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"[The law] is a jealous mistress, and requires a long and constant courtship. It is not to be won by favors, but by lavish homage"
(Joseph Story 1779-1845)

The editorial board of *De Jure* has pleasure in presenting the first volume of 2018. As always the authors have excelled in providing valuable discussions on a wide variety of topics which inadvertently opens the door for academic debate. Interesting discussions are provided for pertaining to amongst others aspects relating to tax administration within the ambit of fulfilling human rights, debt capitalisation, discrimination within the realm of insurance with reference to persons with disabilities, aspects relating to therapeutic jurisprudence and restorative justice, interesting discussions pertaining to the extent to which the nursing profession is informed about the law and their responsibilities within the health care profession to mention but a few as well as interesting case discussions dealing with a wide variety of topics. The *De Jure* team wish to thank all contributors as well as reviewers to this volume for their efforts and contributions to this volume.

The editorial committee would like to express our gratitude to our assistant Daniël 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

Tax Administration Act: Fulfilling human rights through efficient and effective tax administration

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OPSOMMING

Die Wet op Belastingadministrasie

Openbare finansies is noodsaaklik vir doeltreffende bestuur ter vestiging van wet en orde, vrede en voorspoed, fasilitering van die heropbou- en herontwikkeling van nasionale infrastruktuur, en die verstrek van toegang tot sosiale goedere. Doeltreffende en effektiewe belasting administrasie is 'n noodsaaklike pilaar van 'n moderne, demokratiese staat. Hierdie artikel toon dat die Belasting Administrasie Wet 28 van 2011, op die keper beskou, gemik is op die bevordering van die openbare belang. Die kern van sy doelstellings is om seker te maak die doelmatige en doeltreffende invordering van belasting geskied. Hierdie doel is versoenbaar met die Grondwetlike doel van doeltreffendheid in openbare administrasie – waarvan belasting administrasie 'n integrale deel vorm. Verder is die doelstellings van die Wet op Belasting Administrasie konsekwent met die Wet op die Suid-Afrikaanse Inkomstediens, 34 van 1997 wat meld dat SARS se doelwit die effektiewe en doeltreffende invordering van belasting is. Die Wet op Belasting Administrasie bevorder sodoende die Grondwet se onderliggende doelstellings. Dit is duidelik sigbaar daarin dat hierdie Wet gerig is op die verseker van voldoende openbare hulpbronne vir gebruik in die openbare voordeel. Hoewel hierdie strewe 'n legitieme regeringsdoel is, bly elke bepaling in die Wet nogtans onderhewig aan 'n ondersoek van rasionaliteit en, dus, geldigheid.

1 Introduction

The Constitution, 1996 embodies the ideals bonding South Africans who must cohere and transcend their divisions to change the condition of peoples' lives by reconstructing a South African society dogged by corruption and maladministration in the public sector, as well as various social ills (such as, poverty and inequality). Section 7(2) of the Constitution obliges the State to "respect, protect, promote and fulfil" the

* This article is an extraction of the writer's LLD thesis titled "The 1996 Constitution and the Tax Administration Act 28 of 2011: Balancing efficient and effective tax administration with taxpayers' rights".

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rights entrenched in the Bill of Rights. To do so necessitates that the government has sustained access to adequate finance. Financial constraints in the public treasury will hinder the State's ability to achieve social justice through the fulfilment of, inter alia, socio-economic rights. Unless the problem of strained governmental resources is overcome, the aspiration of a fully transformed society with human dignity, freedom and equality for all will have a hollow ring.[1] Finances derived from taxes are, thus, crucial. Success of the social transformation project hinges on the efficiency and effectiveness of tax collection by the South African Revenue Service (SARS). Inadequacy in public finances will hamstring the South African government's ability to fulfil the human rights of its people which, in turn, will give rise to cries that the government is failing in its duty under the Constitution to perform all constitutional obligations "diligently and without delay" (s 237).

