (subsidiary) company (Regulation 43(2)(a)). If a company is required to appoint a social and ethics committee, it may apply to the Companies Tribunal in the prescribed manner and form for an exemption and the Tribunal can give such an exemption for five years if it is satisfied that it is not reasonably necessary in the public interest to require the company to have a social and ethics committee, having regard to the nature and extent of the activities of the company (section 72(5)(b)). This exemption is problematic as the same criteria (quantitatively) that require a company to appoint a social and ethics committee must be used to determine whether it is not necessary, in the public interest, to do so. It is suggested that the nature of the activities (i.e. a qualitative criterion) should be applied in the exercise of the discretion by the Tribunal, as the quantitative criteria are fixed by the public interest formula: See *Henochsberg* 278.

6 As defined in ss 1, 66(1) and Regulation 38.

7 See Reg 43(4).

8 See *Henochsberg* 276.

committee and not a board committee. Also, the social and ethics committee has a responsibility to report to the shareholders, but must only draw the attention of the board to certain matters.[9] Furthermore, it is argued that the Act empowers the board to delegate additional functions to the audit committee, a provision that is not present in respect of the social and ethics committee.[10] Joubert, on the other hand, argues that it is a board committee based on the short title of section 72 and the overall context of section 72 of the Companies Act.[11] It is clearly of importance whether the social and ethics committee is a board committee or not. If it is a board committee then the board can delegate certain powers and authority to the committee. This will be in addition to those listed in the Act. If it is a company committee then it will only have the powers and authority as provided for in the Act and Regulations. This also has an impact on the standard of conduct and the liability of the members of this committee, as board committee members are, in the case of directors, subject to the same duties as directors, as will be discussed later.[12]

1 2 Functions

The division of power between the shareholders and the board of directors is relevant when considering the functions of the SEC. The two (main) organs of the modern company are the general meeting (meeting of shareholders) and the board of directors.[13] The Act provides that the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, subject to the extent that the Act or the company's memorandum of incorporation[14] provides otherwise.[15] The Act therefore introduced a shift in ultimate

9 *Henochsberg* 276; Regulation 43(5)(b).
10 See s 94(7) (i) of the 2008 Companies Act.
11 Joubert 190, footnote 33, or at best a 'hybrid' committee. See also Locke 109, footnote 371 where she argues that Regulations 43(2) and 43(3) must be read together to mean that the board has the power to appoint members of the social and ethics committee and Cassim (man ed) *Contemporary Company Law* 417. This view is shared by Wixley and Everingham *Corporate Governance* (2015) 79.
12 See section 76 on the partial codification of directors' duties. This section is equally applicable to prescribed officers or members of board committees: s 76(1) (a) and (b).
13 See *Henochsberg* 276 on the arguments in favour of the social and ethics committee being a company committee and not a board committee. The audit committee is also appointed by the shareholders and therefore also an organ of the company. See s 94 and *Henochsberg* 277, 356 and on board meetings see s 73 and *Henochsberg* 280. See Cilliers *et al Cilliers and Benade Corporate law* (2000) 83 for the significance of the distinction between organs and agents.
14 Hereafter the MOI.
15 See s 66(1).

power in the company from the shareholders to the board.[16] The board of directors now has the ultimate power in the company, subject to the Act and the MOI. Therefore where the Act provides that 'the company' must act, that would now be the board of directors and not the shareholders (collectively), unless the Act makes it clear that the opposite will apply.[17] This provision on the shift in power from the shareholders to the board of directors has some serious consequences.

Ultimate (indirect) control of a company is usually in the hands of the shareholders as they have the power to appoint and remove directors. The level of protection that shareholders receive in terms of the 2008 Companies Act is, however, different compared to the 1973 Companies Act as shareholders no longer have an original decision-making power. This is due to the enactment of section 66. Section 66(1) apparently creates a positive duty on the board of directors to manage the company as it provides that the business and affairs of the company must be managed by or under the direction of its board. It also means, due to the use of the words 'business and affairs', that the ultimate power is no longer with the shareholders in general meeting, unless otherwise stated in the Act or the MOI.[18] The powers of the directors are now given by statute and not delegated or derived from an agreement between the shareholders and the directors. The ultimate responsibility for good corporate governance thus lies with the board of directors.[19]

The significance of the power to manage the business and affairs in terms of section 66 is twofold. The power is now original and no longer delegated from the shareholders. This shift from the previous position also happened in Canada, one of the models for the Act, and the significance thereof was summarised as follows: 'The directors' power is original, not delegated: as such, it is not subject to controls by the shareholders, except as specified in the applicable statute.'[20] This is also true with regard to South Africa. This means, *inter alia*, that the shareholders no longer have the inherent residual power to take a

16 See s 66(1). See *Henochsberg* 250(1) for a detailed discussion of s 66. It is uncertain to what an extent management functions can be excluded in the MOI or transferred to the shareholders to perform. See s 15(1) that provides that the provisions in the MOI must be in line with the Act; otherwise it would be void in so far as it is inconsistent. Also the directors owe the fiduciary duties to the company, and it will not make sense to give the shareholders the majority or all of the managerial powers because the directors can transfer their powers to the shareholders, or anybody else for that matter, but not their duties. It is also unclear how the shareholders will give effect to the full managerial function, as they will not have access to all the company records and accounts. See the discussion in *Henochsberg* 250(4).

17 See s 75, as one example, where the ultimate power is with the shareholders.

18 *Henochsberg* 250(5); Delport 'The division of powers in a company' in: Visser and Pretorius (eds) *Essays in Honour of Frans Malan* (2014) 81-92 91.

19 This is different from the position in the United Kingdom, which is more in line with the position of the 1973 Companies Act. See Cilliers *et al* 88.

20 Welling *Corporate Law in Canada: The Governing Principles* (2006) 315.

decision in case of a deadlock. This principle was, however, not applied consistently in the Act, and section 81(1)(d) refers to the deadlock ground as a ground for the winding-up of a solvent company. In *Henochsberg* it is stated that 'if the directors are in deadlock, the power to take over the powers of the directors does not transfer to the shareholders as the 'highest' authority in the company'. The same principle applies if the MOI or Act does not provide who must exercise the power.[21]

Secondly, the ultimate power is now in the hands of the board of directors and no longer with the shareholders. Therefore, unless the qualifications of section 66 are complied with, the board of directors is now the ultimate organ of the company. The significance of this is that the shareholders, as erstwhile ultimate holders of authority and power, cannot at common law ratify any actions by the directors beyond their authority or in transgression of their duties in acting on authority of the shareholders, except to the extent that the Act or the MOI expressly provides otherwise.

Also, statutory provisions can provide that the 'company' can or may do certain things.[22] It is thus important to determine whether the board or the shareholders will act as the company. Based on section 66(1) it seems that the default position is that 'the company' now refers to the board of directors and no longer to the shareholders. Thus, 'if the board acts, the company acts'.

The committee has reporting as well as monitoring duties. It has to monitor the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice[23] with regard to certain matters. These matters include social and economic development, good corporate citizenship, the environment, health and public safety, consumer relationships and labour and employment issues.

The committee has to consider matters relating to the company's *social and economic development* and this will include the company's standing relating to the goals and purposes as provided for in the United Nations' Global Compact Principles, the Organisation of Economic Co-operation recommendations on corruption, the Employment Equity Act[24] as well as the Broad Based Black Economic Empowerment Act.[25]

21 *Henochsberg* 332.
22 See e.g. s 78.
23 Monitoring a company's standing in respect of the codes and legislation expressly listed is, however, not enough. Full compliance will only be attained if the company's standing is monitored with reference to all *relevant* codes and legislation. Joubert 189. See also Stoop 2013 Stellenbosch Law Review 562–582 and Havenga 'The social and ethics committee in South African Company law' 2015 Journal of Contemporary Roman Dutch Law 285-292 in respect of the functions of the social and ethics committee.
24 Act 55 of 1998.
25 Act 53 of 2003.

Matters relating to *good corporate citizenship* also fall within their mandate and here reference is made to, *inter alia*, the promotion of equality, the prevention of unfair discrimination and the reduction of corruption. Further matters within their mandate include *environmental, health and public safety* issues as well as *consumer relationships*. Finally *labour and employment* is also listed and here reference is made to the International Labour Organization Protocol on decent work and working conditions.[26]

The committee is also entitled, but not obliged, to report annually to the shareholders at the company's annual general meeting on the matters within its mandate.[27]

The committee is also tasked with developing and monitoring a human rights management policy and system. On environmental, health and public safety the committee has a general duty to consider the impact of the company's activities and of its products and services. The committee is then also tasked to determine and monitor the company's standing in terms of the goals and purposes of the BBBEE Act. They should also monitor the company's activities relating to its consumer relations and this includes advertising, public relations and compliance with consumer protection legislation.[28]

A few remarks are appropriate with regard to the functions of the committee. First, the functions given to this committee are very wide and clear guidance on what is expected from this committee is not provided.[29] Specific terms of reference are not provided.[30] They can, for example, claim any costs or fees[31] for appointing consultants and experts, but they do not have the power to make appointments.[32] If the committee is a board committee, as discussed above, the board can give them this power. If not, the existence of this power is in doubt.

Secondly, as stated above, the committee should monitor the company's activities, having regard to all relevant legislation and codes as well as other legal requirements, and this is not just in relation to matters of a social nature as it extends to a wide range of issues like the environment, health and public safety. All relevant legislation, codes etc are not listed in the Regulations and a notable omission is *King III*.

26 For a detailed discussion on 'labour' and the Protocol in this context see Locke 111-112.
27 Section 72(8)(e). This may be an additional indication that the committee is a company committee rather than a board committee, because if it's the latter, reporting should be only to the board.
28 See Locke 109 -118 for a detailed discussion of the function and duties of the committee with reference to the aspects mentioned in the Regulations.
29 See Kloppers 166, 187 and Joubert 188.
30 Kloppers 166, 188.
31 Section 72(9)
32 Section 72(8).

Reference to national applicable instruments would have been preferred.[33] Knowledge of the relevant legal position concerning these fields is thus necessary. It basically covers all dimensions of social responsibility, sustainability and corporate citizenship.[34] The wider the scope of the duties of committee members the more unlikely that people will be willing to serve on such committees.[35] Joubert[36] argues that the task of identifying the relevant codes and legislation and performing the required monitoring and reporting functions in respect of the specific matters listed is quite an onerous task.

Thirdly, when considering the various matters that fall within the mandate of the committee it is abundantly apparent that the precise nature of these matters and the extent that the committee must pay attention to it is not clear. Herewith a few examples: The meaning of 'social and economic development' as one of the matters that the committee must monitor and report on, is unclear.[37] Kloppers[38] argues that the committee should focus more on social development as opposed to economic development, as the last mentioned is already dealt with by the audit committee.[39] However, just because another committee already deals with an issue does not necessarily mean that the social and ethics committee does not have to pay attention to the issue if it falls within its statutory mandate. Also, reference is made to the Employment Equity Act[40] in the context of 'social and economic development', but it is not clear whether the social and ethics committee should take responsibility for employment equity matters and the employment equity plan (as required by the Employment Equity Act). If it is argued that the social and ethics committee must take responsibility for these matters, and thus have more than a mere oversight function, then it can intrude with the functions of other board committees.[41] Furthermore, a clearer definition of 'health' and 'public safety'[42] would have been beneficial. It is not clear whether it only concerns occupational health, the health of consumers etc.

1 3 Appraisal

Some of the uncertainties with regards to this committee have already been touched upon above. The first issue concerns the appointment of this committee and whether or not it is a company committee or a board committee. We are of the view that the most convincing argument, in

33 Kloppers 2013 PER 166 187.
34 Kloppers 180 argues that it is not unusual to include matters like these under 'social and ethics', but then clear guidance is needed of what exactly is required from the committee. This is not the case.
35 Kloppers 183.
36 Joubert 188.
37 Regulation 43(5)(a)(i).
38 Kloppers 172.
39 Kloppers 172 and footnote 22.
40 Act 53 of 2003.
41 Kloppers 178.
42 Regulation 43(5)(a)(iii).

favour of the fact that it is a company committee and not a board committee, is the fact that the committee has the right, in its discretion, to report back to the shareholders. This is wider than their responsibility to simply draw certain matters to the attention of the board.[43] It is clearly important how one classifies this committee. If it is a board committee then the members will have the same duties as directors. If it is a company committee then it is not the case and the members are only subject to the functions and powers as stated in the Act and the Regulations. The importance of this distinction is that if the committee is not a board committee, without any fiduciary duties as directors and/or prescribed officers in terms of the common law or the Companies Act, towards the company, it can make recommendations to the board, and also report to the shareholders, on matters and in a manner that is not in the interest of the company. In this sense the committee is in the same position as the shareholders who, as organ of the company, do not have fiduciary duties towards the company.[44] Recommendations to the board for implementation would, obviously, be subject to the fiduciary duties of the board. However, if the board cannot or will not implement those recommendations, due to their fiduciary duties, a recommendation to the shareholders can result in removal of the board in terms of section 71, as neither the committee nor the shareholders have any fiduciary duties towards the company.

Secondly, on the functions of this committee, it was discussed above that clear terms of reference are not provided and that committee members will most probably be unclear as to what is precisely expected from them. Their functions will also, most definitely, overlap with some of the functions of the other committees, for example the remuneration committee, which is a board committee, in respect of employment issues. In this sense most of the duties and responsibilities of the social and ethics committee fall within the duties and responsibilities of the board in any case as the board has to take all the interests of stakeholders into account when acting for the benefit of the company.[45] None of the 'stakeholders' as listed in regulation 43 can, directly or by implication, be excluded from the attention of the board in the exercise of its duties. To require the committee to merely report to the board on the matters as outlined in the regulations would be counter-productive, as the board would, in most if not all instances, already have knowledge thereof or will be alerted thereto by e.g. the company secretary or other management divisions within the company, such as labour developments by the human resources department, consumer issues by the legal and compliance department and so forth. Both the social and ethics committee and the audit committee also have an interest in sustainability disclosures and assurances.[46] In addition, many of the risk

43 *Henochsberg* 276.
44 See *Henochsberg* 276 and Cilliers *et al Cilliers and Benade Corporate law* (2000) 83.
45 See discussion under para 4.1 *supra*.
46 Joubert 194, footnote 55.

issues that fall within the mandate of the audit committee, at least from a *King III* perspective and requirements, are also the responsibility of the social and ethics committee, such as the monitoring of and reporting on issues such as corruption. From a practical perspective this overlap is not effective. Two committees will thus report back to the board on the same issues. These committees may also have different views on the matters that they report on. From a cost perspective, the company has to remunerate members of different committees attending to the same matter. The different committees can, presumably, first talk to each other informally before they report back to the board to ensure that they do not provide conflicting views, but this will not solve the cost issues and this *modus operandi* is unacceptable *per se* from a corporate governance viewpoint due to, *inter alia*, lack of formal procedures and documentation. Also if the same members serve on both committees they will basically just meet once with two agendas. It is thus very important that a company provides, as far as it is practically possible, very clear terms of reference for each of its committees, within the ambit of the Act and the Regulations, and also taking into account the functions performed by the executive management and other divisions in the company. In practice the biggest danger has been shown here that the social and ethics committee may want to dictate to management and other divisions in the company as to the work to be done by the latter for the company or for the social and ethics committee. This is clearly untenable and should not be allowed. However, due to the uncertainties as to the exact role and function of the social and ethics committee, it is difficult, if not impossible, to manage this situation effectively in a company.[47]

Thirdly, the function of the social and ethics committee to report to the shareholders, as mentioned above, is most probably the biggest challenge. This can be explained as follows: In terms of Regulation 43(5)(c) the committee may report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate. If the committee brings a matter before the board, the board has to make a decision based on its duties towards the company. In other words they must act in the best interest of the company. If the committee is not a board committee, without any fiduciary duties, in terms of the common law or the Companies Act, towards the company as discussed above, it can make recommendations to the board, and also report to the shareholders, on matters and in a manner that is not in the interest of the company as defined above. If the board, however, does not implement the matter brought under their attention then the social and ethics committee can report back to the

47 A cursory study of arbitrarily chosen companies such as Steinhoff International Ltd and Sanlam Ltd and the reports by the chairmen of these companies in the annual reports, show that there is no consistent application in respect of the social and ethics committee.

general meeting of shareholders as this is a matter that falls within their mandate. The shareholders can of course not implement the decision,[48] but they can remove a specific director or even all the directors elected by shareholders. This ultimate power of shareholders in respect of directors could affect the discretion of the board in respect of the implementation of a matter reported on by the social and ethics committee.[49] In other words the shareholders can enforce CSR through the reporting function of the committee as they can determine the structure of the board. This can create tension between the board of directors and the general meeting and the committee. The reporting to the shareholders can also have the opposite effect from what is envisaged. This will be because the shareholders, in exercising their powers as shareholders, such as voting rights, have no duty, fiduciary or otherwise, towards the company or any other stakeholder for that matter. They will therefore, possibly, only take their own interests into account, and not even that of the company. This will therefore have the effect that the interests of the company as a separate entity, as well as that of the other stakeholders, are negated. If the shareholders are inclined to act in a manner that supports e.g. CSR or other interests, it may have a positive effect, but this is, at present at least, 'soft law' established and applied through codes.[50]

Locke states that the committee plays a supportive role to the board in addressing stakeholder issues as the committee has to draw matters within its mandate to the attention of the board.[51] As stated above, most of these matters will be within the knowledge of the board in any case and this proposed function does not add anything. In view of the above it can be argued that the committee can have a bigger and more controversial role, possibly unplanned and hopefully unintended by the legislator.

The basic principle is, however, that all the functions that fall within the ambit of the committee are actually also matters that the board should take into account in complying with its fiduciary duties towards the company. If the intention with the committee was merely to act as a conduit to the board and to sensitize the board about these matters, so that the board can properly consider the matters in conjunction with other interests, it is submitted that it would have been an important addition to the governance structure of the company. The powers of the committee, as well as the composition thereof with the minimum representation of one director, coupled with the powers of the committee to approach the shareholders, clearly indicate that it was not the intention of the legislature for the committee to merely assist the board.

48 Section 66.
49 *Henochsberg* 279.
50 It is beyond the scope of this article to give an exposition of these codes and the effect thereof. See in respect of institutional investors the *Code for Responsible Investment* in South Africa and a discussion thereof in Esser and Delport 2016 *Journal of Contemporary Roman Dutch Law* 27-28.
51 As per Regulation 43(5)(b). See Locke 110.

2 Conclusions on the South African Social and Ethics Committee

We are of the view that provision for the social and ethics committee is, in principle, a good initiative to give effect to the interests of stakeholders. As stated before, the role of directors is to make a profit for the company. When doing this they need to have regard to the interests of various stakeholders. In the end they need to make a decision that is best for the company as a separate legal entity. By having a committee that addresses the board on issues that are relevant when making business decisions should place directors in a better position to make the best decision for the company. However, as discussed above, there are various shortcomings and uncertainties with this committee. Its terms of reference are not clear enough. There is uncertainty as to whether this is a board committee or a company committee and this have various implications, for example, with regard to the liability of the members of this committee. The tension that can be created between the board and the shareholders is also problematic based on the fact that the committee should report back to the shareholders, as explained above. We are, however, still of the view that a committee like this is preferred to a legislative pluralist approach. But then it should be drafted with more certainty and its shortcomings should be addressed.

Joubert states that listed companies have already showed an awareness of social and sustainability issues in their public reporting.[52] Empirical research is obviously not available on how effective this committee is, but when considering the top 10 listed companies on the JSE it is clear that all of these companies have a social and ethics committee, as required by the Act, in place.[53] Procedurally it therefore seems if companies are starting to comply. Substantially, only time will tell whether this monitoring and reporting role on a wide selection of matters will actually result in better corporate socially responsible behavior and companies that are sustainable and good corporate citizens. It is, however submitted, that although the aims and functions of the social and ethics committee should at least, as argued above, sensitize the board in respect of the interests and importance of other shareholders, there are a substantial number of material legal issues, as discussed above, that will impact negatively on the ultimate effect of this committee.

52 According to a KPMG study the percentage of the hundred largest companies listed on the JSE reporting on corporate responsibility increased from 18% in 2005 to 97% in 2011. See Joubert 183, footnote 1. See https://www.kpmg.com/PT/pt/IssuesAndInsights/Documents/corporate-responsibility2011.pdf for the study (accessed 2017-11-07).

53 For the Top 40 listed companies see https://www.jse.co.za/current-companies/companies-and-financial-instruments.

3 A Comparison with the Stakeholder Approach in the United Kingdom

3 1 Introduction

In 1998 the Secretary of State for Trade and Industry announced a three-year fundamental review of core company law in the United Kingdom. This review was led by an independent steering group. Their aim was to develop a simple, modern, efficient and cost-effective framework to carry out business activity in Britain for the twenty-first century.[54]

In the course of the review process, various consultation documents were drafted.[55] A detailed discussion of the review process is not within the scope of this article. The aim is to discuss the stakeholder approach taken in the United Kingdom with the intention to compare it with the South African approach, discussed in Part 1 of this article.[56] The protection of stakeholders is one of the issues that received considerable attention during the United Kingdom company law review process.[57] The Steering Group, 'for ease of reference', referred to two basic approaches as far as company interests and the stakeholder debate are

54 See Attenborough 'The Company Law Reform Bill: an analysis of directors' duties and the objective of the company' 2006 Company Lawyer 162–169 where he discusses the company law reform of the United Kingdom as undertaken by the Steering Group. For a discussion of the company law review in the UK, see: Rickford 'A history of the company law review' in De Lacy (ed) *The Reform of United Kingdom Company Law* (2002) 3–37,10.

55 The *Strategic Framework*; *Developing the Framework*; *Completing the Structure*; the *Final Report* and the *White Paper of 2005*. See also *Modern Company Law for a Competitive Economy: Reforming the Law concerning Overseas Companies* (October 1999); *Company Formation and Capital Maintenance* (October 1999); *Company General Meetings and Shareholder Communication* (October 1999); *Capital Maintenance Other Issues* (June 2000); *Registration of Company Charges* (October 2000); *Trading Disclosures* (October 2000).

56 See De Jure 17(1). See Lombard and Joubert 'The legislative response to the shareholders v stakeholders debate: a comparative overview' 2014 Journal of Corporate Law Studies 211-240, 211 for a discussion of different models, legislative and otherwise, in various jurisdictions.

57 The interests of the employees as stakeholders have received legislative attention by the Labour government as early as 1980, when the Companies Act of 1980 in s 46 provided that the directors shall have regard to the interests of employees, but that such employees will not be able to enforce those duties directly. See Gower, Prentice and Pettet *Gower's Principles of Modern Company Law* (1992) 73. This movement was also attempted in South Africa, albeit it with a somewhat different *modus operandi*, but with the same lack of success. See Botha *Employee Participation and Voice in Companies: A Legal Perspective* (LLD Thesis 2015 North-West University) for a detail discussion of the development in South Africa.

concerned, namely the so-called enlightened shareholder value approach and the pluralist approach.[58] They summarised the two different approaches as follows:

> A distinction is drawn between the enlightened shareholder value approach, which asserts that [productive relationships] can be achieved within present principles, but ensuring that directors pursue shareholders' interests in an enlightened and inclusive way, and the 'pluralistic' approach, which asserts that co-operative and productive relationships will only be optimised where directors are permitted (or required) to balance shareholders' interests with those of others committed to the company.[59]

The Steering Group seems to strongly favour the so-called enlightened shareholder value approach.[60]

The Companies Act of 2006 provides for a comprehensive code of directors' duties and sections 171–177 set out their general duties. The scope of the general duties is listed in section 170 which states that the duties specified in sections 171–177 are owed to the company by the directors. The general duties are based on certain common law rules and equitable principles. These duties should be interpreted and applied in the same manner as common law rules and equitable principles.[61] Section 172 concerns the duty to promote the success of the company and is of importance for purposes of this article. These factors include that directors should have regard to the likely consequence of any decision in the long-term; the interests of the employees; the need to foster the company's business relationships with suppliers, customers and others; the impact of the company's operations on the community and the environment; the desirability of the company maintaining a reputation for high standards of business conduct; and the need to act fairly as between members of the company.

3 2 Section 172 of the Companies Act of 2006

Section 172 of the United Kingdom Companies Act of 2006 provides as follows:

> 172. Duty to promote the success of the company
> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to –
> (a) the likely consequences of any decision in the long term,
> (b) the interests of the company's employees,

58 See the *Strategic Framework* p 37, par 5.1.11. It has been stated that the enlightened shareholder value approach has a strong emphasis on shareholder primacy and the pluralist approach on the protection of stakeholders.
59 The *Strategic Framework* p iv, par 5.
60 The *Strategic Framework* p 39, par 39; p 42, par 5.1.23; pp 43, par 5.1.25 ff.
61 Section 170(4).

(c) the need to foster the company's business relationships with suppliers, customers and others,
(d) the impact of the company's operations on the community and the environment,
(e) the desirability of the company maintaining a reputation for high standards of business conduct, and
(f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

3 2 1 Explanation of Section 172

It is stated in the Explanatory Notes on the Act that this section enshrines in statute the enlightened shareholder value approach by stating that a director must promote the success of the company with reference to a number of important factors. With regard to subsection (1) it is explained that the list of factors is not exhaustive, but highlights areas of particular importance, which reflect wider expectations of responsible business behaviour, such as the interests of the company's employees. Directors have to determine, with the necessary care and skill, which factors are relevant at what stage of the existence of a company. Subsections (2) and (3) are explained as follows in the *Explanatory Notes*:

> Subsection (2) addresses the question of altruistic, or partly altruistic, companies. Examples of such companies include charitable companies and community interest companies, but it is possible for any company to have 'unselfish' objectives which prevail over the 'selfish' interests of members. Where the purpose of the company is something other than the benefit of its members, the directors must act in the way they consider, in good faith, would be most likely to achieve that purpose. It is a matter for the good faith judgment of the director as to what those purposes are, and, where the company is partially for the benefit of its members and partly for other purposes, the extent to which those other purposes apply in place of the benefit of the members. Subsection (3) recognises that the duty to promote the success of the company is displaced when the company is insolvent. Section 214 of the Insolvency Act 1986 provides a mechanism under which the liquidator can require the directors to contribute towards the funds available to creditors in an insolvent winding up, where they ought to have recognised that the company had no reasonable prospect of avoiding insolvent liquidation and then failed to take all reasonable steps to minimise the loss to creditors. It has been suggested that the duty to promote the success of the company may also be modified by an obligation to have regard to the interests of creditors as the company nears insolvency. Subsection (3) will leave the law to develop in this area.[62]

62 See pars 325–322 of the *Explanatory Notes on the Act*. The Steering Group was against the inclusion of creditors as beneficiaries of directors' duties.

3 2 2 Shareholder Primacy Retained

In terms of this duty embedded in section 172, directors are primarily expected to act in good faith to promote the success of the company for the benefit of its members as a whole.[63] In other words, shareholder primacy has been retained. However, the directors may also have regard to other matters, including and primarily those listed in section 172(1)(a)–(f). As was mentioned above, this list is not exhaustive.[64] The list provided in section 172(1) is probably the most comprehensive list of factors that directors should consider when managing a company contained in any modern company legislation. It is also, probably, the clearest recognition in modern company legislation of the importance of interests apart from the interests of shareholders, namely those of other stakeholders such as employees, suppliers, customers and others.

3 2 3 The Practical Application of Section 172

The practical application of this section is, however, unclear. This uncertainty can be explained as follows: firstly, directors are provided with an unfettered (or unlimited) discretion in terms of this provision. They should manage a company in a way they consider would promote the success of the company, for the benefit of its members. But there are no objective criteria indicating how they should exercise this important discretion. According to the *Ministerial Statements* of June 2007, there are two ways of looking at the statutory statement of directors' duties. On the one hand, it codifies the existing common law obligations of company directors. On the other hand, it marks a radical departure in 'articulating

63 See Esser and Du Plessis 'The stakeholder debate and directors' fiduciary duties' 2007 SA MercLJ 346, 353 and Richardson 'The Companies Act 2006, directors' duties and the onset of insolvency' 2007 Insolvency Law & Practice 138. See further Wesley-Key 'Companies Act 2006: are cracks showing in the glass ceiling' 2007 International Company and Commercial Law Review 422–429 arguing that s 172(1) does not provide stakeholders with sufficient protection. The duty to consider the interests of stakeholders is still subjective. Miles 'Company stakeholders' 2003 The Company Lawyer 56–59 also argues that it is within the discretion of the directors whether to consider other stakeholders or not. See also Attenborough 'Recent developments in Australian corporate law and their implications for directors' duties: lessons to be learned from the UK perspective' 2007 International Company and Commercial Law Review 312 317 stating that s 172(1) does not appear to represent a great movement away from shareholder value. Section 172(1) places merely a general obligation on directors to consider the interests of other stakeholders. Shareholders are still the primary beneficiaries of directors' duties. See further on s 172: Cerioni 'The success of the company in s. 172(1) of the UK Companies Act 2006: towards an 'enlightened directors' primacy?'' 2008 OLR 1 17; Fisher 2009 ICCLR 12; Keay 'Moving towards stakeholderism? Enlightened shareholder value, constituency statutes and more: much ado about little?' 2011 EBLR 1, 33-36; Lynch 'Section 172: A ground-breaking reform of director's duties, or the emperor's new clothes?' 2012 CoLaw 196 201.

64 See Nakajima 'Whither 'enlightened shareholder value'?' 2007 The Company Lawyer 353–354 stating that the statement of directors' duties is not an exhaustive list.

the connection between what is good for a company and what is good for society at large'.[65]

Secondly, it is stated that the new statutory statement of directors' duties captures a cultural change in the way in which companies conduct their business. The Act is based on a new approach to pursue the interests of shareholders and considering the interests of stakeholders. These approaches are complementary approaches and not contradicting ones. It is stated in a 'Corporate Update' by Ashurst [66] that section 172(1) will at least have the effect of making directors think harder about their duties.

Thirdly, the list of issues directors need to have regard to is also not exhaustive. It is specifically stated that directors need to consider these issues 'amongst other matters'. There is no indication of what these 'other matters' entail. Fourthly, there is no definition concerning 'the success of the company'.[67]

Fifthly, none of the stakeholders other than shareholders will have standing to compel directors to take their interests into consideration, unless it can be established that the interest of the company itself was contravened. This will have to be done by way of a shareholder derivative action (in terms of the derivative action in sections 260–264 of the United Kingdom Companies Act of 2006).[68]

The extent of the protection afforded in section 172(1) is therefore uncertain. It would seem that the only practical consequence of recognising these other interests in the legislation is that the actions of directors would not be open for any challenge if they have not only taken

65 See the introduction to the *Ministerial Statements* of June 2007 available at http://uk.practicallaw.com/4-369-5991?q = &qp = &qo = &qe = (accessed 2017-11-07).

66 See the 'Corporate update' of Ashurst of November 2006 on the Companies Act of 2006.

67 Keay 'Section 172(1) of the Companies Act 2006: an interpretation and assessment' 2007 The Company Lawyer 106 109.

68 In England and Wales referred to as 'derivative claims' (s 260 CA 2006ff) and in Scotland as 'derivative proceedings' (s 265 CA 2006ff). This was one of the dilemmas employees faced under s 309 of the United Kingdom Companies Act of 1985. See Du Plessis & Dine 'The fate of the draft fifth directive on company law: accommodation instead of harmonisation' 1997 Journal of Business Law 23, 46; Roach 'The paradox of the traditional justifications for exclusive shareholder governance protection: expanding the pluralist approach' 2001 The Company Lawyer 12, 15. It has been said that one effect of s 309 was to dilute directors' accountability to shareholders rather than to strengthen their accountability to employees. Section 260 sets out the key aspects of a derivative claim. There are three elements to a derivative action: (1) the action must be brought by a member of the company; (2) the cause of action is vested in the company; and (3) relief is sought on the company's behalf. Section 260(3) provides that a derivative claim 'may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company'.

the interests of the company as a whole (defined as the collective interest of the current and future shareholders) into consideration in making decisions, but also other interests. Under the common law, other interests, such as employees' interests, were considered to be pertinent only when they coincided with the company's best interests.[69]

3 2 4 Conclusions on Section 172

The drafters can be commended for clearly stating which approach they prefer regarding the stakeholder debate. The Act seems to provide a theoretical answer to the stakeholder debate, but its practical application is far from clear. It may well be that over time guidelines on its practical application may be provided.[70] The Strategic Report is another method of ensuring that directors comply with their duties. During 2013 regulations were issued relating to the Strategic Report and Directors' Report. Section 414A of the Companies Act now requires all companies that are not small[71] to prepare a Strategic Report. The Report must, to the extent necessary for an understanding of the development, performance or position of the company's business, include— (a) analysis using financial key performance indicators, and (b) where appropriate, analysis using other key performance indicators, including information relating to environmental matters and employee matters.[72] Section 415 of the Act requires all companies to prepare a directors' report.[73] Section 418 deals with the contents of the Directors' Report relating to a statement as to disclosure to auditors. Both the Strategic Report and the Directors' Report are integral parts of the annual report. The purpose of the strategic report is to inform members of the company and help them to assess how the directors have performed their duty under section 172 of the Act.[74]

The Act clearly refers to the interests of other stakeholders and to the fact that directors should have regard to the interests of other

69 *Hampson v Price's Patent Candle Co* (1876) 45 LJ Ch 437; *Hutton v West Cork Railway Co* (1883) 23 Ch D 654.

70 Section 172(1) CA 2006 has thus far mainly been mentioned in the context of the application for permission to bring judicial review proceedings and shareholder's remedies, e.g. unfair prejudice petitions (s 994) and derivative (shareholder) actions on behalf of the company. See for a detailed discussion on case law referring to s 172: Chałaczkiewicz-Ładna *The Relevance of Long-term Interests in the Decision-Making Processes of Company Directors in the UK, Delaware and Germany: a Critical Evaluation* (PhD Thesis 2016 University of Edinburgh) para 4.2. E.g. *Lesini v Westrip Holdings* [2010] BCC 420 421 where the court held that in most cases courts will not challenge directors' subjective judgments.

71 A company is entitled to small companies exemption in relation to the strategic report for a financial year if – (a) it is entitled to prepare accounts for the year in accordance with the small companies regime, or (b) it would be so entitled but for being or having been a member of an ineligible group. See s 414B of the Companies Act, 2006.

72 Section 414C (4).

73 Section 416 deals with the general contents of the Report.

74 Section 414C (4).

stakeholders when promoting the success of the company for the benefit of its members.[75] Thus the Act is very clear on the preferred approach to stakeholders' protection. Shareholders should still be seen as the primary beneficiaries of company's management in comparison to other stakeholders. But directors have a discretion in this regard.[76] Directors should only consider the interests of these stakeholders when it would be in the interests of the shareholders collectively to do so.

The Australian and Market Advisory Committee[77] stated that a non-exhaustive list of stakeholder interests provides directors with little guidance as how to balance these competing interests. They argued that in the interest of certainty it would be more beneficial if the 'best interests of the company' is interpreted to include the interests of stakeholders. Others argue that section 172 provides more clarity on the determination of what directors may consider as being the interests of stakeholders.[78] They argue that the section provides directors with general and structural guidance on how to balance the interests of stakeholders.

In short the advantages of the broad nature of section 172 are that it is adaptable and flexible. The disadvantage is that it does not give meaningful indications to directors as to what these interests entail.[79]

4 Conclusions

Based on the above analysis, the position in the United Kingdom and South Africa can thus be compared as follows:[80]

75 Section 172(1) of the Companies Act of 2006.

76 *Richmond Pharmacology Ltd v Chester Overseas Ltd* [2014] EWHC 2692 (Ch) para 66-68 (Stephen Jourdan QC) confirms that the test in s 172 is a subjective one. See also Re *Southern Countries Fresh Foods Ltd* [2008] EWHC 2810 (Ch) para 53 (Mr Justice Warren) confirming that it is a task for the directors, and not for the court, to decide what constitutes the best interest of the company. The case also stresses the subjectivity of the duty to promote the success of the company.

77 CAMAC Report on Social Responsibility of Corporations (2006) available at http://www.asx.com.au/resources/newsletters/listed_at_asx/20070221_camac_report_the_social_responsibility_of_corporati.htm (assessed on 2016-11-01).

78 Horrigan *CSR in the 21st Century* (2010) 232ff.

79 Wilkinson *Will Social and Ethics Committees Enlighten Shareholders? A Comparison of the South African provisions relating to Social and Ethics Committees with the Enlightened Shareholder Value Approach in the United Kingdom Companies Act 2006* (LLM Dissertation 2011 University of Johannesburg) at 67.

80 The headings used for this comparison are based, but adapted, on those used by Wilkinson.

Comparison Points:	**SOUTH AFRICA**	**UNITED KINGDOM**
Consideration of stakeholder interests	Process-based approach: The SEC: Their role is not to protect stakeholders per se, but to highlight the interests of the stakeholders to the board. Board: Stakeholder interests within discretion of directors as long as in the best interests of the company. Mixture of shareholder primacy and inclusive approach in the Act. Approach not clear, but clearly a move away from pure shareholder primacy.	Rule-based approach: Subjective freedom/discretion of directors as to what to consider when making a decision that would most likely promote the success of the company for the benefit of its members as a whole. (Enlightened shareholder value approach.)
Balance of interests of different stakeholders	SEC: Not required to balance interests, SEC must merely monitor and report. Advantage: Directors have an independent report that can assist with their decisions and the various stakeholders being affected by the decision. Board: Stakeholders should be taken into account based on interpretation of Companies Act as a whole, but the primary focus is shareholder benefit based on the wording of s 76.	This is not clear from the Companies Act, 2006. No guidance on this. Within subjective discretion of directors.
Enforcement	No direct rights to stakeholders in legislation (i.e. in s 76), so would expect no remedies. However: many remedies also available to stakeholders, especially employees and also section 218(2).	Stakeholders do have a right in section 172, but no direct remedy in the Act. Unenforceable (subjective) duty of a director.
Reporting	Not in the Companies Act. But *King III*: Integrated Reporting recommendation. Part of JSE Listings Requirements (8.63).	Strategic Report: ss 414A, 415 and 418 of the Companies Act.

It is clear from the literature that the common law shareholder supremacy doctrine is being questioned. A movement away from that doctrine will change the roots of company law fundamentally. However, it must also be accepted that the doctrine cannot remain absolute and that its reach should be tempered but it should also be recognised that a pluralist approach would, for all intents and purposes, make managing companies by directors virtually impossible. Using 'soft law', such as codes, to at least shift the focus of the management of the company to

also recognise other interests more clearly will work, but only in respect of socially responsible companies, but the enforcement thereof is problematic and lies in the hands of a secondary 'regulator' like a stock exchange, the investors in that company and the shareholders voting with their feet. There are, however, many companies that have an effect on a wide range of stakeholders, where these 'duties' cannot be enforced as above due to the fact that the shares are not listed.

The stakeholder position in the United Kingdom is still very much based on shareholder primacy. The interests of stakeholders will really only be attended to if it coincides with those of the shareholders collectively and is, it is submitted, an imperfect system and solution as it does not change the common law, but merely affirms it.

South Africa's legislative approach to the protection of stakeholders is not clear but a move away from shareholder primacy can, however, not be denied. A committee such as the social and ethics committee is therefore in line with this approach and, in principle, a welcome move. The social and ethics committee therefore seems to be an attempt to ensure that the interests of other stakeholders are directly recognised by the company and by the board, but in a manner that shies away from the amendment of the relevant common law rules which influences its efficacy. It will, however, only be successful and be able to protect the interests of stakeholders (in line with an inclusive approach) if the material legal deficiencies, uncertainties and shortcomings, discussed above, are addressed. Failure to do so will have the effect that the impact of the social and ethics committee will not only be negated, but that it will also cause tensions in the management of a company, and between different stakeholders, that can paralyse the company. We are nevertheless of the view that a structure like the social and ethics committee is perhaps the more sensible process to protect stakeholder interests and to assist directors to consider these interests when they make business decisions, but then the terms of reference and the duties and functions of this committee should be drafted in much clearer terms. The matters that fall within the mandate of the committee are most probably issues that the board would consider in any event, but to have a committee reporting back to the board and not just the board merely 'going through the list' is arguably a better way to make sure that all interests are adequately addressed. A properly constituted social and ethics committee and the proper functioning of such a committee will also indicate the possible pitfalls and dangers if and when a legislative move towards a pluralist approach is contemplated or deemed necessary.

The *Kariba* case – the watering down of the binding offer in South African business rescue proceedings

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OPSOMMING

Die *Kariba* saak – die afwatering van die bindende aanbod in Suid-Afrikaanse ondernemingsredding

Hoofstuk 6 van die Maatskappywet 71 van 2008 ('die Maatskappywet 2008') het die konsep van ondernemingsredding ingevoer vir maatskappye wat onder finansiële druk verkeer. Die proses behels die rehabilitasie van sulke maatskappye deurdat dit die geleentheid skep om 'n ondernemingsreddingsplan voor te lê, gefasiliteer deur 'n ondernemingsreddingspraktisyn. So 'n plan stel 'n basis voor op grond waarvan die maatskappy kan voortgaan om handel te dryf as 'n solvente entiteit, of, in die alternatief, waarvolgens dit 'n beter dividend aan skuldeisers sal voorsien as wat hulle sou ontvang tydens likwidasie. Alle skuldeisers word gebind deur die plan en skuldeisers (aandeelhouers) wat teen die plan stem word potensieel daartoe gedwing om hulle stembelang te verkoop aan partye wat ten gunste van so 'n plan stem. Die konsep van die 'bindende aanbod' wat deur 'n skuldeiser (aandeelhouer) gemaak word aan die teenstemmende party is nuut in die Suid-Afrikaanse reg. Vanaf 'n direkte interpretasie van die artikel, blyk dit dat die teenstemmende party word verplig om sy stembelang te verkoop aan die aanbieder teen die likwidasiewaarde van die betrokke stembelang (dikwels 'n verwaarloosbare bedrag). In hierdie artikel word artikel 153(1)(b)(ii) van die Maatskappywet 2008 ondersoek, asook die ontwikkeling van regspraak oor die onderwerp. Dit behandel ook die toekomstige vooruitsigte van die betrokke bepaling om voortaan skuldeisers (aandeelhouers) toe te laat om die ondernemingsreddingsplan af te forseer ('cramdown') op teenstemmende partye. Die artikel bespreek artikel 153(1)(b)(ii) van die Maatskappye Wet 71 van 2008, die ontwikkeling van die regspraak, en dit lyk of die artikel krediteure (aandeelhouers) kan toelaat om stemregte uit koop om te verseker dat die reddings plan aanvaar word, ondanks teenkanting van afwykende partye. In die besonder, sluit hierdie artikel 'n analise van *African Banking Corporation van Botswana Bpk v Kariba Furniture Manufacturers (Edms) Bpk en ander* 2013 (228/2014) [2015] ZASCA 69 (20 Mei 2015) ('*Kariba* (SCA)'). Die uitspraak van die Hooggeregshof van Appèl (SCA) in die geval van *Kariba* (SCA) het die konsep van die bindende aanbod 'op sy kop' gedraai en as 'n gevolg was die bindende aanbod beginsel 'afgewater'. Die uitspraak van *Kariba* (SCA) het 'n groot invloed op die wyse waarop skuldeisers en aandeelhouers die meganisme in artikel 153(1)(b)(ii) beskou en het derhalwe onbruik geword. Dit word voorgelê hierin dat totdat die wetgewer artikel 153(1)(b)(ii) wysig, of totdat

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daar 'n ander merkwaardige beslissing gemaak word deur die SCA (miskien op verskillende feite), die posisie onveranderd sal bly.

1 Introduction

Many jurisdictions require a specific provision in restructuring legislation to force dissenting creditors to accept the restructuring proposal. The mechanisms vary, but generally there is a requirement that allows one or more classes of creditors to ensure that the plan becomes binding on other classes (including in certain cases, on secured and priority creditors) that do not wish to support the plan.[1] After all, if the aim of a restructuring mechanism is to allow for a rehabilitation of the company, its business and its affairs, it does not make sense that a small group of dissenting creditors should be allowed to dictate to the majority (larger) group of creditors who favour the implementation of the plan, albeit for their own peculiar interests. Westbrook *et al.* describe this procedure as one which is necessary to prevent obstruction of a feasible plan.[2]

Notwithstanding the ability to compel dissenting creditors to accept the plan, legislation should also protect the interests of these creditors who are 'forced to accept the plan', sometimes against their will.[3] Protective mechanisms might include the following: that necessary approvals of the plan were obtained; that the mechanisms for the approval of the plan were properly conducted; that these creditors receive a dividend under the plan which equates to what they would have received in liquidation proceedings; that the plan does not attempt to include provisions that are contrary to insolvency or other laws; that administrative claims and expenses are settled in full except to the extent that agreement has been reached with the holder of such claim or where there is agreement that certain expenses are subjected to different treatment; and that the claims of dissenting creditors are ranked in terms of the relevant insolvency laws of that jurisdiction. The court might be required to consider whether certain of these conditions have been satisfied before ruling that creditors are bound by the plan.[4]

The court may further have to order that secured creditors are bound by the plan; provided certain conditions have been satisfied. These conditions may include; that were the secured creditor not bound by the plan, enforcement of the security interest by the secured creditor would have a material adverse effect on achieving the purposes of the plan; that the interests of the secured creditor will be protected under the plan; and

1 *UNCITRAL Legislative Guide on Insolvency Law* Part 2 (2005) 226. Also see Burdette *Legislative Framework for the Facilitation of Turnarounds in South Africa, Turnaround Management and Corporate Renewal, A South African Perspective* (2011) 136.
2 Westbrook, Booth, Paulus & Rajak *A Global View of Business Insolvency Systems* (2010) 156.
3 UNCITRAL *supra* n 1 at 218.
4 *Idem* at 226.

that the position of the secured creditor will not be prejudiced by the implementation of the plan.[5]

The forced acceptance of these dissenting creditors is necessary so as to ensure the chances of success of the reorganisation of the company. To the extent that these mechanisms result in an impairment to the claims of dissenting creditors without their consent, there is always the risk that creditors would be wary to provide credit in the future.[6] Any interference with the sanctity of contract (contractual provision of credit by a financial institution) will always carry the risk of prejudice and impairment to the rights of those creditors who are forced to comply with the will of the majority. The risk of advancing credit and the possibility of corporate failure, coupled with the ability to rescue a failing entity, provides the necessary tension between allowing a company to lapse into liquidation (bankruptcy) or being rehabilitated through a rescue process.

The purpose of this article is thus to consider the binding offer provisions in the 2008 Companies Act that can result in dissenting creditors being forced to sell their voting interest to parties that support the rescue plan in order to allow for such plan to be adopted.

It is submitted that the rationale behind the binding offer procedure supports not only a goal of promoting debtor-creditor agreement but also the goal of achieving a reorganisation of a debtor company that might be facing a liquidation. The binding offer mechanism allows for a situation where goals diverge. Creditors who do not support the debtor company in its reorganisation objective, or at least not on the terms proposed, need to be forced to exit the process so that a reorganisation plan can be approved.[7]

It is further submitted that the ability to force a plan on dissenting creditors is a fundamental international principle required in a restructuring.[8] Without it, dissenting creditors could hold out (wanting a bigger pay-out) and could ultimately cause the restructuring plan to fail and the company placed into liquidation. The ability to force dissenting creditors to sell their voting interests to those parties that wish to support the proposed plan averts the danger of having obstructive (hold-out) creditors wanting more out of compromise than that which would be acceptable to most other creditors, and thus holding willing creditors to ransom in a situation where liquidation of the company is inevitable.

5 *Ibid*.
6 *Idem* at 218.
7 Herbert *Understanding Bankruptcy* (1995) 342.
8 UNCITRAL *supra* n 1 at 218.

2 The South African Binding Offer Mechanism – Section 153(1)(b)(ii) of the 2008 Companies Act

2 1 Section 153(1)

Section 153 makes provision for various steps that are available to the business rescue practitioner or affected persons, in circumstances where the proposed business rescue plan has been rejected (failure to adopt) under section 152. From a reading of section 153, it appears that the intention of the binding offer mechanism is to ensure that a plan is 'forced' upon dissenting creditors.

The content that is required for a South African rescue plan to be formulated is set out in section 150, and the voting requirements for the plan's approval are set out in section 152(2)(a) and (b) of the 2008 Companies Act. The South African legislature allowed the business rescue practitioner considerable leeway in what is required to be set out in the plan. As long as the plan contains all of the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan, that would be sufficient.[9]

In terms of section 153(1)(a) of the Companies Act 71 of 2008 ('2008 Companies Act'), if a business rescue plan has been rejected (in terms of section 152(3)(a) or (c)(ii)(bb)), the practitioner may –

i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or
ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate.[10]

Section 153(1)(b) states the following:

> If the practitioner does not take any action contemplated in paragraph (a) –
> (i) any affected person present at the meeting may –
> (aa) call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan; or
> (bb) apply to the Court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate; or
> (ii) any affected person, or combination of affected persons, may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan, at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

9 S 150(2).
10 The grounds for setting aside a vote as being inappropriate are set out in s 153(7)(a)–(c). The ability for a company (through its business rescue

Thus, in the event that a business rescue plan has been rejected, the practitioner may seek a vote of approval from the holders of voting interests to prepare and publish a revised plan. The opportunity to propose a revised plan is given to every affected person (including shareholders).[11]

In the event that a revised plan is not put forward in terms of section 153(1)(a), affected persons are entitled to consider making a binding offer to purchase the voting interest of dissenting creditors in order to 'force' the plan through.[12]

2 2 The 'Binding Offer' Mechanism in Terms of Section 153(1)(b)(ii)

The 'binding offer' principle is a concept quite new to South African law. Any affected person or combination of affected persons may make an offer to dissenting persons to buy the voting interests at liquidation value (such liquidation value to be appraised by an independent expert). In South African law one would, in the ordinary course, enter into an agreement of sale of something like a 'voting interest' which would require an 'offer' open to 'acceptance' by the offeree.[13] From a literal

10 practitioner) to apply to court to set aside the result of the vote on the grounds that such votes were inappropriate, is a further mechanism (in addition to the s 153(1)(b)(ii) binding offer process) available to the business rescue practitioner to ensure that a plan is ultimately approved and implemented. In this regard see the findings in *Ex Parte Target Shelf 284 CC; Commissioner, South African Revenue Service and Another v Cawood NO and Others* (21955/14; 34775/14) [2015] ZAGPPHC 740 (13 October 2015)and *Shoprite Checkers (Pty) Ltd v Berryplum Retailers CC and Others* 47327/2014 [2015] ZAGPPHC 255 (11 March 2015). Also see comments by Meskin, Kunst, Galgut, Delport, Vorster & Burdette in *Henochsberg on the Companies Act 71 of 2008* (2011+) ('Henochsberg') 530 on the meaning of the term 'inappropriate'. It is submitted that this mechanism will be used as an alternative to the 'binding offer' mechanism due to the uncertainty created by the various cases on s 153(1)(b)(ii), dealt with below. The purpose of s 153(1)(a)(ii) would also be to set aside a vote (in terms of s 153(2)) and force the business rescue practitioner to either propose a new plan (in terms of s 153(1)(a)(i)) or be faced with having to file a notice of termination of the business rescue proceedings (s 153(5)). In the latter event, there is a strong possibility that the company will be placed into liquidation. Also see *FirstRand Bank Ltd v KJ Foods CC (in business rescue)* (734/2015 [2015] ZASCA 50 (26 April 2017) and the manner in which the SCA dealt with the setting aside of a vote on the grounds that it was inappropriate in terms of s 153(1)(a)(ii) as read with s 153(7). Also see Swanepoel & Gopal *An inappropriate business rescue mess* (Without Prejudice, July 2013) 16 – 17.

11 See s 146(e)(i) and see Loubser *The Business Rescue Proceedings in the Companies Act of 2008: concerns and questions (Part 2)* 2010 *TSAR* 696. ('Loubser *Concerns and Questions*'). See ss 144(3)(g)(i) and 153(1)(b)(i)(bb).

12 S 153(1)(b)(ii).

13 See Van Rensburg, Lotz & Van Rhijn in Joubert & Faris (eds) *The Law of South Africa* 2nd ed Volume 5 Part 1 (2010), par 375: An 'offer' is defined as 'a statement of intention in which the offeror sets out to the person to whom the offer is made what performance and what terms he or she is

reading of section 153(1)(b)(ii), it is submitted that it appears that an offeree can force a dissenting person to sell a voting interest at liquidation value.[14]

Of course, the aim and purpose of this section is to ensure that those affected persons who wish to vote in favour of a plan that has not been approved, be given the opportunity to buy out voting interests in order to get to the required threshold of 75 percent as set out in section 152(2) and in order to approve the business rescue plan. This averts deadlock and forces those dissenting creditors to sell out at negligible value as, by voting down the plan, these creditors have represented to all stakeholders that the plan (and the dividend offered therein) does not appear to be achievable and therefore not acceptable. Consequently, such creditors should, as a result, be happy to accept a lower or negligible dividend set at liquidation value.[15]

All creditors that oppose the adoption of the plan by voting it down are therefore at risk. If they dissent on the vote, they must realise that there is a possibility that they can be bought out at liquidation value.[16] Liquidation value refers to a payment for a voting interest that has been independently and expertly determined to be a fair and reasonable estimate of what the holder of the voting interests would receive if the company were to be liquidated. This task is given to the practitioner who

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prepared to bind himself or herself to'. An 'acceptance' of an offer is defined as 'a statement of intention in which the offeree signifies assent to the proposal embodied in the offer'. On a strict interpretation of s 153(1)(b)(ii), it does not appear that the offeror, once it submits a binding offer, allows the offeree any opportunity to accept or assent to the offer made to be bought out at liquidation value. The principle of offer and acceptance, it is submitted, is watered down by the inclusion of the 'binding offer' principle. The legislature appears to forego this principle in favour of ensuring that plans are 'pushed' through and voted upon at the 75% threshold set out in s 152(2); the objective being to save the distressed company, seemingly at all costs.

14 The author is strongly of the view that the effect of the binding offer procedure is in line with the South African business rescue objectives i.e. to ensure that a viable and workable plan is not rejected by 'hold-out' creditors, who refuse to accept the proposed dividend distribution proposed by a plan. Such creditors should be 'forced' to sell to those creditors who wish to support such a plan, and to do so at liquidation value. See discussion in par 1 above.

15 The concept of allowing those creditors who wish to approve the plan being able to buy up voting interests to reach the required voting thresholds set out in s 152 and to do so through the binding offer mechanism is unique. The previous s 311 compromise provisions set out in the Companies Act 61 of 1973 ('the 1973 Companies Act') allowed for the majority of creditors to bind the minority if a majority in number and two-thirds in value supported the s 311 scheme of management (subject to the sanction of the court – see s 311(2) of the 1973 Companies Act). However, it is submitted, that the binding offer principles create a new dimension and opportunity to those creditors who wish to see the debtor company remain in business through an approved business rescue plan.

16 However, see how the SCA has watered down the principle in par 3 and 4 below.

must appoint an independent expert to provide such determination. Such valuation is subject to review, reappraisal and re-evaluation by the court on application by the holder of the voting interest or the person acquiring it.[17] This provision has been subject to some criticism by Loubser. She questions the basis upon which an offeror is not allowed to offer more than the liquidation value of the voting interest to make the offer more attractive to the offeree. The liquidation value of a concurrent creditor's claim, for example, would be closer to nil and a share in a company unable to pay its debts would definitely be worthless on liquidation.[18]

Loubser is of the view that this provision is one of the most disturbing provisions regulating business rescue proceedings. As a result of the lack of any explanation or clarification of this provision, it could possibly enable the expropriation without any compensation of a concurrent creditor's claim or a shareholder's shares.[19]

The word 'binding' has perplexed readers of the legislation. Initially the view was that 'binding' in section 153(1)(b)(ii) refers to an offer which, once made, cannot be retracted or changed. Do the words 'binding offer' mean that the offer is not necessarily binding on the offeror, but in fact also bound the offeree to the offer? The right of the offeree to apply to court for a review of the liquidation valuation made would support this interpretation, otherwise the offeree could simply refuse the offer.[20]

It is submitted that the 'binding offer' principle is an attempt to ensure that a plan is ultimately approved and implemented by the practitioner. It forces 'dissenters' to be forced to accept the terms of the proposed plan, or be bought out at liquidation value.

We now consider the various cases that have dealt with the binding offer principles envisaged by section 153(1)(b)(ii).

2 3 *African Bank Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* 2013 (6) All SA 471 (GNP)

The issue was first dealt with in the matter of *African Bank Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* ('*Kariba*

17 S 153(1)(b)(ii). In terms of s 153(6), a holder of a voting interest, or a person acquiring that interest in terms of a binding offer, may apply to court to review, reappraise and revalue a determination by the independent experts in terms of s 153(1)(b)(ii).

18 Loubser *Concerns and Questions supra* n 11 697. Also see Loubser 'Some Comparative Aspects of Corporate Rescue in South African Law' (LLD dissertation 2010 UNISA) 138 ('Loubser LLD Thesis').

19 Loubser *Concerns and Questions supra* n 11 697–8.

20 Loubser LLD Thesis *supra* n 18 138. Loubser states that an explanatory memorandum on this aspect of the legislation would have been of invaluable assistance here.

(GNP)').[21] Judge Kathree-Setiloane considered the effect of section 153(1)(b)(ii) of the 2008 Companies Act. In this case, the bank voted against a proposed plan and the shareholders advised the practitioner that as a result, they wished to invoke the provisions of Section 153(1)(b)(ii) and make a binding offer for the bank's voting interest. The practitioner called a short adjournment of the meeting to consider the effect of the binding offer. The practitioner took the view that the offer was immediately and *ipso facto* binding on the bank and treated the offer as having been accepted by the bank. The practitioner duly amended the voting interest of the bank as holding zero percent and the shareholders as holding 95 percent of the voting interest of creditors. The plan was then approved on this basis. The judge confirmed that the concept of a 'binding offer' was novel to South African company law and was a 'last gasp' attempt to have a business rescue plan approved.[22] The difficulty of interpretation resulted from the fact that no definition had been provided for the term 'binding offer'. Was it an offer binding on the offeror only (in the nature of an option) and as a result the offeree was free to accept it or reject it? Alternatively, was it binding on both the offeror and the offeree, such that the offeree is deemed to have accepted the offer once made?[23]

Judge Kathree-Setiloane was of the view that a 'cram down' process was indispensable to the successful implementation of a business rescue plan. Since 'cram down' is a 'process by which creditors are forced to accept a re-organisation or a business rescue plan, even against their wishes', it has the incidental effect of discouraging creditors from resisting or holding out for better treatment and it enables a business recue or re-organisation to proceed despite the objections of one or more disgruntled creditors.[24]

The judge was of the view that the word 'binding' as it appears before the word 'offer' characterises the nature of the offer which the legislature envisaged under section 153(1)(b)(ii). Once the offer is made, it creates a *vinculum juris* or legal obligation on the part of the offeror and may not be withdrawn. The 'binding offer' is not an 'option' or 'agreement' in the contractual sense of the term, but rather a statutory set of rights and

21 2013 (6) All SA 471 (GNP) ('*Kariba* (GNP)'). See the decision reversed on appeal to the SCA below, n 84. Also see Wesso 'Business Rescue: The Position of Secured Creditors' (2014) *De Rebus* 35–36; Meskin *Insolvency Law and its operation in winding up* (1990) par 18.17.4.

22 *Kariba* (GNP) *supra* n 21 at par 19.

23 *Idem* at par 22.

24 *Idem* at par 28. The judge refers to the US-styled 'cram down' procedure in the context of the South African 'binding offer' principles. Judge Kathree-Setiloane distinguished between the two mechanisms and pointed out that the US cram down procedure is court-driven (unlike the binding offer mechanism in South Africa). The judge confirmed that where creditors refuse to assist, the US Bankruptcy Code provides for the court to confirm the repayment plan despite creditors' objections, provided that the requirements of s 1129(b) of the US Bankruptcy Code are met, essentially allowing for the 'cramming down' on dissenting creditors.

obligations from which neither party may resile. The court held that the binding offer will be binding on both the offeror and the offeree once made, predominantly to ensure compliance with the procedure to revive a business rescue and enforce the business rescue plan within the framework of section 153(4) of the 2008 Companies Act.[25]

Judge Kathree-Setiloane was of the view that once the binding offer is made, it is dependent upon either of the parties' acceptance of the value independently and expertly determined or by way of an order of the court as to the value of the offer, which will only become payable after such determination.[26] Significantly, the practitioner would in any event not be able to proceed with the implementation of the adopted business rescue plan prior to finalising the payment of the binding offer.[27]

The reasoning is criticised by Henochsberg,[28] where the author states that the court was incorrect in concluding that the 'offer' is 'binding' because, once it is made, it creates a *vinculum juris* or legal obligation on the part of the offeror which may not be withdrawn.

Henochsberg goes on to state that the 'compulsory' legal obligation established in terms of the judgment might very well have the effect that property (voting interests) would be expropriated contrary to section 25(1) of the Constitution of the Republic of South Africa, 1996.[29]

Notwithstanding, Judge Kathree-Setiloane found that the ability of an offeror to divest the offeree of its 'voting interest' at liquidation value served a compelling and legitimate purpose (in terms of section 7(k) of the 2008 Companies Act) and that the deprivation of such voting interest was in any event accompanied by compensation, expertly and independently determined and thus could not be seen as an 'arbitrary' deprivation of rights.[30]

It is submitted (see further discussion below) that Judge Kathree-Setiloane's interpretation of the 'binding offer' principle is aligned with the intention of the legislature when it drafted section 153(1)(b)(ii). The offeror must be placed in a position where it can, with certainty, put forward a 'binding offer' to buy the dissenting creditor's voting interest at liquidation value (fairly determined), and the offeree must be forced to sell at such price. This creates certainty and allows those creditors who wish to support the proposed plan with the opportunity to acquire

25 *Idem* at par 29. See comments by Henochsberg *supra* n 10 at 532.
26 *Kariba* (GNP) *supra* n 21 at par 36. The judge went on to further consider the determination of the value of the voting interest (*idem* at par 30–31) and the constitutional challenge raised by the bank to its rights to property, access to court and equality (*idem* at par 37–55). See Blom & Ledwaba 'A Binding Offer' *Without Prejudice* November 2013 40–1.
27 See *Kariba* (GNP) *supra* n 21 at par 33.
28 See comments by Henochsberg *supra* n 10 at 532.
29 *Ibid*.
30 *Kariba* (GNP) *supra* n 21 at par 46.

sufficient voting interests to get to the voting thresholds set out in section 152(2) of Chapter 6.

2 4 *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* 2014 (1) SA 103 (KZP) *('DH Brothers')*

A contrary view was provided in the case of *DH Brothers Industries (Pty) Ltd and Karl Johannes Gribnitz NO and Others* ('*DH Brothers*').[31] Judge Gorven disagreed with the findings in the *Kariba* (GNP) case *supra* and stated that a 'binding offer' itself could not, on its own, constitute a 'set of statutory rights and obligations'. The legislature did not intend to create a specific deeming provision of acceptance on the part of the offeree or have stated that the offer, once made, gave rise to binding obligations between the parties. Instead, the legislature used the word 'offer' which can only emanate from one party. Section 153(1)(b)(ii) appears to be consistent with this approach. In order to give rise to legal obligations on the part of both parties, an offer requires acceptance. The intention is to conclude a legal transaction of purchase and sale, a well-established legal concept. The word 'binding' qualifies the word 'offer' and nothing else. It specifically does not refer to the opposing creditor, as the offeree. If the legislature had intended this, then the provision would have said that the affected person could make an offer which is 'binding' on the opposing creditor. The court held that the words 'binding offer' can only mean that the offeror may not retract the offer until it is accepted or rejected.[32]

The court confirmed that an offer under section 153(1)(b)(ii) necessitated an adjournment of the section 152 meeting. As time is of the essence in a business rescue proceeding, an offeror should not be able to make an offer which has the effect of extending the moratorium without being obliged to keep open the offer until acceptance or rejection. Delays could result in a series of offers being made, withdrawn prior to the date of each adjourned meeting, with the intention of keeping the business rescue proceedings alive indefinitely. A new binding offer, in effect, could be made at each consecutive adjourned meeting which does not garner the requisite support for the plan. Further, the outside expert required to fix the price of the voting interest would incur wasted expenditure each time the offer is withdrawn.[33]

Judge Gorven was critical of the *Kariba* (GNP) decision *supra* and, in particular, where a court makes words such as 'binding offer' mean what such court thinks they should mean. The court referred to *National Credit Regulator v Opperman*,[34] and warned that courts should resist the

31 2014 (1) SA 103 (KZP) ('*DH Brothers*').
32 On the nature and meaning of an 'offer' see Joubert *General Principles of the Law of Contract* (1987) 37. Also see on the rules of offer and acceptance Kahn, Lewis & Visser *Contract and Mercantile Law: Second Edition (Volume 1)* (1988) 55.
33 *Idem* at par 43–44.
34 2013 (2) SA (1) (CC).

temptation to substitute what they regard as 'reasonable, sensible or business-like' for the words used. To do so is to cross the divide between interpretation and legislation.[35]

Judge Gorven went on to state that the *Kariba* (GNP) interpretation of 'binding offer' runs counter to the provisions of section 145(2)(a) the 2008 Companies Act. Section 145(2)(a) provides that each creditor has 'the right to vote to amend, approve or reject a proposed business rescue plan, in the manner contemplated in section 152'. The loss of a voting interest is expropriation. Such compulsory loss would have to be made clear if it were contemplated by the legislature. The legislature chose to confer this unqualified right in the very context of voting for or against the adoption of a plan. If such a clearly formulated right were to be qualified or taken away, it would have done so in equally clear terms.[36]

The judge was of the view that in any event, the provisions of section 152 apply afresh at the adjourned meeting. On the *Kariba* (GNP) approach, section 145(2)(a) or section 153(4)(b) or both would need to be suitably qualified so as to exclude a vote at the adjourned meeting by a creditor to whom a binding offer has been made. This was not done. Consequently, an opposing creditor to whom a binding offer has been made remains entitled in terms of section 145(2)(a) to vote. The necessary implication is that where a right is not qualified or taken away, an opposing creditor cannot be deprived of the right to vote against his or her will. The necessary corollary is that the offer cannot give rise to obligations on the part of the opposing creditor which would result in the compulsory loss of its voting interests. Judge Gorven was further of the view that the binding offer must thus be construed as an offer which can be accepted or rejected by the opposing creditor.[37]

The court held that the *Kariba* (GNP) interpretation of a 'binding offer' was incorrect. If a plan is rejected at a meeting, both the practitioner and affected persons are provided mechanisms to attempt to keep the plan alive.[38] A court can be approached to set aside the vote on the basis that it is inappropriate or further seek a vote to amend the plan.[39] In contrast, opposing creditors (who voted against the plan) are not given the right to approach the court to set aside an approving vote or the acquisition of their voting interests. It seems highly unlikely that the legislature would deprive them of their right to vote without their acquiescence, without at least giving them the right to challenge the adoption of a plan secured as a result of their deprivation.[40]

Further, section 145(2)(b) provides a creditor a right to present an offer to acquire the interests of any or all of the other creditors in the

35 *DH Brothers supra* n 31 at par 60.
36 *Idem* at par 46.
37 *Idem* at par 47.
38 S 153(1)(a) and (b).
39 See n 10 for meaning of 'inappropriate vote'.
40 *Idem* at par 48.

manner contemplated in section 153 if a business rescue plan is rejected. The same right is accorded to trade unions and employees in section 144(3)(g)(ii) and to holders of the company's securities in section 146(e)(ii).

The court referred to section 153(6) which states:

> A holder of a voting interest, or a person acquiring that interest in terms of a binding offer, may apply to a court to review, re-appraise and re-value a determination by an independent expert in terms of subsection (1)(b)(ii).

In terms of the *Kariba* (GNP) approach, the value of the voting interests is determined only after the adoption of a plan. At that stage, the offeree is no longer 'the holder of a voting interest'. Judge Gorven was of the view that the transfer of the voting interest can only pass after the value has been finally determined, at the very earliest. Judge Gorven determined that voting interests can only pass upon payment of the purchase price as is the case at common law where there is no stipulation to the contrary.[41]

The court deliberated further over how far the South African process would go in order to force a plan on dissenting creditors. As stated in the *Kariba* (GNP) case,[42] the purpose of Section 153(1)(b)(ii) is 'to enforce a revised business rescue plan'. However, Judge Gorven was quick to point out that the purposes of business rescue, as set out in Section 7(k) of the 2008 Companies Act, does not support an interpretation leading to a forced acceptance of business rescue plans at all costs. If that were so, the 75 percent majority vote would not have been stipulated.[43]

The court further criticised *Kariba* as saying that 'the offeree is therefore adequately protected since it cannot receive less than it would receive if the company were to be liquidated'.[44] Section 153(1)(b)(ii) requires that the purchase price must be independently and expertly valued based on a 'fair and reasonable estimate of the return to that person … if the company were to be liquidated'. Judge Gorven pointed out that this determination could only be an estimate and could never be a calculation of a definitive amount, for the simple reason that this could only be possible in a finalised liquidation and distribution account after liquidation. Further, there are many factors which will influence a liquidation value and it would be very difficult to accurately establish such liquidation value with any degree of accuracy. Issues such as impeachable dispositions, value of claims against directors, estimates on values of the assets and collection of amounts due by way of litigation

41 *Idem* at par 52. The court referred to *Ghandi SMP Properties (Pty) Ltd* 1983 (1) SA 1154, at 1157 G–H. Broom J said 'in the absence of some clear stipulation to the contrary, payment and transfer takes place *pari passu* …'.
42 *Kariba* (GNP) *supra* n 21.
43 *Idem* at par 54
44 *Kariba* (GNP) *supra* n 21 at par 32.

would all affect the ability of an expert to arrive at an accurate determination.[45]

All of these inaccuracies impact on the ability of the opposing creditor's willingness to accept the offer. It is cold comfort to say that a creditor may approach the court to review, reappraise and revalue the determination.[46] The court is unlikely to be in any better position to make such determination. In any event, the opposing creditor might reasonably take the view that insolvency is a preferable option to adoption of the plan. If the practitioner or any affected person believes that this view is unreasonable and the opposing creditor votes against the plan resulting in the plan being rejected, they have recourse to the court to set aside the vote on the basis that it was inappropriate.[47]

Whether or not the court has the power to impose the plan on dissenting creditors was also considered. Section 153(7) does not accord to the court the power to make an 'appropriate order'. The court is limited to setting aside the rejecting vote. The 2008 Companies Act is silent thereafter. Section 152(4) makes a plan binding on the company, all creditors and all holders of the company's securities, whether or not they were present at the meeting which adopted the plan or voted for it.[48]

Judge Gorven concluded by confirming that in his view, the 'binding offer' is an offer which cannot be withdrawn by the offeror and is open to acceptance or rejection by the opposing creditors to whom it is made. If accepted, it gives rise to an agreement of purchase and sale. It is a sale for cash because '[i]n the absence of an express term as to the sale being for cash or on credit there is a presumption that it is for cash'. The judge was of the view that the acceptance or rejection need only take place once the value has been finally determined. The independent expert is only obliged to reach a determination by the date of the adjourned meeting, whereafter the voting interests are transferred on payment of the determined sum. Once this has taken place, the voting interests are settled and the vote on the plan can take place. If adopted, the plan can and must be implemented by the practitioner. Once it has been substantially implemented, the practitioner must file a notice to that effect and the business rescue proceedings come to an end. If it is not approved, it is rejected and, if s153 is not invoked the business rescue proceedings come to an end.[49]

45 *DH Brothers supra* n 31 at par 55.
46 S 153(6).
47 S 153(1)(a)(ii). *DH Brothers supra* n 31 at par 56.
48 *Idem* at par 58.
49 *Idem* at par 69. For a comparison between the two judgments, see Marquand *Who does a 'binding offer' bind? Without Prejudice* August 2014 12–13. Also see Wesso n 43 35–6; Gootkin 'The problem of compelling shareholders to approve business rescue plans' *Without Prejudice* May 2014 12–13.

If the decision in *DH Brothers*[50] is correct, then the position of the secured creditor, whether large or small in respect of voting interest, is protected, since it cannot be deprived of its secured right simply by means of a 'binding offer'. A secured creditor will have to accede to the discharge of the order for it to be valid. This interpretation of section 153(1)(b)(ii) accords more readily with the law relating to offer and acceptance than does the interpretation in the *Kariba* (GNP)[51] matter. If the legislature intended for the provision to veer so significantly from the existing law, as suggested in the *Kariba* (GNP) case, it would have done so more clearly.[52]

2 5 *Absa Bank Limited v Caine NO and Another; In Re Absa Bank Limited v Caine and Another* 3813/2013, 3914 (2013) [2014] ZAF SHC (*'Absa Bank* case*'*)

In *Absa Bank Limited v Caine NO and Another*[53] ('*Absa Bank* case'), Judge Daffue held that a 'binding offer' should be regarded as an offer binding on the offeror and not the offeree, who should have the discretion to either accept or reject the offer.

In the *Absa Bank* case, the judge advised that it was apparent that there was uncertainty and therefore the legislature was urged to consider the issue afresh and make necessary amendments.[54]

2 6 *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 (228/2014) [2015] ZASCA 69 (20 May 2015) ('*Kariba* (SCA)')

The debate about what is meant by a 'binding offer' in terms of section 153(1)(b)(ii) of the 2008 Companies Act appears to have been finally determined. In an appeal to the Supreme Court of Appeal (SCA), the judgment of the court *a quo* in *Kariba* (GNP) *supra* was set aside in the *Kariba* (SCA) matter.[55] On appeal, it was contended that a binding offer made in terms of section 153(1)(b)(ii) did not automatically bind the

50 *DH Brothers supra* n 31.
51 *Kariba* (GNP) *supra* n 21.
52 Wesso *supra* n 43 at 36. Henochsberg extensively criticised the finding in the *Kariba* (GNP) case at n 10 530–531. The authors of *Henochsberg* prefer the interpretation of a 'binding offer' in the *DH Brothers* case at 533. Also see comments on *Kariba* (GNP) and *DH Brothers* in Locke & Esser *Company Law and Stock Exchanges: Annual Survey of South African Law* (2013) 279–286.
53 *Absa Bank Limited v Caine NO and Another; In Re Absa Bank Limited v Caine NO and Another* 3813/2013, 3914 (2013) [2014] ZAF SHC ('*Absa Bank* case').
54 *Absa Bank* case *supra* n 53 at par 37.
55 2013 (228/2014) [2015] ZASCA 69 (20 May 2015) ('*Kariba* (SCA)'). The judgment provides a good synopsis of the previous cases as well as the manner in which the court came to its finding on the meaning of a binding offer.

offeree. Instead, the use of the term 'binding offer' in the section is intended to convey that the offer, once made, could not be withdrawn by the offeror.[56]

The judgment (handed down by Acting Judge Dambuza) referred to the position in the US, and how 'impaired' classes of creditors are to be treated.[57] The SCA were very careful in distinguishing the differences in approach in the cram down procedures available in a Chapter 11 procedure under the US Bankruptcy Code when compared to the South African 'binding offer' mechanism. The court found that the court *a quo* had erred in placing too heavy reliance on the US cram down approach when interpreting the section 153(1)(b)(ii) procedure. The court made reference to the manner in which dissenting creditors are dealt with by the US Bankruptcy Court. The US Bankruptcy Court would determine whether the rejection of a business plan by creditors should be ignored. Section 1129(a) of the US Bankruptcy Code (referred to above) sets out specific peremptory requirements that must be satisfied before a court can confirm a rescue plan.[58]

The court stated that a distinguishing factor is that the making of the offer in the business rescue procedure is a step 'separate and antecedent' to the second round of voting on the adoption of the rescue plan. Therefore, the meaning of 'binding offer' falls to be considered on its own merits and separately from the merits of a rescue plan.[59]

The court stated:

> The term 'binding offer' must be appreciated against the meaning of 'offer' as hitherto understood in this country. In everyday use, the word 'offer' signifies a presentation or a proposal to someone for acceptance or rejection; it is 'an expression of readiness to do or give something; [or] an amount of money that someone is willing to pay for something'. In South African parlance, an offer is an invitation to consent to the creation of obligations between two or more parties. 'What distinguishes a true offer from any other proposal or statement is the express or implied intention to be bound by the offeree's acceptance.' Therefore, the settled meaning, both in the general use and in the more technical legal use of the word 'offer' is that it is only on acceptance that an offer creates rights and obligations.[60]

Clearly, an ambiguous proposal cannot be classified as an offer, and the terms of the offer must cover the minimum requirements of the

56 See discussion in par 12–25 of the *Kariba* (SCA) judgment *supra* n 55.
57 *Idem* at par 16.
58 *Ibid*. The requirements set out in s 1129(a) of the US Bankruptcy Code, include that the plan must be proposed in 'good faith', each 'impaired' class of creditors must have either accepted the plan or each creditor must stand to receive no less than it would receive under liquidation, each class of creditors must accept the plan or be 'unimpaired' and there must be no likelihood of confirmation of the plan being followed by a 'liquidation' or further business 'reorganisation'.
59 *Idem* at par 17.
60 *Idem* at par 18.

proposed contract. A mere regurgitation of the provisions of section 153(1)(d)(ii) cannot constitute a proper binding offer. The offeree (in this case the bank) was entitled to know who exactly was making the offer and what the details were thereof, including the price or determine value and where, when and how payment would be effected.[61]

Section 153(1)(b)(ii) presupposes that for the making of a binding offer, that the rescue plan will contain sufficient detail from which a determination of the value of the creditor's voting interest can be readily and reliably ascertained, such that a binding offer will embody the price or value at which the offer is made. Section 150(2) provides that the business rescue plan must contain all the information reasonably required to enable the affected persons to decide whether or not to accept or reject it. The content of what is required to be set out in the plan is set out in section 150(2). It is the same level of detail that is required to calculate a fair and reasonable value of the voting interests.[62]

The court held that not only must there be an offer, but it must be 'binding'. The significance of such a description can only be that once the offer is made it cannot be withdrawn by the offeror.[63] The court rejected the *Kariba* (GNP) *supra* decision as such an outcome would be extraordinary, and the effect would be to deprive an offeree of an established right to accept or reject an offer. Had that been the intention, the legislature would not have used a word which connotes an expectation of a response.[64] Consequently, the court found that a binding offer remains predominantly similar in nature to the common law offer, save that it may not be withdrawn by the offeror until the offeree responds thereto.[65]

The court strongly disagreed with the court *a quo's* finding that once a binding offer is made to purchase a voting interest, the holder thereof is summarily divested of its voting interest, which includes a divestment of its interest without any determination of affordability on the part of the offeror.[66] The court concluded that there is no language in section 153(1)(b)(ii) that should result in a situation where once a binding offer is made to purchase a voting interest, the holder thereof is summarily divested of its voting interest without allowing such holder to have the ability to determine the affordability of such offer on the part of the offeror. Section 153(6) states that a holder of a voting interest or a person acquiring that interest in terms of a binding offer, may apply to court to review, reappraise and revalue a determination by an independent expert in terms of section 153(1)(b)(ii). The legislature has therefore

61 *Idem* at par 19.
62 *Idem* at par 20.
63 *Idem* at par 21. In contrast to the ordinary meaning ascribed to an offer, that it becomes binding on acceptance and may be withdrawn before then.
64 *Ibid*. Reference was made to Judge Gorven's comments in *DH Brothers supra* n 31 at par 40–41.
65 *Kariba* (SCA) n 55 at par 21.
66 *Idem* at par 22.

made express provision for two categories of persons: those who are holders of voting interests and those *in the process of acquiring* a voting interest. The court was of the view that this suggests that although a binding offer may have been made (during consideration of the business rescue plan), finalisation of the aspects relating thereto, including transfer of the voting interest, is not necessarily immediate. This is consistent with the established meaning of an offer. The court found that the court a quo's interpretation would immediately divest interested holders of their interest once the binding offer is made. This would be untenable. The court ruled that any other interpretation cannot lead to a sensible, business-like result and therefore cannot be supported.[67]

In summary, the SCA held that in order for there to be a binding offer, it had to be accepted by the offeree. Thus a binding offer made to a creditor who opposes a business rescue plan is not automatically binding on the offeree. The court held that in order for there to be a binding offer, it had to be accepted, and that an offer merely regurgitating the terms of the section without any mention of a purchase price, did not constitute an offer to purchase. The offer made to purchase the voting interest of the appellant bank was held not to be binding on the appellant and thus the relevant business rescue plan was set aside.

3 The 'Watering Down' of the Binding Offer Mechanism

The effect of the judgment of the *Kariba* (SCA)[68] decision may be viewed as watering down the ability to 'force' the plan on dissenting creditors and is (in the author's view) directly in conflict with the true intention of section 153(1)(b)(ii). It is submitted that as a result of the finding in *Kariba* (SCA), the offeree would be in a position to determine if the offer that is made to buy out its voting interest is acceptable or falls to be rejected. In practice, it is submitted, a negotiation will take place between the offeror and the offeree to determine a 'fair price' for such voting interest. However, if the offeree becomes difficult, the offeror will not be in a position to force the offeree to accept the offer, thus being unable to 'force' the plan on the dissenting creditor.[69]

67 *Idem* at par 24–25. Also see views of concurring judges of appeal in *Kariba* (SCA), par 41–56. The *Kariba* (SCA) judgment was followed in the unreported judgment of *Gqwaru and Another v Magalela Architects CC and Another* (19959/2016) [2017] JAGPJHC 32 (23 February 2017). Also see analysis by Gribnitz and Lowery *To agree or not to agree* Without Prejudice (August 2016) 10 – 11 and Cebisa in Business Law & Tax Review, Business Day (8 November 2015).

68 *Kariba* (SCA) *supra* n 55.

69 The judgement goes further to confirm that any offer made must be capable of acceptance. Therefore the offer must (in the author's view correctly so) cover certain minimum requirements of the proposed contract, such as details of the person/entity who makes the offer, the price

It is submitted that the SCA's ruling has made significant inroads into the binding offer principle. As stated by Judge Kathree-Setiloane in *Kariba* (GNP), the purpose of section 153(1)(b)(ii) is to provide a swift and efficient procedure to revive a business rescue procedure after the rejection of a business rescue plan. The offeree is in any event protected as, if the value of the voting interest is fairly determined by an independent expert, such offeree would in reality not receive anything less than it would have received in the event of the company ending up in a liquidation.[70]

Whether the process as envisaged by section 153(1)(d)(ii) was intended to be a consensual process, rather than a forced sale, remains unclear.[71] If a consensual process was intended, there is the counter-argument that it would appear to be unthinkable that a creditor, especially a concurrent creditor, would accept an offer for a claim in an amount that the creditor would in any case receive in a winding up.[72]

It is the author's view that there must be an 'end game'. A creditor who would be willing to support a rejection of a workable proposed plan (by voting against a plan), where clearly other creditors (supportive of the plan) would be willing to make the effort to 'buy up' such dissenting voting interests in order to ensure that the plan is voted through, must be 'forced' to sell at a 'liquidation value' price i.e. that which such creditor would be willing to accept if the company had to go into liquidation.

In order to prevent hold-out creditors from holding other supporting creditors to ransom, it is submitted that the *Kariba* (GNP) (judgment of Judge Kathree-Setiloane)[73] approach should be favoured. That is, once a 'binding offer' is made in terms of section 153(1)(b)(ii), it will have the effect of binding both the offeror and the offeree. Once made, the opposing or dissenting creditor must be forced to sell its voting interest to the offeror on the terms proposed in the offer. Any dispute on the price (by either the offeror or the offeree) determined for such voting interest should be dealt with by the expert determination provided for in section 153(6).

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or determined value, and where, when and how payment would be effected. See *Kariba* (SCA) n 55 at para 19–20. It is submitted that had the offer in the *Kariba* (SCA) case been made in clear and unambiguous terms, it might have affected the court's decision in this case. It is possible that a similar matter might again come before the SCA where the court is required to assess the effect of a clear, precise and unambiguous offer. This might result in a different outcome in respect of what is meant by the binding offer in s 153(1)(b)(ii).

70 See *Kariba* (GNP) *supra* n 21 at par 31–32.

71 Henochsberg *supra* n 10 at 534.

72 *Ibid*. However, see the obiter remark made by Judge Gorven in *DH Brothers* n 31 (par 55) where the judge was of the view that the determination is in any event on an 'estimate' and other factors such as impeachable transactions and possible litigation recoveries that might arise as a result of the liability of directors in terms of s 77 of the 2008 Companies Act might influence the size of the final dividend.

73 *Kariba* (GNP) *supra* n 21.

It is further submitted that the only way practitioners, creditors, lawyers and our courts will reach a position where they can definitively determine the meaning of a 'binding offer' will be where the legislature formulates (by an amendment to section 128(1) of Chapter 6) an appropriate definition of the term 'binding offer' as set out in section 153(1)(b)(ii). It is suggested that a new definition be inserted to define a 'binding offer' to mean an offer put forward by an offeror for the voting interests of the offeree where, once submitted, is binding on both the offeror and the offeree in terms of such sale transaction. The ability for an independent person to review the 'value' remains in place and is a safeguard for 'unfair' or 'unreasonable' values of voting interests having been determined. Any other interpretation renders the binding offer provision set out in section 153(3)(1)(b)(ii) meaningless and disables viable plans from being approved as a result of the potentially unconscionable conduct of opposing, hold-out creditors.[74]

What of course is not of assistance is the 'shoddy drafting' of the legislation (section 153) which gives rise to considerable uncertainty.[75] Amendments to the section (as proposed by Judge Leach in the concurring judgment in *Kariba* (SCA),[76] include whether the offeree has a period of time in which to consider whether to accept or reject an offer; the effect of an offer being rejected; whether an offer can be conditional and which conditions would be permissible; whether an offer excludes the making of a counter-offer or any other offers being made by other affected persons and, if not, how offers are to be ranked.[77] As stated by Loubser,[78] 'it was regrettable that the drafters of the provisions regulating the new rescue procedures did not exercise more care and that the unclear, confusing and sometimes alarming provisions regulating the business rescue proceedings … will certainly not assist in making the procedure more acceptable or successful.'

4 Conclusion

The binding offer principle is a strong feature of restructuring mechanisms in international jurisdictions and the South African legislature, in the author's view, recognised this as an essential feature of the rescue legislation.

It is submitted that the binding offer principle ensures that viable plans are ultimately 'pushed through' by the provisions of section 153(1)(b)(ii). The requirement that dissenting creditors (even if in the majority) should be forced to sell their voting interests at liquidation value is aligned to the principles of rescue and as is set out in section 7(k) of the 2008

74 See Levenstein *An appraisal of the new South African business rescue procedure* LLD Thesis 2015 University of Pretoria 602.
75 *Kariba* (SCA) n 55 at par 43.
76 *Ibid.*
77 *Ibid.*
78 Loubser LLD Thesis n 18 700–701.

Companies Act.[79] If as a result of the rejection of the plan, the company is facing liquidation, the legislature remains supportive of the notion that the company should survive, jobs retained and the company continue to contribute to the South African economy.

International principles of rescue and restructuring support forcing dissenting creditors who voted against the plan, to be placed into a position where they are forced to sell at liquidation value to those creditors who wish to vote in favour of the proposed plan.[80] According to the SCA's recent finding in *Kariba* (SCA), the offeree will now be in an enviable position whereby it can 'negotiate' the liquidation value and price at which such offeree will sell to the offeror.

It is clear that the 'binding offer' principle, together with the principle set out in section 154(1),[81] creates the ability to ensure that a plan (and its terms) become binding on all creditors in business rescue. There must be a point reached where those creditors who disapprove of the plan and who would prefer the company to be placed into liquidation,[82] be forced to give up their voting interest at liquidation value. If such creditor is willing to take the minimal liquidation value in respect of a pay-out on its claim, then such a creditor must be prepared to 'walk away', having had its voting interest purchased from it at the same or similar value. The legislature provides the opportunity to make the binding offer available to any affected persons (or a combination thereof). The term 'binding', in the author's view, must be interpreted as being 'binding' on both the

79 S 7(k) states that one of the purposes of the 2008 Companies Act is to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders. It is submitted that the legislature intended that the debtor company, provided it is rescuable, should be the focus, and not necessarily the interests of those creditors who would prefer to support the liquidation of the company with the consequent job losses as a result. The legislature ensured that the Chapter 6 legislation provided employees and trade unions (as affected persons) to have a participative role in the business rescue process (see s 144) and provided employees who work for the debtor company after commencement of the business rescue) with a super-priority status as creditors in the ranking of creditors' claims in the rescue process (s 155). It certainly appears that the South African legislature wanted to ensure the survival of the debtor company to occur at all costs, thereby ensuring that job retention was a contributing factor to the success of the business rescue process in South Africa. Thus, the 'binding offer' mechanism was put in place to ensure that hold-out creditors could not prevent the achievement of these goals.

80 UNCITRAL n 1 at 218 and 226.

81 S 154(1) ensures that once a plan has been approved by creditors, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it.

82 In terms of s 153(5), 'if no person takes any action contemplated in ss (1), the practitioner must promptly file a notice of the termination of the business rescue proceedings'. The notice of termination would bring business rescue proceedings to an end, and which would result, in all likelihood, in the company's liquidation (either brought by the practitioner, a creditor or by the company itself).

offeror as well as the offeree. To interpret such wording in any contrary manner, would not do justification to the obvious result that would be expected from the South African rescue process, namely the acceptance of a workable plan designed to rehabilitate[83] the company and place it back into the South African economy.

'Hold-out' creditors (shareholders) are recognised internationally as parties who cannot be allowed to 'hold' other creditors (shareholders) to ransom and allow the company to collapse into liquidation. It is submitted that the 'binding offer' principle is aimed at preventing a 'scorched earth' philosophy of 'if I am going to go down then all must go down with me!'. Dissenting creditors (and shareholders) must be placed in a position where they are forced to sell their voting interest to the general body of creditors (shareholders) who support voting in favour of the plan and for the plan to be implemented.

The *Kariba* (SCA) judgment, unfortunately, does not assist with the imposition of this principle. Dissenting creditors are placed in a favourable position where they have the opportunity to 'negotiate' the terms of such 'buy-out'. The ability to submit a 'binding offer', as intended by the legislature, has thus been watered down and will result in challenges to the successful implementation of the binding offer principle in business rescue proceedings in the future. The 'mandatory' contractual argument, as envisaged by *Kariba* (GNP) would, in the author's view, clearly support the purpose of business rescue, namely ensuring that the company is rescued by the approval of a workable and viable plan. It is however conceded that the wording of the section does not necessarily make this position clear, and thus an amendment is necessary.[84]

It is submitted that the *Kariba* (SCA) judgment has provided dissenting creditors with the 'poison pill', designed to discourage a hostile takeover of a voting interest and has provided dissenting creditors with the opportunity to vote down the plan, with no further opportunity for an effective binding offer mechanism. It is further submitted that this could never have been the intention of the legislature in the formulation of section 153.[85] Thus, it is highly recommended that when the provisions of Chapter 6 are considered for legislative amendment, the proposals set out above are seriously considered and implemented. As a result,

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83 See s 128(1)(b) – 'business rescue has the clear aim of rehabilitating the financially distressed company and … which maximises the likelihood of the company continuing in existence in a solvent manner..' (s 128(1)(b)(iii)). It is submitted that the binding offer mechanism clearly ensures that the rescue objectives are achieved.

84 See Henochsberg *supra* n 10 at 534.

85 In support of the author's view, on 16 March 2007, in a briefing on the status of the draft Companies Bill, clear reference was made to the ability of the creditors (and employees) to buy out any dissenting creditor. No mention is made of the need for negotiation on issues such as price and terms. See '16 March 2008 Draft Companies Bill: briefing by the Department of Trade & Industry – Parliamentary Monitoring Group' 4.

certainty of the 'binding offer' mechanism will create a definitive and properly considered approach when dealing with hold-out creditors in a business rescue.

An assessment of the realisation of inmates' right to adequate medical treatment since the adoption of the South African Constitution in 1996

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OPSOMMING

'n Ondersoek na die verwesenliking van gevangenes se reg tot voldoende mediese sorg in terme van die Suid Afrikaanse Grondwet, 1996

Suid Afrika se grondwetlike demokrasie waarborg onder andere gevangenes se reg tot voldoende mediese sorg. Sedert die inwerkingtreding van die Grondwet, het die staat en howe 'n kritieke rol gespeel ten einde te verseker dat die reg na behore gerealiseer word. Hierdie rol word duidelik geïllustreer deur die betrokke sake wat die reg direk of indirek oor die laaste twintig jaar afgedwing het, sowel as die maatreëls wat deur die staat aangeneem is. Daar word egter nie ten volle gevolg gegee aan hierdie reg nie, aangesien daar sommige struikelblokke is wat die vooruitgang belemmer wat die staat gemaak het om aan hierdie reg gevolg te gee, en tot 'n sekere mate sien die howe, by die interpretasie, die prosedure vir die uitleg van die Handves van Regte wat aan die Grondwet voldoen, oor die hoof.

1 Introduction

The South African Constitution is renowned for incorporating justiciable socio-economic rights including inmates' right to adequate medical treatment.[1] Like all socio-economic rights, the right of the inmates to adequate medical treatment imposes a positive obligation on the state to take measures to ensure that this right is realised. The Supreme Court of Appeal indirectly summarised this obligation in the case of *Minister of Correctional Services v Lee*:

> A person who is imprisoned is delivered into the absolute power of the state and loses his or her autonomy. A civilised and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation to see to the physical welfare of its prisoner. We are such a society and we recognise that obligation in various legal instruments ...[2]

1 The Constitution of the Republic 1996, hereinafter referred to as the Constitution.
2 2012 (3) SA 617 (SCA) par 36.

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While the Constitutional Court is yet to interpret this right, other courts have directly or indirectly played a critical role in shaping inmates' right to adequate medical treatment since the Constitution came into operation. The state, too, has adopted various measures aimed at complying with the obligation of inmates' right to adequate medical treatment. It is for this reason that this article assesses the realisation of inmates' right to adequate medical treatment since the adoption of the South African Constitution in 1996. The first part sets out the right to adequate medical treatment. The second part analyses the measures that the state has effected in order to fulfil this right. The third part explores the jurisprudence of the courts on the realisation of this right. The fourth part investigates the impediments on the realisation of inmates' right to adequate medical treatment.

This article argues that the measures of the state aimed at fulfilling inmates' right to adequate medical treatment and the jurisprudence of the courts in shaping it contribute positively towards the realisation of this right since the coming into operation of the Constitution. However, this right is not fully realised because there are some impediments that derail the strides that the state has made towards the realisation of this right and to a certain extent, the interpretation of this right by the courts overlooks the constitutionally compliant procedure of interpreting the Bill of Rights.

2 Inmates' Right to Adequate Medical Treatment

Section 35(2)(e) of the Constitution guarantees inmates' right to adequate medical treatment. This section provides 'everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate … medical treatment.' Therefore, just like other socio-economic rights, this right imposes a positive obligation on the state to fulfil it despite the competing demands for the resources of a state.[3] However, unlike socio-economic rights in general, inmates' right to adequate medical treatment obliges the state to fulfil it immediately. The reason is that this right lacks internal limitation clauses such as 'progressive realisation' and 'available resources'. However, the case of *Van Biljon v Minister of Correctional Services* seems to have read in that state is obliged to provide inmates with adequate medical treatment if it is in a financial position to do so.[4]

In *N and Others v Government of Republic of South Africa* and Others, the court held that inmates' right to adequate medical treatment encompasses providing inmates with timeous medical treatment.[5]

3 Pieterse 'The potential of socio-economic rights litigation for the achievement of social justice: considering the example of access to medical care in South African prisons' 2006 *Journal of African Law* 122-123.
4 1997 4 SA 441 (C) parr 49, 58.
5 2006 (6) SA 543.

According to Albertus and Pieterse, an obligation to fulfil inmates' right to adequate medical treatment includes providing them with palliative care,[6] and treatment that complies with the conditions of detention that are consistent with human dignity respectively.[7] Thus, inmates' right to adequate medical treatment entitles inmates to seek justification for the non-fulfilment of their health-related needs.[8] However, inmates' medical treatment does not include 'optimal medical treatment' or 'best available medical treatment'.[9]

The right to adequate medical treatment, just like other rights, is not absolute. It can be reasonably and justifiably limited in an open and democratic society based on human dignity, equality and freedom.[10] However, the limitation of this right also needs to pass a proportionality analysis that takes into account the nature of this right, the nature and extent of its limitation, the importance of the purpose of its limitation, the relationship between the limitation and purpose and the existence of less restrictive means to achieve that purpose.[11]

Other rights that are related to inmates' right to adequate medical treatment include: the right to communicate with and be visited by detained person's chosen medical practitioner;[12] the right to access to health care services which obliges the state to fulfil it by progressively taking reasonable measures within the available resources;[13] the right to human dignity guaranteed by section 10 of the Constitution; the right to conditions of detention consistent with human dignity in terms of section 35(2)(e) of the Constitution; the right not to be tortured, treated or punished in a cruel, inhuman and degrading;[14] children's right to basic health care which obliges the state to provide children including those who are inmates with immediate and effective access necessary for their survival;[15] the right not to be refused emergency medical treatment which empowers inmates to demand available and necessary

6 Albertus 'Palliative care for terminally ill inmates: Does the State have a legal obligation?' 2012 *SACJ* 67-68.
7 *Supra* n 4 at 122-123. These obligations could also be traced from section 7 of the Constitution which obliges the state to, among other things, fulfil constitutional rights.
8 *Idem* at p 129.
9 *Supra* n 5 at par 49.
10 S 36 of the Constitution.
11 *Ibid*; *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (C) par 40, emphasis added.
12 S 35(2)(f)(iv) of the Constitution.
13 S 27(1) and (2) of the Constitution; *N and Others v Government of Republic of South Africa and Others (No 1) supra* n 5 at par 17.
14 S 12 of the Constitution.
15 S 28(1)(c) of the Constitution; Liebenberg *Socio- Economic rights Adjudication Under a Transformative Constitution* (2010) 233-234, emphasis added; Friedman, Pantazis & Skelton 'Children's Rights' in Woolman S *et al* (2nd ed) *Constitutional Law of South Africa* (2006) 47-6.

emergency medical treatment;[16] and the right to equality which is guaranteed by section 9 of the Constitution and which entitles inmates to demand not to be arbitrarily or irrationally excluded from programmes conferring health related benefits.[17]

3 Measures that the State Adopted to Fulfil Inmates' Right to Adequate Medical Treatment

There are various measures that the state adopted to fulfil inmates' right to adequate medical treatment since the Constitution came into operation. Those measures include the passing of legislation, the making of regulations and the adoption of policy, all of which draw inspiration from international norms. Pursuant to Rules 24-35 of the Nelson Mandela Rules which oblige states to provide inmates with health care,[18] South Africa enacted the Correctional Services Act.[19] Section 12 of the Act obliges the state to provide inmates with adequate health care which includes: providing inmates and mentally ill remand detainees with medical treatment;[20] providing pregnant remand detainees with access to pre-, intra- and post-natal services;[21] transferring mentally ill inmates to a designated health establishment;[22] sterilising inmates and performing abortion for medical reasons;[23] keeping inmates in a place with adequate ventilation, separate beds and bedding which provides adequate warmth for the climatic conditions and complies with hygienic requirements.[24]

The obligation of the state to provide inmates with adequate health care could also be deduced from the relevant provisions of other legislation. Sections 2(a)(ii) and 21(2)(b)(vi)of the National Health Act requires the state to establish a national health system which seeks to achieve an equitable, the best possible health services and health care services for inmates and remand detainees, respectively.[25] The Preamble of the Prevention and Combating of Torture of Persons Act prohibits physical and mental torture that includes denying inmates

16 S 27 (3) of the Constitution; *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) par 20, emphasis added.
17 Pieterse *Can Rights Cure? The impact of human rights litigation on South Africa's health system* (2014) 19, emphasis added; Liebenberg *supra* n 16 at 133, emphasis added.
18 *The Nelson Mandela Rules*, resolution adopted by the General Assembly on 17 December, 2015, seventieth session, A/70/490.
19 111 of 1998, hereinafter referred to as the Act.
20 S 49 D (1) of the Correctional Matters Amendment Act 5 of 2011.
21 Reg 26 D of the Correctional Services Regulations Published in *GG* 35277 GN R 323 2012-04-25.
22 *Idem* reg 6.
23 Reg 7(9) of the Correctional Services Regulations Published in *GG* 26626 2004-07-30.
24 S 7(1) of the Act.
25 61 of 2003.

access to health care services, food or water.[26] Sections 3(b)(iii) and 6(6)(e) of the Mental Health Care Act ensure that inmates have access to mental health care, treatment and rehabilitation services and psychiatric hospitals that admit, care for, treat and rehabilitate them.[27] Section 6 of the Judicial Matters Amendment Act obliges the Heads of correctional centres to apply to court for the release of an accused on warning if he or she is unable to pay the amount of bail and he or she is subjected to overcrowding that poses a threat to, among other things, his or her physical health.[28]

In compliance with Rule 30 of the *Nelson Mandela Rules*[29] and Principle 24 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* which oblige states to examine the health of the inmates upon their admission,[30] South Africa adopted a number of instruments. Those instruments encompass sections 6(5) and 45 of the Act; Regulations 2(3) and 3 of the Correctional Services Regulations;[31] clauses 4, 6 and 15 of the Standing Correctional Orders,[32] which impose an obligation on the state to conduct inmates' health status examination upon their admission and to isolate those inmates who have communicable or contagious diseases.

Pursuant to the World Health Organisation (WHO) Consolidated Guidelines on the use of Antiretroviral Drug for Treating and Preventing HIV Infection;[33] the United Nations (UN) International Guidelines on HIV/AIDS and Human Rights Consolidated Version;[34] and WHO, the United Nation Office on Drugs and Crimes and United Nations Programme on HIV and AIDS interventions to Address HIV in Prisons,[35] South Africa initiated various measures to deal with the treatment of HIV in the correctional centres. Those measures encompass: the various National Strategic Plans for HIV and AIDS, TB and STIs which partly seek to

26 13 of 2013, emphasis added.
27 17 of 2002.
28 42 of 2001.
29 *Supra* n 19.
30 *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by General Assembly Resolution 43/173, 76th plenary meeting, 9 December 1988.
31 Correctional Services Regulations 2004 *supra* n 24 as amended by reg 3 of the Correctional Services Regulations 2012 *supra* n 22.
32 Extracted from the Constitutional Court case of *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) par 61.
33 WHO, *Consolidated Guidelines on the Use of Antiretroviral Drugs for Treating and Preventing HIV Infection – Recommendations for a Public Health Approach* (2016).
34 *UN International Guidelines on HIV/AIDS and Human Rights on HIV/AIDS* 2006 available from http://www.ohchr.org/Documents/Publications/HIVAIDSGuidelinesen.pdf (accessed 2017-06-07).
35 WHO, *United Nation Office on Drugs and Crimes and United Nations Programme on HIV and AIDS – interventions to Address HIV in Prisons*: 2007 available from http://www.unodc.org?/documents?/hiv-aids?/EVIDENCE?%20FOR%20?ACTION%202007%20 ?sexual transmission.pdf (accessed 2014-05-10).

facilitate the provision of HIV treatment;[36] the implementation of a new evidence-based policy of offering HIV treatment to all people living with HIV as soon as possible after HIV-positive diagnosis in 2016;[37] the launch of the Central Chronic Medication Dispensing and Distribution Programme (CCMDDP) at Westville correctional centre by the Kwa Zulu-Natal Department of Health[38] and the collaboration between the Department of Correctional Services (DCS) and other relevant stakeholders such as the Aurum Institute, the TB/HIV Care Association and the Right to Care in the fight against HIV/AIDS and TB in the correctional centres.[39]

The CCMDDP seeks to ensure better coordination and dispensing of chronic medications for HIV, diabetes, asthma, and cancer and the eradication of the stigma associated with HIV by packaging ARVs similarly to other chronic medication.[40] This step is a great improvement by the state and the DCS as the criticism for the failure to provide inmates with timeous HIV treatment a decade ago was attributed to the lack of coordination between the Department of Health and the DCS.[41] The collaboration between the DCS and other relevant stakeholders needs to be commended for ensuring that high percentages of inmates were on antiretroviral therapy (ART) and were cured of TB in the periods 2014/2015 and 2015/2016.[42]

In accordance with Principles 1 and 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[43] and Rule 13 of the Nelson Mandela Rules,[44] which prohibit overcrowding which might have a detrimental effect on the health of the inmates, South Africa has adopted quite a number of measures. Those measures include section 7(1) of the Act; clause 2 of Chapter 2 of the Correctional Services Standing Orders;[45] the White

36 See e.g., *HIV & AIDS and STI Strategic Plan for South Africa 2012-2016*, available on http://sanac.org.za/2017/10/24/download-the-full-version-of-the-national-strategic-plan-for-hiv-tb-and-stis-2017-2022/ (accessed on 2017-11-01).

37 UNAIDS Press Release, *South Africa takes bold step to provide HIV treatment for all* 2016 Available from http://www.unaids?.org?/en/resources?/press centre/?pressreleaseandstatementarchive/2016/may/20160513_UTT (accessed 2017-06-14).

38 Enews, *ARV treatment rollout in KZN prisons*, 2016 available from http://www.enca.com/south-africa/arv-treatment-rollout-in-kzn-prisons (accessed 2016-12-17).

39 *DCS Annual Report 2014/2015* available from http://www.dcs.gov.za//Annual?%20Reports/%?%20%20?2014-2015.pdf (accessed 2017-07-01); DCS Annual Report 2015/2016 available from http://www.dcs.gov.za?/docs/2016%20doc/?DCS%20Annual%20Report?%202015-16.pdf (accessed 2017-07-01).

40 Enews n 39.

41 Hassim 2006 *International Journal of Prison Health* 165-168.

42 *Supra* n 40 at p 56, 66.

43 *Supra* n 31.

44 *Supra* n 19.

45 Extracted from *supra* n 33 at par 9.

Paper on Remand Detention Management in South Africa[46] and the DCS Strategic Plans.[47]

In compliance with Rule 22 of the Nelson Mandela Rules, which obliges states to provide inmates with well prepared food of nutritional value that is good for their health and drinking water, South Africa adopted the following crucial measures: section 7 of Correctional Services Amendment Act which obliges the state to ensure that meals are served at intervals of not less than four and a half hours and not more than six and a half hours and that the interval between the evening meal and breakfast is not more than fourteen hours;[48] section 8(6) of the Act and section 9 of the Correctional Matters Amendment Act which requires the state to provide inmates with clean drinking water and permits remand detainees to be given food and drinks brought from outside the correctional centre, respectively;[49] section 8(3) of the Act which compels the state, where reasonably practicable, to provide inmates with a diet that takes into account religious requirements and cultural preferences;[50] and Regulation 26D of the Correctional Services Regulations which obliges the state to provide pregnant or lactating remand detainees with food taking into account cultural or religious beliefs.[51]

4 Inmates' Right to Adequate Medical Treatment as Interpreted by the Courts

4 1 *Van Biljon v Minister of Correctional Services*

This case concerned four HIV positive inmates who had (CD4) counts of less than 500/ml. Out of the four, only two had a medical prescription for anti-viral therapy. However, they all argued that the state's failure to provide them with the anti-viral drug (AZT) violated their right to adequate medical treatment. The legal question, therefore, was whether the inmates whose CD4 counts were less than 500/ml were entitled to receive the anti-viral treatment at the expense of the state. Having gone

46 *White Paper on Remand Detention Management in South Africa* 2014 54-55 available from http://www.dcs.gov.za/docs/landing/white%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf (accessed 2017-06-05).

47 See DCS Strategic Plans, available from http://www.dcs.gov.za/?page_id=667 (accessed 2017-06-07).

48 32 of 2001.

49 5 of 2011.