In view of the foregoing, the imposition of national taxes and the enforcement of prompt and honest payment thereof are matters of national importance. Proper tax administration maintains a regular income stream that will keep the government and its functionaries continuously liquid, solvent and operational. The level of tax collection is, thus, a critical determinant of the *quantum* of funds that can be mobilised for government measures aimed at transformation. Equipping tax administrators with adequate powers that give them bite to optimise tax collection, serves SA's national fiscal interest. To this end, the Tax Administration Act 28 of 2011 (TAA) is important. Whilst it vests SARS with various pre-existing legal and administrative powers, it also grants extraordinary new powers, some of which place SARS on a collision course with taxpayers' fundamental rights entrenched in the Bill of Rights. To defend their rights against onslaught and diminution, taxpayers affected by tax administration occurring in terms of the TAA may attack the validity of the TAA itself, or the TAA provisions that confer wide-ranging powers on SARS and/or other officials that limit taxpayers' rights.

2 Problem statement and objective of the article

South Africa's tax system is somewhat complex owing to its sprawling legislative infrastructure. Historically, each tax statute dealt with its own procedures, duties and remedies. This created high levels of duplication across statutes. Whilst some statutory provisions were identical, others differed to varying degrees. This caused confusion in interpretation and application that contributed to increased tax related disputes, thereby rendering tax administration more convoluted and expensive. In his 2005 Budget Review, the Minister of Finance announced that a single, comprehensive statute would be passed that eliminates this overlapping by aligning and consolidating generic administrative provisions

1 *Azanian People's Organisation v President of the Republic of South Africa* 1996 4 SA 671 (CC) para 43.

replicated in multiple tax statutes.[2] This is the avowed rationale that motivated the enactment of the TAA.[3] The scale of the legislative process to streamline complex, disparate tax provisions was enormous. The process lasted about seven years and included, inter alia, internal and external workshops with stakeholders, public consultation, and an external constitutional review. This is all part of an inclusive legislative process that reflects SA's mode of participatory democracy, a distinctive principle in SA's new national ethos arising from the Constitution.[4]

The TAA overhauled the landscape of tax administration. Section 4(1) thereof reads: "This Act applies to every person who is liable to comply with a provision of a tax Act (whether personally or on behalf of another person) and binds SARS." Since SARS must comply with obligations imposed by the TAA, s 4(1) rebuts the presumption of interpretation that a legislature does not intend to bind the state (or its organs). The TAA has 20 chapters, each covering a different aspect of tax administration. The TAA's overall structure resembles that of New Zealand's Tax Administration Act 166 of 1994.[5] The TAA introduces a step-by-step methodology which aligns the essential order of tax administration to the administrative life cycle of taxpayers. This is illustrated by its chapter headings, a relevant factor in purposive interpretation of statutes.[6] The TAA contains innovative tax administration strategies geared to ensuring that tax collection occurs in an orderly, structured, efficient and effective way. These features characterise a credible tax system. They advance the cultivation of a tax compliance culture that, if realised, will foster enhanced tax collection beneficial to the *fiscus* and, thus, the public purse. The promotion of tax compliance is a central value of the TAA.

The TAA can only play a meaningful role in facilitating access to adequate revenue from taxation by the South African government if its provisions have sufficient bite. The problem is that a literature survey of publications dealing with the TAA reveals that none analyses its provisions with a view to determining the degree to which the TAA

2 For relevant excerpts from the 2005 Budget Review, see the *Release of the Draft Tax Administration Bill for Second Round of Public Comment* 1 available at http://www.sars.gov.za/Legal/TaxAdmin/Pages/History.aspx (accessed 28-09-2013).

3 For the background to the TAA, see Croome and Olivier *Tax Administration* (2015) 3-10.

4 See *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 115; *Matatiele Municipality v President of the Republic of South Africa (No.2)* 2007 6 SA 477 (CC) paras 40 97; *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 5 SA 171 (CC) para 44. Also, see Quinot "Snapshot or participatory democracy? Political engagement as fundamental human right" 2009 *SAJHR* 392; Seforo "Get in the game – taxpayer involvement in the drafting of a reasonable tax law" 2014 *Tax Talk* 62; Phooko "What should be the form of public participation in the lawmaking process? An analysis of South African cases" 2014 *Obiter* 39.