50 The court enforced this provision in the case of *Huang v The Head of Grootvlei* 2003 JDR O658 (O). In this case, the court found that the state's failure to allow the Chines inmates to receive raw food and prepare it in accordance with their Eastern tradition, as required by section 8(3) of the Act, which had not yet commenced at the time, violated their rights incorporated in section 35(2)(e) of the Constitution.

51 *Supra* n 22.

through the constitutional rights of the inmates, the court found in favour of the two inmates who had a prescription for anti-viral therapy.

The reasoning of the court for this finding was partly based on the following factors: the state did not argue that it could not afford to provide inmates with their prescribed treatment;[52] the right to adequate medical treatment cannot be determined by what is provided for people outside and inmates' standard of medical treatment 'cannot be determined by the lowest common denominator of the poorest prisoner on the basis that, he or she cannot afford better treatment outside';[53] and that inmates' right to adequate medical treatment does not include 'optimal medical treatment' or 'best available medical treatment'.[54]

Consequently, the court ordered the state to provide those inmates who had a prescription for anti-viral therapy with AZT.[55] However, it did not order the state to provide the other two inmates who did not have a prescription for AZT with such treatment as such an order would be dictating to the doctors when they had to prescribe AZT.[56]

This judgment emphasises the importance of providing inmates with prescribed HIV treatment if the state can afford it.[57] It also compares well with the African Commission cases of *Odafe and Others v Attorney-General and Others*[58] and *Media Rights Agenda v Nigeria.*[59] In both cases, the African Commission found that the failure of the state to provide HIV positive inmates with treatment violated inmates' right not to be treated in an inhuman and degrading manner and their right to health. However, the discontentment with this judgment is that the court placed the issue of the affordability of the treatment within the ambit of the inmates' right to adequate medical treatment.[60] The criticism that the affordability of treatment should serve as a limitation of this right in terms of section 36 of the Constitution is correct.[61]

4 2 *N and Others v Government of Republic of South Africa and Others (No 1)*

In this case, fifteen HIV positive inmates launched an application on 12 of April 2006 challenging the delays in the arrangement of appointments for their prescribed HIV treatment. The basis of the application was that the delays resulted in them not receiving antiretrovirals (ARVs) or not

52 *Supra* n 5 at par 58.
53 *Idem* at par 53.
54 *Ibid.*
55 *Idem* at par 61.
56 *Idem* at par 34.
57 *Supra* n 4 at 20.
58 *Odafe and Others v Attorney-General and Others* 2004 AHRLR 205 (NgHC 2004) par 33.
59 *Media Rights Agenda v Nigeria* 2000 AHRLR 200 (ACHPR 1998) parr 90, 92.
60 Mdumbe 'Socio-economic Rights: Van Biljon versus Soobramoney' 1998 *SAPL* 460; *supra* n 16 at 12; *supra* n 18 at 110.
61 *Ibid.*

receiving them in time in contravention of their rights to adequate medical treatment and healthcare services. This assertion was based on the following grounds: they sent the Westville Correctional Center (WCC) a letter dated 28 October 2005 in which they sought to be informed about the steps that the WCC was taking in order to provide them with ARVs immediately; they had a meeting with the WCC on 15 December 2005 in which a resolution was taken that the WCC would furnish them with the progress report on such steps; the WCC failed to provide them with such a report; their appointments for HIV treatment were scheduled between March and June 2006; King Edward Hospital (KEH) could only see four offenders in one week, and as a result it would take three weeks for thirteen of them to get their first counselling session and almost a year for fifty other inmates who were similarly affected to be on treatment;[62] and that the National Department of Health's Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa (Operational Plan) only made use of KEH and excluded access to other designated sites such as R K Khan, Wentworth Hospital, Clairwood Hospital, Prince Mshiyeni Hospital, Addington Hospital and Osindweni Hospital.[63]

The court found that the measures of the state were inadequate on the ground that there was a delay in the inmates' appointments for HIV treatment and the Operational Plan only made use of KEH. It also found that the measures of the state were unreasonable on the basis that: the Operational Plan was inflexible, characterised by unjustified and unexplained delay;[64] some of the steps taken by the state (particularly the manner in which the appointments were set up) were irrational, and section 237 of the Constitution obliges the state to perform its constitutional obligations diligently and without delay.[65] Consequently, the court concluded that the state fell short of its constitutional and legislative obligations to the inmates[66] and ordered the state to provide all HIV positive inmates with ARVs at an accredited public health facility within two weeks, and to remove the restrictions that prevented inmates who met the criteria as set out in the Operational Plan from accessing ARVs at an accredited public health facility.[67]

This judgment, just like the judgment for the case of *Van Biljon*, stresses the importance of providing HIV positive inmates with HIV/AIDS treatment prescribed for them. In addition, it emphasises the need for the timeous provision of HIV treatment to the inmates. The emphasis on timeous medical treatment to inmates makes this judgment compatible

62 *Supra* n 6 at par 27.
63 *Ibid.*
64 *Idem* at par 30.
65 *Idem* at par 31.
66 *Ibid.*
67 *Idem* at pars 33-35.

with international norms such as the Human Rights Committee's Concluding Observations: Mongolia,[68] Recommendation 37 for implementation of Guideline 6 of the UN International Guidelines on HIV/AIDS and Human Rights on HIV/AIDS.[69] Such emphasis on timeous medical treatment also makes this judgement to be in line with the regional standard such as the European Court cases of *Lorgov v Bulgaria*[70] and *Melnik v Ukraine*[71] which endorse timeous provision of HIV treatment for inmates.

According to Hassim, the lack of internal limitation clause of inmates' right to adequate medical treatment could be interpreted to mean that the state cannot raise an argument that it lacks resources to fulfil its obligations.[72] However, this judgment fails to 'engage in a normative interpretation of section 35(2)(e) and its interrelationship with section 27 in relation to detained persons'.[73] This failure could be attributed to the interpretation of inmates' right to adequate medical treatment in the same manner in which the courts interpret socio-economic rights in general. Instead of fleshing out the scope of inmates' right to adequate medical treatment, the court paid attention to determining whether the state's measures are adequate and reasonable for the purposes of sections 35(2)(e) and 27 of the Constitution. This approach deprives the state an opportunity to channel its resources in accordance with the scope of the right to adequate medical treatment.[74] Therefore, it goes against the nature of inmates' right to adequate medical treatment. Unlike other socio-economic rights, inmates' right to adequate medical treatment does not have an internal limitation clause which serves as the content of socio-economic rights during their interpretation.[75] It will, therefore, be very interesting to see how the Constitutional Court will interpret inmates' right to adequate medical in the future.

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68 Human Rights Committee's Concluding Observations: Mongolia (2000) UN Doc A/55/40 Vol. I 49 at par 332.

69 *UN International Guidelines on HIV/AIDS and Human Rights on HIV/AIDS* 2006 at n 35.

70 Application No. 40653/98, judgment of 11 March 2004. In this case, the European Court found the right not to be subjected in a cruel, inhuman or degrading treatment to have been violated by the delay in providing adequate medical assistance in an emergency situation.

71 Application no. 72286/01, judgement of 28 March 2006. In this case, the European Court found the violation of Article 3 of the European Convention on Human Rights as a result of the failure of the state to provide an inmate suffering from tuberculosis with adequate and timely treatment.

72 Hassim 'The 5 star prison hotel? Right of access to ARV treatment for HIV positive prisoners in South Africa' 2006 *International Journal of Prison Health* 160.

73 Liebenberg 2010 n 16 at 264-265.

74 Iles 'Limiting socio-economic rights: beyond the internal limitations clauses' 2004 *SAJHR* 455, emphasis added.

75 *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) par 46. However, this approach was not without criticism: Bilchitz in an article entitled, 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' 2003 *SAJHR* 6, argued that the court's sidestepping the need to give content

4 3 *Lee v Minister of Correctional Services*

Mr Lee (an inmate) instituted a delictual claim against the state on the basis that the employees of the Minister of Correctional Services failed to ensure that he did not contract tuberculosis (TB) while serving his sentence at an overcrowded Pollsmoore correctional centre. He averred that the negligence of the employee of Minister of Correctional Services was unlawful in that it amounted to the violation of his rights to freedom and security of the person, to be detained under conditions consistent with human dignity, and to be provided with adequate accommodation, nutrition and medical treatment at the expense of the state. Therefore, the legal question was whether the state was liable for damages.

The Constitutional Court (CC) found the state liable for damages and remitted the case to the Western Cape High Court for a determination on quantum. The basis for the finding of the CC was that the determination of factual causation requires the courts to evaluate only the evidence that a plaintiff presented and not to require more evidence.[76] To this effect, the CC held as follows:

> What was required … was to determine hypothetically what the responsible authorities ought to have done to prevent potential TB infection, and to ask whether that conduct had a better chance of preventing infection than the conditions which actually existed during Mr Lee's incarceration. Substitution and elimination in applying the but-for test is no more than a mental evaluative tool to assess the evidence on record.[77]

In applying this principle, the CC found that the probable causation had been established.[78] The CC took into account the following factors: there was nothing on record that suggested that the screening and examination of inmates for medical problems and the isolation of those who had diseases would not have reduced the risk of infection and contagion of a disease like TB;[79] the determination of wrongfulness entailed considering public and legal policy consistent with constitutional

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to the right in s 27(1) in the case of TAC renders the court to fail to identify the health care services to which one is entitled to claim access or to determine whether these services involve preventative medicine, such as immunisations, or treatment for existing diseases, or both or to determine whether the right entitle one to primary, secondary, or tertiary health care services; Stewart in an article entitled 'Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socioeconomic rights of others' 2008 *SAJHR* 479 argued that the content of the socio-economic right in question should first be established and once that has been established should an inquiry into the reasonableness of the measures be undertaken; McLean in a book entitled, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* 2009 174, argue that it is difficult for a court to determine the reasonableness of state action intended to realize it without having some point of reference regarding what the state is obliged to achieve.

76 *Lee v Minister of Correctional Services* n 33 at pars 43, 50, 55, 56-57.
77 *Idem* at par 58.
78 *Ibid.*
79 *Idem* at par 61.

norms;[80] the norm of accountability pointed to a legal duty on the part of the state to screen the incoming inmates in order to protect their rights;[81] recognising Mr Lee's claim for damages vindicated his rights including his right to adequate medical treatment;[82] and that the existence of a legal causation could be gleaned from the duty of the state to detain inmates in accordance with human dignity which included providing them with adequate health care services and to exercise public power in accordance with the rule of law, Constitution and the values of accountability and responsiveness.[83]

This judgment, unlike the judgments in *Van Biljon* and *N and Others*, enforces inmates' rights including their right to adequate medical treatment through the application of the common law on the operation of the health system.[84] It, therefore, extends liability to the South African Police Service for damages that may be incurred as a result of the transmission of communicable diseases due to overcrowded police cells.[85] It also opens doors for the liability of the state for HIV/AIDS transmission as a result of overcrowding and the failure of the state to protect inmates from sexual assault and to provide them with condoms.[86] Therefore, this judgment, by far, compares well with the European case of *Kalashnikov v Russia* [87] and the American case of *Brown, Governor of California, et al v Plata et al.*[88] In both cases, the European Court and the United States Appeal Court found that overcrowding and its detrimental effect on the health of an inmate violated inmates' rights and ordered the states to pay them some damages.

However, in addition to the values of accountability and responsiveness that the CC partly considered in arriving at its conclusion, the value of human dignity could have also been taken into account and could have also led to the same conclusion. After all, section 35(2)(e) of the Constitution, the Act and the Regulations oblige the state to detain inmates under conditions consistent with human dignity. Therefore, the court could have also argued that the failure of the state to deal with

80 *Idem* at par 53.
81 *Idem* at pars 64-67.
82 *Idem* at par 65.
83 *Idem* at par 70.
84 *Supra* n 18 at 77.
85 Chesne 'Dudley v minister of correctional services: a roadmap to some weak links to in the South African custodial chain' 2015 *Journal of Third World Studies* 164-165.
86 Nienaber 'Liability for the wrongful transmission of communicable diseases in South African prisons: What about HIV?' 2013 *SAPL* 170; *supra* n 18 at 79.
87 *Kalashnikov v Russia* Application no. 47095/99, judgement of 15 October 2002.
88 *Brown, Governor of California, et al v Plata et al,* Appeal from the United States District Courts for the Eastern and Northern Districts of California No. 09–1233, decided May 23, 2011, 13, available from http://www.supremecourt.gov/opinions/10pdf/09-1233.pdf (accessed 2014-05-10).

overcrowding which has been tormenting inmates for a long period of time, and which partly caused Mr Lee to contract TB, is contrary to the value of human dignity and inmates' right to adequate medical treatment.

4 4 *Stanfield v Minister of Correctional Services and Others*[89] and *Du Plooy v Minister of Correctional Services & Others*[90]

The applicants, in both cases, applied for medical parole on the basis that the state was not in a position to provide them with adequate health care for their illnesses. However, the Correctional Services Parole Board refused their applications. They then approached the High Courts. Having taken into account the rights of the inmates, which include their right to adequate medical treatment,[91] the courts ordered the state to release the applicants on medical parole as required by the Correctional Services Act 8 of 1959 as the Act was not yet in operation. Pieterse argued quite correctly that while an analysis of section 35(2)(e) of the Constitution was not conducted in these cases, the court considered it:

> … as essentially requiring an inquiry into whether detention conditions are consistent with human dignity, the outcome of which depended, among other factors, on whether the correctional facility was capable of rendering such medical care as was required by the detainee's condition.[92]

These cases, therefore, provide an alternative remedy in cases where a detainee requires medical treatment that the state cannot afford.[93]

4 5 *S v Mpofana*[94] and *S v Vanqa*[95]

In the case of *S v Mpofana,* Mr Mpofana applied for bail in the Magistrate Court on the basis that: (1) he was incarcerated in a small cell with 14 other awaiting trial inmates; (2) he sustained injuries while in detention and; (3) his requests to consult his own medical practitioner were turned down. The Magistrate Court refused his bail application but ordered the police officials to permit him to see a medical practitioner of his choice. On appeal, the High Court held that Mr Mpofana's refusal to consult with his medical practitioner entitles him to do the following: relying on section 35(2)(e), he can apply to the authorities of the correctional centre and inform them about the inhuman conditions in the correctional centre, challenge the detention before a court of law as being

89 2003 4 All SA 282 (C).
90 2004 JOL 12850 (T).
91 *Idem* at parr 26-27; *Stanfield v Minister of correctional services supra* n 91 at pars 87-102; 129-131.
92 *Supra* n 4 127.
93 *Supra* n 18 at 24.
94 1998 1 SACR 40 (Tk).
95 2000 2 SACR 371 (Tk).

unconstitutional or obtain a court interdict to force the authorities to comply with the law, should they fail to remedy his concern.[96]

However, the High Court proceeded and set aside the order of the Magistrate Court that refused Mr Mpofana's bail application and remitted the case to the Magistrate Court for a reconsideration of the application. The court reasoned that the magistrate arrived at her decision on the basis of insufficient information as she did not request information as to why the identification parade was not held for a period of 30 days.

In the case of *S v Vanqa,* Mr Vanqa applied for bail in the Magistrate's Court. This application was based on the following grounds: Mr Vanqa suffered from asthma; he had three asthma attack during the period of his detention; he was refused medication brought by his relatives; and that he was not taken to a doctor. However, the Magistrate Court refused his bail application. On appeal, the High Court overruled the judgment of the Magistrate Court and granted bail to Mr Vanqa. According to the High Court, these facts constituted exceptional circumstances that warranted the granting of bail.[97] In stressing the importance of inmates' right to adequate medical treatment, the High Court went as far as to say the denial of his medical treatment is deplorable and contrary to sections 35(2) (f) and 35(2) (e) of the Constitution which guarantees his right to be visited by his own medical practitioners and obliges the state to provide him with medical treatment at its expense, respectively.[98]

5 Impediments on the Realisation of Inmates' Right to Adequate Medical Treatment

5 1 The Failure of Some Correctional Centres to Conduct Health Status Examination to Inmates Upon Their Admission to the Correctional Centre

The examination of inmates' health status upon their admission to correctional centres is necessary as it enables the DCS to take the necessary steps to prevent other inmates from becoming ill.[99] However, conducting such an examination of inmates' health status has proved to be a challenge for some correctional centres. This much is evident from the Judicial Inspectorate Reports for correctional services which indicate that some correctional centres do not conduct health status examination to inmates upon their admission in certain cases.[100] The failure to conduct health status examination results in undesirable health

96 *S v Mpofana supra* n 96 *at* 45.
97 *Supra* n 97 at par 16.
98 *Idem* at par 27.
99 L*ee v Minister of Correctional Services* 2011 (6) SA 564 (WCC) par 215.
100 *Judicial Inspectorate Report for Correctional Services* 2009-2010 12 available from http://www.pmg.org.za/files/docs/101116jics.pdf (accessed 2011-02-02); Judicial Inspectorate Report for Correctional Services 2011-2012 50

consequences for inmates such as putting their health at risk as those inmates who pose, or could reasonably pose, a health risk to others are not detained separately. This is even worse for inmates who are incarcerated in Pollsmore correctional centre which is characterised by '… poorly ventilated cells which provide favourable conditions for expelled organisms and congestion, with prisoners being confined in close contact for as much as 23 hours every day'.[101]

The state needs to attend to this shortcoming to protect inmates' health and also to avoid litigation. In the case of *Lee v Minister of Correctional Services,* both the High Court and the Constitutional Courts found the state liable for damages as a result of, among other things, its failure to screen inmates for TB upon their arrival in the crowded Pollsmoor correctional centre.[102]

5 2 Overcrowding, Shortage of Nurses and Social Workers and Double-up Serving of Meals

South African correctional centres have been characterised by overcrowding for many years.[103] In fact, at some stage, South Africa was reported to have one of the highest per capita correctional centre population in the world.[104] The situation is so bad that even awaiting trial disabled inmates sometimes have to share a cell designed for 32 inmates with 87 other inmates.[105] The DCS needs to focus more on releasing inmates on medical parole as overcrowding is associated with the improper utilisation of medical parole.[106] According to the court in *Stanfield v Minister of Correctional Services* and the latest Judicial Inspectorate Report, only a tiny percentage of inmates are released on medical parole, despite the high percentages of HIV positive inmates in

available from http://judicialinsp.dcs.gov.za/Annualreports/Annual?%20Report%202011-2012.pdf (accessed 2017-05-28); *Judicial Inspectorate Report for Correctional Services* 2015-2016 54 available from http://judicialinsp.dcs.gov.za/Annualreports/JICS%20Annual%20Report%20%?202015-2016%20as%20at%204%20October%202016%20v%2012.pdf (accessed 2017-05-28).

101 *Supra* n 3 at par 11.

102 *Supra* n 33 at pars 59, 61.

103 *Judicial Inspectorate Report for Correctional Services* 2011-2012 29-32 available from http://judicialinsp.?dcs.gov.za/?Annualreports/?Annual%20Re?port%202011-2012.pdf (accessed 2017-07-10); *Judicial Inspectorate Report for Correctional Services* 2015-2016 *supra* n 115 pp 47-49, 108.

104 S*upra* n 104 at 39.

105 Raphaely Help for South Africa's Prisoner A *Guardian Africa network* 2013 available from http://www.?guardian.co.uk/?world/2013?/mar/08/south-africa-disability-prison??INTCMP = SRCH Help for South Africa's Prisoner A, Friday 8 March 2013 05.00 GMT (accessed 2013-05-01).

106 Jansen & Achiume 'Prison conditions in South Africa and the role of public interest litigation since 1994' 2011 *SAJHR* 187.

the correctional centres and the large numbers of applications for medical parole.[107]

The shortage of nurses and social workers is another challenge facing the DCS.[108] This issue has undesirable effects on the health of the inmates. In the case of *Lee v Minister of Correctional Services,* the Constitutional Court found the state to have violated inmates' rights as a result of, among other things, its failure to take reasonable steps of hiring more nursing staff in order to provide adequate nutrition to those inmates who were undernourished and vulnerable to TB.[109] However, it is pleasing to note that the DCS has introduced a recruitment drive, called *Operation Hira*, so as to attract and retain scarce skills.[110]

The DCS is also facing the issue of double-up serving of meals by some correctional centres.[111] This shortcoming, as a Judicial Inspectorate Report argues, has serious consequences for those inmates who are to take chronic medication together with meals.[112]

5 3 Restriction of Traditional or Religious Food to Remand Detainees

In giving effect to section 8(3) of the Act, the DCS enacted Regulation 26D which, as already mentioned, obliges the state to provide pregnant or lactating remand detainees with food taking into account cultural or religious beliefs.[113] However, Regulation 26D is arguably discriminatory and thus contrary to the rights to equality and health care services of sentenced inmates who had access to such food when they were remand detainees.[114] After all, technically, Regulation 26D prohibits such inmates from demanding the DCS to continue to provide them with such food.[115] In other words, the officials of the correctional centre would not contravene the law should they discontinue providing those inmates with traditional food or religious food. Therefore, contrary to the value of human dignity, Regulation 26 D has the effect of treating such inmates as lesser human being simply because they are sentenced inmates and no longer remand detainee. In fact, Regulation 26D goes against the right

107 *Stanfield v Minister of Correctional Services supra* n 91 par 128; Judicial Inspectorate Report for Correctional Services 2015-2016 *supra* n 104 pp 74-75. However, as Mujuzi argues in an article entitled, 'Releasing terminally ill prisoners on medical parole in South Africa' 2009 *SAJBL* 60 that, the state is yet to cater for situations where an inmate on medical parole miraculously recovers from his or her terminal illness, it is responsibility of the state to ensure that inmates who qualify for medical parole are released on parole.

108 *Supra* n 102 at 29-32, 47-49, 108.

109 *Supra* n 33.

110 *Supra* n 102 at 74-75.

111 *Idem* at 52-53.

112 *Ibid*.

113 *Supra* n 22.

114 Liebenberg 'The value of human dignity in interpreting socio-economic rights' 2005 *SAJHR* 14, emphasis added.

115 *Supra* n 1 at 160.

to equality and health care services of those inmates. The case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, indirectly endorses this assertion as the Constitutional Court argued that 'At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group...'[116] Further, Regulation 26D amounts to an irrational exclusion of those inmates from programmes conferring health-related benefits such as access to cultural or religious food.[117] After all, there is no reason provided for such exclusion of those inmates.

5 4 Failure of the State to Submit Information on the Admissibility and Merits of the Communication to the Human Rights Committee (HRC) on Civil and Political Rights

The failure of South Africa to submit information on the admissibility and merits of the communication of the HRC in the case of *McCallum v South Africa*[118] represents a lack of respect for an institution tasked with enforcing civil and political rights that are related to inmates' right to adequate medical treatment. Such a lack of respect is indicative of its violation of International Covenant on Civil and Political Rights to which South Africa is a state party.[119] Such an oversight of the HRC on the part of South Africa to a certain extent displays its unwillingness to comply with the obligations of inmates' right to adequate medical treatment. The reason is that the HRC found South Africa to be in violation of the rights not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and to be treated with humanity as a result of denying an inmate his rights to medical treatment by disallowing him to see a doctor for a certain period and denying him an HIV test.[120]

6 Conclusion

South Africa has made great strides on the fulfilment of the obligations of inmates' right to adequate medical treatment since the Constitution came into operation. This much is evident from the measures that the state adopted to fulfil this right and the role that the courts have played in ensuring the realisation of this right. Both the judicial pronouncements and the state's measures in this regard contribute positively towards the realisation of this right. However, this right is not fully realised because

116 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC) par 129; Liebenberg 2005 *SAJHR* n 129.
117 *Supra* n 18 at 19 emphasis added; *supra* n 16 at 133 emphasis added.
118 *McCallum v South Africa,* Communication No. 1818/2008,U.N.Doc.CCPR/C/100/D/1818 par 4.
119 *International Covenant on Civil and Political Rights*, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1996, entered into force 23 March 1976.
120 *Supra* n 120 at par 6.8.

there are some impediments that derail the strides that the state has made towards the realisation of this right and to a certain extent, the interpretation of this right by the courts overlooks the constitutionally compliant procedure of interpreting the Bill of Rights.

To replace the Friendly Society Act 25 of 1956 with the proposed Insurance Bill 2015; a new perspective on society members' benefits in exchange for a premium

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OPSOMMING

Om die Wet op Onderlingehulpverenigings 25 van 1956 te vervang met die voorgestelde Versekeringskonsepwet 2015: 'n nuwe perspektief oor hulpverenigingslede se voordele in ruil vir 'n premie

Die Wet op Onderlinge Hulpverenigings is 'n besondere stuk wetgewing wat om een of ander rede intense akademiese bespreking oor 60 jaar vrygespring het. Onderlingehulpverenigings is 'n vorm van versekering wat nie tipies as kort- of langtermynversekering in Wet 25 van 1956 bespreek word nie. Om hierdie rede is dit moontlik dat 'n lid se voordeel verdere regsbepalings het volgens die kort- of langtermynwetgewing in Suid-Afrika. Dit is ook moontlik dat die voordeel geensins deel vorm van die kort- of langtermynwetgewing nie maar eerder 'n *sui generis*-vorm van versekering is, naamlik die stokvel as besigheidsvorm in Suid-Afrika. Met die inwerkingtreding van die voorgestelde Versekeringskonsepwet 2015 gaan onderlingehulpverenigings nie meer as besigheidsvorm voortbestaan nie, maar daar heers onduidelikheid oor die stokvel as besigheidsvorm in die toekoms. Die nuwe wet gaan duidelikheid bring oor presies hoe onderlingehulpverenigings as mikroversekering in die kort- en langtermynwetgewings getipeer gaan word deur middel van wysigings aan beide wetgewings. Alhoewel die wysigings nuut mag voorkom, bevat die Wet op Onderlinge Hulpverenigings reeds bestaande begrippe wat nou ander betekenisse kry volgens die Versekeringskonsepwet. 'n Praktiese voorbeeld is die nuwe term om selstruktuurversekering te omskryf wat voorheen bekend gestaan het as 'n sentrale onderlingehulpverenigingsstruktuur – geen akademiese bevestiging kon gevind word nie maar die oorvleulende eienskappe tussen die twee terme dui op een en dieselfde konsep. Om hierdie rede verskaf sentrale onderlingehulpverenigings duidelike praktiese voorbeelde oor hoe formules omskryf kan word om eensgesindheid te bring by die verdeling van winste in selstruktuurversekering. Buiten laasgenoemde word daar ook gelet op die nuwe ledevoordele van mikroversekeraars volgens kort- of langtermyn-

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versekering en hoe dit tans vergelyk met bestaande ledevoordele van onderlingehulpverenigings.

1 Introduction

The Friendly Society Act was introduced in 1956 as a method to introduce a new business entity into the South African corporate landscape yet, sixty years later, little has been published concerning it by South African law academics or the judiciary. In fact, our research for this article into published case law matters and academic articles revealed just five cases and three articles in law journals that related to friendly societies in one way or the other since 1956; moreover, these articles referred just briefly to friendly societies in South Africa.[1] On the other hand the Friendly Society Act 25 of 1956 has been amended by twenty-five pieces of legislation over a sixty year time period. Although society benefits are regulated in Sections 2, 18 and 19 of the Act, those benefits have not been classified as either short term insurance or long term

1 *Oranje Benefit Society v Central Merchant Bank Ltd* 1976 (4) SA 659 (A) deals with *ultra vires* contracts entered into by society officials/directors with a third party. The word director does not appear in Section 1 of the Friendly Society Act 25 of 1956. The Act only defines an officer, which includes any person/member appointed to manage the affairs of the society; *Ex Parte Steenkamp* 1996 (3) SA 822 (W) deals with the legal requirements for voluntary sequestration of a natural person's estate, while a policy issued by a friendly society is excluded from the estate to be sequestrated; *Family Benefit Friendly Society v Commissioner for Inland Revenue* 1995 (4) SA 120 (T) where a society has not gone into business but asks the court for an opinion on a tax matter should the society decide to conduct business. *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A) where a person approached a society for a loan to develop property. The society could not grant the loan but nevertheless used its creditworthiness to assist the person in obtaining cash. The society's constitution should permit loans or grant the circumstances under which loans could be granted; *Volkskas Beleggingskorporasie v Oranje Benefit Society* 1978 (1) SA 45 (A) where any loan granted ultra vires allows the society to claim back any money paid plus interest; *Central Merchant Bank Ltd v Oranje Benefit Society* 1975 (4) SA 588(C) refers also to ultra vires loans as decided in the previous matter; See in general Swart & Lawack-Davids 'Understanding the South African Financial Markets: An Overview of the Regulators' 2010 *Obiter* 619-637; Mpedi & Millard 'Bridging the GAP: The Role of Micro-Insurance in a Comprehensive Social-Protection System in South Africa' 2010 *Obiter* 497-517; D Millard 'For Whom the Bell Tolls … Interplay between Law of Delict and Social Security Law in Three Modern Compensation Systems' 2010 *TSAR* 532-557; See in general Von Nessen 'Financial Services Reform: What can be Learned from the Australian Experience?' 2006 *TSAR* 64-82. While this article is interesting, nevertheless, the requirements of product disclosure and or disclosure of financial services rendered are not applicable to friendly societies in terms of the Friendly Society Act 1956; See in general as to the first friendly society in South Africa as a 'medical scheme' in McLeod 'Mutuality and Solidarity in Healthcare in South Africa' 2005 *South African Actuarial Journal* 135-167.

insurance benefits in the Act.[2] To understand whether a society benefit is indeed a short term insurance benefit or a long term insurance benefit, reference must be made to the Short Term Insurance Act or the Long Term Insurance Act[3]. In any event, the amount or the maximum amount of benefits payable to a society beneficiary or member is limited to R7500.[4] Besides the above, Section 47 of the Friendly Society Act makes provision to issue regulations relevant to the payment of a society's benefits, the maximum amount of investments to be made on behalf of the society and or actuarial scrutiny of benefits paid by the society and so forth. In total, twenty-nine regulations have been issued since 1962.[5] The financial statements of the friendly societies are required to disclose general and statistical information pertaining to claim benefits paid to society members in the aggregate as a method to calculate the loss ratio per product; for example, medical-, sick pay-, death-, funeral benefits and or other benefits paid, expressed as a percentage of the total premium received.[6] It is clear that this regulatory template for financial statements is only an example of the different types of benefits payable in terms of sections 2, 18 and 19 of the Act and of how low or high their individual loss ratios may be in comparison to one another.[7]

In terms of the Insurance Bill, the terminology associated with friendly societies will disappear completely; for example, the terms 'central society' and 'friendly society'. The new Bill introduces new terminologies pertaining to micro insurance; for example, cell structure insurance and different forms/types of micro insurance benefits (some benefits are not presently found in the in Act of 1956, i.e. the credit life insurance benefit) and the cell structure insurance practices will be compared with the practices of the central society as regulated in the present Act of 1956.[8]

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2 Section 2 deals with general society benefits or products, for example, funeral costs *etcetera*. Section 18 deals with the payment of members' benefits to members' beneficiaries or nominees and section 19 deals with benefit payments of children under the age of 14 years, who have died.

3 See for example the Short Term Insurance Act 53 of 1998 section 7(2)b.

4 The regulation of the maximum amount of benefits payable in the Short Term Insurance Act is based on section 7(2)b of the Act and authorises the Minister of Finance to determine the maximum amount of benefits payable to society members. For example, the Minister signed or authorised a notice on the 1 March 2008 which limits the maximum amount of money payable to society members to R7500.

5 Originally published in Government Gazette 1409 of 1966/03/25 as various Government Gazette amendments in Government Gazette 9437 of 1984/09/28, Government Gazette 12079 of 1989/09/1, Government Gazette 13536 of 1991/09/27, Government Gazette 14572 of 1993/02/12, Government Gazette 20057 of 1999/05/14 and Government Gazette 28627 of 2006/03/17.

6 Government Gazette 1409 of 1966/03/25, for example, indicates the preferred disclosure of different benefits paid in the financial statements.

7 For example, section 7 which was published in Government Gazette 1409 of 1966/03/25 requires total sick pay benefits paid. Section 1 requires income or gross premium received. It is thus possible to specify gross premium in the aggregate or be product specific in relation to claims paid out to members.

8 Section 1 of the Insurance Bill defines a cell structure, *etcetera*.

Micro insurance businesses will be able to insure life insurance products up to a maximum of R50 000 and R100 000 for short term insurance products.[9] This maximum monetary policy benefit will assist micro insurers to compete more aggressively with other insurance companies by selling a greater variety of micro- insurance products compared to the Act of 1956. In addition to the latter, this article refers briefly to stokvel benefits, the maximum amount payable by a stokvel and how the Insurance Bill will regulate stokvel benefits in the future; i.e., whether it will be a requirement to register any form of stokvel business.[10]

Furthermore, this article uses practical examples to illustrate cell structures (or business schemes) since no law literature in South Africa exists on this topic.[11] Although the latter statement sounds technical, in this article simple examples are used to explain the relevance of central societies in the financial industry and whether central societies as business schemes, will still be able to continue as such in the future. In the literature, the calculation of profits relevant to business schemes is very scanty. For this reason, the researchers used examples employed by insurers in their binder agreements to calculate profits.[12] Besides the latter, the researchers were unable to find any law articles in reference to the profit sharing formulae examples as discussed in this article.

2 What is a Friendly Society?

The definition in terms of the Act of 1956 seems simple and uncomplicated in its application to regulate entities as friendly societies. Section 1 of the Act defines a friendly society as follows:

(a) Any association of persons established for any of the objects specified in Section 2 or

(b) Any business carried on under a scheme or arrangement instituted for any of those objects, and includes any central society referred to in Section 39, whether or not it is liable to provide any benefits mentioned in Section 2 and or any central society, association or business aforesaid which is or may become liable for any such benefits, whether or not it continues to admit or to collect contributions from members.

9 See www.treasury.gov.za/publications/other/MicroinsuranceRegulatoryFramework/Policy%20Document%20Micro%20Insurance.pdf (accessed 2016-01-01).

10 Van der Merwe 'Die Stokvel 'n Ondernemingsregtelike Studie' 1996 Transactions *of the Centre for Business Law* 4.

11 See Section 1 of the Insurance Bill for various definitions to cell structure etcetera; See Friendly Society Act section 39, which defines a central society.

12 The researchers signed a confidentiality agreement and cannot disclose the names of the insurers consulted. The formulae employed by different insurers vary from one insurer to another. Mostly the insurers will rely on a contractual clause to allow them to deduct any discretionary costs associated with the business scheme.

A company is also an association of persons, but the court in Ex Parte Liquidators Royal Oak, Ancient Order of Foresters Friendly Society held that a friendly society is an unregistered company.[13] Although this case was decided in 1941, it is currently equally applicable since a friendly society is incorporated in terms of the Friendly Society Act 1956. Although such a society has often been referred to as a non-profit organisation, it is not similar to a Section 21 company of the Companies Act 1973 or a Section 10 non-profit company in terms of the Companies Act 2008.[14] The latter two companies participate in charity and or any other public benefit.[15] The same applies to friendly societies; however, the difference is simply that a friendly society's conduct is the rendering of insurance business; for example, medical assistance benefits or accidental death benefits as regulated in section 2 of the Act.[16] For this reason a society's income or premium income is distributable to its members as an undertaking to provide policy benefits as regulated in section 2 of the Act, whereas non-profit organisations/companies are not allowed to distribute their income to any of their members. The members of a non-profit organisation are in fact the board of directors and the latter may receive remuneration as employees of the organisation or company.[17] It is at the discretion of the board of directors to decide to help a certain section of the public or a member of the public for charity purposes. The features of Section 1 quoted above are individually discussed in the following paragraphs.

2 1 Any Association of Persons

It is clear from the information above that if an association of persons provides any of the society's benefits or objects in Section 2, this

13 1941 CPD 178.

14 Lambert 'Maintaining a British Way of Life: English-Speaking South Africa's Patriotic, Cultural and Charitable Associations' 2009 *Historia* 55-76. A non-profit company is registered in terms of the Companies Act 71 of 2008.

15 For example, to pay funeral costs to the public where a member of the public is unable to pay these costs. A society may sell a policy/benefit to pay for funeral costs when the member of the society dies. The date of death is uncertain; however, the member contributes to the society on a monthly basis to accept a claim submitted to the society in the event of death of a member; See in general *Re Bucks Constabulary Widows' and Orphans Fund Friendly Society v Holdsworth* [1979] 1 All ER 623.

16 See in general *Trustees of the National Deposit Friendly Society v Skegness Urban District Council* [1958] 2 All ER 601. The court refers briefly to the insurance business of a friendly society. Unlike insurance companies, a friendly society cannot pay any dividends to its members, making the society a non-profit business entity. The non-profit business is not similar to non-profit companies registered to complete a public benefit or charitable cause; Verhoef '"Wie Moet Sorg?" Gesondheidsbeleid en Mediese Fondse in Suid-Afrika in Vergelykende Perspektief 1900-1970' 2007 *Historia* 19-49.

17 See Companies Act 2008, schedule 1, item 1(1); Verhoef 'Savings and Survival in a Modern African Economy: Informal Savings Organizations and Poor People in South Africa' 2001 *Historia* 519-542.

association should register as a friendly society.[18] However, Section 3 of the Act excludes the following entities as friendly societies:[19]

(a) A fund created in terms of the Labour Relations Act 1956 and or

(b) The aggregate income value of the society does not exceed a R100 000 per annum and the entity with less income shall comply with any regulation that may be made in relation to it.

Point b above is relevant to our discussion: it simply states that if an entity or a society receives income less than R100 000 per annum, such an entity or society is not obliged to register the association of persons as a friendly society in terms of the Act. The consequences of such an entity are far reaching. For example, as long as the entity earns less than R100 000 income per annum, it can pay policy benefits to its members in excess of R7500 and can issue benefits other than those listed in Section 2 of the Act.[20] Section 2 benefits or policy benefits are discussed in detail in paragraph 2 3. In addition, the friendly society is required to register society or member rules (the society's constitution) relevant to members' rights and duties. Therefore, if the income is less than the statutory requirement, it is possible to have an entity that does not have member rules. The latter provision is regulated in Section 3(2)(a) of the Act and reads as follows:

> If the registrar is satisfied that the aggregate value of the income likely to be received by a friendly society which is at the commencement of the Friendly Societies Amendment Act 1988 registered under this Act, will not in general exceed during any year an amount of R100 000, he may by notice in writing addressed to that society, and on such conditions as may be specified in that notice, exempt that society from operation of all or any of the provisions of this Act.

Considering the above, it is clear that the registrar of societies can nevertheless require an entity to register as a friendly society in terms of Section 5 of the Act even if the income per annum is less than R100 000.[21] Or the registrar may exempt the entity from all the requirements in Section 5. Part of the registration requirements deals with the provisional registration of an entity as a friendly society for a maximum period of 5 years, after which the society must apply for final registration as a friendly society. The requirements for final registration, which appear in Section 5(4), in brief are the following: the rules or constitution of the society should not be inconsistent with the Act;[22] the rules should

18 See in general Sissons 'Friendly Societies' 1977 *Victoria University Wellington Law Review* 59-75.

19 See in general Sissons *supra* at 64.

20 See in general Sissons *supra* at 67 and 68. In 1909 the maximum benefits payable to society members in New Zealand were $3100 per annum.

21 See in general Sissons *supra* at 70. Here the author distinguishes between state welfare payable and society benefits and it seems that there were no thresholds in minimum income required to register a society. Nevertheless, a decline in societies was noticed in New Zealand; See www.news24.com/SouthAfrica/Local/Kouga-Express/mpendulo-members-visit-jeffreys-bay-wind-farm-20160504 (accessed 2016-04-19).

be financially sound;[23] the business or society benefits provided should not be undesirable;[24] the society should be in a financially sound condition[25] and the rules of the society should not be unduly inequitable as between different society members.[26] If the latter requirements are met, the registrar will register the society as final and it shall cease to operate provisionally.

2 1 1 Stokvels

Although a friendly society is executing the business of insurance, a society is not defined as an insurer in either the Long Term Insurance Act 52 of 1998 or Short Term Insurance Act 53 of 1998. This is in fact strange, since Section 3(2)b of Act 1956 refers to a society as an entity that operates exclusively by means of selling policies of insurance similar to a short term or long term insurer. In addition the society collects a monthly premium in exchange for Section 2 policy benefits. However, if it earns an income of less than R100 000 per annum the society may continue with the business of insurance since it is exempt from the registration requirements relevant to friendly societies.[27] This society can be interpreted or be classified as a stokvel.[28] The term stokvel or stockfel /stockfair commonly refers to an association of persons pooling their money together to help one another in times of risk or need.[29] To help one another or to receive stokvel benefits is based on a rotation principle relevant to the association of persons. For example, a funeral (burial society) stokvel is an association of persons pooling their money together to pay benefits on a rotational basis as and when individual stokvel members die. The benefit is paid in cash and is unlimited in its quantum, while the types of benefits are also not regulated in Section 2 of the Act 1956.[30] On the other hand, it is possible for the members to agree voluntarily on a set of rules or a constitution to regulate stokvel management decisions, the appointment of stokvel managers and or to regulate the maximum amount of money payable to a person when an uncertain event occurs, for example death or funeral costs.[31] Besides the latter, if a stokvel earns more than R100 000 per annum, there is no need to comply with the requirements to register the stokvel as a society if the following criteria are met in terms of Section 2(2) of the Friendly Society Act. Section 2(2) reads:

> No association or business shall be regarded as a friendly society:

22 Section 5(4)a.
23 Section 5(4)a.
24 Section 5(4)b.
25 Section 5(4)c.
26 Section 5(4)d.
27 Section 3(b) of Act 1956.
28 Van der Merwe *supra* n 10.
29 Van der Merwe *supra* n 10 at 5.
30 *Ibid*. Van der Merwe uses a simple example; 2000 members each contribute R100; therefore 2000 times 100 equals R200 000. This amount can be paid over to a member.
31 *Idem* at 10.

(a) If none of the persons entitled to the benefits specified in Section 2 sub-Section 1 contributes to such association or business or[32]

(b) If any of the its activities fall within the objects of a pension fund organization as set out in paragraph (a) or (b) of the definition of 'pension fund organization' in Section 1 of the Pension Funds Act or[33]

(c) If in terms of its rules each member is entitled at all times to withdraw the full amount of his contributions, subject to such notice as may be prescribed in its rules or[34]

(d) If the benefits mentioned in Section 2 sub-Section 1 are provided exclusively by way of loans which in terms of its rules must be repaid.[35]

Therefore, if a stokvel allows a member to withdraw his or her monthly contributions and it earns more than R100 000 per annum, it is exempt from the registration requirements due to Section 2(3). Point d) above is also interesting and refers to a credit stokvel, which is also exempt from society registration requirements.[36] On the other hand, a stokvel that is exempt from the Friendly Society Act is not limited by the maximum amount of R7500, as in the case with friendly societies.[37]

2 2 Any Business Carried on Under a Scheme

2 2 1 Background and Technical Explanation

Understanding a friendly society which carries on its business under a scheme can be a complicated endeavour. The Act refers to a central society as a scheme, immediately posing the question of what types of entities are considered central societies. To understand this sub-Section clearly it is important to refer to Section 1 of the Insurance Bill. Section 1 introduces new terminology into the insurance industry; for example, cell captive and cell structure. Each of these terminologies will be discussed separately to illustrate the financial purpose of a central society and its benefits. Section 1 of the Bill reads:

(a) Cell captive insurer – means an insurer that only conducts insurance business through a cell structure.

(b) Cell structure – means an arrangement under which an entity (cell owner)

(c) Holds an equity participation in a specific class or type of shares of an insurer…

(d) Is entitled to a share of the profits and liable for a share of the losses … losses generated by the insurance business …

32 Section 2(2)a.
33 Section 2(2)b.
34 Section 2(2)c.
35 Section 2(2)d.
36 Van der Merwe *supra* n10 at 7.
37 *Idem* at 14.

(e) Places insurance business with the insurer referred to in paragraph (a) which business is ring-fenced on a going concern basis from the other insurance business of that insurer.

Neither the Short Term Insurance Act nor the Long Term Insurance Act refers to a cell captive or cell structure of the insurer's business. Some insurers in South Africa employ the concept 'cell structure' without any legislative guidance in the present since the Bill will only become law early in 2017. The 'cell structure' is the result of new terminology introduced in 2011 to allow business entities to share in the profits of the insurer and to act as if they are the insurer without applying for an insurer's licence in South Africa; therefore, the company operates as a 'cell' within the insurer's business.[38] This new terminology, for example, refers to an insurance underwriting manager participating in or sharing in the profits of the insurer.[39] An insurance underwriting manager is not a registered insurer but is allowed to act as if it is a registered insurer if the insurer and the underwriting manager have entered into a binder contract.[40] In terms of this contract, the underwriting manager may bind the insurer to any type of insurance contract entered into with a policy holder without informing the insurer beforehand of the conclusion of a policy contract with a policy holder.[41] In terms of the binder contract, the underwriting manager is entitled to calculate its own premiums in exchange for risk, to settle claims, to reject claims and the like as if it is the insurer who had calculated the premiums, settled the claims and so forth.[42] The underwriting manager is therefore entitled to share in the insurance profits of the insurer based on its ability or performance to conduct/run a profitable business of insurance.[43] The binder contract can stipulate a formula as to how to calculate the profits between the insurer and the underwriting manager.[44] A simple, practical formula is presented here in Table 1:

38 Short Term Insurance Act 1998, Section 70 allows the Minister of Finance to issue additional regulations to regulate the insurance industry. The Minister issued binder regulations in Government Gazette 1078 of 2011/12/23.

39 Government Gazette 1078 of 2011/12/23 defines an underwriting manager in section 6.1 as a person that performs one or more of the business of insurance referred to in section 48 A(1) a-e of the Short Term Insurance Act, for example, to calculate premiums etcetera.

40 Government Gazette 1078 of 2011/12/23 defines a binder agreement as an agreement required to complete the requirements of section 48A of the Short Term Insurance Act.

41 Government Gazette 1078 of 2011/12/23 defines enter into in section 6.1 and means any act without the insurer becoming aware of the act until after the act has been performed.

42 Government Gazette 1078 of 2011/12/23 section 6.3(1)g. To settle claims etcetera is referred to as binder functions.

43 Government Gazette 1078 of 2011/12/23 in terms of section 6.4(4) regulates the sharing of profits.

44 Government Gazette 1078 of 2011/12/23 requires a binder agreement to contain the clauses specified in section 6.3. Strangely, the section 6.3 contains no template of a possible formula to calculate profits. The

Table 1:An example of how to calculate the profits between the insurer and the underwriting manager

Total premium received per annum	R1m
Less total claims paid per annum	R 800 000
Less broker commission paid per annum	R125000
Less underwriting manager fee (i.e. 5%)	R50 000
Less insurer's fee (i.e. 3.5%)	R35000
Plus re-insurance commission received	R100 000
Less SASRIA premium paid [a]	R20000
Less claims incurred but not reported (IBNR)	R100 000
Net Profit (-/+)[b]	-R130 000

a. SASRIA is a state owned company which covers loss in the event of riots, terrorism and the like. The amount next to SASRIA in the table is not calculated in accordance with the guidelines set by SASRIA and serves only as an example of deductions relevant to the formula explained.
b. Croome 'VAT: Insurance Premiums and Payments from a Policy' 2005 *Money Web Tax Breaks* 4. It may be necessary to deduct VAT to calculate net profit since net profit payable is subject to VAT. However, irrespective of what the formula should be, any sharing in profits is subject to income tax.

It is possible that the binder agreement will stipulate that only net profit will be shared equally between the insurer and the underwriting manager; not any net profit losses. The formula is not guided by legislation and it' is possible that the insurer and the underwriting manager may agree on additional costs or revenue; for example, excess paid on loss. Any policyholder must pay an excess once a claim is submitted to the insurer.[45] The excess could either be paid to a third party or is payable to the insurer before settling the policy holder's

calculation of profits remains a logical calculation. See, for example, crop hail loss calculation in Mare, Willemse & Grove 'Estimating the Maximum Value of Crop Hail Insurance Under Stochastic Yield and Price Risk' 2015 *Agrekon* 28-44.

45 *Ibid* for a general explanation of Tax; Candy 'Innovative Insurance' 2005 *Money Web Tax Breaks* 13. Penalties and or excesses paid by policyholders may also be part of a profitable product; Verhoef 'Innovation and Expansion: Product Innovation and Expansion of Insurance in South Africa. The Case of Sanlam, 1920-1998' 2016 *Historia* 66-91. This article indicates the policy with which Sanlam began its business in 1910 and discusses the product innovation or development carried out thereafter to increase Sanlam's market share in the insurance industry.

claim.[46] The excess paid on a loss is considered additional revenue/ income for the insurer if paid directly to the insurer and can be part of the formula above. The above profit sharing formula is similar to a cell structure business or cell captive business.[47] The profits can be paid in terms of the binder agreement or in the form of dividends if the underwriting manager has shares in the insurer. Government Gazette 34877 of 23 December 2011, regulates binder agreements but is not too specific on how profits should be shared i.e. by dividends only.

2 2 2 A Cell Structure

If an underwriting manager holds shares in an insurer, then in terms of the Insurance Bill the insurer is conducting its business as a cell captive. A cell structure or cell captive business can also employ the above formula in paragraph 2.2.1 as a method to share in the insurer's profits. It is possible that an insurer may require from the underwriting manager a certain amount in fixed shares to comply with the solvency requirements which is proportional to the cell business's income. For example, if the underwriting manager collects R1m annual premium, the insurer could require a fixed share purchase of 20% of the annual premium to comply with solvency requirements.[48] Whether an insurer could 'outsource' this legislative requirement is unclear, since the Government Gazette 34877 of 23 December 2011, makes no reference to solvency requirements and or the Insurance Bill. Besides the latter uncertainty, from an accounting point of view it would be impossible to share in the profits of the insurer. For example, if the underwriting manager grows 10% per annum in its business, then the underwriting manager must contribute 20% of the 10% growth to the insurer.[49] To share in the profits of the insurer as stated in Section 1 of the Bill becomes nearly impossible; the underwriting manager pays R200 000 for shares to equal the solvency requirements of a R1m annual premium and the following financial year an additional R20 000 etcetera. Before sharing in any profits the underwriting manager would have paid R220 000 to the insurer. If we consider the sharing of profits formula example, it is clear that the net profit is minus R130 000. If the binder agreement makes provision for sharing of profits and losses, this implies

46 If it is a short term policy relevant to vehicles, the policy holder must pay an excess either to the repairer of the vehicle or the insurer.

47 Government Gazette 1078 of 2011/12/23 in terms of section 6.3 and 6.4. Sharing in profits can also imply dividend payments based on shares acquired in the insurer, but is not specified explicitly in section 6.4(4). For this reason the Insurance Bill introduces cell structure terminologies applicable to the Short Term Insurance Act 1998.

48 Business Day (2005-09-07) 8 for a general discussion on the solvency margin as 25% of the gross premium received.

49 The Insurance Bill in section 1 does not exclude the possibility of a solvency requirement for a specific cell. However, solvency requirements are a requirement for the insurer to comply with in terms of section 28 of the Short Term Insurance Act. This is a legislative requirement for short term insurers only; hence to 'outsource' this requirement in terms of a contract should not be permissible.

that the underwriting manager is liable for this R130 000 loss and that the manager was obliged to pay R220 000 in capital. Is it possible for an entity with limited resources to comply with these financial requirements? We believe that sharing in solvency requirements is a legislative duty imposed on the insurer alone and cannot be ceded or outsourced to any underwriting manager. In addition, the definition of a cell structure does not contain solvency requirements but we argue that it should not be part of the cell business for the financial reasons explained above. It is possible that the underwriting manager and insurer may agree to share the underwriting loss of R130 000 equally in the binder agreement or any other agreement that relates to the cell structure business.[50] However, any losses could be covered by a re-insurance treaty or contract between the insurer and a re-insurance company, making the sharing of losses between an insurer and underwriting manager impractical and irrational.[51]

2 2 3 A Cell Structure and a Central Society Compared

A friendly society cannot issue any shares to any other society, company or individual, making our explanation of a cell structure above irrelevant to our discussion in terms of Section 40(2)c of the Friendly Society Act. Nevertheless, a central society could conclude an agreement with a society to share in the net profits or losses of the society in terms of Section 13(n) which regulates the sharing/disposing of profits subject to the approval of the registrar of friendly societies. The formula relevant to share in profits without any shareholding between a central society and a society could be similar to the formula between an underwriting manager and an insurer discussed earlier.[52] Nevertheless, Section 39 defines a central society as follows:

> (a) Central society means a society which controls two or more affiliated societies liable for payment of contributions (premiums) to its funds. The societies contributing to the funds of a central society shall be deemed to

50 Some insurers conclude a binder agreement and in addition, another agreement pertaining to the payment of losses. The payment of losses could be effected to a third party company, which is part of the insurer's business and may include solvency requirement payments. Once again, to require an underwriting manager to pay for solvency requirements and losses is too stringent, making the sharing of profits nearly impossible. Such agreements which require solvency payments should be interpreted as *contra bones mores* where only the insurer is required to comply with solvency requirements. See for example, Government Gazette 34715 of 2011/10/28 section 5 of the Gazette and section 29(1)b of the Act; Section 29 refers specifically to short-term insurers and not to underwriting managers. There are different methods to calculate solvency requirements in terms of section 5 of the Gazette relevant to insurers only. See Kerr *The Principles of the Law of Contract* (2002) 164, 181.

51 See https//www.investopedia.com (accessed 2016-01-05). The insurer cedes a part of its insurance policies' risk to a reinsurer in exchange for a premium. If no claims were made, the reinsurer may refund a portion of the premiums to the insurer, known as a reinsurance commission.

52 See paragraph 2.2.1.

be its members and the central society shall not admit as members any persons other than its affiliated societies.

Section 1 of the Act defines society members as either natural persons and or affiliated societies; affiliated societies can perform the same functions as illustrated by the relationship between an underwriting manager and the insurer. The relationship between a central society and affiliated society could be regulated by a separate agreement, similar to a binder agreement, explained earlier. In terms of Section 40(3) of the Friendly Society Act, where a society's rule is in conflict with a central society's rule, for all practical purposes the society's rule is subordinate to the central society's rule in order to comply with Section 39 of the Friendly Society Act:

(a) Affiliated society means a society which is under the control of a central society and is bound to contribute to a fund administered by such central society.