5 For a discussion of tax administration in New Zealand, see Alston "Taxpayers' rights in New Zealand" 1997 *Revenue LJ* 211.

6 Botha *Statutory Interpretation: An Introduction for Students* (2010) 80.

succeeds in achieving the aims of, on the one hand, simplifying tax administration by SARS, and, on the other, ensuring that taxes are administered efficiently and effectively for public benefit. The objective of this article is to investigate this issue. To this end, the discussion commences by outlining the TAA's provisions that reveal its practical impact and statutory purpose. This discussion is important as it lays the foundation for purposive interpretation of the TAA and those terms therein that are discussed in this article. Secondly, the terms 'administration of a tax Act' and 'taxpayer' will be analysed within their TAA context. These terms are selected because they play central roles in tax administration under the TAA. Thirdly, tax collection under the TAA will be discussed. Finally, the conclusion will draw together the threads of the ensuing discussion.

3 1 Impact of the TAA

SARS and certain of its office bearers are creatures of statute. As such, they can perform no function and exercise no power unless authorised to do so by an enabling statute.[7] The TAA is a source of such power. It confers wide-ranging audit, investigative and general legal and administrative powers. Certain of these powers (such as warrantless inspection and searches) have the potential of encroaching on taxpayers' fundamental rights to, for example, privacy and property. The TAA imposes obligations on SARS and its officials [8] and outlines procedures[9] to be followed. SARS officials must ensure that tax returns and declarations are timeously received and processed promptly, and that tax liabilities are assessed accurately and collected expeditiously. This requires tax capacity, that is, the ability to collect taxes efficiently and effectively. Errors in filing tax returns, auditing capacity and tax morality are some of the practical considerations that adversely affect the level of tax assessment and collection. Thus, it is imperative that SARS, in addition to employing adequate and competent staff, must be conferred powers that sharpen its bite so that it may achieve optimal tax compliance.

The TAA bolsters the efficiency and effectiveness of tax administration by catering for, inter alia, the issuing of identity cards to SARS officials (s 8(1)), the recognition of a deemed or presumed authority by SARS

7 See *AM Moolla Group Ltd v CSARS* 2005 JOL 15456 (T) 3.

8 For example, ss 42 (keeping taxpayers informed of audit completion), 69 (preservation of secrecy of taxpayer information), 82(2) (advance rulings are binding on SARS), 91-96 (duty to issue and give notice of a tax assessment), 106 (duty to decide a valid objection), 190 (duty to pay refunds), 207 (reporting of tax debts written off or compromised), and 216-218 (duty to remit a penalty).

9 For example, ss 50 (process for obtaining prior authorisation for inquiry proceedings), 59 (process for warrant application), 172 (application for a civil judgment pending objection and appeal), 199 (procedure for writing off a tax debt), 204 (procedure for compromise of a tax debt), and 214 (procedure for imposing an administrative non-compliance penalty).

officials in civil proceedings (s 11(2)),[10] the granting of a right of appearance to a senior SARS official in certain judicial proceedings (s 12), the creation of the Tax Ombud to address taxpayer complaints (ss 15-21), the confidentiality of taxpayer information (ss 67-74), the issuing of advance tax rulings (ss 75-90) and tax assessments (ss 91-100), the imposition of a more onerous burden of proof (s 102(1)),[11] the objection and appeal procedures (ss 104-107), the Tax Court's jurisdiction (s 117), the application for a civil judgment to recover taxes (s 172), the payment of refunds (ss 190-191), the service of documents electronically (s 251(*d*)), the granting of tax relief under a voluntary disclosure program (ss 225-233), the imposition of criminal sanctions for non-compliance with a 'tax Act' (ss 234-238), the registration of tax practitioners entitled to practise, and the reporting of unprofessional conduct on their part (ss 239-243), and the issuing of tax clearance certificates (s 256).

The TAA strengthens SARS's arsenal of powers by conferring authority on it, inter alia, to conduct audits and criminal investigations (s 41), to conduct inspections (s 45), to request 'relevant material' (s 46), to convene inquiry proceedings (ss 50-58),[12] to oblige taxpayers to answer questions at an inquiry even if an answer is self-incriminating (s 57), to apply for search warrants (s 59), to conduct warrantless searches of the taxpayer's person, taxpayer's business premises and such part of a residence used for trade purposes (ss 61, 63), to seize relevant material found during a search (s 61(3)), to issue jeopardy assessments (s 94), to institute sequestration, liquidation and winding-up proceedings in a court (s 177), to collect a tax debt from a third party who pays it on a taxpayer's behalf (ss 179-184), to provide assistance to foreign governments under an international tax agreement (s 185), to prevent taxpayers from trading whilst owing a tax debt (s 186(3)), to obtain a court order for the repatriation of a taxpayer's foreign assets (s 186), and to impose non-compliance penalties (ss 208-220) and understatement penalties (ss 221-224).

3 2 Purpose of the Tax Administration Act

Purposive interpretation of the TAA requires that effect be given to its overall purpose as is determinable from various objective factors apparent *ex facie* the statute.[13] These include, inter alia, the language of its provisions, its long and short titles, its preamble, and its aims as set forth in s 2 of the TAA. Curbing tax minimisation is incontestably a mischief at which certain TAA provisions are aimed (such as, s 94 and s 95 dealing with the issuing of jeopardy and estimated assessments

10 *CSARS v Brown* (unreported case no. 561/2016) 2016 ZAECPEHC 17 (5 May 2016) paras 19-21.

11 For the legal test to be applied when determining if a taxpayer has discharged an evidential onus, see *CSARS v Kluh Investments (Pty) Ltd* 2016 2 All SA 317 (SCA) para 9.

12 See *Huang v CSARS: In re CSARS v Huang* 2015 1 SA 602 (GP).

13 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) paras 18-20.

respectively). However, the TAA's overall scheme is to harmonise (or synchronise) tax administration across a litany of tax statutes so as to improve the efficiency in, and effectiveness of, tax collection. Whilst the short title of the TAA indicates firmly that tax administration is its core subject matter, its long title affirms the overall objective of the statute. The relevant extract from the long title reads as follows:[14]

> To provide for the effective and efficient collection of tax; to provide for the alignment of the administration provisions of tax Acts and the consolidation of the provisions into one piece of legislation to the extent practically possible; to determine the powers and duties of the South African Revenue Service and officials … .

Section 2 of the TAA is a purpose clause that expresses the statute's objectives. It reads:

> The purpose of this Act is to ensure the effective and efficient collection of tax by –
>
> (a) aligning the administration of the tax Acts to the extent practically possible;
>
> (b) prescribing the rights and obligations of taxpayers[15] and other persons[16] to whom this Act applies;
>
> (c) prescribing the powers and duties of persons engaged in the administration of a tax Act; and
>
> (d) generally giving effect to the objects and purposes of tax administration.

The content of ss 2(a) to (d) are not aims *per se*. They outline, in general terms, the means chosen by Parliament to give effect to a stated aim. The

14 For the use of a statute's long title as an aid in interpretation, see *Bertie van Zyl (Pty) Ltd v Minister of Safety and Security* 2010 2 SA 181 (CC) para 43.

15 Taxpayers' duties include, inter alia, (i) to register for tax (s 22); (ii) to communicate any change of particulars (s 23); (iii) to be honest by submitting 'full and true' and 'accurate' returns (ss 25, 27, 96(3)); (iv) to submit a certificate or statement supporting financial statements or accounts (s28); (v) to keep records for certain prescribed periods (ss 29, 30, 31, 32); (vi) to make a translation of a document when called upon to do so (s 33(1)); (vii) disclose information concerning a reportable arrangement (s 38); (viii) to attend an interview with SARS and be subjected to questioning (s 47); (ix) to attend and answer questions at an inquiry even if the answers are incriminating (s 57); (x) not to obstruct or refuse reasonable assistance to SARS officials executing a search and seizure warrant (s 61(7)); (xi) to disclose incriminating information in returns (s 72); (xii) to prove an entitlement to a deduction or exemption (s 102(1)); and (xiii) to give security for tax liability when called upon to do so by SARS (s 161).