It is therefore possible that the central society and affiliated society are entitled to a fee or administration fee for contributing to and or administering the fund, which should be similar to the fee as indicated earlier, relevant to an insurer's fee and underwriting manager's fee for administration purposes.[53] The administration of the fund entails the distribution of members' benefits to the society's member and or collection of members' contributions/premiums to the fund, etcetera.

2 3 Members' Benefits

The Friendly Society Act regulates members' benefits in Section 2 as objects of the friendly society. Section 2 states that a society can be established for one or more of the following objects or benefits:

(a) Relief of maintenance during minority or[54]

(b) Relief of maintenance during widowhood, sickness and or mental sickness or[55]

(c) Granting annuities or[56]

(d) Sum of money to be paid on birth of a member's child or death of a member or[57]

(e) Sum of money towards funeral expenses or [58]

(f) Insurance against fire or other contingencies of the implements of trade or calling of any member or[59]

53 *Ibid*.
54 Section 2(a).
55 *Ibid*.
56 Section 2(b).
57 Section 2(d).
58 Section 2(d)iii.
59 Section 2(e).

(g) Sum of money to be paid when a members leaves his or her employment or[60]

(h) Sum of money to be paid when the member is unemployed or [61]

(i) Sum of money to be paid for the advancement of education or training of members or[62]

(j) Any other relief or sum of money as may be directed by the minister in a government gazette.[63]

The above policy or society benefits are regulated by the rules or constitution of the society. The rules may solely regulate a specific benefit payable to the members of a society, or may contain multiple benefits payable to members in the event of a disability or otherwise; for example, a fire which has damaged a member's house and benefits which relate to mental illness and the like. The society and the members are free to agree on any rights and or duties pertaining to the objects/ benefits of the society but these rights and duties should be financially sound. The Act requires that the registrar of friendly societies should only register a society's constitution if the constitution is financially sound or, if, in other words, in accordance with the opinion of an actuary, the rights and duties pertaining to the payment of benefits in return for a monthly premium will not prejudice the society financially. For example, the assumed monthly premiums to be received and assumed liability for payment of benefits would be less than 80% of the total annual premium.[64] If the payable benefits exceed 80% per annum this implies financial prejudice; the annual premiums will be insufficient to continue with the business of insurance.[65]

3 Insurance Bill

3 1 Background to the Department of Treasury's document

In July 2011, the Treasury issued a document relevant to friendly societies containing new terminologies and concepts as a method to highlight the shortcomings of the current Friendly Society Act.[66] The Insurance Bill does not repeal the current Long Term Insurance Act nor the Short Term Insurance Act, but includes new proposals on how to regulate the financial industry applicable to insurers; for example, micro

60 Section 2(f).
61 Section 2(g).
62 Section 2(h).
63 Section 2(i).
64 Section 5(4)a.
65 See www.kpmg.com/ZA/en/IssuesAndInsights/ArticlesPublications/Financial-Services/Documents/2014 KPMG Insurance Survey.pdf (accessed 2016-03-01). The annual expenses of any insurer (salaries, telephone etcetera) should not exceed, a general rule, 27% of the annual gross premium.
66 See www.treasury.gov.za/publications/other/MicroinsuranceRegulatoryFramework/Policy%20Document%20Micro%20Insurance.pdf (accessed 2016-01-01); See also Gibson 'The Future of Micro Insurance Regulation in South Africa' 2008 *The Professional Accountant* 28.

insurance and or cell structures.[67] The 2011 document issued by the Treasury distinguishes between different sizes of societies and or stokvels. For example, if a society or stokvel has less than 2500 members, both the friendly society and the stokvel should register as co-operatives in terms of the Co-Operative Act 14 of 2005.[68] The characteristics of a co-operative fall outside the scope of this article. Needless to say, if a society or stokvel has more than 2500 members and has capital greater than R1.5 million, it will be allowed to register as a micro insurer. On the other hand, if a stokvel consists of a few members then for all practical purposes the stokvel may continue as is without any legislative regulations; such as for example, the Co-Operative Act or Insurance Bill.[69] Therefore, the same consequences explained earlier, will still be relevant in the future; for example, the stokvel can pay any amount of money/benefit to its members and or can collect any amount of premium from its members.[70] This type of stokvel can invent or create any form of benefit and or pay any amount of money as a benefit since this type remains unregulated.

3 2 What is a Micro Insurer?

The department of treasury's document mentions the size of a micro insurer (minimum 2500 members) and the amount of capital (R1.5 million) as requirements to register either a stokvel or friendly society as a micro insurer.[71] On the other hand, the Insurance Bill defines a micro insurer and micro insurance business in Section 1 as follows:

67 See in general Bollen 'Recent Developments with Banking Services in Developing Countries' 2009 *Journal of International Banking Law and Regulation* 509. The importance of developing micro insurance is simply that it caters for the needs of the poor. The legislation relevant to regulations regarding the poor is known as welfare law or social security law. Social security law regulates, for example, access to basic financial services.

68 Gibson *supra* n 68 at 29. The author explains that micro insurance can operate without a separate Micro Insurance Act by amending the Long Term Insurance Act and Short Term Insurance Act. The Insurance Bill to a large extent amends these pieces of legislation; however, it is unclear whether a micro insurer registrar will be required, or whether the current short term registrar will see an increase in regulatory duties to oversee the micro insurance industry; Business Day (2014-07-29) 2.

69 See in general Macchiavello 'Securitisation in Micro Finance and Global Financial Crisis: Innovation or Trojan Horse?' 2010 *Journal of International Banking and Regulation* 109. This article illustrates the increases in demand for micro finance or access to micro finance/credit.

70 See www.treasury.gov.za/publications/other/MicroinsuranceRegulatoryFramework/Policy%20Document%20Micro%20Insurance.pdf (accessed 2016-01-01).

71 See in general Chummum 'Weather Micro-insurance and the Support of Low Income and Vulnerable Communities: The Case of the Island of Mauritius' 2014 *Journal of Africa Growth Institute* 9; D Millard & L Mpedi *supra* n 1; See also www.treasury.gov.za/publications/other/MicroinsuranceRegulatoryFramework/Policy%20Document%20Micro%20Insurance.pdf (accessed 2016-01-01).

(a) Micro-insurer means a micro insurer licensed to conduct only micro insurance business;

(b) Micro insurance business means insurance business

(a) Conducted in respect of any of the following classes and sub-classes of insurance business set out in schedule 2

(1) Non-life insurance business, personal lines in

(aa) classes 1-3,11 and 14 and

(bb) class 10 but only to the extent that the liability directly relates to the classes referred to in item (aa) and

(2) Life insurance business, class 1 to 3 and

(b) In the case of non-life insurance business, in respect of which the aggregate value of the insurance obligations under an insurance policy do not exceed the maximum amounts prescribed

(c) In the case of life insurance business, in respect of which the aggregate value of the insurance obligations relating to each insured under an insurance policy do not exceed the maximum amounts prescribed and

(d) In respect of which all policies comply with the policy holder protection rules prescribed by the registrar under the long term insurance act and short term insurance act.

In (d) above long term and short term insurers and or their underwriting managers must comply with policy holder protection rules. The definition of a short term insurer in Section 1 of the Short Term Insurance Act is very simple; it states an insurer is registered as such in terms of the Short Term Insurance Act and exactly the same definition applies to a long term insurer in the terms of the Long Term Insurance Act. We therefore foresee that the Long Term Insurance Act and or the Short Term Insurance Act will probably contain a definition which states that a micro insurer is an insurer registered in terms of the Short Term Act if the micro insurer sells products relevant to this Act and vice versa for the Long Term Act to comply with policy holder protection rules.[72] The Treasury Department proposed a separate Micro Insurance Act relevant only to micro insurers but it is clear that this proposal is not being adopted. It is unclear whether the current registrar of short term insurance or the long term insurance registrar will oversee the regulatory activities of the micro insurance industry or whether a separate micro insurer registrar will exist.[73] The definition of a micro insurer makes no mention of relevant business schemes similar to the relationship between a friendly society and a central society. Irrespective of the latter sentence, it is possible that the short term (and or long term) registrar may, for example, issue business scheme regulations in terms of Section 70 of the Short Term Insurance Act, similar to binder schemes between

72 See in general Gibson *supra* n 68 at 28.

73 See www.treasury.gov.za/publications/other/MicroinsuranceRegulatoryFramework/Policy%20Document%20Micro%20Insurance.pdf (accessed 2016-01-01).

an insurer and underwriting manager.[74] Although no mention is made of business schemes, the definition of a premium, as discussed in the paragraphs below, indicates the possibility of business schemes being entered into between micro insurers and other companies.

4 Business Carried on Under a Scheme or Binder Agreement

The Binder regulations make provision for a company that is not registered as an insurer to act as if it is the insurer, as the result of a binder agreement.[75] The company is known as an underwriting manager. The latter terminology and the definition thereof are not part of our discussion in this article; however, in brief: an underwriting manager may share in the profits of the insurer. We indicated earlier that this formula is also relevant in the relationship between a central friendly society and a friendly society. Whether this formula is relevant to a micro insurer is unclear.[76] The Insurance Bill refers solely to an insurer in Section 1. The document issued by the Treasury Department proposes a similar binder agreement for the micro insurance industry as presently found between insurers and underwriting managers; for example, a cell structure or a cell captive scheme.[77] Should the term 'insurer' include a micro insurer then it would be possible for a registered micro insurer to conclude an agreement with a company who is not registered as a micro insurer to enable the company to share in the profits of the said micro insurer. This company may therefore calculate premiums in return for policy benefits, settle claims, reject claims, determine the policy wording on behalf of the micro insurer.[78] The following paragraph focuses the discussion on premiums in return for policy benefits.

74 See for example, Government Gazette 1078 of 2011/12/23, which regulates the agreement or binder agreement between an underwriting manager and the insurer.

75 See in general Macchiavello *supra* n 71 at 111.

76 *Ibid*. On page 111, the author describes similar schemes or vehicles to avoid balance sheet disclosure since there are two separate companies doing business with each other. The author also explains different types of schemes; for example, direct securitisation. These types of schemes are irrelevant to our discussion; nevertheless they demonstrate the importance of sharing risks between companies, and so forth.

77 Directive 151 issued by the Financial Services Board on the 1 April 2010, which refers just to a registered short term insurer and makes it clear that a micro insurer is not a registered short term insurer; See in general Gibson *supra* n 68; see www.treasury.gov.za/publications/other/MicroinsuranceRegulatoryFramework/Policy%20Document%20Micro%20Insurance.pdf (accessed 2016-01-01).

78 See for example, Government Gazette 1078 of 2011/12/23, which refers to binder functions i.e. calculate premiums, policy wording and the like in section 6.3(1)g.

4 1 Premium in Return for Policy Benefits

Premiums are not defined in the Friendly Society Act. However, the Insurance Bill defines a premium in Section 1 which reads as follows:

> Premium means any direct or indirect, or partially or fully subsidised payment of any consideration.

This definition is very technical and extremely difficult to understand from a legal or accounting point of view. To explain the definition it is important to make use of the following example presented in below in table format (Table 2) to identify the differences between premiums and subsidised premiums.[79] Premium or gross premium includes a risk premium since the policy holder pays a gross premium to the insurer in exchange for policy benefits. However, the risk premium in this regard deals exclusively with accountancy/actuarial principles.[80] The example below is the gross written premium which, less broker fees, less value added products, equals risk premium. Broker fees are not equal to broker commission, while value added products are products underwritten by other insurance companies who are willing to accept a lesser premium in exchange for policy benefits as a method to price premiums more competitively in the market.[81] The names of these insurance companies are not disclosed to the policy holder since the policy holder is not transacting directly with the other companies.[82] If the policy holder submits a claim, the insurer who sold the gross written premium product will deal directly with the policy holder to settle his or her claim. Afterwards, the insurer will submit a claim against the other insurer and

79 The Short Term Insurance Act in section 1 defines only a premium. A premium is a consideration given in return for an undertaking to provide policy benefits.

80 See in general Forough, I Jones & Dardis 'Investment Guarantees in the South African Life Insurance Industry' *2003 South African Actuarial Journal* 29-75. On page 32, the researcher refers to 'risk premium' without giving a suitable definition. It may be that this phrase is part of general terminology in the financial sector and that the same rationale or explanation may be used in the short term industry to explain risk premium as a premium without any value added products, etcetera.

81 The Short Term Insurance Act in section 8(5) regulates broker fees; See in general Schulze 'The Mode of Payment of Insurance Premiums: Different Methods Compared' 2011 *SA Merc* 64-81. On page 67, the researcher provides different scenarios of premium payments i.e. to different intermediaries/insurers.

82 See in general Macchiavello *supra* n 71. This article uses a general explanation of different schemes, and the author is silent on whether all the parties should be disclosed or not; Verhoef *supra* n 47. On page 69 the researcher states clearly that the literature available to support current industry developments is scanty. On page 73 the researcher lists industry firsts in product innovation. For this reason value added products are also used to limit the risk for the insurer by outsourcing those policy benefits to another insurer in return for a premium.

the latter will settle or pay the claim. The above can be illustrated by the following example:[83]

Table 2:Identifying the differences between premiums and subsidised premiums

Gross written premium paid by policyholder	R600
Less broker fee paid to the broker by the insurer	R50
Less value added product premium paid by the insurer to the other insurer	R60
Risk premium received by the insurer	R490
Gross premium percentage of risk premium	82 %

The insurer who insures the motor vehicle will be receiving a risk premium of R490 and the other insurance company a fully subsidised premium of R60.

The concept of the direct or indirect payment of any premium is also highly technical and we were unable to find any law literature dealing with these types of payments. To illustrate these from a legal point of view, direct payment is simply payment made directly into the bank account of an insurer in exchange for policy benefits. Indirect payment deals exclusively with Section 45 of the Short Term Insurance Act. In terms of this Section, it is possible for an insurer to mandate an underwriting manager to collect premiums on behalf of the insurer and to keep the premiums collected for a maximum of 15 days.[84] Whether a company who acts on behalf of the micro insurer is able to use Section 45 is unclear.[85] The above example of a subsidised premium payment is not set in stone and varies from one insurer to another; direct or indirect payments give an indication of the intention of the legislature to introduce business schemes to the micro insurance industry. If not, then it simply implies that similar relationships, as found between a friendly society and the central society, will not continue in the new Insurance Bill.

83 See in general Verhoef *supra* n 47. On page 83 the researcher asserts Sanlam's ability to be flexible in product development. This footnote is not specific since no literature could be found.

84 The Short Term Insurance Act 1998 in section 45(a) and Directive 145 issued on 16 August 2011 in section 5.12 requires a time period of 15 days. This Directive was issued by the Financial Services Board.

85 Directive 145 stipulates that just those insurers who authorise underwriting managers may collect premiums on their behalf.

4 2 Financial Consequences of a Risk Premium

This is an ideal opportunity for the legislature to distinguish between premium, gross written premium and risk premium, since all calculations to calculate the profits or losses for an underwriting manager depend generally on the total premiums received per annum. If the underwriting manager who acts on behalf of the insurer participates in the profits of the insurer, the following serves as an example how to share in the profits based on a risk premium per annum.

Table 3:An example of percentage of payments of policy benefits in relation to risk premium

Total risk premium received per annum	R1m
Less total claims paid per annum	R 800 000
Loss ratio (or payments of policy benefits ratio in relation to the risk premium)[a]	80%

a. Jacobs &Wagener 'The Importance of Insurer's Commercial Interest in the Removal of Discriminatory Gender Rating Variables in Calculating Insurance Premiums and Benefits: A Comparative Legal Analysis' 2012 *SA Merc* 233-251. The researchers focus on the loss ratio for men compared to women as a reason why some insurance companies prefer women as policyholders. The specific loss ratio is not provided - men younger than 22 are 25 times more likely to cause an accident.

If we use the above, and we employ our explanation of a gross written premium which includes broker fees and or value added products, then the following scenario, presented in Table 4, is possible:

Table 4:An example of percentage of payments of policy benefits in relation to gross written premium

Total gross written premium received per annum	R1.2m (1m is plus minus 82% of R1.2m – see first table of this paragraph above)
Less total claims paid per annum	R 800 000
Loss ratio (or payments of policy benefits ratio)	67%

The difference in profit sharing, comparing 67% with 80%, is significant. For this reason we propose that the Insurance Bill should distinctly stipulate the difference between a risk and gross premium to understand the sharing of profits more unambiguously from a legal point of view. The above difference may well be confusing to say the least and it is possible that an insurer may make use of the above to prejudice a company who acts as an underwriting manager. A practical example might take the form of the following: the company and the insurer agree on a sliding scale to share in the annual underwriting profits; for example, 10% of the profits if the loss ratio is less than 70% and no sharing of profits if the loss ratio is more than 70%. If premium is to be interpreted as risk premium then it would be extremely difficult for the company to share in the insurer's profits.[86]

5 Members' Benefits

In terms of the Treasury Department's proposals for micro-insurance, the policy benefits should be limited to a maximum of R50 000 for life products and or other long term insurance products and a maximum of R100 000 for asset products and or other short term insurance products per single event.[87] However, if a family of three died in a motor vehicle accident it is permissible to pay a combined amount of R150 000 per single event, even although the maximum member benefit is R50 000 (page 8). Member benefits or policy benefits cannot exist for longer than 12 months.[88] This implies that if a person insures an asset or motor vehicle, the policy will expire after 12 months and is only renewable on request of the policy holder.[89] The types of policy benefits are divided into different classes in the Insurance Bill; for example, classes 1-3 regulate long term insurance products whereas classes 11, 14 and 10 relate to short term insurance products.[90] These products will provide for the following benefits: Class 1 specifies ten different types of insurance policies (life policy, death policy, health policy, disability policy, group life policy, group health policy, group health lump sum policy, group

86 It should be remembered that any value added product pays to the underwriting manager an equal amount of money paid by the underwriting manager to the policy holder. For this reason, risk premium calculation is not the preferred method to calculate the sharing of profits.

87 See www.treasury.gov.za/publications/other/MicroinsuranceRegulatoryFramework/Policy%20Document%20Micro%20Insurance.pdf (accessed 2016-01-01).

88 Business Day (2010-12-29) 2. In this article, reference is made to R50 000 benefit. It should be kept in mind that the R50 000 in future value terms (6 years later where inflation is approximately 5%) is R50 000 x 1.34 which equals R67 000. The Insurance Bill makes no provision for future value and the maximum payable benefits must be calculated in terms of future value as to keep up with inflation.

89 See www.treasury.gov.za/publications/other/MicroinsuranceRegulatoryFramework/Policy%20Document%20Micro%20Insurance.pdf (accessed 2016-01-01).

90 See Insurance Bill Schedule 2, classes 1-18.

disability policy and group disability lump sum policy); Class 2 specifies two different type of policies (credit life and credit group policy); Class 3 specifies two different type of policies (group funeral policy and funeral policy); Class 10 specifies 14 different types of insurance policies (director liability policy, employer liability policy, fidelity policy, product liability policy, professional indemnity policy, aviation policy, engineering policy, marine policy, motor policy, railway policy, transport policy etcetera); Class 11 specifies just consumer credit policies and Class 14, accident and health policies. What is interesting to note is that the Treasury proposed micro re-insurance benefits where other micro insurers acts as re-insurers (page 8) but that in the Insurance Bill, re-insurance products fall under Class 17 and are specifically excluded from the definition of the business of a micro insurer.[91]

6 Conclusion

The Insurance Bill introduces new terminologies and new insurance concepts to the South African financial/corporate landscape.[92] The Friendly Society Act will be replaced by the Insurance Bill when it becomes law, so as to regulate society products as micro insurance products.[93] The requirements to register a society and or to register a stokvel as a society will continue to be relevant when the Insurance Bill is promulgated. [94] It seems that a stokvel as a business entity will continue to exist if the requirements for a micro insurer are not being met, for example, less than 2500 members and capital less than R1.5 million. It is therefore possible that a stokvel will remain unregulated in the South African corporate landscape,[95] suggesting that such an entity can create any form or type of product with no maximum payable benefits as long as it has less than 2500 members and or less than R1,5 million capital. Currently, the Friendly Society Act allows for different types of products payable up to a maximum amount of R7500. When the Insurance Bill becomes law the micro insurer will be allowed to pay up to R50 000 benefits for products associated with the Long Term Insurance Act and R100 000 for products associated with the Short Term Insurance Act. Whether a central society as a business scheme will continue when the Bill becomes law remains unclear. This is strange, since similar business schemes are relevant to either the Long Term Insurance Act or Short Term Insurance Act; for example, the relationship between underwriting managers and insurers.

91 See Insurance Bill Schedule 2, class 17.
92 See paragraph 2.2.1 and 2.2.2.
93 See paragraph 2.3 and 5.
94 See paragraph 2.1.1 and 3.1.
95 See paragraph 3.1.

The potential effect of the economic partnership agreements between EU and Africa on article 22 of the African Charter

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OPSOMMING

Die potensiële uitwerking van die ekonomiese vennootskapsooreenkoms tussen die EU en Afrika op artikel 22 van die Afrika Handves

Onder die Afrika menseregtebestel is die reg op ontwikkeling bindend. Artikel 22 van die Afrika Handves oor Mense- en Volkeregte (Afrika handves) dring die plig om 'die uitoefening van die reg op ontwikkeling te verseker' op aan die Afrika state. Tog bly Afrika in werklikheid onderontwikkeld. Tot op hede het die meeste Afrika-lande ooreenkomste gesluit rakende 'n ekonomiese samewerkingsooreenkoms (EPA) met die Europese Unie (EU), terwyl ander nog in 'n onderhandelingsfase is. Hierdie artikel ondersoek die potensiële uitwerking van die EPA's tussen Afrika en die EU ten opsigte van die beskerming van menseregte en, in besonder, die verwesenliking van die reg op ontwikkeling in Afrika. Hierdie artikel poog om te bewys dat die bepalings van artikel 36(1) van die Cotonou Ooreenkoms, wat van Afrika state vereis om 'n vryehandelgebied met die EU te vestig en, sodoende, hulle plaaslike markte te open vir die invoer van meeste van hulle produkte vanaf die EU, die mense van Afrika van hulle reg op ontwikkeling sal ontneem.

1 Introduction

EPA between the EU and ACP countries was once celebrated as a mechanism for development and economic growth and was expected to reduce the poverty level in Africa.[1] However, the recent negotiations have raised concerns about the effect of the EPA on development in Africa.[2] Many African countries are not satisfied with the present negotiations, and few of them have signed an EPA.[3] The dominant concern of the African countries is dual: one of the concerns is that the EPA sustains exporting raw materials from the African states while it allows high-value-added goods from EU to freely access the African markets. This will subdue the capacity of the African states from developing their indigenous value-adding processing industries. The

1 Patel 'Economic Partnership Agreements between the EU and African countries: Potential development implications for Ghana' (2007) available at: www.realizingrights.org (last accessed 2014-06-14).
2 Economic Partnership Agreements – still pushing the wrong deal for Africa? (2012) www.stopepa.de/img/epas_Briefing.pdf (accessed 2014-06-01).
3 *Ibid*.

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second concern is that the elimination of tariffs on these high-value-added goods from the EU will deny the African states much-needed revenue for government expenditure on developmental projects such as health, education and infrastructure.[4]

The present EPA has instigated different reactions, while there are those who believe strongly that the present EPA could provide solutions to Africa's development problems,[5] there are EPA sceptics who think that the present EPA cannot lead Africa on its path to development and therefore must be rejected by Africa.[6]

2 The Concept and Meaning of Development

The meaning of development has been contentious, unsteady, and complex, over the years.[7] The variety of different conceptualisation of development has resulted in a significant confusion of the concept. One common point of convergence in most of the concepts is that development includes a change in most facets of the human existence. In Chambers opinion, the 'underlying meaning of development has been good change',[8] his idea of 'good change' provides a simple definition of development, even though his notion raises some queries on what is 'good' and the type of 'change' that is desirable and if 'bad change' could as well be regarded as a type of development. According to Kanbur,[9] there is no unanimous answer to what could be regarded as 'good change'. What could be accepted as 'good change' in one society may not be acceptable in another.

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4 Brown 'Economic Partnership Agreements' (2012) 8 & 9. *Advocate for International Development Lawyers Eradicating Poverty* http://a4id.org/sites/default/files/user/Economic%20Partnership%20Agreements.pdf (accessed 2014-06-29).

5 See generally, European Commission 'How economic partnership agreements benefit both consumers and producers in Europe and developing countries' http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_151010.pdf (accessed 2015-08-14).

6 See generally, Busse & Grobmann 'Assessing the Impact of ACP/EU Economic Partnership Agreement on West African Countries' (2004), *HWWA DISCUSSION PAPER 294 Hamburgisches Welt-Wirtschafts-Archive (HWWA) Hamburg Institute of International Economics 2004;* Karingi *et al*; 'Economic and Welfare Impacts of the EU-Africa Economic Partnership Agreements' (2005) *African Trade Policy Centre Work in Progress* No. 10 and Keck & Piermartini 'The Economic Impact of EPAs in SADC Countries' (2005) Staff Working Paper ERSD-2005-04 World Trade Organization Economic Research and Statistics Division http://econpapers.repec.org/paper/esswpaper/id_3a2.htm (accessed 2014-12-21).

7 Thomas 'The Study of Development' (2004) Paper prepared for Development Studies Association Annual Conference, Church House, London. See also http://www.sagepub.com/upm-data/18296_5070_Sumner_Ch01.pdf (accessed 2015-05-10).

8 Chambers 'Ideas for Development' (2004) IDS Working Paper 238. Sussex: IDS iii at 2-3.

9 Kanbur 'What's Social Policy got to do with Economic Growth?' (2006) http://www.arts.cornell.edu/poverty/kanbur/ (accessed 2005-08-01) 5.

Development was first conceptualised as a progression of 'structural societal change',[10] it is mostly linked to capitalism, industrialisation and modernisation. This notion has a historical and long-term perspective and involves changes in the socio-economic structures, comprising of ownership and the institutional structure. These changes ensue over the time; nations go through changes that may relate to economic growth as well as societal change which are normally acknowledged as development.

Development has also been viewed to be about people[11] instead of focusing on the amassing of capital as the core influence motivating economic growth, and consequently, development. Amartya Sen, the Nobel-prize winning economist changed the general view about the meaning of development in his book 'Development as Freedom'. Sen's view is that development should be measured, not just by the increase in people's income, but by its effect on people, in terms of their capabilities, choices and freedoms.[12]

In its first Human Development Report, United Nations Development Programme (UNDP) started promoting a different idea of development.[13] They conclude that development is not absolutely knotted either to economic development or human development, but instead, economic development and human development are interconnected, and both must be present to steer development.

Although Article 22 of the African Charter did not clearly define development, it overtly separates into elements its notion of development into economic, social and cultural elements. However, the Declaration on the Right to Development (DRTD) defines development in paragraph two of its preamble as:

> A comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

The DRTD view's development as a continuing process of achieving economic security for the people and this most involve the unrestricted contribution of the people. Thus the DRTD perceive development to be generally about people and the individual. It means access to jobs, right skills for the labour market, good healthcare, and a decent standard of living among others.

10 Thomas (2004) at 7.
11 Jonsson 'Human rights approach to development program' (2003) http://www.unicef.org/rightsresults/files/HRBDP_Urban_Jonsson_April_2003.pdf (accessed 2015-05-10).
12 See generally A Sen *Development as Freedom* (1999) Oxford University Press.
13 UNDP, *Human Development Report* (1990) Oxford Univ. Press.

3 The Right To Development

The RTD is an inalienable right to participate in a process in which all human rights and fundamental freedoms can be realised, which would lead to 'the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active … participation in development and … distribution of benefits resulting therefrom.'[14] Article 1 DRTD stresses the fact that both the human person and all peoples are entitled to the RTD. However, Article 2(1) DRTD emphatically states that 'the human person is the central subject of development and should be the active participant and beneficiary of the right to development.' Although peoples or group of persons are entitled to some rights, for example, full authority over the natural resources within its territory, the human person is the active participant and beneficiary of the RTD.[15] The DRTD situates the human person as the epicentre and focus of development.[16]

The realisation of the RTD cannot be set as grounds for the violation of any of the human rights, failing to protect human rights constitutes an impediment to the RTD.[17] The process of development should encompass all human rights and fundamental freedoms, and assist in the realisation of human rights for everyone. The DRTD acknowledges in Article 6(2) that human rights are indivisible and interdependent. This requires that economic, social and cultural rights, as well as civil and political rights should be given equal attention and that all human rights must be attended to in an integrated manner, and not in the realisation of separate individual human rights.[18]

In Article 8(1), States and the international community are required to formulate appropriate development policies. Since the human person is the central subject of development, the processes by which such policies are formulated must be participatory. Although all human rights and freedoms are integrated into the RTD, the right to participate is unmistakably indicated in Article 1(1) thus: 'every human person and

14 Declaration on the Right to Development, Article 2(3). Article 8 further explains this point by stating that: 'States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.'

15 Piron 'The Right to Development A Review of the Current State of the Debate for the Department for International Development' (2002) Right to Development Report http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2317.pdf 10.

16 Declaration on the Right to Development, Article 2(1).

17 *Ibid* at Article 6(2).

18 Piron (2002) at 10.

peoples are entitled to participate.' Participation is the foundation of the RTD; it guarantees that no one is left out of the process of development.

International cooperation[19] and assistance both in technical and financial capacities have an important role to play in the quest to realise RTD. The realisation of the RTD involves not only applicable domestic policies but also appropriate international conditions for development, with appropriate international policies and cooperation.

The DRTD requires that 'States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.'[20] International cooperation also involves 'eliminating obstacles to development.'[21]

Although, in 1986 when the DRTD was adopted, a consensus was not reached.[22] However, as time goes by, scepticism about RTD changed. At the 1993 Vienna World Conference on Human Rights, consensus was reached. At that conference, RTD was described as an 'integral part of fundamental Human Rights.'[23] From then on RTD has been referenced in major United Nations (UN) documents, such as the Millennium Declaration,[24] where it states that 'we are committed to make the Right to Development a reality for everyone and to freeing the entire human race from want.' Likewise, the Rio + 20 Outcomes Document in 2012 reiterates the significance of 'freedom, peace and security, respect for all human rights, including the right to development.'[25]

RTD is recognised in Article 23 of the UN Declaration on the Right of Indigenous peoples where it said that the 'Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development'. In 1998 the United Nations (UN) Open Ended Working Group on RTD was established by the Commission on Human Rights (now Human Rights Council) in its resolution 1998/72, and by the Economic and Social Council (ECOSOC), in its decision 1998/269, with the mandate to oversee progress achieved in implementing the RTD, to appraise reports presented by States and other stakeholders on the

19 International cooperation involves a group of actions and/or resources exchange of technical, financial and/or human resources nature from different countries, voluntarily and according to their own interests and strategies for the purpose of promoting anything that can lead to development. See HR Vazquez 'International Cooperation for Development: A Latin American Perspective' http://www.southsouth.info/profiles/blogs/international-cooperation-for (accessed 2016-02-07).

20 Declaration on the Right to Development, Article 4(1).

21 Declaration on the Right to Development, Article 3(3).

22 Kirchmeier F 'The Right to Development where do we stand? state of the debate on the Right to Development' (2006) http://www.fes-globalization.org/publicationsGeneva/FESOccPapers23.pdf (accessed 2014-06-25).

23 Vienna Declaration (A/conf.157/23).

24 Millennium Declaration (A/RES/55/2), par 11.

25 See http://www.uncsd2012.org/content/documents/774futurewewant_english.pdf para 8 (accessed 2015-08-08).

correlation between their activities and the RTD and to 'present for the consideration of the Commission on Human Rights a sessional report on its deliberations.'[26]

To assist the Working Group in the implementation of RTD, an independent expert was appointed in 1999 by the Chair of the Commission on Human Rights in the person of Arjun Sengupta. The Independent Expert conducted a study (1999-2004) on the state of progress in the implementation of the RTD. To also assist the Working Group is the High-level Task Force on the Implementation of the Right to Development which was established by the Commission on Human Rights, in its resolution 2004/7, and the Economic and Social Council, by its decision 2004/249 composed of five experts (2004-2010) to provide the needed expertise to the Working Group to enable it to provide proper recommendations.[27]

The RTD is regarded as a 'soft law', commonly accepted by the international community but not quite legally binding.[28] However, the legality of the RTD can be established from other binding treaties. The content of RTD can be found in the Covenant on Civil and Political Rights (CCPR) and Covenant on Economic, Social and Cultural Rights (CESCR).[29] The rights to education, life, work, health, self-determination, food, housing, liberty, security which constitute part of the RTD are also found in the two covenants.

Although RTD is considered as a 'soft law' by the international community, it is legally binding on the African States through the provision of Article 22 of the African Charter.

4 Rights to Development Obligations of the African States

Under the African human rights system, RTD is legally binding on all state parties. Article 22 of the African Charter on Human and Peoples' Rights provides thus:

26 See The Intergovernmental Working Group on the Right to Development available at http://www.ohchr.org/EN/Issues/Development/Pages/WGRightToDevelopment.aspx (accessed 2015-12-20).

27 See High-Level Task Force on the implementation of the right to development available at http://www.ohchr.org/EN/Issues/Development/Pages/HighLevelTaskForce.aspx (last accessed 2015-12-20).

28 Kirchmeier (2006) at 11.

29 Articles 1-15 of the ICESCR touches on some elements of RTD, especially article 11 on the right to an adequate living standard. ICCPR also guarantees, in articles 22, 23 some freedoms as well as the protection of the right to marry and equality in the union, substances that touch on development.

1 All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2 States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Paragraph one of Article 22 highlights the multidimensional nature of RTD; it accentuates that RTD consists of economic, social and cultural development. Although it did not mention civil and political rights, it did mention freedom which is a component of civil and political rights. Additionally, paragraph 7 of the preamble to the African Charter shows that Article 22 could not have neglected civil and political rights, it states:

> Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

Article 22(1) also presents the RTD as peoples' rights, however, it does not repudiate the point that the RTD is also an individual right. Regarding this Ouguergouz opines that the RTD certainly consist an individual element and that the view of RTD in the Charter has the eventual objective of the complete development of the individual, individual rights and peoples' rights endeavour to achieve the same goal.[30] There is also, evidence in the Charter to show that the RTD enshrined in the Charter has an individual dimension. For example, Article 2 assures every individual the enjoyment of the rights and freedoms recognised and guaranteed in it including the RTD.

The African Commission (the Commission) has made pronouncements on the RTD. The case of *Centre for Minority Rights Development (on behalf of the Endorois) v Kenya,*[31] is perhaps the most authoritative decision on RTD by the Commission. The Endorois community brought a claim against the Kenyan government who failed to include them in the process of the development. The Complainants in this case (the Endorois community) sought a declaration that the Kenyan government is in violation of, among others, Article 22 of the African Charter which guarantees the RTD.[32] They allege that the Kenyan government violated these rights by forcibly removing them from 'their ancestral lands around the Lake Bogoria area of the Baringo and Koibatek Administrative Districts, as well as in the Nakuru and Laikipia

30 Ougergouz *'African Charter on human and peoples' rights – A comprehensive agenda for human dignity and sustainable democracy in Africa'* (2003 The Hague/ London/New York: Martinus Nijhoff) at 306.

31 Communication 276/2003 available at http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf (last accessed 2016-09-02).

32 *Ibid* par 22.

Administrative Districts within the Rift Valley Province,' without consulting and adequately compensating them.[33]

The Complainants states that the almost sixty thousand people of the Endorois community have lived in the Lake Bogoria area for centuries. They assert that before they were dispossessed of their land in 1973 'through the creation of the Lake Hannington Game Reserve, and a subsequent re-gazetting of the Lake Bogoria Game Reserve in 1978' by the Kenyan government, 'the Endorois had established, and, for centuries, practiced a sustainable way of life which was inextricably linked to their ancestral land.'[34]

The commission is of the opinion that:

> The right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the Complainants' arguments that recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.[35]

Concerning the RTD, the commission notes the report of the UN Independent Expert who said that:

> Development is not simply the state, providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to choose where to live. He states … the state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are made available.[36]

The Commission also notes that freedom of choice is a criterion necessary for the fulfilment of RTD and is of the view that 'the Respondent State bears the burden for creating conditions favourable to a people's development.' The Commission ruled that the Endorois people have been denied their rights guaranteed under Article 22 of the African Charter.[37]

4.1 The right holders envisaged under Article 22

The right holders envisioned under the DRTD are individuals as well as peoples. This is made clear in its definition of RTD as 'an inalienable human right by virtue of which every human person and all peoples are entitled to participate in …' From the formulation of the definition of the RTD, the drafters of the Declaration envisaged the RTD holders to be

33 *Ibid* par 2.
34 *Ibid* par 3.
35 *Ibid* par 277.
36 *Ibid* par 278.
37 *Ibid* par 278 and 298.

individuals and peoples. Likewise, in the definition of development by the DRTD, it recognised that 'development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals …' The individual as right holder is further strengthened by the provisions of Article 2(1) of the DRTD which describes the individual as 'the central subject of development' and who 'should be the active participant and beneficiary of the right to development.'

Under the provisions of Article 22, the RTD should be enjoyed by all peoples, as alluded earlier, it does not repudiate the point that the RTD is also an individual right. The individuals and peoples are therefore the right holders. However, the word 'peoples' is not defined under Article 22 or anywhere in the African Charter. There are contentions as to whether the term peoples embrace ethnic groups and minorities or whether it refers solely to the States as the representatives of the whole inhabitants of their nations.[38] This contention has been settled by the Commission in some of its cases, for example, in *Katangese Peoples' Congress v Zaire*[39] the ethnic group of the Katangese people, brought a claim of the denial of self-determination guaranteed under Article 20(1) of the African Charter. Although, the Commission declared that the claims lack merit and there was no evidence of violation of the rights guaranteed under Article 20 (1) of the African Charter, neither Zaire nor the Commission objected to the admissibility of this claim on the basis that it did not satisfy the meaning of peoples under Article 20 (1) of the African Charter. Likewise, in *SERAC v Nigeria,*[40] the Commission recognised the people of Ogoni – an ethnic and minority group – as peoples within the meaning of Article 21 of the African Charter which states that 'all peoples shall freely dispose of their wealth and natural resources'. The Commission found that Nigeria did violate the Ogoni people's rights guaranteed under Article 21. The Commission's decisions on the above cases can logically be applied to the meaning of peoples under Article 22.

States are not declared clearly as the RTD holders by the DRTD. However, Article 2(3)[41] has been interpreted as introducing the view that States are beneficiaries. For example, Sengupta argues that Article 2(3) implies that 'if States acting on their own are unable to formulate and execute those policies … they have the right to claim cooperation and

38 See Kiwanuka 'The Meaning of 'People' in the African Charter on Human and Peoples' Rights' (1988) *American Journal of International Law*, vol. 82 at 84; A Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures* (1996The Hague: Martius Nijhoff) at 167 and Ougergouz (2003) at 320.

39 (2000) AHRLR 72 (ACHPR 1995).

40 (2001) AHRLR 60 (ACHPR 2001)

41 Which states that: 'States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.'

help from other States.'[42] This interpretation implies that States can claim RTD against other States. This view is against the general notion that the duty to ensure human rights is held by the states towards their own peoples. The DRTD is not asking States to claim RTD from another State but rather that States should take collective actions. Collective action is taken by the international community. The international community refers to all countries when they come together to act as a group such as the UN, EU or the AU.

4.2 The duty bearers envisioned under Article 22

Article 22 clearly imposes the duty to ensure the enjoyment of RTD on state parties to the Charter. It also urges the African states to act 'collectively' to ensure the realisation of RTD; this implies that the state parties also have the obligation to act through international co-operation to ensure the enjoyment of the RTD of its citizen.

There have been arguments that similar lawful obligations should be imposed on such bodies as the transnational corporations (TNCs); the powerful industrialised nations and their development organisations; the international financial institutions - IMF and the World Bank.[43] Regarding this, it will not be practicable for any African people to allege violations of her RTD under Article 22 by any of the above-mentioned bodies since they are not parties to the African Charter. Moreover, the Vienna Convention on the Law of Treaties in Article 26 entreats state parties to respect the *pacta sunt servanda;* this means that only parties to a treaty are bound by it. Moreover, some cases decided by the Commission also point to this fact, for example, in the case of *SERAC v Nigeria,*[44] mentioned earlier, the Commission could not find Shell Petroleum Development Corporation (SPDC) – a TNC - guilty of violating the RTD of the Ogoni people, despite that the Commission find the TNC to be profoundly involved in denying the RTD of the Ogoni people. The Commission considered Nigeria's obligations as a State party to the African Charter, and violations of human rights by Nigeria as a result of the government's failure to apply the necessary amount of due diligence concerning the conduct of the TNC.

Article 22(2) also imposes a duty on the international community; it urges States to take collective action to ensure the exercise of the RTD. Although the Article 22 did not categorically state how the international cooperation can be achieved, it obviously is not asking States to claim RTD from another State but rather that States should take collective actions. Collective action is taken by the international community. The

42 Sengupta 'On the Theory and Practice of the Right to Development' (2002) *Human Rights Quarterly* vol. 24 853.

43 Okafor 'Righting the Right to Development: A Socio-Legal Analysis of Article 22 of the African Charter on Human and Peoples' Rights' in SP Marks (ed) '*Implementing the Right to Development The Role of International Law'* (2008 Friedrich-Ebert-Stiftung) at 59.

44 (2001) AHRLR 60 (ACHPR 2001).

international community refers to all countries when they come together to act as a group.[45]

States can also collectively act or cooperate under regional groups, for example, the Assembly of the African Union, which is a medium where the Heads of States of all the AU member States meet, deliberate and take decisions on issues contained in the Constitutive Act of the African Union.[46] Another example is the European Council which also is a medium that brings together the European Union's Heads of State to act together to provide general political directions and priorities to the EU; it represents the uppermost level of cooperation among EU countries.[47] States can also act collectively under the United Nations General Assembly, which is a medium for decision making where the entire 193 member States hold multilateral discussion and democratically take decisions on a range of international issues, including international political cooperation, threats to peace and economic development, as well as the huge range of social, humanitarian and cultural issues covered by the UN Charter.

However, the duty of acting collectively can only take place within the African States who are parties to the Charter as they are bound by its provisions. Acting collectively may not be achieved between the African States and the EU or UN as they are not bound by the provisions of the Charter. Nevertheless, that is not to say that the EU or UN cannot voluntarily cooperate with the African States in other to ensure RTD.

4.3 Types of obligation envisaged by Article 22

In human rights laws, obligations can be 'positive' which involve the performance of a necessary action in order to protect human rights or 'negative' which includes abstinence from the commission of a prohibited act to protect human rights.[48] The types of obligations have been further categorised into the obligations to respect, protect and fulfil.[49]

4.3.1 The obligation to respect

This category of obligation suggests that states should desist from engaging in any act (this includes going into any kind of [trade]

45 Rocard 'What Is the International Community?' https://www.project-syndicate.org/commentary/defining-the-international-community-s-role-and-responsibility-by-michel-rocard (accessed 2016-03-01).

46 Heyns and Killander 'Compendium of key human rights documents of the African Union' (2013) PULP.

47 The European Council http://www.consilium.europa.eu/en/european-council/ (accessed 2016-03-01).

48 Bulto '*The extraterritorial application of the human rights to water in Africa'* (2014 *Cambridge*) at 85.

49 De Schutter *et al* 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) *Human Rights Quarterly* 34 at 1090.

agreement with any institution or body) that will obstruct the enjoyment of the RTD of individuals and peoples.[50] The obligation to respect human rights, according to Bartels, is the minimum human rights obligation,[51] which includes what is fundamentally a negative obligation on the state not to engage in whatever thing that will directly or indirectly impede the enjoyment of the human rights in question.[52] In the *SERAC* case, the Commission found that the obligation to respect the rights protected in the African Charter requires that states should not allow any practice or policy that will impede the enjoyment of human rights of the individual or peoples.[53]

4.3.2 The obligation to protect

RTD can be violated by third parties (non-state actors such as TNCs); the obligation to protect is a positive obligation that requires the states to take necessary action in the form of regulations to prevent the violation[54] of RTD by non-state actors. According to the Commission in the *SERAC* case, to protect human rights, a state needs to enact laws to make sure that right holders are protected from the interference of third parties.[55]

4.3.3 The obligation to fulfil

The obligation to fulfil requires that states should provide basic needs, for example, jobs and other resources and means of realising RTD where the people lack the resources and means of achieving RTD. According to Bulto,[56] the obligation to fulfil is owed to peoples who for any reason do not have the resources and means to enjoy their human rights, in other words, their RTD. Succinctly put, the state parties are obligated to provide the minimum resources and means of enjoying RTD by the peoples.

5 The EPA

EPAs between the EU and ACP countries started in February 1975 when the first Lomé Convention (Lomé I) came into force.[57] Lomé I was followed by the II, III and IV Lomé Conventions, and they entered into

50 Bulto (2014) at 85.
51 Bartels 'A model Human Rights clause for the EU's International trade agreements' (2014) *German Institute for Human Rights* http://ssrn.com/abstract=2405852 (accessed 2016-03-01) at17.
52 Bulto (2014) at 85.
53 *SERAC v Nigeria* (2001).
54 Bartels (2014)at 17.
55 *SERAC v Nigeria* (2001).
56 Bulto (2014) at 96.
57 Although, cooperation between the European Union (at that time European Community) and Africa, the Caribbean and the Pacific countries (then not yet ACP Group) started in 1957 with the signing of the Treaty of Rome, which gives commercial advantages and financial aid to African the Caribbean and the Pacific countries. The Treaty provided for the creation of European Development Funds (EDFs), aimed at giving technical and

force in 1980, 1985, 1990, respectively. The Lomé Conventions lasted from 1975 – 2000.[58] From 2000, the EPAs between the EU and ACP countries continued, but now under the name, Cotonou Convention. The Lomé Conventions covered trade, industrial, financial and technical cooperation. According to some observers, Lomé Conventions 'remained the most far-reaching, elaborate, and complex North-South contractual agreement among its contemporaries'.[59]

An important feature of the Lomé Conventions is the non-reciprocal preferences given to the ACP countries for most of their exports to the then European Economic Community (EEC). This means that ACP countries may impose duties on EU goods coming into ACP countries without EU doing the same on more than 90 percent of goods from ACP countries entering the EU. ACP countries thus have considerable advantages in trading with the EU. Another feature of the Lomé Conventions is the creation of the European Development Fund (EDF) which provides economic assistance to the ACP countries. The EDF manages and disburses funds based on 'need', determined by, per capita income and other criteria.[60] The Conventions also provided two insurance schemes, namely, the stabilisation of exports (STABEX) in Lomé I and the system of minerals (SYSMIN) in Lomé II, for ACP countries that depend on agricultural and mineral exports. The two insurance schemes were aimed at alleviating the impacts of shortfalls from revenues on agricultural and mineral exports.[61]

The Lomé convention introduced 'respect for human rights, democratic principles and the rule of law' for the first time in the revised Lomé IV in 1995 as essential elements of the Convention.[62] It also provided the non-execution clause in Article 366a which provides that a party can invite another party for discussions if that party thinks that there has been a breach in the fulfillment of the essential elements contained in Article 5, 'with a view to assessing the situation in detail and, if necessary, remedying it'. It further provides that where the discussions fail, the party who initiated the discussions may take necessary steps, 'including, where necessary, the partial or full

57 financial aid to African countries still colonised at that time. See http://ec.europa.eu/europeaid/where/acp/overview/lome-convention/index_en.htm (accessed 2014-06-05).

58 Laaksonen, Maki-Franti & Virolainen 'Lome Convention, Agriculture and Trade Relations between the EU and the ACP countries in 1975-2000' Trade AG working paper 06/20 http://ageconsearch.umn.edu/bitstream/18853/1/wp060020.pdf (accessed 2014-06-05).

59 Faber G 'The Lomé Conventions and the causes of economic growth' 5th SUSTRA Workshop on European Governance and European Opinions on Trade and Sustainable Development, IFRI, Paris June 3 and 4, 2004 http://www.agromontpellier.fr/sustra/research_themes/ue_governance/papers/Faber.pdf (accessed 2014-08-20); see also Anne-Marie Mouradian 'The Lomé Convention under threat' http://mondediplo.com/1998/06/08lome (accessed 2014-08-20).

60 *Id* at 2.

61 *Ibid*.

62 Lome Convention IV revised (1995) Article 5.

suspension of the application of this Convention to the Party concerned'.[63] The non-execution clause was put into practice when the democratic principles were obliterated in the Niger Republic by a coup d'état in 1996. The EU suspended financial cooperation for six months after which they returned to constitutional order.[64]

The EU has also engaged other schemes to provide preferential access for the ACP to the EU market for the economic growth of the poorest countries, for example, the General System of Preferences (GSP), General System of Preferences + (GSP+) and the Everything But Arms (EBA).

The GSP scheme has been applied by the EU since 1971 and has been revised from time to time to mirror progressions in global trade. The current changes were made on 31 October 2012 and took effect on 1 January 2014[65] The GSP is a unilateral measure by the EU aimed at assisting the developing countries to integrate into international markets by reducing duties on their exports to the EU market. This measure does not require reciprocity by the developing countries.[66]

The GSP+ is a part of the reviewed GSP that provides additional trade incentives to developing countries already profiting from GSP and who ratify and shows a sincere commitment to implementing 'core international conventions on human and labour rights, sustainable development and good governance'. The GSP+ provides a strong motivation for the developing countries to protect core labour rights and good governance that enters into force on 1st January 2014. It offers additional tariff reductions or full removal of tariffs for basically the same product categories covered by the GSP.[67]

EBA is also part of the EU's GSP initiated to grant duty-free and quota-free to the Least Developed Countries (LCD) on all their exports into the EU except arms. The EBA initiative came into force on 5 March 2001.[68]

The Lomé Convention was a mechanism for development in Africa; it influenced virtually every single facet of economic life and has been one of the sources for providing jobs in Africa and an improved standard of

63 Id Article 366a (3).

64 Cuyckens 'Human Rights Clauses in Agreements between the community and third countries the case of the Cotonou Agreement' (2010) Institute for international law working paper no. 147 at 68.

65 European Commission 'Revised EU trade scheme to help developing countries applies on 1 January 2014' http://europa.eu/rapid/press-release_MEMO-13-1187_en.htm (accessed 2014-08-27).

66 *Ibid*.

67 European Commission '10 countries to benefit from EU preferential trade scheme GSP+ as of 1 January 2014' http://trade.ec.europa.eu/doclib/press/index.cfm?id=1006 (accessed 2014-08-27).

68 European Commission 'Everything But Arms (EBA) – Who benefits?' http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150983.pdf (accessed 2014-08-27).

living even to the very low level of its people,[69] ultimately, providing a means of attaining the RTD of the African people.

In 1995, the United States (US) government (including other developing countries from Asia and South America who are not members of the ACP) petitioned the World Trade Organization (WTO) to investigate if the Lomé conventions had gone contrary to WTO rules. The WTO, in 1996 ruled that the Lomé conventions had indeed violated WTO regulations.[70] The violation is as a result of the EU's exemption of exports from the ACP countries from tariffs while exports from other countries that are not ACP members but are WTO members were subjected to the tariffs. WTO rules GATT (Article XXIV) permits this type of discrimination when the parties enter a Free Trade Agreement (FTA), or under a GSP arrangement.[71] This means that the trade cooperation between the ACP and EU must be reciprocal. A new EPA has to be designed to be compatible with WTO rules. The Lomé conventions were replaced with the Cotonou Agreements (the Agreement) in February 2000 when it came into effect. The Agreement will establish EPAs between the EU and the ACP countries, making it possible to have a fresh trading system founded on reciprocal preferences. On this basis, in 2001 the WTO granted a waiver to the EU to carry on providing unilateral preferences to the ACP countries up to January 2008.[72] When it became obvious that the EU and all APC regions may not come to an agreement on full EPAs by the end of 2007, the EU and the ACP countries began negotiating an Interim EPA in 2002 which concluded in 2007.[73]

The fundamental objective of the Agreement is poverty reduction.[74] This objective 'shall inform all development strategies and shall be tackled through an integrated approach taking account at the same time of the political, economic, social, cultural and environmental aspects of

69 Friedrich Ebert Stiftung 'Impact of the Lome Convention' http://library.fes.de/fulltext/iez/01113004.htm (accessed 2014-07-02).

70 The Cotonou Agreement selected issues, effects and implications for Caribbean economies www.cepal.org/publicaciones/xml/1/23581/L.66.pdf (accessed 2014-06-02).

71 See http://www.eac.int/trade/index.php?option = com_content&id = 121& Itemid = 105 (accessed 2014-06-20).

72 Fontagne *et al*; 'An Impact Study of the Eu-Acp Economic Partnership Agreements (EPAs) in the Six ACP Regions' (2008) Commission of the European Union – Directorate General for Trade http://ssrn.com/abstract = 1194965 (accessed 2015-01-15).

73 Bilal & Stevens 'The Interim Economic Partnership Agreements between the EU and African States' (2009) *Policy management report 17 European Center for Development Policy Management available at:* http:// ecdpm.org/wp-content/uploads/2013/11/PMR-17-Interim-Economic-Partnership-Agreement-Between-EU-Africa-2009.pdf (accessed 2015-01-15) at 15. See also Karingi & Deotti 'Interim Economic Partnership Agreements Point to the Classic Regional Trade Agreement after all: Should African Countries really be worried?' (2009) *African Trade Policy Center Work in Progress No. 75 Economic Commission for Africa 13* http://www.uneca.org/sites/defult/files/publications/75.pdf (accessed 2015-01-15).

74 Article 1 of the Cotonou Agreement revised 2010.

development'.[75] The Agreement ensures ownership; the ACP States have control over the development policies for their economies and people.[76] Conceivably, the most far-reaching change introduced by the Agreement is the removal of the 'non-reciprocal trade preferences' granted under the Lome Conventions. Article 36 of the Cotonou Agreement requires that the parties to the agreement should conclude a new WTO-compatible EPA, 'removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade'. This will include establishing Free Trade Agreements (FTA) between the EU and the African regional economic communities. The Agreement provides for a special fund for the ACP countries every five years, known as the European Development Fund (EDF) which provides resources for the development cooperation.[77] The EDF is funded by the EU member States every five years; it is managed by a specific committee with its own financial rules.[78] We are currently in the 11th EDF, which runs between 2014 and 2020, with funds amounting to €30.5 billion.[79] It should be noted that the Agreement provides for the establishment of the EPA that will last for 20 years, starting from 1 March 2000 and can be reviewed every five years.[80]

The Agreement contains human rights clause (essential elements)[81] under Article 9(1), 9(2), 9(3) and 9(4) which recognises the human person as the centre for which development will be directed, this involves 'respect for and promotion of all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance'.[82] While referring to their international obligations and commitments regarding respect for human rights, the parties acknowledged the relatedness, indivisibility and universality of human rights and 'undertake to promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural'.[83]

Article 9 aimed at ensuring that the human rights obligations that have been in existence should be respected by the parties, referring particularly to economic and social rights as well as civil and political rights. Article 9 also introduced another concept – 'fundamental elements', and considered Good Governance as a fundamental element

75 *Ibid*.
76 Article 2 of the Cotonou Agreement revised 2010.
77 Financial Protocol, Annex I of the Cotonou Agreement revised 2010, par. 2.
78 See European Development Fund (EDF) http://eurlex.europa.eu/legal content/EN/TXT/?uri = URISERV:r12102 (accessed 2015-10-02).
79 *Ibid*.
80 Article 95 of the Cotonou Agreement revised 2010.
81 A lot of bilateral treaties with the EU contain human rights clauses, usually under the part titled 'essential Elements' and that the agreement may be suspended if that essential element is violated in the non-execution clause. For example Art. 2 of the EU–Iraq Partnership and Cooperation Agreement.
82 Article 9(1) of the Cotonou agreement revised 2010.
83 Article 9(2) of the Cotonou agreement revised 2010.

of the agreement which 'underpins the ACP-EU Partnership'.[84] It is not quite clear what is the difference, but according to Cuyckens, it is believed it could be a way of finding the middle ground due to the fact that the ACP countries could not accept good governance as part of the essential elements of the agreement. However, in practice, apart from the expressions there is no other difference.[85]

The Cotonou Partnership Agreement contains a non-execution clause under Article 96. It laid down procedures that will be activated when a party contemplates that another party has failed to comply with the essential elements of the agreement.[86] The parties must explore every likely option for discussion under Article 8,[87] 'except in cases of special urgency, prior to the commencement of the consultations'.[88] If after dialogue a party thinks that the other party did not accomplish an obligation in the essential element clause, 'it shall invite the other party to hold consultations that focus on the measures taken or to be taken by the party concerned to remedy the situation'. If the consultations fail or are refused or in a situation of 'special urgency, appropriate measures may be taken … appropriate measures referred to in this Article are measures taken in accordance with international law, and proportional to the violation'.[89] What constitutes 'appropriate measures' is not spelt out in the Agreement but the measure should not subject the people to undue hardship, for that reason, a party can suspend aid to the government while aids, to NGOs as well as humanitarian aids, can remain and the measures revoked as soon as the violation of the essential element ceases.[90] It should be noted that the Cotonou Agreement recommends that suspension should be a last resort,[91]

6 Concerns for the EPA

African states have expressed concern as to the potential effects of the EPA. At the Lisbon summit, held in Portugal in December 2007, the African Heads of State and Government reiterated that 'EPAs should be able to bring about development in Africa as well as strengthen regional integration initiatives; so far the agreements have not achieved this'.[92] In a Conference of Ministers of Trade, in Kigali in November 2010, the African Union issued a declaration regarding EPA negotiations, calling on

84 Article 9(3) of the Cotonou agreement revised 2010.
85 Cuyckens (2010) at 36.
86 In which, Article 9 stated are human rights, democratic principles and the rule of law.
87 The condition for having a dialogue among the parties was in the Cotonou Agreement that came into force in 2000, however, the connection between Article 96 and Article 8 was further strengthened in the 2005 and 2010 reviewed Cotonou Agreement.
88 Article 96(1)(b) of the Cotonou agreement revised 2010.
89 Article 96(1)(c) of the Cotonou agreement revised 2010.
90 Article 96(1)(a) of the Cotonou agreement revised 2010.
91 Article 96(1)(c) of the Cotonou agreement revised 2010.
92 Brown (2012).

the EU to provide more funds to address EPA related loss of revenue and capacity building.[93]

Representatives of African countries have over and over again stated that the current EPA pact is not in the development interest of the African peoples. Dr James Ndahiro, Rwanda's representative to the East African Legislature, said: 'we are concerned that the outstanding issues, if not resolved and if included in the EPA framework, will bind the EAC to poor trading terms'.[94] According to Professor Chukwuma Soludo, former governor of the Central Bank of Nigeria, 'despite … the reported public protests in 20 countries against the raw deal, it seems all but certain to be rammed through'. He further said that: 'in private whisperings, not many Africans or policymakers are happy with the deal, but there is a certain sense of helplessness'.[95] In the opinion of Onkundi Mwencha, the Deputy Chairperson of the African Union (AU) Commission, 'our advantage is regional integration', he maintained that EPA cannot help us to integrate our markets, rather it will stall us, and 'I don't think the EPA is a priority for Africa'.[96]

Busse and Grobmann[97] state that ACP nations that are parties to the EPAs are obligated to establish an FTA with the EU. If this is achieved the result will be that they would have to expose their local markets to virtually all goods from the EU, free of tariffs within a period of twelve years. They further state that in addition to the bearing on 'trade flows', the result of tariff removal will be a drop in import levies and, later, the whole government income. Likewise, Karingi *et al*[98] looked at the economic and social bearings of the trade liberalisation features of the anticipated EPAs between the EU and African countries. They provide an appraisal of the probable consequences of EPAs creating FTA between the EU and the various African Regional Economic Communities. They addressed questions such as 'how will an EPA that includes reciprocal market access agreements between the EU and Africa impact on African countries' GDPs, levels of employment and other macroeconomic aggregates?' and 'What sectors in Africa are most likely to lose and what sectors gain with EPAs?'. They conclude that complete reciprocity could be very expensive for Africa. A similar study was made by Keck and Piermartini; they analyse the impact of the creation of an FTA between the EU and the Southern African Development Community (SADC). They explore many issues, particularly the following two essential subjects: First, they evaluate the effects of an FTA between the EU and SADC countries on SADC members including under a full liberalisation and partial exclusions in agriculture. Moreover, secondly, they examine whether SADC countries should concurrently go on with further intra-SADC liberalisation. Their analysis not only pays attention to the

93 *Ibid* 8 & 9.
94 Economic Partnership Agreements (2012) at 2.
95 *Ibid*.
96 *Ibid*.
97 Busse & Grobmann (2004).
98 Karingi (2005) 6.

consequences in terms of well-being and real GDP growth, but also emphasise redistribution effects and cost of adjustments. The study looks at resource reallocation across sectors, differences in the wage of factors of production and variations in trade patterns. They find that major growth impacts should not be expected from liberalisation between the EU and SADC. Zouhon-Bi and Nielsen[99] also evaluate the fiscal revenue effects of a potential EPA between ECOWAS and the EU. Zouhon-Bi and Nielsen carried out an empirical analysis study which shows that the effect of executing EPA on fiscal revenue for certain ECOWAS states will be substantial. They find that goods imported from the EU will rise by almost 10.5 percent in Senegal to 11.5 percent in Nigeria if free trade is implemented. In case of total government income, they find that income loss would be biggest in Cape Verde at about 15.8 percent and Senegal at about 10.4 percent, this is because these countries import largely from the EU and depend highly on income generated from tariffs on importation. Other states that could also be considerably affected include Ghana, whose government income is likely to drop by 7.1 percent and Nigeria who will lose an estimated amount of only 2.4 percent of government income. As regards GDP, they find that tariff income losses sum up to '1.0 percent of GDP in Nigeria, 1.7 percent in Ghana, 2.0 percent in Senegal and 3.6 percent in Cape Verde'.

These concerns arise because the EPA is not addressing the major challenges facing the African peoples. Many African peoples face high unemployment as a result of weak productive capacity and food insecurity because of lack of growth in the area of agricultural production and infrastructure. Benjamin W. Mkapa the former president of Tanzania points out that:[100]

> We cannot continue to export a narrow range of largely primary products and import a broad range of finished goods on our way to development. The hard work of industrialization and food production must be done.

According to the Human Development Index of the United Nations Development Program (UNDP), the EU is one of the richest regions with a very high level of human development.[101] The African countries have a much lower level of development and weaker economies than the EU. The EPA threatens the African countries' development and the RTD of its people because of the difference of the level of economic development between EU and African states. Certainly, such weak economies in most African countries face serious competition from the industrialised EU. If these weak economies that are already incapacitated by poverty collapse

99 Zouhon-Bi & Nielsen 'The Economic Community of West African States Fiscal Revenue Implications of the Prospective Economic Partnership Agreement with the European Union' (2007) World Bank Policy Research Working Paper 4266, June 2007.

100 Ibid.

101 Position paper International Federation for Human Rights (2007) at 4 & 5.

and their per capita incomes further decrease, it will threaten the RTD of millions in the continent of Africa.[102] In addition, there are no sufficient protections for workers who are affected by restructuring, and in case of inactivity, there is no established social security system.[103]

Some African countries may reform their tax regimes to compensate for the loss of customs duties, and may heavily tax domestic actors (VAT, income tax or corporate tax) to recover the lost import tax revenue. This will have grave consequences on companies' competitiveness and people's purchasing power. This, in addition to the decrease of customs revenues in the after effects of market liberalisation will lead to a tremendous fall in the African countries' budgets.[104] This may severely reduce their ability to finance public policies such as education, health and housing due to decreasing incomes and thus infringe upon the peoples' RTD, guaranteed by article 22 of the African Charter.

As alluded earlier, RTD is binding under the African human rights system, and the state parties have the obligation to ensure the enjoyment of RTD to their citizens as well as desist from any action that will impede the enjoyment of RTD, this includes abstaining from entering into trade agreements that will impede the realisation of RTD. African countries must let their negotiating partners be aware of their RTD obligations to their citizens, and this fact must be on the negotiating table.

7 Conclusion

Article 22 of the African Charter provides a normative force for the RTD under the African human rights system. RTD is a process of development that will result to the realisation of all human rights, a process that must be carried out in a way identified as rights-based, in compliance with the international human rights standards; it is a process that is participatory, nondiscriminatory, equitable, accountable and transparent. Paragraph one of Article 22 of the African Charter points to the multidimensional nature of the RTD; it highlights that RTD comprises of economic, social and cultural development. Article 22 evidently foists the duty to ensure the enjoyment of RTD in African States. African States also have the duty to act through international cooperation to ensure the enjoyment of the RTD by its people. This duty includes restraining from entering into trade agreements that will impede the enjoyment of the RTD by its people.

Presently, most African countries have concluded negotiation on an EPA with the EU while others are still in negotiation. The trade agreement is a source of great concern to most Africans. As mentioned in the introductory section above, one of the concerns is that the EPA sustains exporting raw materials from the African states while it allows high-value-added goods from EU to freely access the African markets. This will

102 *Ibid.*
103 *Ibid.*
104 *Ibid.*

subdue the capacity of the African states from developing their indigenous value-adding processing industries. The second concern is that the elimination of tariffs on these high-value-added goods from the EU will deny the African states much-needed revenue for government expenditure on developmental projects such as health, education and infrastructure. The EPA has a potentially devastating effect on the enjoyment of RTD in Africa; this must be at the back of the minds of the African states as they negotiate the EPAs or revise the EPA at the expiration of the five-year tenure. They should also remember that they have an obligation to respect the RTD of the African peoples and cannot enter into a trade agreement that could obliterate this obligation. The fact that they have a binding obligation to respect, protect and fulfil RTD must be part of the negotiation.

Intrusion into the autonomy of South African local government: Advancing the minority judgment in the *Merafong City* case

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OPSOMMING

Ingrype in die autonomie van Suid-Afrikaanse plaaslike regerings: Die aanvoer van die minderheidsbeslissing in die *Merafong City*-saak

Teen die agtergrond van die aard en wese van die Suid-Afrikaanse plaaslike regering wat na 1996 tot stand gekom het, is die saak van *Merafong City Local Municipality v AngloGold Ashanti Ltd* [2016] ZACC 35 een van die mees onlangse sake betreffende die inbreukmakende geaardheid van nasionale regulering van munisipale bevoegdhede. Een van die belangrikste aangeleenthede in hierdie saak was die vraag tot watter mate appèl na 'n Minister moontlik is wanneer 'n munisipaliteit 'n besluit neem rondom heffings vir die verskaffing van waterdienste (vir huishoudelike en industriële gebruik). Hierdie artikel handel met die minderheidsuitspraak van Regter Jafta in die Grondwetlike Hof en ondersteun die regter se interpretasie wat stel dat dit ongrondwetlik is vir die nasionale regering om as appèlliggaam in te tree in soverre dit 'n munisipaliteit se uitoefening van 'n oorspronklike bevoegdheid aangaan. Die artikel maak spesifiek melding van die moontlike wysiging van artikel 8 van die Wet op Waterdienste 108 van 1997 ten einde die genoemde ongrondwetlikheid aan te spreek.

1 Introduction

The post-apartheid constitutional dispensation heralded fundamental institutional reforms that transformed the structures of government in South Africa. The Constitution of the Republic of South Africa, 1996 established three spheres of government – national, provincial and local spheres[1] – with far-reaching changes at the local government level.[2] The changes at the local sphere are clearly evident from *inter alia* the

1 See s 40(1) of the Constitution of the Republic of South Africa, 1996 outlining the government's setup.

2 For details on the nature of local government reform in post-apartheid South Africa, see *City of Cape Town v Robertson* 2005 2 SA 323 (CC) pars 58-60; Fuo *Local Government's Role in the Pursuit of the Transformative Constitutional Mandate of Social Justice in South Africa* (LLD thesis NWU 2014) 78-177; Steytler & De Visser *Local Government Law of South Africa* (2014) 1-3 to 1-31 and 5-5 to 5-14.

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enhanced status and autonomy of local government as well as its expanded developmental mandate.[3]

Unlike in the past, local government now has a developmental mandate that transcends service delivery.[4] Local government must: provide democratic and accountable government; promote public consultation in local government matters; promote socio-economic development; promote a safe and healthy environment; provide services to communities in a sustainable manner; and contribute, together with the other spheres of government, towards realising a variety of rights entrenched in the Bill of Rights.[5] Nevertheless, the provision of municipal services such as water, electricity and sanitation remains the most important function of local government and the central mandate of municipalities is to develop service delivery capacity in order to meet the basic needs of all inhabitants of South Africa.[6]

Apart from its general constitutional protection, the status and autonomy of local government is enhanced by a number of fundamental characteristics etched in the Constitution. Firstly, the local sphere of government, constituted by about 257 municipalities of different categories[7] that cover the entire geographic space of the country is recognised as a distinct sphere of government and its leaders are democratically elected for a specified period.[8] Secondly, municipalities now have self-governing legislative and executive authority vested in democratically elected municipal councils.[9] Municipalities have the right to govern, on their own initiative, the local government affairs of their

3 See ss 40, 41 and ch 7 of the Constitution; *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 pars 35-38; *Cape Town v Robertson supra* n 2 at *Cape Town v Robertson supra* n 2 at pars 58-60; Steytler & De Visser *supra* n 3 at 1-26 to 1-27; Fuo (LLD thesis) *supra* n 3 at 109-117.

4 Fuo (LLD thesis) *supra* n 3 at 82-84; Steytler & De Visser *supra* n 3 at 1-26 to 1-27.

5 This flows from a joint reading of ss 152 and 153 of the Constitution and the obligations emanating from the Bill of Rights. See Fuo (LLD thesis) *supra* n 3 at 109-117.

6 *Joseph v City of Johannesburg* 2010 3 BCLR 212 (CC) par 34.

7 The Local Government: Municipal Structures Act 117 of 1998 creates three categories of municipalities – Category A (metropolitan municipalities), Category B (local municipalities) and Category C (district municipalities). District and local municipalities share powers and functions and s 84 of the Structures Act outlines the division of powers and functions between them. On the contrary, metropolitan municipalities have exclusive executive and legislative powers and functions over local government matters. See Du Plessis & Nel 'An Introduction' in Du Plessis (ed) *Environmental Law and Local Government Law in South* Africa (2015) 25.

8 See s 40(1) of the Constitution; ss 22-24 of the Local Government: Municipal Structures Act 117 of 1998; De Visser *Developmental Local Government: A Case Study* (2005) 87; Du Plessis & Nel *supra* n 8 at 24-25.

9 See ss 151(2)-(3) of the Constitution; Du Plessis & Nel *supra* n 8 at 24; *Cape Town v Robertson supra* n 2 at pars 55-60

communities.[10] Their original powers and functions outlined in the Constitution include the powers to administer the local government matters listed in Schedules 4B and 5B as well as the powers to impose property rates and surcharges for municipal services.[11]

The elevated status and autonomy of post-apartheid local government has been strongly asserted by the Constitutional Court in several cases. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,[12] the Court held that the constitutional status of local government is materially different to what it was when parliament was supreme and that municipalities are constitutionally entitled to certain powers, including the powers to make by-laws and impose rates.[13] In the *City of Cape Town v Robertson*, the Court castigated the view that in the absence of empowering legislation, a municipality has no power to act.[14] It held that such an approach to the powers, duties and status of local government was a relic of the pre-1994 order and was no longer permissible in the new democratic constitutional order. The Court indicated that the Constitution has moved away from the past where municipalities were creatures of statute and enjoyed only delegated or subordinate legislative powers derived exclusively from ordinances or acts of parliament – where municipal regulations or by-laws that went beyond powers conferred expressly or impliedly by superior legislation were *ultra vires* and invalid.[15] In the new constitutional dispensation, local government can no longer be considered as 'mere local authorities entrusted to provincial councils to administer'.[16]

Despite its elevated status, local government's autonomy is not absolute. All three spheres of government are interrelated and interdependent. Their 'interdependence' signifies the supervision of municipalities by other spheres of government. National and provincial

10 See s 151(3) of the Constitution; s 4(1)(a)-(b) of the Local Government: Municipal Systems Act 32 of 2000.

11 See ss 229(1)(a), 156(1)(a) and (2) of the Constitution, together with Schedules 4B and 5B. See Du Plessis & Nel *supra* n 8 at 24. The above provisions are not the only source of local government's powers and functions. See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 BCLR 150 (CC) pars 21-29; Fuo 'Role of Courts in Interpreting Local Government's Environmental Powers in South Africa' 2015 *Commonwealth Journal of Local Governance (CJLG)* 20-26.

12 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458.

13 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* at par 38.

14 *Cape Town v Robertson supra* n 2 at para 53.

15 See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* at pars 35-38; *Cape Town v Robertson supra* n 2 at pars 54-60.

16 See *Cape Town v Robertson supra* n 2 at pars 53-54.

governments are authorised to supervise the extent to which municipalities execute their powers and functions.[17] On the other hand, their 'interrelated' nature talks to the duty imposed on all spheres of government to co-operate with one another in order to promote the welfare objectives of the entire country.[18] The exercise of municipal powers and functions is subject to the Constitution and generally to national and provincial legislation that are constitutionally compliant.[19] However, national and provincial government are barred from compromising or impeding the ability or right of municipalities to exercise their powers or perform their functions[20] and the three spheres of government must work together in equal partnership within the parameters of the principles of cooperative government.[21]

Notwithstanding the constitutional protection, the exact reach of local government's newly established self-governing powers is often misconceived, doubted and contested by functionaries in other spheres of government, business and members of the public, for example. *Merafong City Local Municipality v AngloGold Ashanti Ltd*[22] is the most recent case illustrating this trend. This case revolved on two issues: whether it was constitutionally permissible for a municipal council decision setting surcharges for water services provision (for domestic and industrial use) to be subjected to appeal to a Minister; and secondly, whether the remedy of a collateral challenge was available to an organ of state seeking to challenge an administrative decision adopted by a public authority. This article discusses the minority judgment of the Constitutional Court written by justice Jafta, in relation to the first issue above. In line with the minority judgment, this article argues that it is unconstitutional to subject the powers of a municipality to impose surcharges on water services to the executive in another sphere of government because this unreasonably intrudes on and usurps the right and ability of the local sphere of government to fully exercise its original (and assigned legislative) powers and functions. The overall intention is to further advance the thinking in the minority judgment with a view to developing suggestions to cure the legal defect in section 8 of the WSA.

17 See ss 100 and 139 of the Constitution; *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 9 BCLR CC par 56; Steytler & De Visser *supra* n 3 at 15-5 to 15-57.

18 De Visser 'Developmental Local Government in South Africa: Institutional Fault Lines' 2009 *Commonwealth Journal of Local Governance (CJLG)* 13-14; Fuo (LLD thesis) *supra* n 3 at 88-89.

19 See s 151(3) of the Constitution; *Cape Town v Robertson supra* n 2 at par 60; Fuo 2015 *CJLG* 20-23.

20 See 151(4) of the Constitution; Steytler & De Visser *supra* n 3 at 1-26 to 1-27.

21 See s 41 of the Constitution; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (LLD thesis NWU 2008) 431; Du Plessis 'Legal Mechanism for Cooperative Governance in South Africa: Successes and Failures' 2008 *SAPL* 87-110.

22 2016 ZACC 35.

In order to achieve the above objective, the discussion that follows is structured into three main parts. To provide a contextual background for discussing the minority judgment, the first part elaborates on the nature of the mandate of municipalities to provide water services with more emphasis on industrial water and the concomitant power to impose surcharges for the provision of water services. The second part provides an overview of the facts, decision and *ratio decidendi* of the minority judgment in the *Merafong City* case. The last part analyses the minority judgment and offers some suggestions on the way forward.

2 Water Services Mandate and Power to Impose Surcharges

2 1 The Mandate of Municipalities to Provide Potable and Industrial Water

Municipalities have original constitutional powers and are directly responsible for the provision of water services, limited to potable water supply.[23] In terms of section 156(1)(a) of the Constitution, a municipality has executive authority in respect of, and has the right to administer, the local government matters listed in Schedules 4B and 5B. The provision of water services, limited to potable water supply systems appears in Schedule 4B. In terms of section 156(2) of the Constitution, a municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer. A joint reading of the above subsections shows that municipalities have executive and legislative authority over the provision of water services, limited to potable water supply systems. They can adopt and implement by-laws to the extent that it is necessary for the effective administration of water services provision. This is consistent with the right of municipalities to self-govern the local government affairs of their communities.[24]

However, national and provincial government have powers to regulate local government's provision of water services. This flows from the provisions of section 155(6)(a) and (7) of the Constitution. Section 155(6)(a) of the Constitution compels provincial governments to monitor and support municipalities through legislative and other measures. On

23 S 156(1)(a) read with Schedule 4B of the Constitution. See Steytler & De Visser *supra* n 3 at 5-5. For details on the substantive obligation of municipalities to provide access to water to communities, see regs 3, 4 and 5 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water in GN R509 of GG 22355 of 2001-06-08; *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC). The obligation of municipalities stems from s 27(1)(b) and 27(2) of the Constitution read together with ss 3 and 11 of the Water Services Act 108 of 1997 (WSA).

24 See s 151(2) and (3) of the Constitution; Steytler & De Visser 'Local Government' in Woolman & Bishop (eds) *Constitutional Law of South Africa* (2014) 22-49.

the other hand, section 155(7) of the Constitution gives national and provincial governments legislative and executive authority to regulate the exercise of the executive powers of municipalities in order to ensure that municipalities effectively perform their functions in respect of matters listed in Schedules 4B and 5B of the Constitution. In addition, section 151(3) of the Constitution makes the exercise of municipal executive and legislative powers regarding local government matters subject to national and provincial legislation. However, section 151(4) of the Constitution dictates that the powers of national and provincial governments must be exercised in a manner that does not 'compromise or impede a municipality's ability or right to exercise its powers or perform its functions'.

There are several implications that flow from the constitutional protection of local government's original powers over water services provision as defined in Schedule 4B and the authority accorded to national and provincial governments to regulate the powers of municipalities. The most profound implication of the original constitutional powers of local government is that they cannot be removed by legislation except through an amendment of the Constitution.[25] Bronstein points out that the powers of municipalities vis-à-vis matters listed in Schedules 4B and 5B means that neither national nor provincial government entities 'may exercise executive authority over, or administer these local government matters, since this will intrude on the executive authority reserved to the municipalities' by section 156(1)(a) of the Constitution.[26] This means that, everything being equal, the national or provincial executive cannot exercise the executive/administrative powers of municipalities to provide potable water services, for example. Any national or provincial legislation which purports to confer executive authority for the administration of water services, limited to potable water supply systems, to a national or provincial organ of state would be beyond the legislative competence of the enacting legislature and therefore invalid.[27] Such action can also be considered a violation of section 41(1)(g) of the Constitution which in this context will seek to ensure that the regulation powers of national and provincial governments are not used in a manner that undermines the local sphere of government and preventing it from effectively performing its function.[28] In *City of Johannesburg v Gauteng Development Tribunal*, the Constitutional Court observed that national and provincial spheres cannot use their regulating powers in order to give themselves, by way

25 See Steytler & De Visser *supra* n 3 at 12-19; Fuo 2015 *CJLG* 20-26; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* at par 37.

26 See Bronstein 'Legislative Competence' in Woolman & Bishop (eds) *Constitutional Law of South Africa* (2014) 15-6.

27 See Woolman & Roux 'Cooperative Government' in Woolman & Bishop (eds) *Constitutional Law of South Africa* (2014) 14-17.

28 See Bronstein *supra* n 26 at 15-6.

of legislation, the power to exercise executive municipal functions or the right to administer municipal affairs.[29] The regulating powers of national and provincial government should be used to ensure that municipalities effectively perform their water services function. Regulation in the context of the Constitution implies a general managing and controlling role rather than a direct authorising function.[30] The jurisprudence of the Constitutional Court makes it clear that regulate under section 155(7) of the Constitution means:

> … creating norms and guidelines for the exercise of a power or the performance of a function. It does not mean the usurpation of the power or the performance of the function itself. This is because the power of regulation is afforded to national and provincial government in order 'to see to the effective performance by municipalities of their functions'.[31]

It follows from the above that the power to regulate municipalities should be used to set minimum requirements, essential standards and monitoring procedures applicable across the country.[32]

While the provision of potable water is a municipal mandate emanating directly from the Constitution, the discussion below shows that the provision of industrial water is an assigned municipal function. Although the Constitution makes it possible for national and provincial legislative competences to be assigned to local government generally or to specific municipalities, it is beyond the scope of this article to discuss the relevant provisions in detail.[33] However, it is worth noting that in terms of section 156(1)(b) of the Constitution, a municipality has executive authority and has the right to administer any matter assigned to it by national and provincial legislation. This gives the relevant municipalities the right to legislate over that function within their jurisdictions. The extent to which a municipality can legislate over an assigned function will largely depend on the nature of the assignment as spelt out in the assigning legislation.[34] Furthermore, national or provincial legislation can also transfer an executive power/obligation to municipalities.[35] Although this type of assignment does not transfer general legislative authority over the functional area, a municipality can adopt and implement by-laws that seek to ensure the effective administration of the assigned area.[36] In both cases where legislative and

29 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* at pars 59 and 68.
30 See Steytler & De Visser *supra* n 24 at 22-52.
31 *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* 2014 (5) BCLR 591 (CC), par 22, Steytler & De Visser *supra* n 24 at 22-52.
32 See Steytler & De Visser *supra* n 24 at 22-52.
33 For a detailed discussion, see: Steytler & De Visser *supra* n 3 at 5-41 to 5-50; Steytler & De Visser *supra* n 24 at 22-58 to 22-63; Fuo 2015 *CJLG* 24-26.
34 See Steytler & De Visser *supra* n 24 at 22-49 to 22-50.
35 See Steytler & De Visser *supra* n 3 at 5-43.
36 *Ibid*.

executive powers are assigned, relevant municipalities are empowered to exercise assigned powers for as long as the assigning Act is still in force.[37]

Steytler and De Visser argue that the requirement that national and provincial governments should not compromise or impede the right or ability of a municipality to exercise its powers or perform its functions also applies to assigned powers.[38] Therefore, the authority of national and provincial government to set parameters on assigned powers is not without limits. For example, they argue that the assignment of power that is made subject to unnecessarily restrictive or burdensome criteria, conditions or monitoring requirements would fall short of the standard demanded by section 151(4) of the Constitution.[39] In the context of assignment, they argue that imposing conditions such as prior approval of municipal decisions or power to override municipal decisions by an assigning agent will contravene section 151(4) of the Constitution.[40] According to the authors, assignment is supposed to lead to a complete transfer of the function by national or provincial government, including the final decision-making powers in individual matters.[41]

Water management, including the bulk supply of water from dams and rivers, and the management of the resource, is a national competency, as a matter not allocated under either Schedule 4 or Schedule 5 of the Constitution.[42] This competency provides the National Department of Water with oversight over all role-players in the water-sector, including bulk water supply providers, municipal water service providers, and all the users of water, including industrial users.[43] Therefore, in accordance with its powers to look after water in the national interests, the national government has given municipalities the authority to oversee industrial water supply, in terms of section 7 of the WSA, primarily for practical reasons. Due to the wall-to-wall nature of municipalities, this implies that the function of municipalities over industrial water use now extends to all industrial users.

The WSA makes it compulsory for all water users within the jurisdiction of a municipality to only use water services from a water services provider nominated by that municipality.[44] The Act provides that a person who, at its commencement, was using water services from a source other than one nominated by the relevant water services authority (municipality), may continue to do so – (a) for a period of 60 days after the relevant water services authority has requested the person

37 *Ibid*.
38 See Steytler & De Visser *supra* n 24 at 22-50.
39 *Ibid*.
40 *Idem* at 22-59.
41 *Ibid*.
42 See generally s 3 of the National Water Act 36 of 1998 (NWA). See also See Bronstein *supra* n 26 at 15-1 and 15-9.
43 See s 3(1)-(3) of the NWA.
44 See s 6(1) of the WSA.

to apply for approval; and (b) if the person complies with the request within the 60 days period, until (i) the application for approval is granted, after which the conditions for the approval will apply; or (ii) the expiry of a reasonable period determined by the water services authority, if the application for approval is refused.[45]

Section 7 of the WSA prohibits any person from obtaining water for industrial use from any source other than the distribution system of a water services provider nominated by the water services authority having jurisdiction in the area in question, and this must also be approved by that water services authority.[46] In terms of the WSA, a water services authority is defined as any municipality responsible for ensuring access to water services. It is important to note that, a person who, at the coming into effect of the WSA, obtained water for industrial use from a source requiring the approval of a municipality may continue to do so – for a period of 60 days after the relevant municipality has requested the person to apply for approval; if the person complies with the request for application from the municipality within a 60 day period, continue to do so until the application is granted, after which the conditions of the approval will apply; or at the expiry of a reasonable period determined by the municipality, if the application for renewal is refused.[47]

The WSA provides that where the approval of a municipality is required in terms of sections 6 and 7 outlined above, that municipality should not unreasonably withhold the approval and that, it may grant approval subject to reasonable conditions.[48] Section 8(3) outlines a number of factors which should be taken into account by municipal authorities in arriving at reasonable decisions following applications for industrial water use or other uses.[49] Furthermore, the WSA makes it possible for dissatisfied applicants to appeal against unfavourable municipal decisions or inaction to the Minister of Water and Sanitation who has the powers to 'confirm, vary or overturn' any decision of a municipality.[50] The validity of the Minister's appellate jurisdiction runs contrary to the requirements for assignment discussed in the paragraphs above. However, this is discussed below in detail.

45 See s 6(2)(a)-(b) of the WSA.
46 See s 7(1) of the WSA.
47 See s 7(3)(a)-(b) of the WSA.
48 See s 8(1)(a)-(b) of the WSA.
49 These include: the cost of providing; the practicability of providing; the quality of provision; the reliability of providing; the financial, technological and managerial advisability of providing; the economic and financial efficiency of providing; and the socio-economic and conservation benefits that may be achieved by providing, the water services in question; and any other relevant factor. See s 8(3)(a)-(b) of the WSA.
50 Section 8 of the WSA on approvals and appeal provides that: '… (4) A person who has made an application in terms of section 6 or 7 may appeal to the Minister against any decision, including any condition imposed, by the water services authority in respect of the application. (5) An appellant under subsection (4) must note an appeal by lodging a written notice of

Municipalities are obliged to make by-laws which contain conditions for the provision of water services and these must provide for the determination and structure of tariffs.[51] Such by-laws must be consistent with norms and standards in respect of tariffs for water services which the Minister of Water and Sanitation, in agreement with the Minister of Finance, must prescribe, from time to time.[52] The Minister of Water and Sanitation also has powers to prescribe from time to time, compulsory national standards for the provision of water services.[53]

2 2 Municipal Powers to Impose Surcharges on Services Provided

The power of local government to impose surcharges for municipal services[54] emanates directly from the Constitution. According to section 229(1) of the Constitution, a municipality may impose surcharges on fees for services provided by or on behalf of the municipality.[55] This means that municipalities have original powers to impose surcharges on fees for municipal services provided either by themselves or duly nominated water services providers.[56] These powers are 'original' because they are entrenched in the Constitution.[57] The direct implication of such powers is that, just like the local government powers entrenched in section 156(1)(a) of the Constitution, they cannot be removed or amended by national legislation – they can only be removed or amended through an

appeal with – (a) the Minister and (b) the person against whose decision the appeal is made, within 21 days of the appellant becoming aware of the decision. (6) A person who has made an application in terms of section 6 or 7 may appeal to the Minister if the water services authority in question fails to take a decision on the application within a reasonable time. (7) An appeal under subsection (6) – (a) must be conducted as if the application had been refused; and (b) must be noted by lodging a written notice of appeal to the Minister and the water services authority in question. (8) A relevant province may intervene as a party in an appeal under subsection (4) or (6). (9) The Minister may on appeal confirm, vary or overturn any decision of the water services authority concerned. (10) The Minister may prescribe the procedure for conducting an appeal under this section.'

51 See s 21(1)(d) of the WSA.

52 See s 10 of the WSA. To this effect, see Norms and Standards in respect of Tariffs for Water Services in GN R652 in GG 22472 of 2001-07-20.

53 See Regulations Relating to Compulsory National Standards and Measures to Conserve Water in GN R509 in GG 22355 of 2001-06-08.

54 In terms of s 1 of the Municipal Fiscal Powers and Functions Act 12 of 2007 (MFPF), a municipal service means any of the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution; and any function assigned to a municipality in accordance with sections 9 and 10 of the Local Government: Municipal Systems Act 32 of 2000, identified by the Minister by notice in the Gazette. This definition is wider than that used in the Systems Act. See s 1 of the Systems Act.

55 See s 229(1) dealing with the fiscal powers of municipalities.

56 See *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 2 BCLR 150 (CC) pars 61, 64 and 73; *Rates Action Group v City of Cape Town* 2007 1 All SA 233 (SCA) pars 1-20; *Joseph v City of Johannesburg* at pars 51 and 55; *Cape Town v Robertson supra* n 2 at pars 61-71.

57 See Steytler & De Visser *supra* n 3 at 5-6; Steytler & De Visser *supra* n 24 at 22-85.

amendment of the Constitution. However, it is important to note that the right of municipalities to impose surcharges on fees for services provided by or on behalf of a municipality can be limited in terms of national economic policies,[58] for example, and can be regulated by national legislation.[59]

Although there are several laws confirming the fiscal powers of municipalities,[60] the Municipal Fiscal Powers and Functions (MFPF) Act 12 of 2007 regulates the power of municipalities to impose surcharges on fees for services provided under section 229(1)(a) of the Constitution. The objects of the Act are to: promote predictability, certainty and transparency in respect of municipal fiscal powers and functions; ensure that municipal fiscal powers and functions are exercised in a manner that will not materially and unreasonably prejudice national economic policies, economic activities across municipal boundaries or the national mobility of goods, services, capital or labour; effectively oversee the exercise of municipal fiscal powers and functions; and provide for an appropriate division of fiscal powers and functions where two municipalities have the same fiscal powers and functions.[61]

The above objects of the MFPF Act are applicable to municipal surcharges.[62] According to the MFPF Act, a 'municipal surcharge' in terms of section 229(1)(a) of the Constitution is a charge in excess of the municipal base tariff that a municipality may impose on fees for a municipal service provided by or on behalf of a municipality.[63] On the other hand, the MFPF Act defines a base tariff as the fees necessary to cover the actual cost associated with rendering a municipal service and this includes: bulk purchasing costs in respect of water and electricity reticulation services, and other municipal services; overhead, operation and maintenance costs; capital costs; and a reasonable rate of return, if authorised by a regulator of or the Minister responsible for that municipal service.[64]

Chapter 3 of the MFPF Act deals exclusively with municipal surcharges. The Act accords the Minister of Finance the power to prescribe compulsory national norms and standards for imposing municipal surcharges, which may include, *inter alia*, maximum

58 S 229 (2) of the Constitution. For a discussion of this provision, see *Rates Action Group v City of Cape Town* 2007 1 All SA 233 (SCA) par 10; *Cape Town v Robertson supra* n 2 at par 62.

59 See s 229(2)(b) of the Constitution.

60 These include: Local Government: Municipal Finance Management Act 53 of 2003; the Local Government: Municipal Property Rates Act No 6 of 2004; and the Systems Act.

61 See s 2(a)-(d) of the MFPF Act.

62 See s 3 of the MFPF Act.

63 See 'Definitions and interpretation' in s 1(1) of the MFPF Act.

64 See 'Definitions and interpretation' in s 1(1) of the MFPF Act. For a discussion of the difference between a surcharge and a 'reasonable rate of return' and the significance of the latter, see Steytler & De Visser *supra* n 3 at 12-20.

municipal surcharges that may be imposed by municipalities.[65] Such norms and standards may express the maximum surcharge that may be imposed as a ratio of the municipal base tariff, a percentage of the municipal base tariff or a Rand value of the municipal base tariff; and provide bands or ranges within which municipal surcharges may be imposed.[66] In addition, the compulsory norms and standards may differentiate between different kinds of municipalities; types of municipal services; levels of municipal services; categories of users, debtors and customers; consumption levels; and geographical areas.[67] Compulsory norms and standards may also determine the basis upon and intervals at which municipalities may increase surcharges; and determine matters that must be assessed and considered by municipalities in imposing municipal surcharges.[68] Each municipality is obliged, when imposing a surcharge on fees for services provided by it or on its behalf, to comply with any norms and standards prescribed by the Minister.[69] This means that, in the absence of nationally prescribed norms and standards, municipalities have significant discretion in determining municipal surcharges. In addition to this discretion, municipalities can be exempted by the Minister from strictly complying with prescribed norms and standards where it is practically impossible to ensure strict compliance.[70] A ministerial exemption can apply to municipalities generally or be limited in its application to a particular municipality or kind of municipality, which may be defined in relation to several criteria.[71]

Details relating to the manner in which municipal surcharges are levied and how a resolution to that effect must be made known are outlined in section 75A of the Systems Act.[72] Municipal surcharges are supposed to be levied by resolution passed by the municipal council with a supporting vote by the majority of its members[73] and this function cannot be delegated by a municipal council.[74] The exercise of this power is akin to the powers generally reserved for legislative bodies to raise taxes[75] and constitutes a legislative act which is only subject to the principle of legality.[76] In order words, a resolution of a municipal council to levy surcharges for a municipal service should only be reviewable in a court of law on the basis of the principle of legality or directly by the

65 S 8(1) of the MFPF Act.
66 See s 8(2)(a)(i)-(ii) of the MFPF Act.
67 See s 8(2)(b)(i)-(vi) of the MFPF Act.
68 See s 8(2)(c)-(d) of the MFPF Act.
69 See s 9(1)(a) of the MFPF Act.
70 See s 9(1)(b) of the MFPF Act.
71 See s 9(1)(c)(i)-(ii) of the MFPF Act.
72 S 9(2) of the MFPF Act read with s 75A of the Systems Act.
73 See s 75A(2) of the Systems Act.
74 See s 160(2)(c) of the Constitution. See Steytler & De Visser *supra* n 24 at 22-86.
75 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* at par 44.
76 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* at pars 41-46; Steytler & De Visser *supra* n 24 at 22-86.

electorate through the ballot box during local government elections. Municipalities must annually, as part of their budget preparation process, review any municipal surcharges.[77]

The constitutional and legislative framework discussed above shows that the original constitutional power of municipalities to impose surcharges for municipal services can be regulated by national legislation and by ministerial norms and standards. However, regulation should not exceed the bounds of section 151(4) of the Constitution. The regulating role of national government means that it should, through legislation and ministerial regulations, create norms and standards, minimum requirements and guidelines for the exercise of municipal fiscal powers or the performance of the municipal function of levying surcharges for municipal services.[78] Steytler and De Visser observe that the MFPF Act does not provide a regulatory framework for municipalities but instead provides a framework which can be used by the Minister of Finance to prescribe compulsory norms and standards for imposing surcharges which can include maximum charges but not determine the actual amount.[79] Ministerial norms and standards can also prescribe the matters that a municipality must consider when imposing surcharges.[80] In brief, the need for limited/minimal national regulation in relation to how municipalities exercise their legislative powers to levy surcharges is underscored. The legal validity of by-laws when they collide with national norms that seek to regulate the powers of municipalities to impose surcharges for municipal services should be assessed taking into consideration the nature of regulation discussed above.[81]

3 *Merafong City Local Municipality* Case: Facts, Decision and *Ratio Decidendi*

3 1 Facts

AngloGold operates mines within the jurisdiction of Merafong City Local Municipality. It uses water for its mining operations and also supplies same for household use to its employees living on the mines. Until 2004, the water used by AngloGold was supplied directly by Rand Water which

77 See s 9(3) of the MFPF Act.
78 Steytler & De Visser *supra* n 3 at 5-24(12); Steytler & De Visser *supra* n 24 at 22-89.
79 Steytler & De Visser *supra* n 3 at 12-21 to 12-22; Steytler & De Visser *supra* n 24 at 22-100.
80 Steytler & De Visser *supra* n 3 at 12-22.
81 S 156(3) of the Constitution provides that: 'Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid …'. See Steytler & De Visser *supra* n 3 at 5-27.

was responsible for maintenance of the water delivery infrastructure. AngloGold and Rand Water had written water supply agreements.[82]

In view of the changes heralded by the WSA – designating municipalities as water services authorities,[83] Merafong City sent a written notice to mining companies operating within its area jurisdiction on 11 February 2004 to indicate that it had been accorded the powers and functions of a water services authority. The City requested the mining companies to apply for approval for the supply of water for industrial use as required by section 7 of the WSA. On 31 May 2004, the City informed the mining companies in writing that new water tariffs would come into operation on 1 July 2004.[84] In response to the call by the City, AngloGold sought their approval in terms of section 7 of the WSA to 'continue obtaining water from Rand Water for its mining operations and associated domestic applications at the tariffs set by, and under the conditions imposed by Rand Water'.[85]

Merafong City announced new tariffs in May 2004 that were far higher than those of Rand Water. However, because the City could not provide water services on its own, it appointed Rand Water to continue to provide these services and collect payment from consumers. After deducting its share, Rand Water paid the balance/surcharge added by the City into the latter's coffers. The surcharge was imposed as a new source of income that will enable the Municipality meet its service delivery obligations to the community and contribute towards its financial sustainability.[86]

AngloGold appealed to the Minister of Water Affairs and Forestry (as it then was) against the new tariffs. It complained that the new tariff imposed by the Municipality was much higher than those under Rand Water and that this cost it an extra half a million rand per month even though the City did not assume any responsibility in relation to water services provision.[87] AngloGold argued *inter alia* that the City did not add any value to water services provision and failed to take into consideration its role as a water services provider – for its employees.

Purporting to act under her powers in terms of section 8(9) of the WSA, the Minister upheld AngloGold's appeal on July 18 2005 when she made her ruling. She overturned the Municipality's decision to levy surcharges on water for industrial use for a number of reasons. The Minister found that the tariff increase of 62% was unreasonable because

82 *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at par 3.
83 *Idem at* par 4.
84 *Idem at* pars 4-5.
85 *Idem at* par 6.
86 *Idem at* par 7.
87 For details, see *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at par 8.

Merafong City did not add value to the services provided by Rand Water to AngloGold.[88] She held the view that since water used for industrial purposes was not defined in the WSA as a municipal service, the City could only levy surcharges on the portion of water that AngloGold was using for domestic purposes.[89] She expressed doubts as to whether the mines were given reasonable opportunities for engagement before the tariffs were imposed. Based on her findings, she directed Merafong City, AngloGold and Rand Water to negotiate a reasonable tariff on the portion of water used for domestic applications.[90]

In 2005, the City obtained a legal opinion to the effect that the Minister's decision was 'void in law'. Emboldened by the legal opinion, the City continued to collect the tariff and surcharges from AngloGold although under the threat of discontinuing water supply. Attempts to negotiate a mutually acceptable agreement were unsuccessful largely because the Municipality remained adamant that the Minister's decision was unlawful.[91] The City tried unsuccessfully over a five year period to get the Minister's response to the legal opinion – she remained elusive.

In view of the above, AngloGold launched proceedings in the High Court in 2011 to force Merafong City to comply with the Minister's ruling. Merafong City counter-applied for a declaratory order to the effect that: it had exclusive executive authority to set, adopt and implement tariffs, including surcharges, on the provision of water services in its jurisdiction; section 8 of the WSA did not give the Minister authority to interfere with tariffs set and implemented by it for water services provided in its jurisdiction. In the alternative, the City of Merafong sought an order striking down section 8(9) of the WSA upon which the Minister's appeal decision was made as unconstitutional and invalid.[92]

AngloGold was successful in the High Court which dismissed the counter-application of Merafong City. The Court found that AngloGold had validly applied to the City under the WSA and that the Act conferred the Minister with appellate powers which she had exercised. In addition, the High Court found that even if the decision of the Minister was impugnable, it was binding on the Municipality until set aside through judicial review. On this basis, the Court ordered the City to comply with the Minister's ruling.[93]

On appeal, the Supreme Court of Appeal (SCA) endorsed the findings of the High Court.[94] It held that without setting aside the Minister's ruling through the courts, the City breached the principle of legality by choosing to disregard it. The SCA held that the approach adopted by the City to

88 *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at par 9.
89 *Idem at* par 9.
90 *Idem at* par 9.
91 *Idem at* pars 10-12.
92 *Idem at* par 13.
93 *Idem at* pars 13-15.
94 *Idem at* pars 14-15.

disregard the Minister's ruling on the basis that it was unlawful amounted to a collateral challenge to the validity of an administrative action, a remedy which was not available to an organ of state against another organ of state.[95] The SCA held that, in accordance with established jurisprudence, the remedy of collateral challenge to the validity of administrative action is only available to an individual threatened by a public authority with coercive action.[96]

In the Constitutional Court, the main question was whether SCA and the High Court were right to enforce the Minister's ruling.[97] The Constitutional Court had to decide on two issues: whether the High Court and SCA correctly applied the jurisprudence relating to the remedy of collateral challenge;[98] and whether the Minister's ruling of 18 July 2005 was lawful/constitutionally compliant.[99] In relation to the second issue, Merafong City was of the view that the Minister's decision was unlawful because it intruded on an area of exclusive constitutional competence bestowed on municipalities by section 156(1) of the Constitution.[100] In other words, the City argued that the provision in terms of which the Minister claims to have taken the decision is inconsistent with the Constitution and therefore invalid.

3 2 Decision and *Ratio Decidendi*

The important issue for purposes of this article relates to the lawfulness of the Minister's ruling of 18 July 2005.[101] This issue was largely ignored by the majority judgment on the pretext that the City did not persist with the argument. While the majority judgment remitted this issue to the High Court for a decision, it was addressed in the minority judgment.[102] What follows is an outline of the finding in the minority judgment on this issue as well as the *ratio decidendi* for the position adopted.

95 *Idem at* par 15.
96 *Idem at* par 15.
97 *Idem at* par 22.
98 This is the main issue addressed in the majority judgment written by Justice Cameroon. However, this is not the focus of this case note.
99 This issue was largely ignored by the majority judgment on the pretext that the City did not persist with the argument. The majority judgment remitted this issue to the High Court for a decision. See *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at pars 16 and 84. However, it was addressed in the dissenting judgment because this issue was at the heart of the dispute between relevant parties. See *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at pars 86-87.
100 *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at par 2.
101 In relation to the first issue, which is not relevant for this article, the majority judgment upheld the view of the High Court and SCA to the effect that an invalid administrative act that exist is binding and enforceable until it has been set aside by way of judicial review. For a detailed exposition of the Court's position and rationale, see pars 26-83. Justice Jafta disagreed with the approach adopted by the majority. See *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at pars 88-152.
102 See *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at pars 16, 84, 86-87.

Justice Jafta held that section 8(9) of the WSA impermissibly empowers the Minister to exercise an exclusive municipal power which was inconsistent with the Constitution.[103] The learned Justice held that the reasoning of the Minister was based on a flawed understanding of the law and that the conclusion reached by the High Court overlooked the principle of separation of powers that applies among the spheres of government.[104] Justice Jafta established that although the Constitution limits municipal competence on water services to potable water supply systems, the WSA empowers municipalities to supply water for industrial use by making it compulsory for industries to procure water only from a municipality duly designated under the Act as a water services authority or its nominee.[105] He observed that the WSA also regulates the power of municipalities to approve the supply of water for both domestic and industrial purposes by requiring *inter alia* that a water services authority may not unreasonably withhold applications for approval and may grant approval subject to reasonable conditions.[106]

In relation to the Minister's findings and ruling, Justice Jafta expressed the view that they were based on a complete misconception of the law under which she considered the appeal from AngloGold. Justice Jafta held that the Minister completely overlooked the fiscal powers conferred on municipalities by section 229(1) of the Constitution which expressly declares that a municipality is entitled to levy a surcharge on services provided by it and also those that are provided by a third party on its behalf. In addition, Justice Jafta established that section 7 of the WSA equally authorises the Municipality to nominate a water services provider where the supply of water for industrial use cannot be done by itself.[107] Based on these provisions, he established that the Minister therefore misunderstood the law by holding the view that even where water for industrial use is supplied by the Municipality, it may not levy a surcharge for the service because that service is not defined as a municipal service in the WSA. He held that section 229 authorises municipalities to levy a surcharge on services provided by it or on its behalf, regardless of whether there is value added or not.[108] He observed that section 229 of the Constitution prescribes conditions that apply to the exercise of municipal fiscal powers and functions and empowers Parliament to enact legislation that regulates how municipalities exercise their fiscal powers.[109] He reiterated that municipal fiscal powers fall within the exclusive domain of municipalities and may only be exercised by them subject to conditions listed in section 229 of the Constitution.[110]

103 *Idem at* pars 177-178.
104 *Idem at* pars 162 and 171.
105 *Idem at* par 157.
106 *Idem at* par 157.
107 *Idem at* par 162.
108 *Idem at* pars 155 and 163.
109 *Idem at* par 156.
110 *Idem at* par 173.

After the above clarification, the learned Justice proceeded to dismantle the finding of the High Court that the Minister had exercised power duly conferred on her by legislation when she reached her decision and ruling – legislation which purports to confer the Minister the power to regulate the exercise of the executive power of municipalities for water provision for domestic use.[111] Justice Jafta held that the fundamental weakness of the Court's conclusion lies in the fact that it overlooked the principle of separation of powers that applies amongst the three spheres of government and the jurisprudence established by the Constitutional Court to the effect that municipalities enjoy exclusive powers in relation to competences allocated by the Constitution.[112] He re-echoed the view that national and provincial spheres of government are barred from arrogating to themselves the power to exercise municipal competences by simply passing legislation authorising the exercise of municipal powers.[113] The learned justice held that the impugned provision empowering the minister to intrude into the area of competence of the City and overturn a decision taken pursuant to the exercise of the City's municipal fiscal powers was unconstitutional.[114]

Based on the above findings, he declared section 8 of the WSA invalid to the extent of the inconsistency and expressed the view that the High Court should have upheld the City's constitutional challenge.[115]

4 A Discussion of the Minority Judgment and Proposals on the Way Forward

The findings of the minority judgment can be summarised as follows: the Minister's appellate powers in terms of section 8 of the WSA fall foul of section 151(4) of the Constitution in that they are unnecessarily intrusive and impede on: the right and ability of municipalities to exercise their original water services function; the right of municipalities to exercise their original powers to levy surcharges for water services; and the ability of municipalities to perform their assigned legislative function to provide water for industrial use and the concomitant powers to levy surcharges for providing that assigned service. It is submitted that although Justice Jafta neither referred to important legislation such as the MFPF Act nor any secondary source of law addressing the issue they grappled with, the above findings are tenable. They are consistent with both the applicable legal framework and the jurisprudence emanating from a string of Constitutional Court cases.

111 For details, see *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at pars 167-171.
112 *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at par 171.
113 *Idem at* par 171.
114 *Idem at* par 172.
115 *Idem at* pars 172, 177-178.

It has been established that the right of municipalities to impose surcharges for municipal services stems from their original fiscal powers entrenched in section 229(1) of the Constitution and that these powers are akin to taxation powers in that, a municipality needs not provide the service itself – it can outsource the provision of the service to an external party but still collect the surcharge.[116] The Constitution does not prescribe that a surcharge can only be levied when a municipality has added value to the service delivered. In addition, although the provision of industrial water is an assigned legislative function, municipalities generally have powers to impose a surcharge on this service because the broad definition of a municipal service in section 1 of the MFPF Act shows that municipalities have powers to impose surcharges for services that are listed in Schedule 4B and 5B as well as those assigned to them in terms of legislation. Justice Jafta was correct in finding that a municipality cannot be expected to provide a service and then be prevented from imposing surcharges for the same service. In addition, it is important to note that the assigning legislation does not forbid municipalities from imposing surcharges for the provision of industrial water. Municipalities can only be prevented from levying a surcharge on an assigned function if the legislation assigning the function excludes the levying of the surcharge.[117] Where the assigning legislation is silent on this matter, a municipality has the discretion to use its broad fiscal powers. The assignment of a power without ensuring that resources are available to perform the function effectively is contrary to section 151(4) of the Constitution.[118] The same applies to any assignment which requires that municipal decisions should receive prior approval from other spheres of government or which gives national and provincial government authority to override decisions taken by municipal councils.[119]

Furthermore, it has been established that the constitutional powers of local government to provide potable water and impose surcharges on municipal services are original powers that cannot be removed by legislation except through an amendment of the Constitution. Justice Jafta was correct to point out that the Constitution forbids national and provincial spheres of government from appropriating to themselves the power to exercise municipal competences by merely enacting legislation that authorises them to exercise municipal powers.[120] Such an approach is contrary to the prescriptions of sections 41(g) and 151(4) of the Constitution.[121] The power of the Minister in terms of section 8(9) of the WSA to vary or overturn the decisions of elected municipal councils – decisions that are not administrative in character – pertaining to

116 See Steytler & De Visser *supra* n 3 at 12-20.
117 *Idem* at 12-21.
118 See discussion in 2.1 and 2.2 above.
119 See discussion in 2.2 above.
120 *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at par 171.
121 See discussion in 2.1 and 2.2 above.

municipal surcharges and the provision of potable water constitute an overt intrusion into their constitutionally defined areas of competence. It is important to note that the appellate powers of the Minister under section 8(9) of the WSA relate to approvals for general use of water and approvals for industrial use of water. Even in relation to the provision of water for industrial use, it has been indicated above that assignments are supposed to be a complete transfer of a specific function, and this includes the final decision-making power in individual matters.[122] In this regard, even though industrial water provision is an assigned function, it is a violation of section 151(4) of the Constitution for the Minister to be able to override a municipal decision on this matter.[123] Decisions adopted by deliberative bodies such as municipal councils can only be reviewed on the basis of legality or reasonableness.[124]

However, it is acknowledged that the original powers of municipalities to impose surcharges on municipal services and the powers to provide water services are not absolute in the sense that they can be regulated by legislation and ministerial directives to the extent permissible by the Constitution.[125] It has been argued that regulation means creating norms and standards, minimum and maximum requirements and guidelines on how municipalities can effectively exercise their original powers in their executive and legislative decision-making processes.[126] Such norms and standards, guidelines and minimum requirements should be generally applicable in order to ensure predictability, certainty and consistency in governance. National (and provincial) regulation should not seek to produce predetermined outcomes but provide frameworks that can be objectively used by municipalities.[127] While this approach is reflected in the MFPF Act which leaves municipalities with sufficient discretion in imposing municipal surcharges,[128] the same cannot be said of the WSA in terms of the powers of municipalities to grant authorisation for general water use or industrial use. Despite the criteria provided in section 8(3) of the WSA to enable municipalities to arrive reasonable decisions when applications for the use of industrial water are considered, the Act goes further to subject those decisions to the approval of the Minister of Water and Sanitation through appeals. It is argued that the Minister's appeal powers go beyond regulation and amounts to an arrogation of both the original and assigned legislative powers of municipalities regarding the provision of water services. Regulation can only take place within limits permissible under the Constitution. National legislation or ministerial

122 See discussion in 2.1 above.
123 See Steytler & De Visser *supra* n 24 at 22-59.
124 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* at pars 45-46.
125 See 2.1 and 2.2 above and s 229(1)(b) of the Constitution.
126 See 2.1 and 2.2 above.
127 See 2.1 and 2.2 above.
128 See Steytler & De Visser *supra* n 3 at 12-12; Steytler & De Visser *supra* n 24 at 22-100

regulations that run contrary to sections 151(4) and 41(1)(g) of the Constitution are invalid.[129]

Finding section 8(9) of the WSA unconstitutional in the minority judgment is in line with the jurisprudence of the Constitutional Court in the area of planning law – where the Court has consistently declared unlawful attempts to subject municipal planning decisions to appeal at the provincial level on the ground that this intrudes into an original area of competence of local government listed in Schedule 4B. In *Minister of Local Government, Environmental Affairs and Development Planning Western Cape v Habitat Council*,[130] the Court for example declared section 44 of Land Use Planning Ordinance 15 of 1985 (LUPO) which allowed persons aggrieved by municipal land-use decisions to appeal to the Western Cape provincial government, with powers to overturn and replace such decisions, unconstitutional and invalid because provincial appellate capability impermissibly usurped the power of local authorities to manage 'municipal planning'; intrudes on the autonomous sphere of authority the Constitution accords to municipalities; and fails to recognise the distinctiveness of the municipal sphere.[131] In *Tronox Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal*,[132] the Court considered the constitutional validity of section 45 of the KwaZulu-Natal Planning and Development Act 6 of 2008 (PDA) which provided for aggrieved persons to appeal municipal planning decisions to the provincial Planning and Development Appeal Tribunal. Despite attempts in the PDA to ensure the independence and impartiality of the Planning and Development Appeal Tribunal,[133] the Court held that section 45 impermissibly interferes with local government's exclusive constitutional power over municipal planning.[134] The Court rejected the argument that the establishment of the Appeal Tribunal and the provision of an internal appeal does not involve the exercise of a provincial function or power. The Court held that the Appeal Tribunal was established by provincial legislation and that the legislation subjects municipalities to an appeal process without their consent and irrespective of whether municipalities considered it appropriate or not.[135] The Court held that irrespective of the independence of the Appeal Tribunal – staffed by experts and not provincial officials, the fact that municipalities are subjected to an appeal process by the Province intrudes on their autonomous power. The Court held that the province's involvement in the appointment of persons to the Appeal Tribunal and its administrative influence exacerbates the intrusion.[136] The Court also

129 See Steytler & De Visser *supra* n 3 at 5-28; Bronstein *supra* n 26 at 15-16.
130 *Minister of Local Government, Environmental Affairs and Development Planning Western Cape v Habitat Council* 2014 4 SA 437 (CC).
131 *Idem at* pars 13-15.
132 *Tronox Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal* 2016 ZACC 1.
133 *Idem at* par 17.
134 *Idem at* par 27.
135 *Ibid.*
136 *Idem at* par 28.

held that the provincial appeal mechanism dilutes and erodes the exclusive competence and original power of municipalities.[137] Section 45 of the PDA was declared unconstitutional and invalid.

A cogent principle distilled from the jurisprudence of the Court emanating from the cases in the area of planning law is that a decision taken by a municipality pursuant to powers protected in its exclusive area of constitutional competence cannot be subjected to appeal to a functionary or entity operating within the national or provincial sphere of government. This also means that legislation, executive policies or regulations cannot subject such decisions to appeal at the national or provincial level. Doing so would violate the constitutional vision of autonomous spheres of government which dictates that national and provincial spheres of government not be entitled to usurp the exclusive constitutional powers and functions of municipalities, barring exceptional circumstances.[138]

In view of the above, it is argued that it is not only section 8(9) of the WSA which must be repealed, but the other subsections that are dependent on or directly linked to that provision. These include: the right of dissatisfied applicants to appeal to the Minister in section 8(4); the procedure to be followed in case of an appeal in section 8(5); the ground of appeal based on unreasonable delays in the processing of an application in section 8(6); the presumption and process to be followed where an appeal is based on the ground of unreasonable delays in processing an application in section 8(8); and the powers of the Minister to prescribe the procedure for conducting an appeal in section 8(10). If these sub-sections are repealed, it will be more tenable for an amendment to section 8 to make provision for a dissatisfied applicant to approach courts to review municipal decisions where they believe there was non-compliance with the requirements for reasonableness in section 8(3)(a) of the WSA. Where some of the factors listed in section 8(3) are vague, for example, the regulating role of the Minister could be utilised to develop guidelines to supplement conditions imposed by section 8(3) of the Act that must be taken into consideration by municipalities. While appeal against arbitrary local government action should lie with the courts, the importance of cooperative governance in ensuring that municipalities effectively exercise their powers and perform their functions cannot be underestimated. After all, the three spheres of government are interrelated and interdependent and must all work together to improve the welfare of all South Africans.

137 *Idem at* par 29.
138 *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 1 SA 521 (CC) par 46.

The 'law of general application' requirement in expropriation law and the impact of the Expropriation Bill of 2015

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OPSOMMING

Die 'algemeen geldende regsvoorskrif' vereiste in onteieningsreg en die implikasies van die Onteieningswetsontwerp van 2015

In hierdie artikel word die vereiste 'algemeen geldende regsvoorskrif' in artikel 25(2) van die Grondwet van die Republiek van Suid-Afrika,1996, ontleed aan die hand van die Onteieningswetsontwerp van 2015. Die relevante bepalings van die wetsontwerp laat blyk dat onteiening slegs geldig sal wees indien onteiening in wetgewing gematig word. Verder word dit duidelk gestel dat die onteieningsprosedure soos uiteengesit in die wetsontwerp gevolg moet word in alle gevalle waar eiendom onteien word, ongeag of die wetsontwerp of ander magtigende wet op gesteun word om die eiendom te onteien.

Die vereistes dat onteiening in wetgewing gemagtig moet word en dat die onteieningsprosedure in die wetsontwerp gevolg moet word, laat vrae onstaan oor die korrektheid van die toestaan van vergoeding vir 'n onteiening in gevalle waar daar geen magtiging vir die onteiening in die relevant wetgewing was nie, en waar daar ook geen formele onteieningsprosedure gevolg was nie.

Siende die toestaan van vergoeding vir onteiening in die toekoms slegs kan geskied in gevalle waar daar magtiging vir onteiening is en waar die onteieningprosedure gevolg was, blyk dit dat konstruktiewe onteiening nie toepassing kan vind in die Suid-Afrikaanse reg nie. Dit word gestel dat konstruktiewe onteiening slegs erken kan word in gevalle waar daar nie streng klem geplaas word op 'n statutêre basis vir onteiening nie. Daarom, indien die wetsontwerp in werking tree sal konstruktiewe onteiening nie toepassing kan vind in die Suid-Afrikaanse reg nie.

'[s]ince there is no common-law authority for expropriation in South African law, the law of general application that is required for expropriation by section 25(2) must specifically and clearly authorise an expropriation of property.'[1]

1 Van der Walt 'Property law in the constitutional democracy' 2017 *Stell LR* (forthcoming).

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1 Introduction

Section 25(2) of the Constitution of the Republic of South Africa, 1996, requires an expropriation to be effected in terms of law of general application and undertaken for a public purpose or in the public interest. An expropriation must also be compensated, and the standard for the amount of compensation is that it must be just and equitable. While substantial research has been conducted on various issues relating to the public purpose or public interest requirement[2] and the calculation of just and equitable compensation,[3] the law of general application requirement has not received similar attention. Similarly, courts have considered issues surrounding public purpose or public interest[4] and matters concerning compensation,[5] but little, if any, attention has been paid to the law of general application requirement.[6] In his last article, André van der Walt therefore correctly points out that the 'law of general application requirement' has 'arguably not received sufficient attention or rigorous enough analysis in case law.'[7]

2 See Van der Walt *Constitutional Property Law* (2011) 458-503; Du Plessis 'Restitution of expropriated property upon non-realisation of the public purpose' 2011 *TSAR* 579-592; Van der Walt & Slade 'Public purpose and changing circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)' 2012 *SALJ* 219-235; Slade *The Justification of Expropriation for Economic Development* (LLD thesis 2012 US); Slade 'The less invasive means argument in expropriation law' 2013 *TSAR* 199-216; Slade 'Public purpose or public interest' and third party transfers' 2014 *PER* 166-206; Slade 'Addressing the issue in *Harvey v Umhlatuze Municipality* in legislation' 2014 *Stell LR* 116-125; Mostert 'The poverty of precedent on public purpose/interest: An analysis of pre-constitutional an post-apartheid jurisprudence in South Africa' in Hoops *et al* (eds) *Rethinking Expropriation Law Vol I* (2015) 59-92.

3 Van der Walt (2011) 503-520; Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's The Law of Property* (2006) 568-578; Du Plessis *Compensation for Expropriation under the Constitution* (LLD thesis 2008 US).

4 On the less invasive means argument, see *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010; *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2010] ZAGPPHC 154, 12 October 2010; *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246, 1 December 2011. On the re-transfer of expropriated property on the non-realisation of the public purpose, see *Harvey v Umhlatuze Municipality* 2011 1 SA 601 (KZP). On the lawfulness of third party transfers see, *eThekwini Municipality v Sotirios Spetsiotis* [2009] ZAKZDHC 51, 6 November 2009; *Bartsch Consult v Mayoral Committee of the Maluti-A-Phofung Municipality supra*; *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd* 2009 5 SA 661 (SE); 2010 4 SA 242 (SCA); 2011 1 SA 293 (CC); *Harvey v Umhlatuze Municipality supra*.

5 *Du Toit v Minister of Transport* 2006 1 SA 297 (CC); *Haffejee v eThekwini Municipality* 2011 6 SA 134 (CC); *Msiza v Director-General, Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC).

6 For instance, in *Harvey v Umhlatuze Municipality supra* n 4 at 82, the court referred to the two prerequisites for an expropriation in terms of the Expropriation Act 63 of 1975 as being public purpose and compensation, whilst not having regard to the constitutional requirement that it must be effected in terms of law of general application.

7 Van der Walt 2017 *Stell LR* (forthcoming).

The Expropriation Act 63 of 1975, which currently governs expropriation law in South Africa, predates the Constitution by some 20 years. Therefore, it is not aligned with the constitutional provisions, especially section 25(2)-(3) that sets out the constitutional requirements for an expropriation. For instance, the Expropriation Act does not refer to a 'public interest' requirement,[8] and the calculation of compensation is based primarily on the market value of the property.[9] In terms of the Constitution, market value is but one factor in calculating just and equitable compensation.[10] Attempts to repeal the 1975 Expropriation Act have twice been unsuccessful. Both the 2008 Expropriation Bill[11] and the 2013 Expropriation Bill[12] were retracted after receiving severe criticism. The 1975 Expropriation Act is set to be repealed by the 2015 Expropriation Bill.[13] The Expropriation Bill aims to 'ensure consistency with the Constitution and uniformity of procedure of all expropriations'.[14] The Bill, therefore, seeks to replace the primary expropriation act with one that is aligned with the constitutional requirements, in particular, section 25 (the property clause) and section 33(1), which provides for lawful, reasonable and procedurally fair administrative action.

Since the Expropriation Bill seeks alignment with the constitutional provisions and aims to streamline the expropriation procedure, it differs substantially from the current Expropriation Act. The Bill differs from the

8 In *Offit Enterprises v Coega Development Corporation supra* 674 the high court held that the public interest requirement in the Constitution must be read in to the Expropriation Act to ensure compliance of the Act with the constitutional provisions.

9 S 12 of the Act dictates that the compensation to be awarded for the expropriation of property shall not exceed the market value plus an amount 'to make good any actual financial loss caused by the expropriation'. In *Du Toit v Minister of Transport supra* par 36 the Court indicated that '[i]t would have been more expedient if the Legislature had made provision in the Act itself for complying with the constitutional standards of just and equitable compensation and ensuring that an equitable balance between the interests of the State and those of the individual is reflected.'

10 In *Msiza v Director-General supra* the Land Claims Court held that although market value is a starting point to determine just and equitable compensation, it is not the most important factor; all the factors in s 25(3) must be given appropriate consideration. On the compensation provisions in the Expropriation Bill, see Van Wyk 'Compensation for land reform expropriation' 2017 *TSAR* 21-35.

11 On the Expropriation Bill B16-2008 [explanatory summary of Bill published in Government Gazette No 30963 of 11 April 2008] see Du Plessis 'The (shelved) Expropriation Bill B16-2008: An unconstitutional souvenir or an alarmist memento?' 2011 *Stell LR* 352-275; Pienaar 'Die grondwetlikheid van die voorgestelde onteieningsraamwerk vir Suid-Afrika' 2009 *TSAR* 344-352; Van der Walt 'Constitutional property law' 2008 *ASSAL* 231-240.

12 On the 2013 Expropriation Bill GN 234 in *GG* 36269 of 20-03-2013, see Van der Walt 'Constitutional property law' 2013 *ASSAL* 216-220.

13 See https://pmg.org.za/bill/550/ (accessed 2017-04-04). The President referred the Bill back to the National Assembly because of reservations concerning inadequate public participation.

14 Memorandum on the Objects of the Expropriation Bill, 2015 par 1.3, http://www.publicworks.gov.za/docswhitepapers.html (accessed 2017-04-04).

Expropriation Act in the sense that it places greater emphasis on the statutory authority to expropriate.[15] The Bill explicitly states that expropriation may only be effected if the use of the power of expropriation is authorised by legislation.[16] In this regard, the Bill gives clearer guidance on the understanding of the law of general application requirement in section 25(2) that has been somewhat neglected in the literature and case law thus far. The Bill also requires an expropriation to be undertaken for a public purpose or public interest. The definition of public purpose in the Bill is similar to the definition currently in the Expropriation Act.[17] The public interest definition in the Expropriation Bill is very similar to the definition of public interest in section 25(4) of the Constitution,[18] although it does emphasise that reforms are necessary to bring about the equitable access to all South Africa's natural resources 'in order to redress the results of past racially discriminatory laws or practices'.[19] The Bill also contains detailed provisions regarding the calculation and payment of compensation in line with the constitutional requirements in section 25(2) and (3).[20]

This article will, however, focus specifically on the law of general application requirement in section 25(2) of the Constitution and the implementation of this requirement in the Expropriation Bill. The purpose of this article is therefore to consider the authority to expropriate in more detail, with reference to the new Expropriation Bill and applicable case law. This article will also consider the implications the new Bill will have for the recognition of the doctrine of constructive expropriation in South African law.

2 The Law of General Application Requirement and the Expropriation Bill

Section 25(2) of the Constitution requires an expropriation to be effected in terms of law of general application. The current Expropriation Act is regarded as law of general application.[21] Therefore, any expropriation effected in terms of this Act would satisfy the law of general application requirement in section 25(2) of the Constitution. However, the exact meaning of 'law of general application' is not clear from the Act and courts have not been able to give further guidance as to what would be

15 S 2(1) of the Expropriation Act authorises the minister of public works to expropriate property in terms of the Act, but s 2(2) of the Act makes it clear that the minister may expropriate property in terms of s(1) or 'any other law'. The Act does not further indicate what is meant by the term 'law'.

16 See clause 2(3) and the discussion below.

17 '[P]ublic purposes' includes any purposes connected with the administration of the provisions of any law by an organ of State'.

18 S 25(4)(a) of the Constitution states that 'the public interest includes the nation's commitment to land reform, and to reform to bring about equitable access to all South Africa's national resources'.

19 Clause 1 of the Expropriation Bill.

20 Ch 5 of the Expropriation Bill

21 *Offit Enterprises v Coega Development Corp supra* (SE) 674.

considered 'law of general application' in relation to expropriation disputes.

The 'law of general application' requirement has been considered, to some extent, in the context of the limitation of rights in terms of section 36(1) (the limitation clause) of the Constitution. Section 36(1) states that '[t]he rights in the Bill of Rights may be limited only in terms of law of general application …'. In theory, section 36(1) would be applied if there were a limitation of a right in the Bill of Rights. Therefore, if there has been a limitation of the right in section 25(2), the case proceeds to limitation analysis in terms of section 36(1).[22] In relation to the law of general application requirement in section 36(1), the literature indicates that the limitation must be authorised by a law that was 'properly adopted',[23] and the law must be of general application.[24] Usually, a broad understanding of 'law' is accepted. The concept 'law' therefore includes original and delegated legislation, the rules of common law and customary law.[25]

However, the understanding of the 'law of general application' requirement specifically in expropriation cases is vastly different from the broader, more general understanding thereof in the broader constitutional context.[26] Van der Walt points out that 'there is no common law authority for expropriation in South African law.'[27] Therefore, because expropriation is regarded as a unique state power, it

22 However, see Slade 'Less invasive means: The relationship between sections 25 and 36 of the Constitution of the Republic of South Africa, 1996' in Hoops *et al* (eds) *Rethinking Expropriation Law Vol I* (2015) at 331-348. On the general operation of the property clause in relation to the seminal constitutional property law decision in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC), see Van der Walt (2011) at 74-78. Even though the Court in *First National Bank* held that all expropriations are deprivations and therefore all limitations of property must comply with the requirements in terms of s 25(1) of the Constitution, the trend is to only have regard to the requirements in s 25(2) of the Constitution in cases where a formal expropriation has occurred. See in this regard, *Du Toit v Minister of Transport supra*; *Erf 16 Bryntirion v Minister of Public Works supra*; Slade (2015) at 340-341.

23 Van der Walt *Property and Constitution* (2012) at 28.

24 Currie & De Waal *The Bill of Rights Handbook* (2013) 155; Van der Walt (2012) at 28.

25 *Supra* n 23 at 156; Woolman & Botha 'Limitations' in Woolman *et al* (eds) *Constitutional Law of South Africa Vol II* 2006 ch 34-7; *S v Thebus* 2003 6 SA 505 (CC) at parr 64-65.

26 See Van der Walt (2011) at 453; Van der Walt (2012) at 27. Gildenhuys *Onteieningsreg* (2011) 93 states that law authorising expropriation, would mostly be statutory law, although the author also provides an example of expropriation in terms of the common law.

27 Van der Walt (2011) at 453 with reference to Roux 'Property' in Cheadle *et al* (eds) *South African Constitutional Law: The Bill of Rights* 2010 ch 20. See also Van der Walt (2012) at 27. To the contrary, see Gildenhuys (2011) at 93.

will always be carried out pursuant to legislation.[28] This position is supported by the provisions of the Expropriation Bill of 2015, since the Bill requires the enabling legislation to specifically authorise a particular authority to acquire property through expropriation before it can be considered as such. Clause 2(3) of the Bill, which deals with the application of the Bill, states as follows:

> An expropriating authority may expropriate property in terms of a power conferred on such expropriating authority by or under any law of general application, provided that the exercise of those powers is in accordance with sections 5 to 27 and 31.

Although this clause refers to 'law of general application', it is clear from the Bill that the reference to 'law' is specifically restricted to legislation. In clause 1 of the Bill, an 'expropriating authority' is defined as 'an organ of state or a person *empowered by this Act or any other legislation* to acquire property through expropriation'.[29] 'Expropriation', in turn, is defined as the 'compulsory acquisition of property'.[30]

The requirement that an expropriating authority must be empowered by legislation before it can expropriate property is a departure from the position set out in both the 2008 and 2013 Expropriation Bills. In terms of the 2008 Bill, an expropriating authority was an organ of state that was empowered by the 'Act or any other law' to expropriate property.[31] The 2013 Bill, on the other hand, referred to the relevant expropriating authorities being empowered by 'a law of general application' to expropriate property.[32] Both the 2008 and 2013 Bill did not give greater clarity as to what is considered 'any other law' or 'a law of general application'. The 2015 Bill is, therefore, more specific in that it requires an expropriating authority to be empowered by legislation to expropriate property. Therefore, on a plain reading of clause 2(3) and the definitions identified above, an expropriating authority may only acquire property through expropriation if that expropriating authority is specifically empowered by legislation to expropriate property.

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28 Van der Walt (2011) at 453. See *Joyce & McGregor v Cape Provincial Administration* 1946 AD 658 671, where the court stated that 'all rights of expropriation must rest upon a legislative foundation'. See further Jacobs & Gildenhuys 'Expropriation in South Africa' in Erasmus (ed) *Compensation for Expropriation: A Comparative Study Vol I* 1990 at 373; Gildenhuys (2001) at 49.

29 Own emphasis

30 This is in line with the Constitutional Court decision in *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) par 48 where the Court held that 'expropriation entails state acquisition of the property'. See also *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) par 64.

31 Ch 1 of the Expropriation Bill of 2008.

32 Ch 1 of the Expropriation Bill of 2013.

Similar to the current Expropriation Act,[33] the Expropriation Bill of 2015[34] awards the minister of public works the power to expropriate property for a public purpose or in the public interest. The Expropriation Bill does not affect the validity of other pieces of legislation (also future legislation) that also confers expropriation powers. Therefore, other pieces of legislation may be relied upon to expropriate property. However, the other pieces of legislation must specifically authorise the use of expropriation to achieve a public purpose. The Expropriation Bill also dictates that all expropriations must comply with the procedural requirements set out in clauses 5 to 27 and 31.[35]

In light of the above, two important interrelated points become apparent. Firstly, legislation must specifically authorise an expropriation. The uncertainty about whether the common law can effect an expropriation of property should therefore disappear. The notion that legislation must specifically authorise an expropriation calls to question certain decisions where the courts, especially the Constitutional Court, have been prepared to award compensation for an expropriation even though there was no formal expropriation procedure in terms of enabling legislation. Secondly, regardless of the statute empowering an expropriation, the procedure set out in the Bill must be followed in order for an expropriation to be formally valid. In this regard, the Bill goes a long way in ensuring that a uniform expropriation procedure will be adopted by all expropriating authorities. The emphasis on statutory authority and a mandatory expropriation procedure would restrict the possibility of awarding compensation in cases where there is acquisition of property, but not through expropriation. This also holds implications for accepting the doctrine of constructive expropriation in South African law, since constructive expropriation can only be recognised if the formal authority to expropriate is not observed strictly.[36] The implications of these two interrelated points, as identified here, are further teased out below.

3 Legislation Must Specifically Authorise Expropriation: An Analysis of Case Law

The Expropriation Bill of 2015, which is set to replace the current Expropriation Act of 1975, will be the primary and overarching piece of legislation that will govern expropriation in South Africa. Similar to the Expropriation Act, the Expropriation Bill empowers the minister of public works to expropriate property. The Bill also recognises that expropriating

33 See s 2 of the Act.
34 Ch 2 of the Expropriation Bill of 2015.
35 Clauses 5 to 27 deal with processes involved in investigating the suitability of the property to be expropriated, the manner and form of the notice of intention to expropriate, the notice of expropriation, and issues surrounding compensation. Clause 31 deals with transitional arrangements and savings.
36 Van der Walt (2011) at 354.

authorities other than the minister of public works may expropriate property if those authorities are specifically empowered by other legislation to expropriate property.[37] Irrespective of whether property is expropriated in terms of the Bill or other empowering legislation, the procedure set out in the Bill must be applied. In this regard, the Bill provides detailed guidelines as to how the expropriation process is to be implemented by the relevant authority. The Bill also sets out how compensation is to be calculated if property has been expropriated in line with the requirements as set out in the Bill.

From the above, it is clear that only in cases where property is acquired through expropriation can compensation be awarded in terms of the Expropriation Bill. If property is acquired in terms of legislation that does not authorise the use of expropriation to acquire the property, and the expropriation process as set out in the Bill is not followed, the acquisition of property cannot be treated as an expropriation, and the compensation provisions in the Bill cannot apply. Therefore, an interference with property in the form of an acquisition of property in cases where there is no authority for the expropriation of such property cannot be challenged in terms of the Expropriation Bill (or section 25(2) of the Constitution).[38]

If legislation, therefore, causes the acquisition of property in the state, but there is no authority for the expropriation in the legislation, the acquisition cannot be regarded as an expropriation. Therefore, the validity of such an acquisition cannot be challenged with reference to the Expropriation Bill; it must be challenged in terms of the prohibition against the arbitrary deprivation of property in section 25(1) of the Constitution or in terms of the rules of administrative law.[39] The confiscation and forfeiture of property is an example where property is acquired in terms of a regulatory framework and the validity of the interference is tested against the requirements for a valid deprivation of property in terms of section 25(1) of the Constitution.[40] Therefore, in cases where legislation of a regulatory nature causes property to vest in the state, the validity would have to be considered in terms of section 25(1). In the absence of clear authority being granted to expropriate, courts will be unable to award compensation in terms of the Expropriation Bill.

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37 This is made clear in the definition of 'expropriation authority' in ch 1 of the Expropriation Bill. An expropriating authority may expropriate property if empowered by 'this Act or any other legislation'.

38 Since the Expropriation Bill gives effect to s 25(2), the principles of subsidiarity dictates that the Expropriation Bill must be relied upon if an expropriation is challenged. S 25(2) can only be relied upon if the Bill's constitutionality is challenged. On subsidiarity, specifically in the constitutional property law context, see Van der Walt (2012) at 35-36.

39 See Van der Sijde *Reconsidering the Relationship between Property and Regulation: A Systemic Constitutional Approach* (LLD thesis 2015 US), who argues that a litigant can only rely on s 25(1) of the Constitution if the deprivation was not caused by administrative action.

40 See in this regard Van der Walt (2011) at 311-323.

There are a few examples in case law where the courts have found that an expropriation did not (or could not) occur, since the relevant state department or minister did not have the necessary authority to expropriate. For instance, in *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*[41] the high court held that the threat of expropriation for which the applicant sought injunction was not real, since the relevant authority did not have the power in terms of the Expropriation Act of 1975 or the Eastern Cape Land Disposal Act[42] to expropriate property. When the case came before the Constitutional Court, the Court noted that without any formal expropriation procedure, the validity of any future threat of expropriation would have to be adjudicated in terms of section 25(1) of the Constitution.[43] Similarly, the minority of the Constitutional Court in *Tshwane City v Link Africa*[44] held that the provisions in the Expropriation Act could not apply to the matter in question, since the legislation, namely section 22(1) of the Electronic Communications Act,[45] does not authorise the expropriation of property. In this regard, the minority held that the impugned section authorised an arbitrary deprivation of property in conflict with section 25(1) of the Constitution.

However, there are other examples where the Constitutional Court specifically did not seriously consider the law of general application requirement (i.e. the statutory authority to expropriate) and had held that the compensation provisions in the Expropriation Act did apply. In these cases, there was no authority in the applicable legislation to expropriate property, but the Court nevertheless indicated that compensation may be awarded in terms of the Expropriation Act. The first case in point is the Constitutional Court's decision in *Arun Property Development (Pty) Ltd v Cape Town City*.[46]

In *Arun*, the issue was whether the local authority was obliged to pay compensation to the appellant since the local authority acquired the land of the appellant through the operation of legislation.[47] The appellant relied on section 28 of the Land Use Planning Ordinance (LUPO)[48] to claim compensation for land that vested in the local authority. Section 28 of LUPO determines that ownership of any land that is required by the local authority upon approval of subdivision for public streets and public places based on the normal need arising from the subdivision, shall vest in the local authority without compensation. The appellant argued that since land in excess of those required for the 'normal need' also vested

41 2009 5 SA 661 (SE) 666-667.
42 7 of 2000.
43 *Offit Enterprises v Coega Development Corporation supra* (CC).
44 2015 6 SA 440 (CC) par 92.
45 36 of 2005 (as amended by the Electronic Communications Amendment Act 37 of 2007 and the Electronic Communications Amendment Act 1 of 2014).
46 2015 2 SA 584 (CC).
47 *Idem* at 1.
48 15 of 1985.

in the local authority upon approval of the subdivision, it had a right to be compensated. The Constitutional Court awarded compensation on the basis that section 28 of LUPO causes an *ex lege* transfer of ownership that 'has the same effect as an expropriation'.[49] The Court, therefore, determined that the local authority is obliged to pay compensation in terms of section 26(1) of the Expropriation Act of 1975.

In this decision, the Constitutional Court did not rigorously interrogate the purpose of the law that caused the vesting of normal and excess land. The purpose of LUPO is to regulate orderly township development; it does not confer the power of expropriation to achieve any particular purpose.[50] Section 28 of LUPO allows for development contributions, a regulatory measure that leads to acquisition of property without compensation.[51] The Court seems to have accepted that since property that is in excess of the normal need vested in the local authority, the owner is entitled to compensation as determined in terms of the Expropriation Act since the section does not exclude compensation for the excess property.[52]

The provisions in the new Expropriation Bill as outlined above calls into question the appropriateness of awarding compensation in *Arun*.[53] In this decision, the particular legislative provision did not confer the power of expropriation on the local authority in order to effect proper town planning. The legislative provision allows for the vesting of property in the local authority in cases where that property is required to provide a particular development with public streets and places. The vesting of property, in this case, is typically regarded as development contributions or exactions, which falls under the state's regulatory powers.[54] The validity of such exactions is therefore determined in terms of section 25(1), which requires a deprivation to be non-arbitrary.[55] It has been argued that the vesting of excess land was contrary to section 25(1), because the Court itself admitted that there is no relationship between the acquisition of the land in excess of the normal need and the purpose of creating public streets and places for the development.[56] The court should, therefore, have determined the validity of the vesting of the excess land in terms of section 25(1), and should not have ordered compensation in terms of the Expropriation Act. In terms of section

49 *Arun supra* at par 73.
50 Slade 'Compensation for what? An analysis of the outcome in *Arun Property Development (Pty) Ltd v Cape Town City*' 2016 *PER* 1-25.
51 Slade 2016 *PER* 12-18; Van der Walt (2011) 290-292, Singer *Introduction to Property* (2005) 736-737. On the interpretation of s 28 of LUPO, see also Marais and Maree 'At the intersection between expropriation law and administrative law: Two critical views on the Constitutional Court's *Arun* judgment' 2016 *PER* 1-54.
52 However, it is questionable whether the section permits the vesting of land in excess of the normal need.
53 See also Slade 2016 *PER* 1-25.
54 Slade 2016 *PER* 1-25 at 12-15; Van der Walt (2011) 290-292.
55 Slade 2016 *PER* 1-25 at 12-15; Van der Walt (2011) 290-292.
56 *Arun supra* par 40. See also Slade 2016 *PER* 15.

25(1), a court should declare an arbitrary deprivation unconstitutional.[57] No provision is made for the payment of compensation in terms of section 25(1).

The second case in which the Constitutional Court applied the compensation provisions in the Expropriation Act without considering whether there is actual authority in legislation that authorises expropriation, is the majority decision in *Link Africa*. In *Link Africa*, the Court considered the constitutional validity of section 22 of the Electronic Communications Act.[58] Section 22(1) of the Act permits a licence holder to 'enter upon any land' for the purposes of constructing, maintaining, altering or removing an electronic communications network. Section 22(2) requires that regard must be had to 'applicable law' when any action is taken in terms of section 22(1). At issue was whether a licence holder has to obtain consent from the relevant landowner before such licence holder performs any of the actions in section 22(1) of the Act. The argument of the respondent was that if consent is not required, any action taken in terms of section 22 will be in conflict with section 25(1) of the Constitution in that it permits an arbitrary deprivation of property.

According to the majority, a licence holder can only perform the actions identified in section 22(1) if the licence holder has regard to the 'applicable law' as required in terms of section 22(2). In terms of the approach adopted by the majority, there are two sources of law that, if applied, would prevent any action taken in terms of section 22(1) from being considered arbitrary. The first is the law of servitudes. The Court argued that section 22 affords the licence holder a public servitude, which must be exercised with due regard to common law principles. In this regard, the holder of the servitude (the licence holder) must exercise the rights in terms of section 22(1) 'respectfully and with due caution'.[59] Therefore, the licence holder would have to consult with the owner of the property before any action is taken in terms of section 22(1).[60] Apart from consulting with the owner regarding the exercise of the competencies in terms of the licence, the court also held that the common law requirement of compensation applies. With reference to *Van Rensburg v Coetzee*[61] the Court stated that in cases where a court grants a way of necessity, the servitude that is created without the landowner's consent is 'treated as a kind of expropriation' that is compensated.[62] The compensation would be to counter the disadvantage suffered by the affected property owner.[63]

57 See the discussion below on remedies.
58 36 of 2005 (as amended by the Electronic Communications Amendment Act 37 of 2007 and the Electronic Communications Amendment Act 1 of 2014).
59 *Link Africa supra* at par 143. See Van der Walt *Servitudes* (2016) 207-208 on the application of the law of servitudes in this decision.
60 *Link Africa supra* at par 154.
61 1979 4 SA 655 (AD).
62 *Link Africa supra* at par 149.
63 *Idem* at par 149.

However, the Court also referred to a second source of law that, if applied, prevents a finding of arbitrariness. The Court referred to section 3 of the Expropriation Act and held that 'the public law protection of compensation for expropriation by juristic persons other than the state found in the Expropriation Act also applies to action taken under section 22(1).'[64] The Court is not correct to apply section 3 of the Expropriation Act, since the section allows the minister of public works to expropriate property on request of a juristic person if that juristic person requires the property for a public purpose but is unable to acquire it on reasonable terms.[65] In this decision there was no request made to the minister to expropriate property for public purposes. In *Link Africa*, the legislation allowed the licence holder to enter upon the property of another for purposes of carrying out various tasks related to the construction and maintenance of the telecommunication networks. While the minister of public works may be called upon to expropriate property in order to allow a third party to fulfil a public purpose, the relevant section of the Electronic Telecommunications Act that was challenged does not authorise the use of expropriation in any form to realise the purpose of construction and maintenance of telecommunication networks. In the event that legislation does not authorise expropriation to achieve a particular public purpose, the compensation provisions of the Expropriation Act should not apply. The minority's view that the Expropriation Act does not apply is in this regard the correct approach, and is supported by the provisions in the Expropriation Bill. The compensation provisions in the Expropriation Bill would not apply in cases where there is no specific authority to expropriate property and where the expropriation procedure in the Bill has not been followed.

The two decisions discussed above shows an emerging tendency on the part of the Constitutional Court to apply the compensation provisions in the Expropriation Act in cases where there is no authority in the legislation to expropriate property. In both *Arun* and *Link Africa* the legislation in question is regulatory in nature. The aim of LUPO is to 'regulate land use planning and to provide for matters incidental thereto.'[66] Similarly, the primary purpose of the Electronic Communications Act[67] is to 'provide for the regulation of electronic communications in the Republic in the public interest'.[68] In terms of the provisions in the Expropriation Bill, as discussed above, the courts will be unable to award compensation in cases where there is no authority in the legislation in question to expropriate. If there is no authority in legislation to compulsorily acquire property through expropriation, any acquisition of property that is caused by or permitted in legislation cannot be attacked by relying on the Expropriation Bill or section 25(2) of the

64 *Idem* at par 157.
65 See further Van der Walt 'Constitutional property law' 2016 *ASSAL* (forthcoming).
66 Long title of the Ordinance.
67 36 of 2005.
68 S 2 of the Act.

Constitution. If legislation, therefore, causes or permits the acquisition of property, but there is no authority to expropriate, the infringement of property should be attacked with reference to section 25(1). This would mean that compensation with reference to the Expropriation Bill cannot be awarded for the compulsory acquisition of property in cases where an expropriation is not specifically authorised by legislation.

4 Implications for the Recognition of Constructive Expropriation

As argued above, the Bill makes it clear that expropriation can only take place if an expropriating authority is specifically empowered in legislation to acquire property through expropriation. Furthermore, the Bill makes the expropriation procedure, as set out in the Bill, mandatory, irrespective of the legislation relied upon to expropriate property. The Expropriation Bill sets out three phases in the expropriation procedure.[69] The first phase relates to the investigation and gathering of information as to the suitability of the property to be expropriated.[70] The second phase relates to serving notice of expropriation on the owner of the property or the holder of an unregistered right in the property.[71] The third phase relates to the notice of expropriation that must be served on the owner or holder of an unregistered right if the expropriating authority decides to expropriate the property.[72] In the notice of expropriation, the expropriating authority must include the amount of compensation that is payable.[73] Chapter 5 (clauses 12-20), deals with compensation for expropriation. Clause 12 of the bill sets out how compensation must be determined. Clause 12(1), which is similar to section 25(3) of the Constitution, states that '[t]he amount of compensation to be paid to an expropriated owner or expropriated holder must be just and equitable reflecting an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder.' The compensation provision in chapter 5 of the Bill would arguably only apply in cases where property has been expropriated, in other words in cases where legislation has been relied upon to expropriate property and if the expropriation procedure in the Bill has been adhered to. This may hold implications for the acceptance of the doctrine of constructive expropriation in South African law.

The acceptance of the doctrine of constructive expropriation has not been decided authoritatively in South African law.[74] In *Steinberg v South*

69 *Supra* n 10 at 21-35.
70 Ch 3 of Bill. See *supra* n 10 at 31-32.
71 Clause 7 of the Bill. See *supra* n 10 at 32-33.
72 Clause 8 of the Bill. See *supra* n 10 at 33-34.
73 Clause 8(3)(g) states that the amount of compensation is either 'the amount of compensation offered by the expropriating authority or agreed to by the expropriating authority and the owner and the holder of an unregistered right'.
74 Van der Walt (2011) 376.

Peninsula Municipality[75] the Supreme Court of Appeal raised the possibility of accepting constructive expropriation, but in the end it gave no definite answer as to whether it should be accepted.[76] Constructive expropriation seems to operate in a so-called 'grey area' between deprivations in section 25(1) and expropriations in section 25(2) of the Constitution.[77] The doctrine of constructive expropriation would therefore only be recognised if the concepts deprivation and expropriation cannot be clearly distinguished from each other.[78]

Mostert argues that the '"doctrine" of constructive expropriation should essentially serve to curb excessive exercise of the state's regulatory powers for the sake of the public interest.'[79] She argues that upon invoking the doctrine of constructive expropriation, a claimant would either be seeking enforcement of the compensation provision in section 25(2) or alternatively the invalidation of the excessive regulation in terms of section 25(1) of the Constitution.[80] Constructive expropriation can, therefore, occur when a court transforms an excessive regulatory measure into an expropriation, thereby triggering the compensation provision in section 25(2) of the Constitution.[81] It is argued that constructive expropriation can only be recognised in jurisdictions where either the formal authority for expropriation or state acquisition of property is not strongly emphasised.[82] With regard to state acquisition, the Constitutional Court has held that '[t]here can be no expropriation in circumstances where deprivation does not result in property being acquired by the state'.[83] It would, therefore, seem as if state acquisition of property is required before a deprivation can be considered an expropriation that must be compensated. However, it would be incorrect to treat any infringement on property that also involves state acquisition of the property concerned as an expropriation. There are various examples where state acquisition of property by the state in terms a regulatory scheme is not treated as expropriation, but

75 2001 4 SA 1243 (SCA).
76 On *Steinberg supra* and constructive expropriation see Van der Walt (2011) 377-381; Badenhorst, Pienaar & Mostert (2006) 554-557.
77 Van der Walt (2011) 347.
78 Mostert 'The distinction between deprivations and expropriations and the future of the 'doctrine' of constructive expropriation in South African law' 2003 *SAJHR* 573 describes this particular reading as a 'disjunctive' reading of s 25(1) and (2).
79 Mostert 2003 *SAJHR* 569.
80 *Idem* at 569.
81 See Mostert 2003 *SAJHR* 569; Bezuidenhout *Compensation for Excessive but otherwise Lawful Regulatory State Action* (LLD thesis 2014 US) 57-58; Van der Walt (2011) 350; Badenhorst, Pienaar & Mostert (2006) 553-554
82 Van der Walt (2011) 354; *supra* n 32 at 58. German law, for instance, require that a law must specifically authorise an expropriation and indicate the basis upon which compensation must be calculated. Therefore, constructive expropriation is not recognised in German law: See Van der Walt (2011) 366; Van der Walt *Constitutional Property Clauses* (1999) 146-150.
83 *Agri SA supra at* par 59.

whose legitimacy is determined with reference to section 25(1) of the Constitution.[84]

Although expropriation involves state acquisition of property, the Bill makes it clear that there should also be express authority for that acquisition in the form of expropriation in the enabling legislation. Therefore, the Bill's emphasis on the statutory authority for an expropriation, as well as making the expropriation procedure set out in the Bill mandatory, may hold implications for the recognition of constructive expropriation in South African law. If it is accepted that constructive expropriation involves payment of compensation in cases where a regulatory measure imposes a severe burden on a particular property owner, the provisions in the Bill potentially makes the recognition of constructive expropriation impossible. In terms of the Bill, an expropriation that requires compensation would only come about when there is specific legislative authority for an expropriation in the legislation and where the expropriation procedure in the Bill has been followed. In cases where there is no legislative authority to expropriate property for a particular purpose, questions of expropriation and compensation do not surface.

Therefore, if regulatory legislation causes property to vest in the state and it is regarded as excessive by a court, the court should, as a first option, invalidate the acquisition or the legislation that causes the acquisition. The court would not be able to award compensation in terms of the Expropriation Bill or section 25(2) of the Constitution because the provisions in the Bill does not allow for that. If, however, the purpose of the law or the acquisition is important, and invalidation of the law would not be the best option,[85] the court would have to develop another remedy that may involve some form of payment. This remedy can include the payment of equalisation payments,[86] reading-in a compensation provision into the legislation that causes the deprivation,[87] or awarding constitutional damages in terms of sections 38 and 172(1)(b) of the 1996 Constitution.[88] Although the discussion about the appropriateness of alternative remedies is outside the scope of this article, it seems clear that the courts would not be able to award compensation for an expropriation of property in cases where the legislation does not specifically authorise the expropriation and where the expropriation procedure in the Bill has not been implemented. The incorporation of the doctrine of constructive expropriation into South African law, therefore, seems unlikely.

84 See the discussion above at 3. See further Van der Walt (2011) 290; 311-312.
85 *Supra* n 32 at 42-52.
86 *Supra* n 32 at 129-209, Van der Walt (2011) 345-346, 367, Badenhorst, Pienaar & Mostert (2006) 557-558.
87 *Supra* n 32 at 239-250, 283.
88 *Supra* n 32 at 250-280, 285-296.

5 Conclusion

In this article, the law of general application requirement in section 25(2) of the Constitution has been considered in light of the applicable provisions in the new Expropriation Bill of 2015. It is argued that the law of general application requirement in section 25(2) is restricted to legislation. The Bill makes it clear, in clause 2(3) and the accompanying definitions in clause 1, that property may only be acquired through expropriation if legislation specifically authorises the use of expropriation to achieve a particular public purpose. In this regard, there is no common law authority of expropriation. Furthermore, the expropriation procedure as set out in the Bill must be followed by all authorities that are granted expropriatory powers in terms of either the Expropriation Bill or other enabling legislation.

The effect of strictly requiring a legislative basis to expropriate property coupled with the mandatory expropriation procedure that must be followed would potentially restrict the courts' ability to award compensation for an apparent expropriation in property disputes. Courts would not be able to award compensation for the acquisition of property in cases where there was no legislation authorising expropriation and where the expropriation procedure as set out in the Bill has not been followed. This conclusion calls to question the Constitutional Court's decision in *Arun*, where the Court awarded compensation for an apparent expropriation, even though the legislation in question did not provide for expropriation and even though no expropriation procedure was adopted. If the Court was correct in treating the issue as a constitutional property issue, then the Court should have decided the case with reference to section 25(1). The Court seems to accept that since acquisition of property occurred, compensation must also follow. However, this view cannot be supported as it blurs the line between valid regulatory state interference with property that may involve acquisition of such property and expropriation. As indicated above, there are instances where valid regulatory state interference with property leads to the acquisition of property, but it is not treated as an expropriation, since expropriation is a unique state power only to be used in clearly circumscribed circumstances, and generally as a matter of last resort.

Strictly requiring a legislative basis for an expropriation also renders the acceptance of the doctrine of constructive expropriation unlikely in South African law. In terms of the doctrine of constructive expropriation, courts transform an excessive regulatory imposition of property into an expropriation that must be compensated, since invalidation of the regulation would not be expedient. However, if a legislative basis authorising expropriation is strictly required, courts will not be able to award compensation in terms of the Expropriation Bill or section 25(2) in cases where it is found that a necessary regulatory measure is excessive, since courts will not be able to decide whether an expropriation has taken place or not.

The Expropriation Bill of 2015, which is set to replace the pre-democratic Expropriation Act of 1975 goes a long way in complying with the constitutional requirements for an expropriation, especially those found in section 25(2) of the Constitution. Although certain aspects of the Bill are called into question,[89] the Bill does provide greater clarity as to what is to be understood as 'law of general application'. Requiring expropriation to be expressly authorised by legislation should be welcomed as it potentially provides greater clarity as to when a particular dispute must be resolved with reference to expropriation law.

89 *Supra* n 10 at 21-35.

Solid organs transplanted from HIV-positive dead donors to HIV-negative recipients: should it be allowed?

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OPSOMMING

Moet dit toegelaat word om MIV-positiewe organe van kadawer skenkers oor te plant in MIV-negatiewe pasiënte?

Amerikaanse wetgewing laat die oorplanting van MIV-positiewe geskente organe toe vir inplanting in MIV-positiewe pasiënte. Suid-Afrika het geen wetgewing rondom die oorplanting van MIV-positiewe geskenkte organe nie. Navorsing is wel gedoen rondom die oorplanting van soliede organe wat deur MIV-positiewe mense geskenk is en toe oorgeplant is in MIV-positiewe mense op die oorplantingswasglys. Sulke oorplantings was suksesvol. Die vraag het dus onstaan of weens die knellende te kort aan geskenkte organe daar oorweeg moet word om MIV-positiewe organe oor te plant in MIV-negatiewe pasiënte. Hierdie opsie het beide regs- en etiese implikasies. Aangesien dit nie algemeen gedoen word nie, behoort dit as navorsing gesien te word en derhalwe moet daar streng aan wetgewing waar mense vir navorsing gebruik word, voldoen word. Om MIV-positiewe organe in MIV-negatiewe ontvangers oor te plant behoort die allerlaaste uitweg te wees om orgaantekorte aan te spreek, ander maniere van orgaanverkryging in ander dele van die wêreld wat nog nie deur Suid-Afrika ondersoek is nie, behoort eers ondersoek te word alvorens HIV-positiewe organe gebruik word.

1 Introduction

The *National Organ Transplant Act (NOTA),* a federal law, was passed in 1984 in the United States of America. In 1988 it was amended to ban organ donations from HIV-positive donors.[1] The Act prohibited the recovery of organs from donors 'infected with the etiologic agent for acquired immune deficiency syndrome.'[2] The wording did not specifically refer to the human immunodeficiency virus (HIV),[3] but it was interpreted as such. During that time the medical community did not know that HIV was the virus that caused the acquired immune deficiency

1 Public Law 100-607, Title IV, s 403(a)(3) §628(2)(C) of *NOTA*.
2 *Ibid*.
3 HIV can lead to acquired immunodeficiency syndrome or AIDS if not treated. The human body cannot get rid of HIV even with treatment. Once you get HIV you have it for life. HIV attacks the body's immune system, specifically the CD4 cells (T cells), which help the immune system fight of infections. Untreated HIV reduces the number of CD4 cells in the body,

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syndrome. In the years to follow there have been significant developments in HIV research and treatment, allowing HIV-positive individuals to live decades longer than originally anticipated.[4] In 2013 the United States Senate passed the *HIV Organ Policy Equality Act*, or *HOPE Act*,[5] which changed it all. From then on it was permitted to transplant solid organs from HIV-positive donors into HIV-positive recipients.[6]

South Africa does not have a similar legislative prohibition on the usage of HIV-positive solid organs.[7] In other words, there is no piece of legislation or regulation stipulating specifically that HIV-positive people cannot donate their organs. It is common practice though, in hospitals where transplants are performed, not to use the organs of an HIV-positive donor.[8]

There is a huge demand for transplantable solid organs in South Africa, and the supply is not nearly enough to fulfil the demand.[9] HIV-positive people were until recently not even admitted on a transplant waiting list due to the possible poor outcome of a transplant. However, highly active antiretroviral therapy has reduced morbidity and mortality of HIV-infected people.[10] Research has also shown that an HIV-positive donated solid organ can be transplanted into an HIV-positive recipient without any detrimental effects.[11] Studies have also shown that HIV-positive patients who required organ transplants fared well after receiving an

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making the person more likely to get other infections. No effective cure currently exists, but with proper medical care, HIV can be controlled. The medicine used to treat HIV is antiretroviral therapy. If taken the right way and daily an infected person can dramatically prolong his or her life. Today someone with HIV which is treated correctly can live nearly as long as someone who does not have HIV. See Centers for Disease Control and Prevention 'About HIV/AIDS' 2016 available from http://www.cdc.gov/hiv/basics/whatishiv.html (accessed 2016-10-07).

4 HIV 2 HIV 'The history of the *National Organ Transplant Act (NOTA)*' 2012 available from http://hiv2hiv.org/history.php (accessed 2016-09-29).

5 Public Law 113-51, November 21, 2013.

6 Christensen 'In a first, HIV-positive donor's kidney, liver given to HIV-positive patients' 2016 available from http://edition.cnn.com/2016/03/30/health/hiv-first-successful-transplant/index.html (accessed 2016-09-14).

7 Solid organs for this article include the kidneys, heart, lungs, liver and pancreas.

8 See the SA Renal Society, SA HIV Clinicians Society, the Department of Health and the SA Transplant Society's 'Guidelines for renal replacement therapy in HIV-infected individuals in South Africa' 2007; Barday *et al* 'Guidelines for renal replacement therapy in HIV-infected individuals in South Africa' 2008 *The Southern African Journal of HIV Medicine at* 34-42.

9 At Groote Schuur Hospital the number of deceased donor referrals has halved in the past 10 years. See Muller *et al* 'Renal transplantation between HIV-positive donors and recipients justified' 2012 *SAMJ*; Organ Donor Foundation 'Statistics' 2016 available from https://www.odf.org.za (accessed 2016-09-27).

10 Muller *et al* 2012 *SAMJ at* 497.

11 *Idem* at 497-498; Muller *et al* 'HIV-positive-to-HIV-positive kidney transplantation – results at 3 to 5 years' 2015 *The New England Journal of Medicine (NEJM)* at 613-620.

organ from another HIV-positive donor.[12] Until 2004, HIV-infected patients were deemed unsuitable for transplantation owing to the dangers of using immunosuppressive anti-rejection drugs in the absence of highly active antiretroviral therapy. This fear has been abated as good outcomes have been confirmed after transplantation in HIV-infected persons receiving highly active antiretroviral therapy combined with anti-rejection drugs.[13]

The question now is whether it should be permissible to transplant a solid organ donated by a HIV-positive donor to a HIV-negative recipient. The question on its own raises legal and ethical concerns but, before the question can be answered, it is important to address the reasons why HIV-positive organs should ever be used for HIV-negative patients. Is it because the donor pool of organs is so limited? Should other ways of persuading more people to become organ donors not be fully exhausted before even thinking of using HIV-positive organs for HIV-negative recipients?

The concerns of using HIV-positive organs for HIV-negative recipients are addressed under three categories namely: consenting adults,[14] children and lastly whether such transplants should not be seen as experimental in nature and therefore research. The last category has its own special legal requirements. Other ways not yet legally permitted in South Africa to get more donated organs are briefly discussed and, in conclusion, it is recommended that HIV-positive solid organs should not be transplanted into HIV-negative recipients, as other ways of procuring organs for transplantation could increase the donor pool more effectively.

2 Transplantations: HIV-Positive to HIV-Negative

2 1 Consenting Adults

The principle that an adult has consented to a risk associated with a medical procedure is embodied in the Latin maxim *volente non fit iniuria* – meaning a willing person is not wronged, or he who consents cannot be injured. The maxim has its origins in Roman and Roman-Dutch law.[15] Currently it could be seen as entrenched in the Constitution of the Republic of South Africa, 1996 (the Constitution) section 12(2) which determines that everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body. In other words any person has a constitutional protected right to decide what should happen to his or her body, yet, the law is clear that

12 *Ibid*.
13 *Supra* n 10 at 497.
14 Adults in this article refer to adults capable of making decisions on their own in other words having legal capacity to act.
15 Neethling & Potgieter *Law of delict* (2010) at 104.

when decisions concerning the body are taken, the decision must be made with the informed consent of the person making the decision.

The constitutional right of deciding what should happen to your body is underlined in the *National Health Act* 61 of 2003 (NHA) in sections 6 – 'User to have full knowledge', 7 – 'Consent of user' and 8 – 'Participation in decisions'. The doctrine of informed consent was also confirmed in the case of In *Castell v De Greef.*[16] The court referring, with approval at page 425H-I of the judgment to the doctoral thesis of Prof Van Oosten on *The doctrine of Informed Consent,* to the following requirements for consent to be valid:

(a) The consenting party must have had knowledge and been aware of the nature and extent of the harm or risk;

(b) The consenting party must have appreciated and understood the nature and extent of the harm and/or risk;

(c) The consenting party must have consented to the harm or assumed risk;

(d) The consent must be comprehensive, that is extend to the entire transaction, inclusive of its consequences.[17]

Carstens and Pearmain[18] also point out with reference to the purpose and function of the doctrine of informed consent, that pivotal to its application, is an understanding of the broader purpose and function of the doctrine which are two-fold: First, to ensure the patient's right to self-determination and freedom of choice; and secondly, to encourage rational decision-making by enabling the patient to weigh and balance the benefits and disadvantages of the proposed intervention, in order to come to an enlightened choice either to undergo or refuse treatment. Thus, according to Carstens and Pearmain, the physician is obliged to:

- Give the patient a general idea in broad terms, and
- in a layperson's language; of the nature, scope, consequences, risks, dangers, complications, benefits, and disadvantages of the procedure as well as the alternatives to the proposed intervention, and the patient's right to refuse treatment.[19]

In the context of using an HIV-positive solid organ for transplantation into an HIV-negative recipient, it means that the receiver of the infected organ should give informed consent as described above, before such an endeavour could be undertaken. As there is currently no legislative ban on transplanting an HIV-positive solid organ into an HIV-negative recipient, it could legally be done after the giving of informed consent. Ethically the question could be asked whether it should be allowed, as such practice would run counter to extensive public health efforts to minimise HIV transmission. It could also put intimate partners of organ

16 *Castell v De Greef* 1994 4 SA 408 (C).
17 *Supra* n 15 at 106-107.
18 Carstens & Pearmain *Foundational Principles of South African Medical Law* (2007).
19 *Idem* at 884.

recipients at risk.[20] It should thus only be done in rare cases where the risks of HIV infection are clearly outweighed by the risks of continuing to wait for a transplant. The need to transplant an HIV-positive solid organ into an HIV-negative recipient may exist when a patient's medical urgency for a transplant is so severe that the risks of waiting include imminent death.[21] It should also only be done with the recipient's informed consent in the broadest terms possible. Meaning the recipient should understand that he or she will probably be HIV-positive after the transplant. Such a recipient should also appreciate the fact that he or she should be on medication for the rest of his or her life and that his or her intimate relatives might also be affected. In other words, the consent should comply with the requirements as quoted in the *Castell* case.

As indicated at the beginning of this section informed consent is an explicit requirement for any medical intervention. It could be argued that a desperate patient whose only other option is death, cannot really give informed consent to receive an infected solid organ. Apart from being desperate to stay alive, albeit by accepting an infected heart or lungs, the risks associated with the procedure can also not be explained in detail to the patient by the physician, as there is still uncertainty as to what the effect of an HIV-positive organ might be on an HIV-negative recipient.

No transplant is ever guaranteed to be a success, and recipients are always warned about the possibility of receiving an infected organ. Because time is of the essence in solid organ transplants, it might happen that an HIV-negative person receives an HIV-positive solid organ accidentally. In this instance, the informed consent was given by the recipient for a transplant while knowing clearly the risks associated with the operation. An unfortunate scenario like this might happen because of the window period for HIV to manifest. During the window period, a person can be infected with HIV and be very infectious but still test HIV-negative.[22] [23] Antibody testing at four weeks can give a good indication of HIV-status in an individual; this is impossible to do in a transplant context. When a patient is certified as brain dead, the question of organ donation might be raised. The blood flow of the deceased is then artificially maintained in order for the organs not to start deteriorating. Tests will also be done to see whether the deceased could be a donor, should the relatives consent to a donation. These tests are not always reliable because of the window period as discussed above.

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20 Mgbako *et al* 'Allowing HIV-positive organ donation: ethical, legal and operational considerations' 2013 *American Journal of Transplantation (AM J Transplant*) 3.

21 *Ibid*.

22 I-base 'What is the window period for an HIV test?' 2016 available from https://i-base.info/guides/testing/what-is-the-window-period (accessed 2016-09-26).

23 Wispelwey *et al* 'The transplantation of solid organs from HIV-positive donors to HIV-negative recipients: ethical implication' 2015 *Journal of Medical Ethics* (*J Med Ethics*) 367 where cases are discussed in which recipients received infected organs which tested negatively.

Transplantations are unique therapeutic interventions with risks of rejection or receiving an infected organ. The supply of donated organs is not nearly enough for people requiring a transplant, especially the patients ranked lower on a transplant list, namely older adults. By using HIV-positive organs, many borderline adults who might never receive a transplant could be helped to live longer, instead of dying because there was no organ available. Seen in this context and the constitutional right to self-determination, as well as informed consent, it seems as if every adult patient should be allowed to decide whether to accept an infected solid organ for transplantation or not. However, even though it seems legally valid to consent to such a transplant, it is not yet practice in South African hospitals to use HIV-positive donated organs for transplantation into HIV-negative recipients. If it was to be done it should, therefore, be seen as experimental and research-based which requires strict legislative compliance as will be indicated later in the article.

2 2 Children

According to the Constitution, a child is a person under the age of 18 years and a child's best interests are of paramount importance in every matter concerning the child.[24] The Constitution must be read with the Children's Act 38 of 2005. According to section 129 of the Children's Act, the parents (guardian) must give consent for medical treatment of a child between 0 and 12 years. After the age of 12 and if the child is sufficiently mature enough and has the mental capacity to understand the benefits and risks of the treatment, he or she must assent to the procedure with the parents or guardian.

In other words, the parents/guardian could decide for a child below the age of 12 to receive an HIV-positive solid organ for transplantation into the HIV-negative child. If the child is above the age of 12, he or she should decide with the parents/guardian whether to accept such an infected organ, if he or she is mature enough to understand the risks. This could be a very difficult decision to make, either on behalf of the child or with the child. As there is no law prohibiting the transplantation from an HIV-positive donor to an HIV-negative recipient, it could happen that parents or guardians could be faced with such a choice between the death of their child or accepting an infected organ. Children are usually prioritised on organ waiting lists and therefore to transplant an HIV-positive organ into an HIV-negative child should happen only in very exceptional cases. As in the case of adults, set out above, because the transplantation of HIV-positive solid organs into HIV-negative children is not happening yet in South African hospitals, it should thus at this moment rather be viewed as research.

24 S 28 of The Constitution of the Republic of South Africa, 1996.

3 Research

3 1 Adults

The Constitution states in section 12(2) that everyone has the right to bodily and psychological integrity, which includes the right not to be subjected to medical or scientific experiments[25] without his or her informed consent. Informed consent has been discussed above and applies therefore in any research scenario as well. The Constitution should be read with the NHA which requires in section 11 – 'health services for experimental or research purposes' that, before treatment, the patient must be informed of the *experimental* or *innovative status* of the intended treatment (own emphasis). In other words, apart from just informing the patient about the risks and benefits of the procedure the physician responsible for the research project must also inform the patient of the innovative status of the treatment, in order for the patient to give informed consent.[26] Carstens and Pearmain[27] submit that in the context of medical research there should be 'full disclosure', meaning that the patient should be informed that the proposed medical intervention involves research. In addition, he or she must be furnished with comprehensive and detailed information about amongst others:

- the precise nature, scope, purpose and duration of the proposed research project;
- is it randomised, a pilot study and/or controlled;
- the consequences of the proposed intervention;
- the anticipated benefits and advantages for the patient and society;
- foreseeable dangers and complications and that participation is voluntary.

They also underline the fact that in a research context the research subject should be given sufficient time to contemplate and decide on participation.[28]

The NHA also gives statutory authority for governance of 'health research' and the necessary research ethics regulatory infrastructure. Section 71 of the NHA specifically addresses research or experimentation with human subjects. Section 73 determines that every organisation/ institution, health agency and health establishment at which health and

25 The term 'experiments' originates from Article 7 of the *International Covenant on Civil and Political Rights* – UN 1996 and echoes the Nuremberg Code; in the constitutional context, it is intended to mean 'research'.

26 Department of Health Republic of South Africa 'Ethics in Health Research: Principles, Processes and Structures – 2015' (hereafter Guidelines 2015) s 3.1.9; *Venter v Roche Products (Pty) Ltd* (A11/2014) (2014) ZAWCHC 157 where informed consent in a research context is discussed. It concerns the payment of trial-related injuries bur also elaborates on informed consent.

27 *Supra* n 18 at 894-895.

28 *Supra* n 18 at 895; Guidelines 2015 s 24 and s 25 'No person should be required to make an immediate decision'.

health-related research involving human participants is conducted, must establish or have access to a registered Human Research Ethics Committee (REC).[29] REC's that review research involving human participants must register with the National Health Research Ethics Council (NHREC).[30] Mandated by section 72 of the NHA, the NHREC compiled guidelines 'Ethics in Health Research: Principles and Structures – 2015'.[31] The 2015 *Guidelines* refers to the ethical principles of beneficence and non-maleficence meaning to maximise benefit and minimise harm as follows: 'Research that involves human participants should seek to improve the human condition. If the research cannot do this, then it is unlikely to be ethical'.[32] Concerning distributive justice (equality), it provides: 'there should be a fair balance of risks and benefits amongst all role-players involved in research, including participants, participating communities and the broader South African society.'[33]

In light of all of the above, to do research by transplanting an HIV-positive solid organ into an HIV-negative recipient, strict requirements will have to be met. There must be full disclosure of the envisaged research before informed consent could be given by the recipient as well as the approval of the research by a REC. This might be problematic as such transplants are not really improving the human condition, albeit that he or she will not die; he or she will have a life-threatening condition that would need constant medication. The REC's might have a problem with this double effect, and they might not approve it due to the fact that it will not necessarily maximise benefit and minimise harm. Even though it could be argued that informed adults, knowing that they will be part of an experiment, could give consent to receive an HIV-positive solid organ, it seems difficult to accept the benefit of living outweighing the harm done to the recipient.

3 2 Children

The NHA in section 71(2) states:

29 Chapter 4 of the Guidelines 2015.
30 S 72 of the NHA.
31 S 1.1.7 of the Guidelines 2015 'The core ethical principles outlines in these guidelines apply to all forms of research that involves living human participants and the use of animals, placing their safety, welfare and interests of both humans and animals as paramount'. S 1.8.3 These Guidelines should be read in conjunction with other guidelines such as the Department of Health (DoH) Guideline for Good Practice in the Conduct of Clinical Trials with Human Participants in South Africa (2006); the Human Sciences Research Council (HSRC) Ethics Guideline; and international guidelines such as the Declaration of Helsinki (2013); the Council for International Organizations of Medical Sciences (CIOMS) International Ethical Guidelines for Biomedical Research involving Human Subjects (2002); the ICH Harmonised Tripartite Guideline: Guideline for Good Clinical Practice E6 (R1) 1996; the ICH Harmonised Tripartite Guideline: Clinical Investigation of Medical Products in the Pediatric Population E11 200.
32 S 2.1 of The Guidelines 2015.
33 S 2.1 of The Guidelines 2015.

> Where research or experimentation is to be conducted on a minor for a therapeutic purpose, the research or experimentation may only be conducted –
>
> (a) if it is in the best interests of the minor;
>
> (b) in such manner and on such conditions as may be prescribed;
>
> (c) with the consent of the parent or guardian of the child; and
>
> (d) if the minor is capable of understanding, with the consent of the minor.

The Guidelines of 2015 determines that '… anyone under the age of 18 years may not choose independently whether to participate in research; a parent or guardian must give permission for the minor to choose'.[34] It goes further to state: '… minors should participate in research only where their participation is indispensable to the research, meaning the research cannot deliver the desired outcomes if adult participants were to be used instead.'[35] The minimum conditions for research involving minors are amongst others that it should pose acceptable risks of harm; not be contrary to the best interests of the child and written permission must be given by a parent/guardian despite the Children's Act 38 of 2005 sections 129 and the Choice on Termination of Pregnancy Act 92 of 1996 s 5(2). If possible, the child must assent in writing as well.[36]

Taking the above into consideration, it could never be in the best interest of the child to infect him or her with HIV, and it thus seems that children should *never* be used in an experiment to find out the effect of transplanting an HIV-positive organ into an HIV-negative recipient.

4 Discussion

There is a small pool of donated solid organs. To discard HIV-positive donated organs could have a huge impact on the organ pool.[37] 'The ever-growing disparity between the number of donated organs and the number of wait-listed patients has created an ethical imperative for transplant clinicians to seek novel methods of expanding transplant access.'[38] But, given the risks associated with transplanting an HIV-positive organ into an HIV-negative recipient, if novel ways are used, it should first take place using only organs from donors with well-controlled HIV and no history of opportunistic infections. Ideally, these infected donors should have a stable, well-characterised HIV infection which existed for a substantial period prior to brain injury. This will help

34 S 3.2.2. of The Guidelines 2015.
35 S 3.2.2.1 of The Guidelines 2015.
36 S 3.2.2.1-3.2.2.5 of The Guidelines 2015.
37 There was a 10-20% HIV seroprevalence in potential donors referred to transplant co-ordinators in Cape Town and Johannesburg. See Muller *et al* 2012 *SAMJ* 498.
38 Mgbako *et al* 2013 *Am J Transplant* 3; S 2.3.1 of The Guidelines 2015 states: 'Research should be relevant and responsive to the needs of the people of South Africa' – If more people could live even with a HIV-positive organ it could be argued that this requirement will be fulfilled.

transplant teams to obtain important information on the donor virus, such as historical genotype patterns and current viral load. These restricted criteria could then be relaxed over time if outcomes among recipients are favourable.[39]

Highly active antiretroviral therapy has also reduced the morbidity and mortality of HIV-infected people. In other words, it is not a death sentence anymore to be HIV-positive. It could thus be argued that you are in fact better off with an infected organ than without an organ facing death. The concern about potential interactions between antiretroviral and immunosuppressive agents is also unnecessary as experienced centres routinely monitor blood levels of these agents and adjust doses accordingly.[40] Doctors at a hospital in France did a study of the drug to drug interaction between antiretroviral medication and immunosuppressive drugs. They came to the conclusion that careful monitoring for interactions between immunosuppressant drugs and anti-HIV medication is required in order to ensure that effective therapy for both HIV and rejection is sustained. A multi-disciplinary team should therefore evaluate and care for the patient. These specialists should include people with expertise in HIV, transplantation and pharmacology.[41] These medication-related issues should also be explained to the prospective infected organ receiver as it should form part of the risks associated with the transplant. The recipient should understand the problems concerning the drugs he or she will have to take post-transplantation in order to give full informed consent.

It can further be argued that to deny patients the right to take on the risks of HIV-infection when a transplant is the only recourse available to stay alive would be a unique limit on autonomy.[42] It should be left to the patient opting for a transplant knowing the solid organ is infected with HIV to determine whether the risks associated with HIV-infection are reasonable in relation of the benefit – to have life.[43]

Currently by way of practice and not because of a legal ban, HIV-positive solid organs are singled out as a severe medical criterion listed as an absolute ban to donation for transplantation. This might even be seen as discrimination against HIV-positive people, as it is an exclusion of the HIV-positive population from the psychological benefits that accrues from knowing one might become a donor after death. This prohibition might also have an impact on the families of HIV-positive individuals given that donor families gain psychological relief that the

39 *Supra* n 20 at 3.
40 Roland *et al* 'Clinical, ethical, and policy issues in the evaluation of the safety and effectiveness of solid organ transplantation in HIV-infected patients' 2003 *Archives of Internal Medicine Journal* (*Arch Intern Med)* 1773-1778.
41 Izzedine *et al* 'Antiretroviral and immunosuppressive drug-drug interactions: An update' 2004 *Kidney International* 532-541.
42 *Supra* n 23 at 369.
43 S 3.1.6 of The Guidelines.

donor's death helped others.[44] But, despite all arguments for the use of HIV-positive solid organs, it should like in the United States of America, only be used for HIV-positive patients. HIV-negative patients should have the right to receive as far as possible, a HIV-negative solid organ, therefore other ways of increasing the donor pool that have not yet been explored in South Africa, should first be exhausted before the transplantation of a HIV-positive organ into a HIV-negative recipient is undertaken.

5 Possible Other Solutions to the Organ Shortage

When one conscientiously considers the benefits and risks associated with transplanting a HIV-positive organ to a HIV-negative recipient, one is faced with the question of whether all other possible solutions have been exhausted that it is necessary to take such desperate measures. The answer to this question is simple; there are other solutions that have not yet been tried and tested in South Africa which could be a possible solution to the acute organ shortage. It must be noted that the foreign systems referred to are not flawless. Yet, the systems are a step in a positive direction to attempt to change the current dire situation. The Constitution encourages us to consult international and foreign law when developing legislation.[45] Hereafter, a short discussion will follow on the approaches that have been successfully followed by other countries:

5 1 Point System: Israel

The acute organ shortage is not a dilemma which is only faced by South Africa but in fact a predicament that a number of countries find themselves in. These other countries have taken the necessary steps to implement new procedures when it comes to organ transplants. In 2010, Israel implemented a new law governing organ donation and allocation namely the *Organ Transplant Act* (2008). The aim of the Act is mainly to increase the number of organ donations by introducing a priority point system.[46] The system motivates individuals to sign donor cards or to consent to the donation of the organs of a first-degree relative. In a nutshell, this system creates a tiered system of priority which includes the following: maximum priority, regular priority and second priority.[47] To obtain maximum priority a candidate has two options; he can either give consent for organ donation from a deceased first degree relative or he donated a kidney, a liver lobe, or a lung lobe in the course of his lifetime to a non-specified recipient.[48] Regular priority is granted to candidates who hold a donor card and have consented to donate their

44 *Supra* n 20 at 3.
45 S 39(1)(b) and (c) of the Constitution.
46 Slabbert & Venter 'Organ procurement in Israel: Lessons for South Africa' (2015) *SAJBL* 44.
47 Quigley Wright & Ravitsky 'Organ donation and priority points in Israel: An ethical analysis' 2012 *Transplantation* 971.
48 *Ibid*.

organs after death.[49] Those candidates who do not hold a donor card themselves, but has a first-degree relative who holds a donor card are granted second priority.[50] If a similar priority system is introduced in South Africa it could serve as a motivation and recognition of potentially registered organ donors. The system could also potentially bring an element of fairness to the organ donation process.

The downside of the Israel system is that medical care should be allocated on the basis of medical need and not on extraneous factors. To prefer those willing to be organ donors could create the perception that organ donation status is related to a person's moral worth and this could begin a trend for other types of moral worth variables in the organ allocation equation.[51]

5 2 Opting In and Routine Referrals: Spain

When a country is experiencing an acute shortage of organs available for transplantation one of the first measures they usually take is to amend their organ procurement system. Internationally, countries either follow an 'opt-in' or 'opt-out' system.[52] Opt-in is an altruistic form of organ donation which focuses on consent from the donor. The donor either consents to a living donation during his lifetime or he consents to donate his organs at his death,[53] whereas, opt-out focuses mainly on deceased donors. According to the opt-out system, every citizen of that specific country is automatically considered an organ donor unless the individual registers his objection to being an organ donor.[54] Spain has benefited immensely from their opt-out system and currently has the highest organ donation rate in the world.[55] Yet, it seems that the Spanish model's success could also be credited to their transplant co-ordination network and routine referral system.[56] The routine referral system is based on a basic principle which requires the treating physician to routinely and timeously refer the possible brain or cardiac death of a potential donor to the transplant co-ordinator.[57] In South Africa, routine referral is not commonly practised due to a number of reasons such as time

49 *Ibid*.
50 *Ibid*.
51 Guttman 'Laypeople's ethical concerns about new Israeli organ transplantation prioritization policy aimed to encourage organ donor registration among the public' 2011 *Journal of Health Politics, Policy and Law* 691-716.
52 Slabbert 'Combat organ trafficking – reward the donor or regulate sales' 2008 *Koers* 77.
53 Shepherd O'Carroll & 'Ferguson 'An international comparison of deceased and living organ donation' 2014 *BMC Medicine* (*BMC Med*) 131.
54 Schicktanz Wiesermann & Wohlke Teaching ethics in organ transplantation and tissue donation (2010) 4.
55 McIntosh 'Organ Donation: is an opt-in or opt-out system better?' 2016 available from www.medicalnewstoday (accessed 2016-12-08).
56 *Ibid*.
57 Dominguez-Gil Murphy & Procaccio 'Ten changes that could improve organ donation in the intensive care unit' 2016 *Intensive Care Medicine* (*Intensive Care Med*) 265.

constraints, lack of education and awareness regarding organ transplants as well as an acute staff shortage. It could be a considered as a first, minute step in the right direction if a routine referral policy is implemented compelling physicians to refer every death to be evaluated for the possibility of organ harvesting. When considering all of the above it can be inferred, the routine referral system and transplant co-ordination networks need to work hand in hand to achieve optimal success.[58]

The Spanish transplant co-ordination network operates at three levels: national, regional and hospital. For purposes of this paper there will be a brief focus only on the hospital level. The Spanish transplant co-ordinators have a unique profile where they facilitate early identification and referral of potentials donors.[59] The hospital level of co-ordination is represented by a network of officially authorised procurement hospitals, this network grew from less than 20 hospitals in 1989, to 118 in 1992, and has continued to increase to 170 hospitals in 2009.[60] Whereas, in South Africa there is an approximate number of 20 transplant co-ordinators which serve both the public and the private sector. Since, South Africa already has a basic transplant co-ordination network and routine referral process in place it would be more sensible to try and expand and improve the network and process before relying on other drastic solutions as discussed above.

5 3 Rewarding the Donor: Singapore

Singapore, similar to other countries has made several changes to their transplant legislation. In 2008, The *Human Organ Transplant Act* (*HOTA*)[61] was amended and some of the major changes included adopting an opt-out organ procurement system and making provision for the reimbursement of living donors.[62] According to section 14(3)(c)(ii) of *HOTA* a donor can be reimbursed for the following costs or expenses; the costs of travel, accommodation, domestic help or child care or loss of earning as far as reasonably or directly attributable to the donor supplying his kidney. Furthermore, section 14(3)(c)(iii) stipulates that the donor will be reimbursed for any short-term or long-term medical care or insurance protection that may be reasonably necessary as a consequence of the donation. The reimbursement approach followed by Singapore could serve as a perfect example for South Africa due to the

58 See Slabbert and Venter 'Routine referrals: A possible solution for transplantation shortages' 2017 *The South African Journal of Bioethics and Law* 15.

59 In South Africa this process is usually done by the junior doctor on duty in the intensive care or trauma unit until a transplant co-ordinator becomes available.

60 Matesanz *et al* 'Spanish experience as a leading country: what kind of measures were taken?' 2011 *Transplant International* 334.

61 *Human Organ Transplant Act* 1987 (hereinafter '*HOTA*').

62 Slabbert & Venter 'Rewarding a living kidney donor: a comparison between South Africa, Singapore and Iran' 2013 *Obiter* 187.

cultural and religious similarities that the countries share. The National Health Act 61 of 2003, already makes preliminary provision for the reimbursement of a living donor in section 60(4)(a), which stipulates that the donor may be reimbursed for the reasonable costs incurred by him to provide a donation.[63] As yet, it has not been decided what will be regarded as reasonable costs and who will take responsibility for these reasonable costs within the South African framework. The legislature could rely on section 14(3)(c)(ii) and (iii) of *HOTA* to assist in the interpretation and development of section 60(4)(a) of the NHA to avoid further uncertainties and to secure more living donors for the future to improve the current organ shortage.

5 4 Paying the Donor: Iran

Iran has by far achieved the greatest success with its radical Iranian model of paid kidney donations which was established in 1988.[64] To summarise the model entails a government-funded, regulated and compensated living, unrelated donor renal transplantation programme. In the early 1980's the model started out as an unregulated international market but eventually the Iranian Ministry of Health became involved with the practice, due to the communities' fear of potential exploitation, manipulation and unfair treatment involved within the process.[65] Before, the implementation of the model, Iran was experiencing a drastic, escalating number of patients with end-stage renal failure.[66] To exacerbate the situation Iran did not have a deceased-donor organ programme or any future plans for such a programme.[67] The Iranian Patients' Kidney Foundation[68] was and continues to be the main key player in the process; they register the statistics and information of both candidates for kidney transplants and willing donors into a database to find a match for each party.[69] Once, the proper consent is obtained the IPKF introduces the newly matched pair to each other, and the pair comes to an agreement on an acceptable price to be paid from the kidney recipient to the potential donor of the kidney. It is indeed an exceptionally sophisticated system which does not leave any gap for an organ broker (agency) or transplant tourism.[70] The Iranian model provides a plethora of benefits such as an eradication of organ trafficking in Iran, an increased amount of living donations and the promotion of autonomy and control over one's body and choices. A disadvantage of the model is the reliance on the poorer population for the supply of

63 *Ibid*.
64 Bagheri 'Compensated kidney donation: an ethical review of the Iranian model' 2006 *Kennedy Institute of Ethics Journal (Kennedy Inst Ethics J)* 270.
65 Potter 'Does the Iranian Model of kidney donation compensation work as an ethical global model' 2015 *Online Journal of Health Ethics* (*OJHE*).
66 *Supra* n 62 at 187.
67 *Ibid*.
68 Hereinafter referred to as IPKF.
69 *Supra* n 65.
70 Rupert 'Paying kidney donors: time to follow Iran?' 2008 *McGill Journal of Medicine* 68.

organs.[71] When compared with the rewarding-the-donor-approach followed by Singapore, it could be argued that rewarding the donor would be a more sensible starting point for South Africa. The Iranian Model could perhaps be perceived by the South African community as a tad ambitious and ahead of its time. Yet, we feel it should even be considered before condoning the transplantation of solid organs from HIV-positive donors to HIV-negative recipients

6 Conclusion

To transplant of solid organs has proven successful in many instances; the only limitation is the lack of donor organs. Many organs are rejected because of the desire to ensure that donated organs are disease free. 'The acute need for effective screening has been heightened by modern immunosuppression, the double-edged sword that has made transplantation so successful but also puts the recipient at an ever-greater risk of infectious disease infection or reactivation.'[72] The consequences of failing to get an organ for transplantation in time are grave and well documented, yet, the burden of HIV on individuals on chronic immunosuppressive medication has been shown to be acceptable.[73]

Legislation does not prohibit the transplantation of an HIV-positive organ into an HIV-negative recipient; this should stay as is. At the end, it is not a legal question but rather an ethical one. In our Constitutional dispensation, with the emphasis on personal autonomy, every adult patient should decide for himself or herself whether to live rather than to die because of the unavailability of an HIV-negative donor organ albeit on lifelong antiretroviral drugs treatment. A transition to such a practice should be thought through and if none of the other options seem to be better, be stepwise, starting with a research group of consenting patients. As Wispelwey *et al.* concludes: 'Given the data on organ availability and the post-transplantation risks that are currently deemed acceptable, there appears to be little reason for the medical community and broader society to reject this opportunity.'[74]

71 *Supra* n 65.
72 *Supra* n 23 at 367.
73 *Supra* n 23 at 369.
74 *Supra* n 23 at 370.

Comparative analysis of *commorientes* – a South African perspective: Part 1

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OPSOMMING

Hedendaagse analise van *Commorientes*

Die gelyktydige afsterwe van 'n familie, of lede van 'n gesin as gevolg van 'n katastrofiese gebeurtenis, het 'n direkte invloed op die aanwysing van begunstigdes en die bereddering van die oorledenes se boedels. Dit blyk dat natuurrampe en ander rampe aan die toeneem is. Die gelyktydige dood van families en verwante kan 'n geskil ontketen oor die verdeling van die boedels (van persone wat gelyktydig gesterf het).

Die term '*commorientes*' word in die vorige deel van hierdie artikel ontleed en die leerstuk word bespreek soos dit gemanifesteer het in die Romeinse siviele reg en die resepsie daarvan in die Romeins-Hollandse reg. Daarteenoor word die leerstuk in die Engelse gemeenregtelike jurisdiksies bespreek en vergelyk met die Romeins gebaseerde siviele reg wat Europese stelsels beïnvloed het. Die verskillende benaderings om 'gelyktydige sterftes' te bewys, word bespreek. Waar die Anglo-Amerikaanse stelsels die volgorde van sterftes reguleer deur wetgewing (siviele kodes) en gebruik maak van sekere vermoedens in die geval van onsekerheid oor die spesifieke volgorde, volg die Engelse gemeenregtelike jurisdiksies die benadering dat die volgorde van dood 'n feitevraag is wat telkens in die lig van die omstandighede wat gelei het tot die dood, bewys en beantwoord moet word. Die volgorde van dood op 'n oorwig van waarskynlikhede te bewys.

In hierdie, die vervolg van bogenoemde artikel, word die historiese aanloop tot hedendaagse benadering en die invloed daarvan op die Suid-Afrikaanse reg onder die loep geneem. Uit enkele Suid-Afrikaans gerapporteerde hofsake oor die onderwerp, blyk dit dat die 'tradisionele gemenereg' gevolg word en dat die volgorde van dood 'n feitevraag is. Wetgewing wat in ander jurisdiksies in die loop van die twintigste eeu geïmplementeer is om voorsiening maak vir 'n vermoedens van gelyktydige afsterftes, word toegelig. Daar word aangetoon dat statutêre ontwikkelings in ander gemeenregtelike jurisdiksies hoofsaaklik ten doel het gesamentlike eiendomsreg (*joint tenacies*) te reguleer. Ander ontwikkelings hou verband met klousules wat vir substitusie voorsiening maak (in geval van vooroorledenes) en 'gelyktydige afsterf' klousules wat deur testateurs gebruik word by die verlyding van testamente. Ten slotte word 'n kritiese evaluering van die verskillende stelsels gedoen en aangetoon dat Suid-Afrika nie 'n behoefte het aan hervorming nie en waarskynlik die billikste en regverdige benadering van 'hy wat beweer moet bewys' volg.

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1 South African Law

Where does South Africa stand in its approach towards simultaneous deaths? This question should be answered against the backdrop of influences by both civil and common law on our legal system.[1] In general the South Africa law of succession reflects the principles of a mixed jurisdiction *par excellence*.[2] Tetley describes it as follows:[3]

> In the new Republic of South Africa, where South African legislation and precedents are lacking, Roman-Dutch and English sources are given approximately equal weight, in a kind of pragmatism. There is a considerable respect for both the institutional writers and more recent authors on Roman-Dutch law (a civilian trait), mixed with a view of judicial precedent as of very great importance (a common-law characteristic).

Thus, where aspects of the Roman-Dutch law principles were initially retained,[4] the English law blended with Roman-Dutch law in the aftermath of Britain's occupation of the Cape in 1806.[5] As far as the 'simultaneous deaths' principle is concerned the position is explained as follows by Corbett and others:[6]

> Unlike Roman law, Roman-Dutch law, English law and the laws of most Continental countries, South African law *has no presumptions as to survivorship*, based on age, where several persons were killed in the same catastrophe, such as (a) shipwreck, an aeroplane crash, a motor vehicle collision.[7]

The reference (in the quote) to 'has no presumptions as to survivorship' is a rejection of the codified Continental law,[8] and the statutory amendment of the English law (after 1925).[9] While South Africa has no statutory provision that deals with 'simultaneous deaths' or 'survivorship' and although the courts would normally revert to the Roman-Dutch law in situations where legislation lacks, it appears that the

1 See Tetley (*ULR*) 597 ff; Lee (1946) 369; Roeleveld 33; Schoeman 108-109; Zimmermann and Visser 3 n 16; Corbett *et al* 5; Boezaart 157; Du Toit 278 ff; De Waal and Schoeman-Malan 12.

2 See Lee (1946) 369; Zimmermann and Visser 3 n 16 and 2-13; see also Thomas 133-155.

3 (*ULR*) 605.

4 Tetley (*ULR*) 591; The British rulers retained Roman-Dutch law, but the law at the Cape came under increased English legal influence as the British pursued an aggressive policy of Anglicisation from 1820 onward. See also Du Toit 278.

5 Tetley (*ULR*) 605.

6 See also Roeleveld 31 ff and Schoeman 108 ff.

7 Own emphasis.

8 See also Williams (*YLR*) 156 who explains that the Cape was untouched by the new French codification, which had been introduced in 1811 in the Netherlands putting an end to the so-called Roman-Dutch law in that country.

9 As seen above, the traditional English law with regard to 'simultaneous deaths' was altered by the 'section 184 presumption' in 1925.

courts have opted to follow judicial precedent rather than the Roman-Dutch law.[10]

The foundation of the South African '*commorientes*' principle is rather vague and is found in case law.[11] There are only five reported cases dealing with '*commorientes*' and they are all dated after 1940. It is not clear when, how, where and if the change from the 'presumption orientated civil law approach' (Roman-Dutch law), to the 'traditional English common law approach' took place. In earlier case law reference is vaguely made to Roman-Dutch law and to common law cases.[12] In *Nepgen v Van Dyk* reference was made to the 'presumption rule' and it was rejected as not being part of South African law.[13] Lansdown JP pointed out:

> … that there was no presumption in our law such as that provided for in the English *Law of Property Act* 1925, s 184, which enacted that if it was uncertain which of two persons survived the other, the younger was deemed to have survived the elder.

The case, however, deals with a situation where *two unrelated persons* died in an accident and one was the beneficiary of the other in a will.[14] In *Ex parte Martienssen,* it was *presumed* that a mother and her daughter died simultaneously by drowning when their lifeboat capsized.[15] The sequence of death could not be proved. The court came to the conclusion that as it would make no difference what the order of death is, they have consequently died together.

The case *Ex parte Graham,* is regarded as the leading case in South Africa on '*commorientes*'. The court had to deal with the simultaneous deaths (or not) of a mother and her son and the interpretation of the word 'predeceased' in the will.[16] The court reflected on previous case law

10 The common law as it was applied in England before 1925. See also Murray 365; Corbett *et al* 5; Boezaart 157; De Waal and Schoeman-Malan 12 and Du Toit 278 ff and Folkerth (*OSLJ*) 684-5.

11 *Nepgen v Van Dyk* 1940 EDL 123; *Ex parte Martienssen* 1944 CPD 139; *Ex parte Bagshaw* 1942 (2) PH F77; *Ex parte Chodos*; *Ex parte Graham* 1963 4 SA 145 (D). Recently another case was withdrawn: *Smith v Pretorius* [2012] ZAFSHC 161.

12 See *Underwood v Wing* and *Wing v Angrave*.

13 The court was referred to Voet 36 1 15 and the English common law case *Wing v Angrave*. See also Roeleveld 36.

14 Own emphasis. There is no presumption of survivorship, where the parties are not related so as to be able to take from each other on intestacy.

15 'Presume' does not refer to 'a presumption' but to 'an assumption' in this context. See Murray 365. The court was referred to *D* 24 5 23 and *D* 34 5 10. See Roeleveld 36-37. Voet 34 5 3, refers to certain presumptions, after he made the statement that, generally speaking, where people die together in a single catastrophe, no one is deemed to have survived another, unless such is proved.

16 They passed in a plane crash.

on this topic and rejected any 'presumptions' with reference to *Nepgen's* case by stating as follows:[17]

> It seems to me that the approach adopted in *Nepgen v van Dyk* is the proper one. There the Court examined the facts to see if there was any evidence to support a conclusion that the deaths were not simultaneous. In the present case, we are concerned with the crash of an aircraft and the evidence is that the aircraft crashed in a swamp and in any event, there is no ground for believing that death would have overtaken them in the usual course of mortality.

The court came to the conclusion that the presumptions have not been followed in previous case law and found that even *if* the presumptions in fact did form part of the Roman-Dutch Law, that '*it [is] not necessary or desirable to slavishly follow such completely artificial reasoning in modern times'*.[18] The court emphasises that the general rule is that there is no presumption (to prove the order of death).[19]

The South African position can subsequently be explained as an uncodified system, which revert to the traditional English common law. Whenever the order of death of related people is in dispute, the sequence of death remains a factual question that must be established by evidence.[20] It seems from case law that the South African courts had failed to accurately investigate the differences between the civil law and common law jurisdictions.[21]

At the time when these cases were heard in the 1940's the Roman-Dutch law had long been replaced by the *Dutch Civil Code* in The Netherlands and the 'traditional common law' had been replaced in England by section 184 of the *Law of Property Act*. In *Boberg's Law of Persons and Family*[22] it is explained that although there is in principle no presumption of death, there is one in practise.[23] The use of words 'presume, incline and assume' sometimes contributes to ambiguity in the common law as it is understood (confused) by some as if there in fact is *a presumption of simultaneous deaths.* It seems as if the principle of equity could have counteracted and influenced the operation of the

17 (n 28). Voet 36 1 16. See Folkerth (*OSLJ*) 684 explains that the no presumption rule requires proof to show survival.
18 Own emphasis.
19 Roeleveld 45.
20 The traditional common law approach as followed in *Underwood v Wing*; *Wing v Angrave*; *Matter of Burza*; *Gray v Sawyer*; *Matter of Estate of Hughes* 735 SW 2d 787 (Missouri Court of Appeals 1987).
21 For common law jurisdictions see also Hunter 928; Sherman 42; Von Madai 373; Benas and O K F (*MLR*) 88-90; Folkerth (*OSLJ*) 684 and Nótári and Papp (*FJ*) 12.
22 Van Heerden *et al Boberg's Law of Persons and Family* (1999) 56. Other similar general 'presumptions of death' are also rejected in South Africa. See De Bruin 'Presumption of Death – It's Legal Consequences' 1978 *SALJ* 577; Council of Europe 'Principles Concerning Missing Persons and the Presumption of Death' 2010 *Council of Europe Publications* 1-24.
23 56. See Tracy and Adams (MLR) 801 ff; De Bruin 577; De Beer 8; *LRCSA* 8-9; Corbett *et al* 5; Boezaart 157; Council of Europe 1-24.

common-law rules in cases dealing with '*commorientes*'. Roeleveld explains that all systems have the purpose of serving equity and achieving certainty.[24]

2 Critical Analysis of Civil Law and Common Law Approaches

2 1 Introduction

As seen above the difference in the approaches in the civil and common law jurisdictions towards 'simultaneous deaths' sometimes result in ambiguity. Furthermore, survival by seconds by one victim, can change the distribution of the estates. Tetley explains the underlining differences in the methodologies that the civil law and common law follow:[25]

> Civil law codes and statutes are concise (*le style français*) while common law statutes are precise (*le style anglais*). Indeed, civil law statutes provide no definitions, and state principles in broad, general phrases. Common law statutes, on the other hand, provide detailed definitions, and each specific rule sets out lengthy enumerations of specific applications or exceptions, preceded by a catch-all phrase and followed by a demurrer such as 'notwithstanding the generality of the foregoing'.[26]

These dissimilarities, between civil law and common law, are evidently reflected in the '*commorientes*' doctrine.[27]

However, regardless of whether the civil law or common law approach is applied, the first step in determining the order of deaths is, to establish whether the one victim survived the other. The party who claims to benefit from the 'first dying *commorient*' bears the burden to prove survival.[28] In all jurisdictions, whenever the order of death *can be established*, any *uncertainty* falls away and the division of the estates will follow the sequence of deaths.[29] Only when it is not possible (uncertainty surrounds the deaths) to prove the order of deaths and establish same, the different approaches (between the civil law and common law)

24 49.
25 Tetley (*ULR*) 613.
26 615. Common law statutes have to be read against a case law background, while civil law codes and statutes are the primary source of law.
27 See also Neuhaus 'Legal Certainty versus Equity in the Conflict of Laws' 1963 *Duke Law* 795 ff; Zander *The Law-Making Process* (2015) 132-139 explains the differences between the French law and the English law.
28 See Folkerth (*OSLJ*) 684; Tracy and Adams (*MLR*) 804 ff; Mee (*NILQ*) 178 ff for a detailed discussion of the burden of proof. See also Orji (*CPL*) who explains that this is also the position when s 184 of the *Property Act* is applied. In New Zealand, the burden of proof is one of beyond reasonable doubt: See s 3(1) *Simultaneous Deaths Act* 1958.
29 Own emphasis. See also Gallanis 198.

become pertinent. Kiernan remarks as follows on disputes that might arise on the subject of simultaneous deaths:[30]

> More importantly for some people is the effect on inheritance provisions either under the will or subject to the intestacy rules. This can result in *a fine analysis of the time of death* to see if there is any indication that one deceased may in fact have died later – no matter how short a time is involved – which might impact on the way property passes under a will or intestacy.[31]

As seen above, the differences between the approaches towards '*commorientes*', in, (i) the traditional common law, (ii) the changed (or altered) common law and (iii) the civil law, become pertinent when the sequence of death still remains 'uncertain' and cannot be proved.[32] In situations of *uncertainty* the civil law 'presumptions' will serve as evidence (replace proof) of the sequence of death, while the common law will not make use of any presumptions and will assume that the departed had died simultaneously.[33]

2 2 Criticism Against Civil and Common Law Approaches

Criticism on the topic of 'simultaneous deaths' is comprehensive as it cuts through all approaches toward '*commorientes*'. Disapproval and justification involve thorough scrutinising of all approaches *i.e.* the civil law, the English traditional common law and the amended statutory directives.[34] To explain the extent of criticism the apposite quotation by Middleton JA in the 1925 case *Bennett v Peattie* can be used as a point of departure:[35]

> The rules of the Common Law *and the rules* of the Civil Law upon the subject of survivorship are *alike illogical and unsatisfactory.* Where upon the death of two the right depends upon survivorship, and the whole fund must go to one or the other according to the determination as a question of fact that one person killed in a common accident drew his last breath a moment after the other expired, the difficulty of the inquiry and the unsatisfactory nature of the result are obvious.[36]

30 'Simultaneous Deaths' http://clarkekiernan.com/contentious-probate/simultaneous-deaths (accessed 10-09-2016). See also Ryan (*WLLR*) 1517-1518 and Capron and Kass (*UPLR*) 89-90.

31 Own emphasis.

32 See *Underwood v Wing*; *Olson v Estate of Rustad*. See also Conway and Bertsche (*FLR*) 18 ff; Haneman and Booth (*NLR*) 451-471. For SA law see Roeleveld 33 ff; Schoeman 111; for Northern Ireland see Mee (*NILQ*) 171 ff; *NILC*; Nótári and Papp (*FJ*) 12 ff for the civil law in general and Lazarus (*LLR*) 363 for Louisiana.

33 Own emphasis.

34 *LRCSA* (1985) 3-37.

35 See also Tracy and Adam (*MLR*) 807.

36 Own emphasis. See Tracy and Adams (*MLR*) 806; *LRCSA* (1985) 9-11; Pawlowski and Brown (*PLR*) 122-134; Nathan (*TLR*) 40; Gallanis 189; Yntema (*Cor LR*) 77 ff and Re (*FLR*) 482.

2 2 1 Critique Against Roman Law Presumptions

The Roman law presumptions have been criticised as illogical rules, based on inappropriate distinctions between deceased victims based on age and gender.[37] Wigmore dismisses the civil law presumptions which reflect (according to him) 'a rule of continental sort' as 'grotesque false to human nature' and suggests that '[s]ome Monkish jurist of the middle Ages must have been its composer'.[38] Nathan argues more persuasively that the civil law does not narrate modern times and has some imbalances and 'lacks common sense'. He states:[39]

> Technological developments have left the Roman Empire behind, and with it the conditions that gave rise to such presumptions. Neither the Romans nor the redactors of the French Civil Code had any inkling of the tremendous developments in the fields of transportation that would come about in the nineteenth and twentieth centuries.

The Roman law was also labelled as complicated, and 'not entirely perspicuous and decisive'.[40] Conway and Bertsche criticises the Roman presumptions as follows:[41]

> The choice of age as the determining factor does have the merit that such fact is easily and definitely established, more so than any of the other circumstantial evidence (aside from sex) usually available in cases of contemporaneous death. Utilization of the less objective circumstances of strength or health as factors determinative of survivorship would necessitate comparisons and a consideration of conflicting inferences which the enactment of such a statutory presumption seeks to avoid.

From a present-day perspective, the Roman law has little influence as most jurisdictions have moved on to a more general presumption based on 'simultaneous death' or the 'no survivorship principle'. In modern time, only a few jurisdictions follow the Roman law principles as moderately reflected in section 184 of the English *Land Property Act*.[42] It can be argued that the Roman presumptions have lost their impact as even the *Napoleonic code* was altered in 2001.

2 2 2 Critique Against Traditional Common Law

Although the common law's 'no presumption' principle has been described as the most honest of all three the approaches, it was also

37 *LRCBC* (1982) 7; Nótári and Papp (*FJ*) 12.
38 *Evidence in Trails at Common Law* (1981) 620. This remark might be too harsh.
39 (*TLR*) 33 ff. He refers to the position in Louisiana and compare it with the rest of America.
40 Derrett (*UCR*) 66 argues that it 'left a good deal of room for judicial equity, which hampers the descendants of the jurists who do not share their atmosphere or their skill'. See also Hubback 149-150.
41 (*FLR*) 19-20.
42 See Folkerth (*OSLJ*) 684. Guernsey released a document Project *De LOI* 'The Inheritance (Guernsey) Law' 2011 *Commorientes and Survivorship Part IV* where the order of seniority was reintroduced.

subjected to criticism.[43] Factual differences led to different scenarios, depending on the actualities concerning the circumstances of the death.[44]

2 2 2 1 Burden of Proof

On the one hand criticism includes critique on the 'burden of proof' as it was adopted in the traditional common law.[45] Several scholars have condemned the common law as, according to them, it results in an unacceptable state of affairs leaving beneficiaries (who want to prove survivorship) in the unenviable position where they have to prove which person died first or who had survived.[46] De Beer warns that:[47]

> The use of experts in testimony is a very expensive procedure and will only become relevant once a matter has been set down for trial. The whole procedure is time consuming, expensive and, in essence, squandering our courts' time.

It has also been argued that the advances made in medical technology, which allows life to be prolonged artificially in ways that were not possible in earlier historical periods, are contributing to problems with proof in the common-law jurisdictions.[48]

2 2 2 2 Interpretation of Wills

The strict interpretation of wills, phrases such as 'if the one predeceased the other', or interrelated clauses such as 'if we die simultaneously' or 'if she dies before I do' have not been even-handed, especially in situations where 'uncertainty' has arisen as to who died first.[49] Case law such as *Underwood v Wing* and *Wing v Angrave* confirmed the 'no presumption' principle but unfortunately interpreted the words in the wills, which made provision for the one spouse to 'die in my lifetime', very literally.[50] Since the beneficiary could not prove that the departed had died 'the one before the other', the claim by the nominated substitute beneficiary was rejected.[51] The interpretation by the courts of such clauses in wills,

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43 In *Bennett v Peattie* (Ontario case) the common law on survivorship was even regarded as illogical and unsatisfactory. See also Conway and Bertsche (*FLR*) 17-18; *LRCSA* (1985) 3-37.

44 See Roeleveld 49 for circumstances that can contribute to the judgement.

45 Casey *et al* 26-27; Nathan (*TLR*) 42.

46 See also De Colyar (*JSCL*) 255-277; Mee (*NILQ*) 177; Cohen (*LLJ*); Phillips (*Cal LR)*; Gallanis 189-200; *LRCSA* (1985) 19.

47 10.

48 Gallanis 199; Haneman and Booth (*NLR*) 451: 'Rapid mass transportation, natural disasters, and multiple homicides are common situations in which a decedent and his heir apparent will perish without clear evidence as to the order of death.'

49 Compare Mee (*NILQ*) 177 and his discussion of *Re Kennedy*; Phillips (*Cal LR)*; Pawlowski and Brown (*PLR*) 122 ff and Zander 42.

50 See also De Colyar (*JSCL*) 255-277; Mee (*NILQ*) 173 for Northern Ireland and Phillips (*Cal LR)* for the USA. See also Cohen (*LLJ*); Gallanis 189-200 and *LRCSA* (1985) 19.

where provision is made for eventualities, therefore became contentious and once again led to statutory interventions.[52]

2 2 2 3 Terminology

Contributing to vagueness regarding the common-law principle is the situation that whenever the order of death could not be established (there is uncertainty), the courts rejected the application of presumptions but use terminology such as 'an inference can be made from the fact that they have died together' or 'it is inclined/assumed/presumed that the victims have died simultaneously'.[53] The use of these phrases is confusing and it has been explained as follows in the *Harvard Law Review*: [54]

> The common-law technique is most readily applicable to the situation where two persons, one the heir of the other, perish in a common disaster leaving no evidence of even momentary survival. *Disavowing the creation of any presumptions, the courts yet 'assume' simultaneous death and place the burden of proof on that party whose claim of title depends on his proving survivorship.* Where no will is involved, the deceased heir is eliminated, and those who claim through him lose because of their inability to bear the burden of proving his survivorship. The property passes to the other heirs of the intestate, who need prove only his death and their own survival.[55]

2 3 Criticism of Statutory Intervention

As seen above, the statutory intervention in certain jurisdictions was a direct result of the difficulties that have arisen with the onus of proof, joint tenancies and testamentary clauses.[56] Unfortunately, the reform in England grasps back to the Roman 'presumptions' as it provides for the younger victim to have survived the older victim. It is argued that the very purpose of enacting legislation is to reach some conclusion, which inevitably will be more or less arbitrary, regarding the distribution of property.[57] The English provisions differ from their American equivalents which rely more on guidance from continental law.

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51 See Orji (*CPL*) 503-504. See the cases *Underwood v Wing*; *Tucker v Shreveport Transit Management Inc* 226 F 3d 394 CA, 5th Circuit 2000; *Greyling v Greyling* 1978 2 SA 114 (T). See Murray 364 for a detailed discussion of the latter case where it was argued that if the one spouse is nominated as a beneficiary and survives the first dying (even for a very short time) the rights to the estate of the first dying had vested in the survivor and should be channelled through the 'initial survivor' to his or her heirs and not to the first dying person's heirs.

52 As seen above. See Tracy and Adams (*MLR*) 806; *LRCSA* (1985) 9-11; Pawlowski and Brown (*PLR*) 122-134; Nathan (*TLR*) 40; Gallanis 189; Yntema (*Cor LR*) 77 ff; Re (*FLR*) 482.

53 Own emphasis. See also Tracy and Adams (MLR) 806; Schoeman 181; Van Heerden *et al* 56; De Beer 8 and *LRCSA* (1985) 8-9.

54 See 343.

55 Own emphasis.

56 Folkerth (*OSLJ*) 684; See *Leete v Sherman* where it is explained that legislation has its origin in the problematic administration of the common-law rule. England and Wales already adopted legislation in the early 20th century.

2 3 1 English Law of Property Act

Section 184 of the English *Law of Property Act* was soon widely condemned as it does not satisfy 'all circumstances' and assumingly lacks an actual basis in human experience.[58] It has been described as 'an arbitrary solution' to the problem of determining the order of death.[59] Allegedly the scope of the presumption is too wide, as it applies for 'all purposes effecting the title to property' (including property held in joint tenancy),[60] and it has some restrictions as it only applies to 'cases of uncertainty' and is 'subject to a court order'.[61] Both these phrases have been criticised. Lord Walker makes the following barefaced remarks in this regard:[62]

> But I must come back to section 184. What is the significance of 'subject to any order of the court'? Does it give the court a discretion to displace the default rule if it would be fairer, or more sensible, to do so? That suggestion was firmly rejected in Re Lindop, so establishing the cold-blooded nature of the presumption. Bennett J also decided, following Lord Campbell and taking what may seem rather a Lincoln's Inn approach, that since time is infinitely divisible, he could not hold that a husband and wife died simultaneously in a wartime air-raid even though the house where they were in bed was completely destroyed by a direct hit.'

However, Gallanis has argued that a statutory presumption (along the lines of section 184) might have a distinct advantage over the common law position '… because the common law, by leaving the possible sequence of deaths open to argument and practically invites litigation'.[63]

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57 Conway and Bertsche (*FLR*) 19-20; Benas and O K F (*MLR*) 88; see Tate 'Inheritance and Presumptions' 2010-07-01 *Trusts and Estates Jotwell* states: 'Since the mid-twentieth century, widely adopted uniform acts have attempted to solve the puzzle of simultaneous death by establishing a presumption of survivorship. Yet this was not always the case'. See also Zander 132-139 and 142. De Beer 10 and Walker (*SLSC*) 5 ff.

58 *HLR* 346-347; Walker (*SLSC*) 5; Zander 132-139 and 142.

59 Similar presumption applied in Louisiana and was also criticise. See Haneman and Booth (*NLR*) 451-471. See also *LRC* 70-2003 Ch 3; *LRCSA* (1985) 11 also repudiates s 184. Mee (*NILQ*) 171.

60 See also Walker (*SLSC*) 3: 'That is no doubt why Parliament changed the law, in 1952, for the limited purpose of intestate succession between espouses. Otherwise the combined wealth of a young couple who died together on their honeymoon would tend to end up with the family of whichever happened to be the younger.' See also Kerridge 343 and Sawyer and Spero 156.

61 *Re Lindop, Lee-Barber v Reynolds*; *Re Kennedy*; Phillips (*Cal LR)*; Pawlowski and Brown (*PLR*) 122 *ff*; Mee (*NILQ*) 177 ff; Orji (*CPL*) 506 and Zander 42; Casey *et al* 26-27; Nathan (*TLR*) 40; Nótári and Papp (*FJ*) 19.

62 3. See also *Victoria Law Reform Commission* 'Amendment to Outdated Provisions' Ch 6 and *Victoria Law Institute* § 44. 'Section 184 should be amended to omit the words "subject to any order of the Court" and to substitute the words 'unless a court otherwise orders.'

63 189 ff stating that a presumption gives a firm starting point and can be displaced only by positive evidence. See also Hubback 150; Wislizenus (*StLR*) 1 (argues in favour of civil law presumptions).

From a South African perspective, De Beer describes the presumption in section 184 essentially as one of convenience, with no firm basis in probability.[64]

2 3 2 Other jurisdictions

Despite legislation in most jurisdictions which makes provision for situations (including joint tenancies) where uncertainty surrounds the order of deaths of people, some additional problems with the application of 'the simultaneous deaths' doctrine have surfaced.[65] These problems stem from certain testamentary clauses that one finds regularly in wills of spouses or relatives. On the one hand, testators often make provision for 'gift overs' if it is foreseen that the instituted beneficiary might predecease the testator.[66] On the other hand, testators often anticipate possible *simultaneous deaths* in common disasters or catastrophes.[67] Gorgopa explains the motivation for people to make provision in their wills for such eventualities: [68]

> It is common for spouses to make mutual or reciprocal wills by which each spouse makes provision for the other and then specifies a scheme of distribution that is essentially identical in both wills, with the intent that the scheme of distribution will operate only once on [sic] the last of them to die.

Both of these types of testamentary clauses, dealing with either successive or simultaneous deaths, have often come into consideration not only by the courts but also by legislation.[69] The interpretation of such clauses indeed prove to be problematic, as the courts tend to interpret the word 'predeceased' and related phrases such as 'simultaneous death', or 'die before me' strictly and literally.[70] Derrett warns against dispositions drafted to provide for the contingency of two persons dying 'simultaneously' or 'contemporaneously':[71]

> This is a mistake, for if it is not possible to prove that the death was actually simultaneous, etc., as is usual, the condition cannot operate. In one of the more interesting cases on the subject of *commorientes* arising in the last half-century this was pointed out strikingly.

64 10.
65 See the discussion above in paras
66 Kimbrough (*W&M L Rev*) 269; *LRCSA* (1985) 6; *Underwood v Wing* 664-665; *Wing v Angrave*.
67 Murray 363-364; Gorgopa; Orji (*CPL*) 503-504.
68 See *Underwood*-case; *Wing v Angrave*; *Re Rowland*: *Smith v Russell*; *Estate Greenacre v Brett* 1956 (4) SA 291 (N); *Greyling v Greyling*; *Gray v Sawyer*; *White v Taylor* 286 South Western 2d 925 (Texas 1956); *Estate of Rowley* Cal App 2d 324 332-335 (1967); *In re Estate of Schmidt*; *Re Fair*; *Collins v Becnel*.
69 In this regard reform was considered in America (UPC), Canada, Australia and New Zealand. See the *LRCBC* (1982), which in turn drew on the *USDA*.
70 See *Underwood*-case; *Wing v Angrave*; *Re Rowland*: *Smith v Russell*; *Estate Greenacre v Brett*; Murray 363-364; Gorgopa; Orji (*CPL*) 503-504.
71 (*UCR*) 59.

If it has been found *that the couple did not die momentarily together*,[72] the alternative provision fails to take effect, because the sequence of deaths did not occur (precisely) as stipulated in the wills.[73] This could result in a situation where potential beneficiaries find that they were treated differently based on the length of the interval between the deaths of testators.

In this regard it has been advocated that when the courts interpret testamentary clauses they should take into account the testator intention, for property to pass to a person and through a person who survives him,[74] even only by a split second.[75] In this regard Nathan makes the following submission:[76]

> A provision in the will for a gift over, however, reveals the inadequacies of the common-law rule, for a strict adherence to it defeats such gifts by making fatal the inability of the beneficiary under the gift over to prove the non-survival of the primary legatee, which is a condition precedent to the vesting of his own interest. This is the result reached in the English cases even where the two unfortunate testators had, after leaving their property each to the other, made identical provisions, conditioned upon the non-survival of such other, for a gift over to a third person.

Several jurisdictions revert to profound statutory measures.[77] In most common-law jurisdictions attempts to resolve these matters include adopting legislation to regulate situations where there is no sufficient evidence to substantiate the sequence of deaths (also known as delay clauses).[78] Folkerth explains that the intent and effect of legislation has been that the property which belonged to the deceased prior to his death,

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72 Corbett *et al* 547-548; Murray 363; Orji (*CPL*) 502.

73 See Gorgopa; *Estate Greenacre v Brett*; *In re Pringle*; *Re Rowland: Smith v Russell*. The court held that the spouses' deaths had 'coincided' within the terms of their wills, since it was quite possible that one had survived the other by some period of time. The bequests in the wills were therefore of no effect.

74 Haneman and Booth (*NLR*) 464: 'The stated purpose for this revision was to distribute property in a 'manner most consistent with the decedent's intentions and to avoid litigation over the precise time of death in common accident cases'.' See also *LRCSA* (1985) 3.

75 39. See also Zadnik 74; Saslaw 60; *HLR* 345 and Gallanis 197.

76 (*TLR*) 40.

77 Phillips (*Cal LR)*; Provence 101. The testator(s) can provide in estate planning documents (such as a will) for a longer survivorship period, such as 30 days. Coffey and Long 1315 explains: 'A major change under the Succession Act is s 35 which states that if a gift is made to a person who dies within 30 days after the will-maker's death, the will is to take effect as if the person died immediately before the will-maker. It is however possible to exclude that provision from your will or to lengthen or shorten the 30-day period.' See also *LRCBC* (1982) 1 ff.

78 The first anti-lapse statute was enacted in Massachusetts in 1783. The English *Statute of Wills* of 1837 contained an anti-lapse provision that limited its coverage to devises to children or other issue of the testator.

shall descend to his respective heirs at law.[79] If the survivor does not live beyond the death of the other victim for at least the time stipulated in the applicable statute, then neither victim is regarded as a survivor, and they are considered to have died simultaneously.[80] If the survivor does actually live for at least the stipulated time, following the death of the other, it is assumed that he or she survived the first deceased.[81] Kimbrough clarifies the anti-lapse statutes:[82]

> Beginning in the late eighteenth century, legislatures in the United States and in Great Britain began to counter this harsh result by crafting statutes that would protect certain devises from lapsing. These statutes, commonly referred to as 'antilapse' statutes, provide that when a devisee within a particular class predeceases the testator, the devise does not fall into the residue or pass to the testator's heirs by intestacy but descends to the issue of the predeceased devisee.

South Africa has no legislation that makes provision for a period of delay before a survivor can inherit. It remains a factual question to establish the sequence of death and then to interpret the will of the deceased to establish the meaning of the 'words' they used.[83] When the court had to decide on a similar clause in the South Africa case *Greyling v Greyling,* it held that the words 'to die simultaneously' mean the death of the testators as the result of a single incident, irrespective of the fact that there was a difference in the exact time at which they each died.[84] As there are no presumptions in South African law regarding the order of deaths the court found that the words in the wills refer to a single occurrence. Murray explains the South African position on such clauses as follows:[85]

> Because of difficulties of determining whether the deaths are 'simultaneous' – so as to bring into play the alternative provisions for devolution of the bequest

79 Kimbrough (*W&M L Rev*) explains it as follows 275: 'The position is materially different if given the tragic accident where both parties die and are married but both are intestate i.e. they have not made a Will at the date of their death. The rule that the elder survives the younger is not imposed. If it is not possible given these circumstances to establish who survived, then neither spouse will take an interest in the estate of the other i.e. the husband's property on death will fall to go to his children or other relatives and the spouse will likewise devolve her property to her children'.

80 Orji (*CPL*) 502; Sawyer and Spero 27. See *LRCBC* (1982) 7 where reference is made to *Re Warwicker*, a 1936 Ontario decision. See also *In re Pringle.*

81 *Estate of Villwock* 142 Wis 2d 144 (1987) 418 NW 2d 1 (Wisconsin Court of Appeals); *Re Kennedy*; *Tucker v Shreveport Transit Management Inc*; *Ex parte Martienssen*; *Hickman v Peacey*; *In re Pringle*; *Ex parte Chodos.*

82 (*W&M L Rev*) 269.

83 S 2C(2) of the Wills Act makes provision for a descendant of the testator: '… whether as a member of a class or otherwise, would have been entitled to a benefit in terms of the provisions of a will *if he had been alive at the time of death of the testator* … the descendants of that descendant shall … *per stirpes* be entitled to the benefit, unless the context of the will otherwise indicates'.

84 Murray 364 ff. *Estate Greenacre v Brett* was criticised by Murray. For the same approach see *Underwood v Wing.*

85 365.

> – a frequently – used form of will specifies some period of time for survivorship or non-survivorship, for example that the alternative provision is to take effect should the testator and the named beneficiary either die at the same time, or within, say, one month of each other.

It has been argued that the approach adopted in *Greyling's* case is seemingly more acceptable than the strict 30 days or 120-hours approach that can fail to give effect to the testator's or testators' wishes.[86] However, the potential for possible unintended consequences can be significantly reduced or eliminated through careful planning and the implementation of a comprehensive estate plan.[87]

3 Conclusion

If all the criticism is taken note of it becomes understandable why the '*commorientes*' doctrine remains contentious.[88] From the discussion above, it becomes clear that the foundation and historical differences between civil law and common law principles are mirrored in the '*commorientes*' doctrine. Tetley summarises it as follows:[89]

> A major difference between the civil law and common law is that priority in civil law is given to doctrine (including the codifiers' reports) over jurisprudence, while the opposite is true in the common law.

In the evaluation of the formalistic civil law as opposed to the casuistic common law approaches toward '*commorientes*' it becomes apparent that there are by and large some similarities in the different systems. Firstly, when the sequence of deaths *can be established* the division of the estates will follow the order as proved; and secondly only when a dispute arises or when there is '*uncertainty*' that surrounds the deaths of related people, the courts are called upon to establish the sequence of death.[90] Then again, the dissimilarities between the civil law and common law are reflected in the approaches towards '*commorientes*' and are typical of the different legal systems. Neuhaus explains it as follows:[91]

> The former aspect calls for legislation, the latter for judicial decision. It has often been said that legislation corresponds to the abstract and systematic mode of thought of continental Europeans, while judge-made law is more suited to the practical and empirical style of Britons and Americans. Indeed, in England as well as in the United States, even statutes are generally directed

86 See Gallanis 200 argues that in light of technology, a rule that makes the outcome depend on survival by 120 hours might not adequately take into account the incentives that some heirs and devisees may have? *Leete v Sherman* for the application of the rule.
87 See Corbett *et al* 547. See however *Tucker v Shreveport Transit Management Inc*.
88 Tate. See also Walker (*SLSC*) 5 ff; Benas and O K F (*MLR*) 88; Zander 132-139 and 142.
89 (*ULR*) 613.
90 Own emphasis.
91 See Neuhaus 795:

> not so much to general regulation in comprehensive terms, but rather to case-by-case solutions of separate situations. [92]

However, regardless of whether presumptions are used, or not, it remains a daunting task to establish the exact order of death.[93] Two further worrying issues regarding '*commorientes*' remain. Firstly, it has become clear that the courts are accepting the slightest tad of evidence indicating survival, to find that *simultaneous deaths did not occur*.[94] The second issue is that the outcome of the distribution of an estate can depend on *survivorship by seconds*.[95] Tracy and Adams, already in 1940, suggested that the concept of inheritance of property based on survivorship of mere minutes or hours is offensive to many.[96]

An assessment of the doctrine of '*commorientes*' has shown that the differences between traditional English common law and English statutory law are evident (the 'no presumption rule' *versus* the 'presumption').[97] However, the differences between the continental approach of 'presumptions of no survivor' (as reflected in most civil codes) as opposed to the English common law approach of 'no presumptions' is more perplexing because in both systems the outcome can be the same. In both systems, the victims are regarded as *being unable to inherit* from one another either because they are looked upon as being predeceased or because they are regarded as not having survived each other.

The position in South Africa is unique as it rejects Roman civil law, Roman-Dutch law and the English statutory advances. However, when all the historical approaches and modern day developments are assessed, it can be concluded that South Africa has adopted the traditional English common law approach (as it was before 1925) based on the so-called 'no presumption' rule.[98]

In this regard De Beer argues that although through section 184 the shift seems to be towards legal certainty, the basic question of feasibility still remains unanswered. He states: 'It is safe to infer that in the United Kingdom, the position on *commorientes* has undergone a paradigm shift

92 See Wigmore 620. The fundamental difference identified between the civil law approach and the traditional common law approach is reflected in the presentation of evidence to ascertain whether 'simultaneous deaths' occurred. See also *HLR* 344.

93 Middleton JA in *Bennett v Peattie* said: 'There is no way by which a division of the property can be secured unless the *common sense* of the contending factions triumphs over the desire to litigate'. Ontario Court of Appeal. See also Tracy and Adam 807.

94 Own emphasis. See also *Thomas v Anderson*; *Smith v Smith* 229 Ark 579 (Arkansas 1958).

95 Own emphasis.

96 (*MLR*) 801 ff.

97 Most jurisdictions have made attempts to replace 'presumptions of survivorship' with workable and equitable rules.

98 Case law however, does not really refer to any authority. See Corbett *et al* 5.

from relying on common law presumptions towards reliance on legislation'.

It is noteworthy that there is often, throughout all approaches toward the '*commorientes*' doctrine,[99] an undertone of an *equitable approach*.[100] Derrett refers to the reception of presumptions as follows:[101]

> Where the court has to elect between the rigid application of a rule of the old law to a case not clearly contemplated by that law and the application of an *equitable principle* which does not defeat the old law but prevents any injustice from its rigid application, the court would be quite justified in choosing the latter alternative.

The traditional common law approach of 'no presumption' was also regarded as equitable but came under suspicion due to the literal interpretation of 'simultaneous deaths'. Phillips explains the adoption of legislation so as:[102]

> … [t]o supplant the former arbitrary and complicated presumptions of survivorship with effective, *workable and equitable rules* applicable to the ever-increasing number of cases where two or more persons have died under circumstances that there is no sufficient evidence to indicate that they have died otherwise then simultaneously.[103]

Roeleveld in his discussion of the South African position explains that all systems (civil and common law) have the purpose of serving equity and achieving certainty:[104]

> The question is to be considered if all these presumptions are still valid in the changed circumstances of the present rate of morality, the higher average age of human beings, the higher average age of women in comparison with men … and the same in connection with climatological circumstances, the probably higher rate of traffic accidents and the lower rate of accidents on the high seas, etc.

It appears from South Africa case law, that a general *equitable approach* is followed when dealing with 'simultaneous deaths'.[105] As seen above the court in *Ex parte Graham* rejected the presumptions because '… it [is] not necessary or desirable to slavishly follow such completely artificial reasoning in modern times'. Roeleveld tends to agree with the opinion of

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99 Case law will be discussed in another contribution.

100 Du Toit 285 explains that in virtually every aspect of Roman-Dutch law one will find *equitable principles and remedies* which give concrete expression to its underlying concern with justice and fairness.

101 (*UCR*) 64 fn 17.

102 (*Cal LR)*. He refers to *Azvedo v Benevolent Soc of Calif*. See also Belkin 101.

103 Own emphasis. See also Provence; De Beer 10: 'It is safe to infer that in the United Kingdom, the position on *commorientes* has undergone a paradigm shift from relying on common law presumptions towards reliance on legislation'.

104 49. He refers to the opinion of Völker: '… the Roman Law had more reasonable results and emphasises equity more than probability'.

105 Own emphasis.

modern writers that the courts should have a discretion (after considering the facts) in the matter of '*commorientes*'.[106]

In the South African context, De Beer has made some recommendations regarding 'simultaneous deaths'.[107] Firstly, he recommends that 'death' should be defined as 'brain death' and that 'time' should be considered in relation to the occurrence of a common event in which two or more people die simultaneously or as a result of which they incur fatal injuries. He further suggests an amendment to the law of succession by stating the following:

> Incorporating the French position (the presumptions) with that of New Zealand (the burden and degree of proof) and the United States (provisions of the Simultaneous Death Act) would seem to be the best solution for all the questions hanging over the head of modern laws of succession. A further qualification of the new procedures would require a person who aims to prove the contrary of simultaneous death to render sufficient security to ensure that no assets of the estate would be used in either instituting or defending such an action.[108]

In my opinion these recommendations might be too much of a giant leap and over ambitious in a jurisdiction such as South Africa which has no statutory basis for the '*commorientes'* principle and claims not to follow the Roman or Roman-Dutch law. There is, furthermore, no clarity whether statutory provisions have any real advantages over the common-law principles.[109] It seems from reported case law that in jurisdictions where presumptions are used to prove the order of deaths, the focus has shifted from 'have the victims died simultaneously' to 'is there *uncertainty* as to the order of death'. Bottom of Form

The proposal by the *Law Reform Committee of South Australia* is supported:

> In dealing with the remit we have reached a similar conclusion to that expounded by Wigmore as early as 1934, namely that the problem of survivorship should not be dealt with by making a rule of evidence to cope with the uncertainties of proof but rather by making a rule or rules tending towards a fairer distribution of property and more in accord with the likely wishes of the testator.

106 He refers to Hoffman *South African Law of Evidence* (1963) 97 '… but if it is uncertain which of two persons died first, there is probably no rule requiring the court to presume that their deaths occurred in any particular order'. Reference is made to Voet 34 5 3 and 36 1 16. He refers to 'the usual practice to make an order presuming that they died simultaneously'.

107 41-42. See also *In Re: the Estate of Byron Keith Miller* No 2002-CA-00231-SCT (2003): 'That aside, courts have consistently held that under the equitable doctrine that 'equity follows the law,' courts of equity cannot modify or ignore an unambiguous statutory principle in an effort to shape relief'.

108 De Beer 41 in addition, proposed a further qualification, namely that in the event of a person being in a state of unconsciousness (a coma), he or she has to be considered to be alive until death or resurrection.

109 Nathan (*TLR*) 42.

It seems as if the 'prophesies of justice' in the Holy Bible that Roeleveld referred to in his conclusion on '*commorientes*' remain true:[110]

> All the attempts of legislators, courts and lawyers to find justice and equity in relation to *commorientes* must be seen in this light. My conclusion is that the law of succession must be sober, not complicated, because it is not given to man to foresee every legal and factual possibility and to anticipate them by strict rules. There must remain sufficient room for case-law, fully based on equity.

In conclusion, I tend to agree with the view that in many instances the common law (factual question and interpretation) appears to provide a more satisfactory solution to the survivorship problem than any strict presumption such as section 184 of the English Law.[111]

110 He refers to Ecclesiastes 7:16-17. The New King James Version (NKJV) reads as follows 'Do not be overly righteous, Nor be overly wise: Why should you destroy yourself? Do not be overly wicked, Nor be foolish: Why should you die before your time?'

111 See also Hubback 150; Mee (*NILQ*) 181. This is also the view taken by the *Law Reform Committee of South Australia*: 'On the other hand, the presumption will not be invoked if evidence is adduced which in fact establishes the precise order of death, because in such a case the circumstances will not render it uncertain who survived the other or others.'

Aantekeninge/Notes

The open society: What does it really mean?

1 Introduction

The Constitution refers to the *open society* in the Preamble, the limitation clause (s 36), the interpretation clause (s 39), and clauses dealing with public access and participation in the legislature (ss 59, 72, 118). As remarked by Sachs J in his concurring judgement in *S v Lawrence; S v Negal; S v Solberg* 1997 4 SA 1176 (CC) (par 146), 'The concept of an open society must indeed be regarded as one of the central features of the bill of rights … ' However, the open society has been under-utilised in our human rights jurisprudence – perhaps because of the legal profession's limited acquaintance with this political philosophical concept. The open society is mostly subsumed by the larger phrase 'open and democratic society', with emphasis on the far better-known concept 'democracy' accordingly rendering the open society meaningless and of no particular relevance in itself. The under-appreciation of the open society as a philosophical guiding light *in its own right* in our human rights jurisprudence, amounts to hiding a vital constitutional light under a bushel.

The purpose of this article is to lift the metaphorical bushel: I intend to focus on the open society and submit that this supposed lodestar of our Constitution can, and must, illuminate our human rights jurisprudence. Based on case law and the principle of purposive interpretation, I argue that the open society should be interpreted according to how the concept was developed in the political philosophy of Karl Popper. I subsequently provide an analysis of the meaning of the open society as developed by Popper – focusing on how the values denoted by the open society complement our extant human rights jurisprudence.

2 The Open Society in Case Law

While the larger phrase 'open and democratic society' (and sometimes 'democratic and open society') is regularly referred to by our courts, the term *open society* as a *distinct concept* has received relatively scant attention. In the handful of cases where the open society was applied as a distinct concept, our courts interpreted it as pertaining to the following values:

- Public adjudication rather than a private ventilation of the dispute (*Luitingh v Minister of Defence* 1996 2 SA 909 (CC) par 5);

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- Pluralism and diversity (*Lawrence supra* parr 146–147 per Sachs J (concurring); *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) par 134 per Sachs J (concurring));
- Transparency (*Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) par 6);
- Protection of freedom of speech in certain contexts (*Laugh It Off Promotions CC v South African Breweries International (Finance) BV trading as Sabmark International* 2006 1 SA 144 (CC) par 88 per Sachs J (concurring));
- Open justice (*Independent Newspapers (Pty) Ltd v Minister for Intelligence Services, In re: Masetlha v President of the Republic of South Africa* 2008 5 SA 31 (CC) par 167 per Sachs J (dissenting));
- Accountability and institutional checks and balances that limit state power (*Primedia Broadcasting, a division of Primedia (Pty) Ltd v Speaker of the National Assembly* 2015 4 SA 525 (WCC) parr 35–37).

However, in not one of these judgments did the court attempt to examine the open society methodically and in detail, or refer to any sources on the concept. The meanings that the courts allocated to the open society were, therefore, nothing more than the unsubstantiated, idiosyncratic opinions of the particular judge or judges. The only (minor) exception to this analytical paucity in our case law is the dissenting judgment by Ackermann J in *Ferreira v Levin; Vryenhoek v Powell* 1996 1 SA 984 (CC): In support of his position that the right to freedom as formulated in the Interim Constitution should enjoy an expansive interpretation – which was rejected by the majority of the Constitutional Court in favour of a narrow interpretation – Ackermann J relied *inter alia* on the open society (par 50). In the footnote to his brief analysis of the open society (n 36), Ackermann J cited Karl Popper's *The Open Society and Its Enemies*. Importantly, although the majority in *Ferreira* rejected the expansive interpretation of the right to freedom as formulated in the Interim Constitution as proposed by Ackermann J, the majority did so for reasons other than Ackermann's reliance on the open society. The majority was silent on Ackermann J's analysis of the open society and failed to proffer any alternative analysis of the concept. As I discuss below, Ackermann J's reliance on Popper's *The Open Society and Its Enemies* marks 'X' on the philosophical treasure map of the open society as a distinct constitutional concept.

3 Purposive Interpretation of the Open Society

Where a political philosophical term with an established meaning is included in the text of the Constitution, the most likely purpose for the use of such a term is for its established meaning to be given effect. As I analyse in more detail below, the open society is indeed a technical term in political philosophy with an established, well-developed meaning. It follows that the established meaning of the open society must be given effect.

If the open society is to be interpreted loosely, without specific reference to its established political philosophical meaning, there is a danger that the open society may become a vehicle for advancing any value or objective that can be linguistically connected with the words 'open' or 'openness'. This would not be aligned with the purpose of the inclusion of a political philosophical term with an established meaning, and would, accordingly, be incorrect. Also, it would detract from the understanding that can potentially be gained from analysis of the established political philosophical meaning of the open society.

The concept of an open society is most closely associated with the philosopher Karl Popper, who gave currency to the concept in his book *The Open Society and Its Enemies* (2013, first published in 1945; also see Langlands & Venter 'The Constitutional Court of South Africa and the open society' 2009 *Administratio Publica* 140). Popper constructed a theoretical framework based on a dichotomy between the *open* society and the *closed* society. In his dissenting judgment in *Ferreira*, Ackermann J, referring to this dichotomy (and citing Popper's *Open Society and Its Enemies*), held that the closed society is the 'magical or tribal or collectivist society', while the open society is the kind of society in which 'individuals are confronted with personal decisions' (n 36). Although correct and important, this explanation of the open society only touches the surface of the concept's meaning. In the following paragraphs, my analysis of the open society drills down deeper into the concept's meaning.

The open society must be interpreted in the context of the Constitution as a whole. As is clear from my analysis below, the established, well-developed meaning of the open society *qua* technical term in political philosophy, is aligned with – and complementary – to other constitutional values.

4 The Standards of the Open Society

The decision by the framers of our Constitution to include the open society as a definitive value of the South Africa they were envisioning, must be seen against the historic backdrop of the closed society, which was the apartheid regime: A society ruled by so-called 'moral' or 'ethical' taboos on racial integration and equality, homosexuality, a woman's choice to terminate her pregnancy, and many other aspects of life; and an authoritarian society that suppressed criticism through fostering a closed, tradition-dominated culture and often by using the brute power of the state – especially criticism proffered by the meek and marginalised. The transition from apartheid to our current constitutional dispensation was, I submit, not only a political, but also great moral and spiritual revolution. With reference to such great moral and spiritual revolutions in history, Popper states the following in the Preface to the Second Edition of *The Open Society and its Enemies* (Popper xl, my emphasis):

> It is the longing of uncounted unknown men [and women] to free themselves and their minds from the tutelage of authority and prejudice. It is their attempt to build up an open society which rejects the absolute authority of the merely established and the merely traditional while trying to preserve, to develop, and to establish traditions, old or new, that measure up to their *standards of freedom, of humaneness, and of rational criticism*.

A few initial observations on this quotation will suffice: First, 'traditions' refer to all of society's political and social institutions – including its laws. Second, the three standards listed in the quotation above – (a) freedom, (b) humaneness, and (c) rational criticism – are a golden thread that runs through *The Open Society and Its Enemies* (e.g. Popper 175).

In the following sections, I analyse each of these three standards. In 2001, I published an analysis of the open society that also identified and analysed these three standards of the open society as conceived by Popper ("The open society" 2001 *THRHR* 107). Since 2001, however, the standards of the open society were affirmed in a variety of Constitutional Court judgments. In my analysis below, I highlight the most important of these post-2001 judgments.

4 1 Freedom

Popper espouses a classic, liberal conception of freedom, based on John Stuart Mill's harm-principle (Popper 105). Popper is concerned with freedom as being personal or individual freedom – which approximates to the Constitutional Court's conception of *autonomy* in *Barkhuizen v Napier* 2007 5 SA 323 (CC). In *Barkhuizen*, the Constitutional Court held as follows (par 57):

> Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.

According to the Oxford Dictionary, the word 'autonomy' originates from the Greek 'autonomos' meaning 'having its own laws', from 'autos' (self), and from 'nomos' (law). Given the etymology of 'autonomy', I submit that the phraseology 'self-autonomy' is an unnecessary tautology, and that the court did not intend 'self-autonomy' to mean anything different from 'autonomy'. Besides my critique of the court's phraseology, the *dictum* quoted from *Barkhuizen* is a powerful statement that gives a generous, non-paternalistic interpretation to autonomy *qua* individual freedom ('the ability to regulate one's own affairs, even to one's own detriment'), and posits autonomy as a core value underlying our Constitution – in particular the constitutional values of freedom and dignity.

It is important that freedom is not the antithesis of *tradition*, but rather the antithesis of *blind adherence to tradition*. In fact, aspects of tradition can be inspirational, and can lead to social reform (Popper 63). The dovetailing of freedom and tradition is exemplified in *MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC). In this case, the Constitutional Court was confronted with the question of whether voluntary cultural

practices should receive the same protection as mandatory cultural practices. The Constitutional Court held (par 64, footnote omitted):

> A necessary element of freedom and of dignity of any individual is an 'entitlement to respect for the unique set of ends that the individual pursues.' One of those ends is the voluntary religious and cultural practices in which we participate. That we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity.

Pillay is an acknowledgement of the vital role of tradition in people's lives – and that tradition need not be an inhibitor of freedom, but rather can be an object of freedom.

4 2 Humaneness

Humaneness plays a fundamental part in Popper's view on justice in an open society. He pleads for a redirection of philosophical discourse towards the 'least amount of avoidable suffering' (Popper 548; 602). Already in the early cases heard by the Constitutional Court, most prominently *S v Makwanyane* 1995 3 SA 391 and *S v Williams* 1995 3 SA 632, the Constitutional Court held that 'unnecessary suffering' is unconstitutional.

Humaneness, Popper contends, demands an equalitarian and individualistic interpretation of justice (Popper 101). An equalitarian interpretation of justice finds expression in Pericles' oration, which states that the law must guarantee equal justice to all (Popper 91). This accords with *formal* equality, which is guaranteed by the Constitution (*S v Ntuli* 1996 1 SA 1207 (CC) par 18). An individualistic interpretation of justice is expressed in the Kantian maxim to always recognise that human individuals are ends, and to refrain from using them as mere means to ends (Popper 98). This maxim was endorsed by the Constitutional Court in *S v Dodo* 2001 3 SA 382 (CC) (par 38). In contrast, the closed society adheres to a collectivist interpretation of justice which has the interest of the state – *id est* the collective – as its sole criterion of morality (Popper 102).

4 3 Rationality

Popper uses rational criticism interchangeably with rationality. Rational criticism or rationality in Popper's philosophy means more than simply acting for a reason. It requires an assessment of whether the reason itself is aligned with the values we have decided are worthy of being realised (Popper 59) – such as freedom and humaneness. In this assessment, Popper points out that facts alone cannot determine norms (Popper 62). Facts alone have no normative content and only assume such content if seen through the lens of pre-decided norms (Popper 482). In a closed

society, norms are unchanging and perceived to be as inevitable as the rising of the sun – essentially the same as 'natural laws' or facts (Popper 55). In an open society, by contrast, norms must be rigorously distinguished from facts (Popper 55). The fact–norm dualism received an implicit affirmation in *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC), where the Constitutional Court held that (par 74):

> [T]he antiquity of a prejudice is no reason for its survival. Slavery lasted for a century and a half in this country, colonialism for twice as long, the prohibition of interracial marriages for even longer, and overt male domination for millennia. All were based on apparently self-evident biological and social facts; all were once sanctioned by religion and imposed by law; the first two are today regarded with total disdain, and the third with varying degrees of denial, shame or embarrassment.

4 4 Conclusion: Responsibility

Given the dualism between facts and norms, and the human-made nature of norms, we as humans are responsible for the norms we uphold in our societies (Popper 59). The closed society is an obstacle to responsibility, as its norms are typically placed beyond rational criticism, and are not measured against the standards of humaneness and freedom. By contrast, the open society is the necessary outcome of the decision to carry 'the cross of being human': taking responsibility for avoidable suffering, and to work for its avoidance (Popper 189). Accordingly, the individualism that characterises the open society must be infused by individual moral responsibility and an ethic of humaneness.

5 The open society and *ubuntu*: A paradigm shift needed in legal thinking?

Can the individualism of the open society be reconciled with *ubuntu*? When *ubuntu* first appeared in our jurisprudence, some judges implicitly associated it with the opposite of individualism – namely collectivism. The classical example of this is the description by Mokgoro J in *Makwanyane* (par 307) of *ubuntu* as meaning, *inter alia*, 'conformity to basic norms and collective unity'. Clearly, individualism clashes with this collectivist conception of *ubuntu*. As argued by English, the conception of *ubuntu* as expressed by Mokgoro, Mohamed and Sachs JJ in *Makwanyane*, is irreconcilable with individual human dignity (English 'Ubuntu: the quest for an indigenous jurisprudence' 1996 *SAJHR* 645).

However, the jurisprudence that followed *Makwanyane* appears to have largely sidelined the collectivist conception of *ubuntu*, in favour of a conception of *ubuntu* as being *altruism with African roots*. (For an overview of such jurisprudence, see: Himonga, Taylor and Pope 'Reflections on judicial views of ubuntu' 2013 *PER* 67, and for a more

critical appraisal of *ubuntu*, see: Kroeze 'Doing things with values II: The case of ubuntu' 2002 *Stell LR* 252). Key values entailed by this conception of *ubuntu* are, *inter alia*, 'restorative justice', 'reconciliation', and 'humaneness'. This conception of *ubuntu* is of course aligned with the open society.

In the context of altruism, Popper criticises Plato for positing collectivism as the only escape from selfishness, and states as follows (Popper 96):

> Collectivism is not opposed to egoism, nor is it identical with altruism or unselfishness. Collective or group egoism, for instance class egoism, is a very common thing ... and this shows clearly enough that collectivism as such is not opposed to selfishness. On the other hand, an anti-collectivist, i.e. an individualist, can, at the same time, be an altruist; he can be ready to make sacrifices in order to help other individuals.

Popper views the unity between individualism and altruism as the basis for the Kantian central doctrine to always recognise that human individuals are ends, and to refrain from using them as mere means to other ends – and as core to the open society (Popper 98). This may be Popper's paradigm-shifting contribution to the development of South African legal thinking: There is not necessarily any connection between collectivism and altruism; in contrast, our constitutional commitment to the open society enjoins us to promote *altruistic individualism*. While free to live their lives as they please, individuals are also responsible for working to avoid suffering.

6 Differentiating Between the Open Society and Pluralism

In at least two of his concurring judgments as a member of the Constitutional Court's bench, Sachs J interpreted the open society as meaning pluralism (*Lawrence* parr 146–147; *National Coalition* par 134). However, in neither of the two concurring judgements did Sachs J explain why he interpreted the open society as such. It is in the interests of conceptual clarity to clearly differentiate between these two concepts: The political philosophical concept of 'pluralism' in the broadest sense refers to the recognition and acceptance of a multiplicity of beliefs and ways of life in society (Crowder "From value pluralism to liberalism" 1998 *Crit Rev Int Soc Polit Philos* 2). Particular creeds of pluralism have been developed by contemporary philosophers like Isaiah Berlin and John Rawls. Although there may be overlapping elements between the open society and certain creeds of pluralism, the open society and pluralism are distinct concepts. The *Constitution as a whole* celebrates South Africa's diversity and can thus be interpreted as supporting pluralism in the broad sense, as described above (see, e.g. *National Coalition* n 164, where Sachs J held there are many provisions in the Constitution that 'highlight the rich diversity of our country'). However, this does not justify an interpretation of the *open society qua pluralism* – irrespective of the creed of pluralism contemplated. Accordingly, the

conceptual conflation between open society and pluralism should not be followed.

In my 2001 article, I explored the ramifications of Sachs J's judgments in *Lawrence* and *National Coalition*, and proposed that these judgments expanded the concept of the open society to include pluralism. However, I have since reconsidered this proposition. The first weakness of my previous proposition is that it overvalues Sachs J's *ipse dixit*. It should be remembered that Sachs J failed to cite any sources, and failed to present any reasons for his interpretation of the open society qua pluralism. The second weakness of my previous proposition is that it did not take due cognisance of the imperative of purposive interpretation: Given that the open society is a political philosophical term with an established meaning, the most likely purpose for using such a term in the Constitution, is for its established meaning to be given effect. For this reason alone, Sachs J's conceptual conflation between the open society and pluralism should be rejected.

7 The Open Society's Enemies and the Limits of Tolerance

An important aspect of the open society that I did not address in my 2001 article, is the limits of an open society's tolerance towards dissenting political ideologies. How should an open society deal with ideologies within society that aim to undermine the open society itself – or the open society's core values of personal freedom, humanitarian ethics, and rationality? In the 1930s, Popper witnessed how the tolerance of the Weimar Republic was used by the Nazis to overthrow the Weimar Republic and replace it with the Third Reich. As such, Popper had an acute awareness of the problem that unlimited tolerance is self-defeating, and he called it the *paradox of tolerance* (Popper 581). The open society that Popper envisioned would not be paralysed by tolerance as was the Weimar Republic, but rather it would be distinctly confident in the superiority of its core values and be willing to defend these against contrary ideologies. Popper's reasoning in this regard is insightful (Popper 581, original emphasis):

> Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them. In this formulation, I do not imply, for instance, that we should always suppress the utterance of intolerant philosophies; as long as we can counter them by rational argument and keep them in check by public opinion, suppression would certainly be most unwise. But we should claim the *right* to suppress them if necessary even by force; for it may easily turn out that they are not prepared to meet us on the level of rational argument, but begin by denouncing all argument; they may forbid their followers to listen to rational argument, because it is deceptive, and teach them to answer arguments by the use of their fists or pistols. We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant. We should claim that any movement preaching

> intolerance places itself outside the law. And we should consider incitement to intolerance and persecution as criminal, in the same way as we should consider incitement to murder, or to kidnapping, or to the revival of the slave trade, as criminal.

The extent to which an open society should resort to criminalising intolerant ideologies would, therefore, be situation-specific and would be determined by whether the marketplace of ideas is sufficiently effective in exposing and disempowering such ideologies. However, it is clear that Popper is under no illusions as to the rationality or goodwill of humans. If the marketplace of ideas is ineffective in disempowering intolerant ideologies, the open society must employ the force of the law to suppress its enemies. The open society is not a supine, value-neutral society – but instead is unapologetic in actively defending its values.

In his concurring judgement in *National Coalition*, Sachs J indeed held that South Africa *qua* constitutional state is not value-neutral (par 136, footnotes omitted, my emphasis):

> A state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but is not neutral in its value system. The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and *the limits to which it may go, are to be found in the text and spirit of the Constitution itself*.

The constitutional commitment to the open society should serve as guidance regarding the limits to which the state may – and must – go, in order to enforce the dictates of our constitutional morality.

8 Conclusion

Our courts have only superficially engaged the meaning of the open society, and, usually, have failed to undertake any proper analysis of the concept. The concept of the open society is inextricably bound to the political philosophy of Karl Popper, as published in his *magnus opus The Open Society and Its Enemies*. In this book, Popper posits the core values of the open society as individual freedom, humanitarian ethics, and rationality – values that all resonate with our Constitution. Moreover, these are values that perceived together remind us that altruism need not and should not imply the subservience of the individual to the group, but that individuals can be both ends in themselves and compassionate towards each other. It is further important to differentiate the open society from pluralism, and to recognise that the open society does not necessarily accommodate all belief systems, but takes active measures against intolerant belief systems if the situation so demands. Recognition of the open society as a meaningful concept *in its own right* accomplishes more than reinforcing our constitutional ethos. It opens up a rich source of philosophical thought – Popper's *The Open Society and Its Enemies* –

that can inform and enhance our understanding and application of the Constitution.

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Onlangse regspraak/Recent case law

J v J 2016 ZAKZDHC 33 (unreported)

Setting the record straight on the general principles for defamation.

1 Introduction

In July 2016, Masipa J of the Durban High Court dismissed a counter-claim for defamation that had arisen from allegations of adultery against the second defendant, one Dr H, in the judgment of J (*J v J* 2016 (ZAKZDHC) 33 (hereafter *'J'*). The court based its ruling on two main reasons. First, the court found that there is no longer an action for delict founded on allegations of adultery against another person (par 88). The court's assertion was based on an earlier judgment of the Constitutional Court in *DE v RH* 2015 5 SA 83 (CC) (hereafter '*DE*'). The high court in the *J* judgment held that in view of the decision of *DE*, 'public opinion no longer considers adultery as tabooed ... a statement to the effect that a person committed adultery can no longer convey a meaning with the propensity to define a person …' (par 88). Moreover, the court was of the view that the plaintiff had prima facie supported the allegations labelled against Dr H, by means of evidence (par 90). The latter remarks were stated in relation to the question of the costs for the suit (par 90). In its analysis of the law, the high court also held that to succeed with his action, '[the plaintiff] has to prove that [defendant] published words which were *wrongful* and intended to injure his status, good name or reputation.' (par 72). This note takes issue with this reasoning of the court. It will show that this is not the correct reflection of the law of defamation. Further, relying on the case of *Suid-Afrikaanse Uitsaaikoporasie v O'Malley* 1977 3 SA 394 (A), the court held that '[the] plaintiff *must show animus iniuriandi* i.e. intention to defame and knowledge of wrongfulness' (par 73, *emphasis added*). Again, this is not the correct reflection of the current position of the law of defamation, as it will be shown in this case note.

Another reason why the court dismissed the claim for damages against SJ was that Dr H had failed to discharge the duty that rested on him to prove that his reputation had indeed been injured as a result of the plaintiff spreading allegations of adultery between his wife and Dr H (par 89). In essence, the assertion of the court was that, as one of the requirements for defamation, the claimant (Dr H in this case) needed to prove the existence of causation. However, I submit that this assertion of the court in the *J* judgment, amounts to a distortion of the law of defamation. Henceforth, the purpose of this case note is to attempt to

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correct the misconception that this judgment of *J* creates by its assertions that, to succeed with his action, the plaintiff ought to prove that *wrongful words* were published; the *animus iniuriandi* (intention), and that the publicised remarks had caused the plaintiff's reputation to be injured ('causation'). Immediately after this introduction, the note sets out the factual background to the high court judgment. It then proceeds to address the question of the nature of words that the plaintiff needed to prove to succeed with his action and whether the plaintiff ought to have shown (or proved) *animus iniuriandi*, as the court found. Thereafter, the issue or role of causation in the law of defamation is addressed through reference to authorities, before advancing a conclusion.

2 Facts

In *J,* the plaintiff, SJ, was the husband of one PJ, who was the first plaintiff in the main case. SJ had sued PJ for divorce on the allegations that she had committed adultery with one Dr H who was also their family doctor (paras 1 and 53). In the process of suing for divorce against his wife, SJ also sued for damages against Dr H, who was the second defendant in the case. The action against Dr H was founded on *contumelia* and loss of consortium, owing to the alleged adulterous intimate relationship between SJ's wife and Dr H. However, before the court could deal with SJ's matter, the Constitutional Court ruled in *DE* that adultery was no longer an actionable cause of action for purposes of SJ's claim (par 1). As SJ no longer had a cause of action for his claim, he tendered to withdraw his claim against Dr H (par 1). While Dr H accepted a tender by the husband to withdraw his claim against him, he nevertheless filed a counterclaim for defamation against the husband (par 1). It transpired from the evidence that SJ had told his mother about the alleged adulterous relationship between his wife and Dr H (paras 21, 77 – 79). Meanwhile, SJ's mother informed the nursing assistants in Dr H's surgery about the alleged adultery (paras 23, 55, 57, 63–64, 69). SJ allegedly informed his in-laws about the adultery (par 55). Additionally, when SJ was in the process of suing Dr H for *contumelia* and loss of *consortium*, he had informed the wife of Dr H about the alleged adultery (paras 21 and 80). This was done out of courtesy as the two families were acquaintances (par 81).

In its findings with regard to Dr H's claim, the court ruled that a reference to a person as having been involved in an adulterous relationship is no longer defamatory in the light of the judgment of *DE* (par 88). Whether or not the court was correct to come to the conclusion that is no longer defamation based on insinuations of adultery in the light of the CC judgment of *DE* is beyond the scope of this case note. This view by the high court is debatable, because *DE* never considered the issue of adultery and defamation. It merely dealt with the issue of adultery and contumelia and loss of consortium. Therefore, for purposes of this case note, I would not venture into this issue. Suffice is to state that Masipa J the *J* judgment, simply imported the ruling of *DE* that abolished the action for adultery to the law of defamation without proper legal basis for doing

so. In other words, the judge did not support the applicability of DE in defamation with any sound legal arguments. Hence, the high court in the judgment of *J* failed to put this issue to rest (see Buthelezi 'Is there still defamation under SA law based on adultery 2017, 38 (2) *Obiter*; also Neethling 'Die regspraak bevestig die gedingsvatbaarheid van afrokkeling as iniuria' 2017 (2) *LitNet Akademies*, Scott 'Delictual liability for adultery: a healthy remedy's road to perdition' in Potgieter, Knobel and Jansen (eds) *Essays in honour of / Huldigingsbundel vir Johann Neethling* (2015) 421-438 and Potgieter 'Die reg op die gevoelslewe (en die moontlike relevansie daarvan by 'n aksie weens owerspel? 2016 (3) *TSAR* 397-411). Moreover, the court held that the publication of the allegation by SJ to his mother was in law justified (par 78). I concur that the court was correct in this regard. The defence of truth and public benefit would have justified such publication since SJ's mother had an interest in the marriage of her son (par 78). Further, the high court held that SJ could not be held liable for the publication that his mother made to the nursing assistants of Dr H (par 79). I am also in agreement with the court in this regard. The court was also of the view that the disclosure that SJ made to Dr H's wife did not in law amount to publication (par 82). I concur with the court that communication to a person's spouse is not publication for purposes of defamation, although the constitutionality of this legal view may now be challenged in the light of legal recognition that married spouses are two separate legal subjects.

Most importantly for purposes of this article, the court also held that Dr. H had failed to prove that his reputation had been injured as a result of the allegations by SJ that Dr. H was intimately involved in an adulterous relationship SJ's wife (par 89). In essence, the court was asserting that in order to succeed in an action for defamation the plaintiff needs to prove causation. I take issue with this view, as shown below. However, before I address this reasoning of the court, I will first deal with the court's analysis regarding the nature of the allegations that incur liability for defamation and the issue of *animus iniuriandi* (that is, whether the plaintiff is in law required to prove intention to injure or defame the plaintiff).

3 Critique of the Judgment

3 1 Defamatory Words and *Animus Iniuriandi*

As stated earlier, among other things, the court held that the plaintiff should prove publication of the wrongful words to succeed with his claim for defamation (par 72). However, this is an erroneous statement of the law. I take issue with this take of the court on this element of the law of defamation. As a primary requirement for defamation, the plaintiff must prove that *defamatory* words *(not wrongful)* have been published by the defendant (See for example: *Le Roux v Dey* 2011 3 SA 274 (CC), paras 84 and 85; Also *Khumalo v Holomisa* 2002 5 SA 401 (CC), par 18). Thus quoting *Khumalo,* the majority (Brand AJ) in *Le Roux* reaffirmed that the elements of defamation are: '(a) the wrongful and (b) intentional

(c) publication of (d) a defamatory statement (e) concerning the plaintiff.' (par 84) Clearly, the high court erred in its analysis of the general principles for defamation when it held that the plaintiff needed to prove that 'the [defendant] published words which were wrongful …' (*J* case, par 72). This assertion distorts the requirement defamatory words in defamation by conflating this element with the element for wrongfulness.

The court also erroneously stated that the plaintiff ought 'to show *animus iniuriandi*' (which obviously meant to prove) to succeed with his claim for defamation (par 73). Contrary to what the high court held in *J*, the plaintiff does not have to show *animus iniuriandi* (par 73). It is now trite that to succeed with his claim, the plaintiff only bears the *onus* to prove the publication of a defamatory matter, which referred to him, whereupon the court will presume that the intention to injure (*animus iniuriandi*) the reputation of the plaintiff and wrongfulness are present (*Le Roux,* par 85). This was reaffirmed in *Le Roux* where Brand AJ reiterated the five elements for defamation (without adding causation) (par 84). Then the justice emphatically held:

> Yet the plaintiff does not have to establish everyone of the [five] elements. All the plaintiff has to prove at the outset is the publication of defamatory matter concerning himself or herself. Once the plaintiff has accomplished this, it is presumed that the statement was both wrongful and intentional … (par 85)

In other words, intention (*animus iniuriandi*) is one of the two elements of defamation that are presumed to exist – the other one being wrongfulness. The view that the plaintiff must show *animus iniuriandi*, as the high court held in *J*, is incorrect. Perhaps, one reason to account for the latter error is that the court relied on the 1977 decision of *O'Malley* as its authority (see par 73). However, the law of defamation has evolved a great deal since the case of *O'Malley* and, most importantly, the general principles for defamation are now settled, as encapsulated by Brand AJ in *Le Roux* (par 84 – 85). Moreover, one of the two main reasons why the high court in *J* dismissed Dr H's claim in *J* was that he had not succeeded to show that his reputation had been injured by the allegations of adultery levelled against him by the plaintiff, SJ. The next section explores this issue in detail.

3 2 Causation in Defamation

As has been stated, the high court in *J* held that the plaintiff has to prove causation, in the form of injury to his reputation, before he can succeed with his defamation claim *J* (par 89). It held:

> The second defendant had a duty to prove that his reputation was indeed injured as a result of the plaintiff's conduct. No such evidence was led. The court cannot assume that because words or statements were made an injury occurred. In the absence of evidence regarding injury to the second defendant's good name, reputation and status, there is no case made out to prove defamation. In any event, society no longer views such conduct with disdain. It can therefore not be said that a statement that someone

> committed adultery has the effect to injure the reputation, status and good name of the second defendant.

It is, however, difficult to put in perspective the above remarks of Masipa J regarding the duty that allegedly rested on the plaintiff 'to prove that his reputation was indeed injured as a result of the plaintiff's conduct' as the judge did not correctly encapsulate the elements for defamation. Legal authors are silent on the question of causation among the general elements for defamation. For example, Loubser *et al* do not include causation among the five elements for defamation when they discuss the infringement of reputation (Loubser *et al The Law of Delict in South Africa* (2012) 339 – 358; see also Neethling *et al Neethling – Potgieter – Visser Law of Delict* (2016) 354). It is possible that the remarks were said in relation to the requirement that the plaintiff must prove defamatory statement, as one of the elements for defamation (that is, that the meaning was defamatory). Still, from the words that the court used (namely, 'that his reputation was indeed injured as a result of the plaintiff's conduct'), it would appear that the judge had in mind causation in general. In that case, the court would have misrepresented the South African law position regarding the general principles for defamation. Causation is accepted as part of defamation, but it has remained a dormant element for law of defamation. Even if one were to assume that Masipa J was referring to the second requirement for defamation ('defamatory statement – that is, its meaning), the high court would have gotten it incorrect. The plaintiff does not have to prove that his reputation was injured. As Brand AJ held in *Le Roux*, the question to ask with regard to the second element for defamation is whether the statement 'is likely to injure the good esteem in which [the plaintiff] is held by the reasonable or average person to whom [the statement] has been published …' (*Le Roux*, par 91). The assessment is an objective one as opposed to being subjective, as Masipa J is in fact asserting in the judgment of *J*. Authors are also in agreement that the approach of assessing impairment of reputation is not subjective, but objective, and that the only relevant question is whether, viewed through eyes of 'a reasonable person of normal intelligence and development the reputation of the plaintiff has been injured' (Neethling 354).

Moreover, case law authorities hold that the court will only become subjective, regarding the effect of the defendant's conduct (publication of defamatory material) on the plaintiff's reputation, when it determines the quantum for the plaintiff's claim. At that stage, the defendant may argue for the reduction of the plaintiff's damages on the basis, for example, that the plaintiff had a very low reputation, in any case (for example, this view was adopted by the court in *Viviers v Kilian* 1972 AD 449). Alternatively, the argument may be that the publication had not dented the image of the plaintiff (such a view was expressed by the Constitutional Court in *Dikoko v Mokhatla* 2006 6 235 (CC), par 78). When the Constitutional Court was determining the quantum in *Dikoko,* for example, it held that the fact that, Mokhatla, the respondent, still got appointed to a position of high public office despite the defamatory

remarks uttered by Dikoko was an important mitigating factor in determining the quantum to award against Dikoko (par 78). However, as is the case in many other cases, nowhere does the court in *Dikoko* allude to the proposition that the plaintiff needed to prove that the impugned defamatory statements had injured his reputation. It is therefore respectfully submitted that the court in *J* case erred when it concluded that the second defendant in the case (Dr H) 'had a duty to prove that his reputation was indeed injured' as a result of the publication of the offending allegations. Instead, causation is an inactive (or dormant) element for defamation. Therefore, the assertion to that effect in *J* amounts to a distortion of the law of defamation.

4 Conclusion

The general principles for defamation are now trite in our law, as has the shown in this case note. Hence, the high court in *J* judgment made material errors in its findings regarding the elements for defamation. Chief among these is the assertion that the plaintiff has a duty to prove that his reputation had been injured by the conduct of the defendant. As has been argued in this case note, it is not correct that the plaintiff has to prove publication of wrongful words to succeed with his claim in defamation. Rather, the correct legal position is that the plaintiff has to prove defamatory words that referred to him. It is also incorrect to say that the plaintiff needs to show or prove intention (*animus iniuriandi*) to injure his reputation. Instead, intention as an element for defamation is presumed to exist once the plaintiff has proved the publication of defamatory statement (words), referring to him. Last, it is not the correct position of the law of defamation that the plaintiff needs to prove that the publication of the defamatory words has injured his reputation (causation), as concluded by the high court *in casu*. Contrary to that finding of the court, causation is a dormant sixth element of defamation, which only comes to the fore on calculating the quantum of damages to award to the plaintiff when he has succeeded in his action. Thus, in a sense, it will fall under the elements that are presumed, although it plays no role in determining the liability or otherwise of the defendant for defamation. Should these inaccuracies be left unchallenged, this could distort the law of defamation. In my view, the action should not have stumbled on Dr H's failure to prove that the publication of the allegations about adultery had injured his reputation. Instead, it would have failed by reason of the availability of a defence to SJ in the form of truth and public benefit.

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