16 The duties of third parties include, inter alia, (i) to submit full and true returns (ss 26, 27); (i) to keep records pertaining to a taxpayer's affairs (ss 29, 30, 31, 32); (iii) to attend an inquiry and answer questions even if the answers are incriminating (s 57); (iv) not to obstruct or refuse reasonable assistance in the carrying out of a warrant by SARS (s 61(7)); and (v) to pay taxes for a taxpayer (ss 154, 157, 159, 179, 180, 181, 182, 183, 184).

use of "and" between sub-paras (c) and (d) indicates that sub-paras (a) to (d) are to be read conjunctively (that is, not disjunctively).[17] Recurring reference is made in sub-paras (a), (c) and (d) to tax administration. This fact lends credence to the construction that improved tax administration is the key method selected by Parliament for giving effect to its ultimate aim in the TAA of ensuring "the efficient and effective collection of tax".

The TAA (s 2(b)) refers to "prescribing the rights … of taxpayers". Parliament's choice of "prescribing" taxpayers' rights as a means to give effect to the statute's aims is significant for various reasons. First, it underscores the legal culture of rights established by the Constitution. By "prescribing" rights for taxpayers, Parliament has imposed a corresponding duty on SARS and its officials to respect those rights. Secondly, s 2(b) highlights that respect for rights is a means chosen by Parliament for promoting efficiency and effectiveness in tax collection. This is a relevant value to be considered when a TAA provision is reviewed for constitutional congruence. Also, it reinforces the notion that a deeper culture of voluntary tax compliance will be established if SARS and its officials conduct themselves within the bounds of the law. Respect for the law, as well as for taxpayers and their rights fosters respect for SARS and its officials and breeds respect by taxpayers for their obligations arising from tax statutes. This, in turn, has the potential to create a tax environment that is less adversarial and more co-operative, dignified and respectful as between taxpayers and SARS officials. The creation of such environment accords with the values and ethos of the Constitution.

4 1 Meaning of 'administration of a tax Act' analysed

The process of tax administration is a natural consequence flowing from the imposition of a tax. In a broad sense, tax administration involves the formulation and development of tax policies underpinning domestic revenue laws and international tax treaties, as well as the administration, management, conduct and supervision of the execution and application of tax laws, policies and agreements.[18] This includes, inter alia, information gathering and sharing, tax audits, assessment, collection, enforcement and litigation.[19] Tax administration is a concept used in the TAA in a technical, legal sense. Section 3(2) provides a definition of "[a]dministration of a tax Act".

17 See *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC) para 50.

18 Stiglingh (ed), Koekemoer and van Zyl *et al Silke: South African Income Tax 2016* (2015) 1134 define 'tax administration' as 'the process under which a person registers for a specific tax, submits relevant returns or information, retains prescribed documentation, is assessed for the tax and makes payment of the amount assessed'. In this narrow sense, tax administration serves merely as a means to audit a set of tax laws and 'carries out the orders' of tax policy (see Mansfield 'Tax administration in developing countries: An economic perspective' 1988 *Staff Papers IMF* 181 183).

19 For a list of standard or usual functions included in tax administration, see Granger *Economics Topic Guide: Taxation and Revenue* (January 2013) 23-24.

Tax administration is the key subject of the TAA. In terms of s 3(2), "[a]dministration of a tax Act means to", inter alia, (i) obtain full information; (ii) ascertain whether a person has filed or submitted correct returns, information or documents as required by a tax Act; (iii) establish a person's identity for the purpose of determining a tax liability; (iv) determine a tax liability; (v) collect taxes and refund taxes overpaid; (vi) investigate whether a tax related criminal offence has been committed pursuant to the provisions of a tax Act and, if so, lay criminal charges and provide assistance for the investigation and prosecution of tax offences or related common law offences; (vii) enforce SARS's powers and duties under a tax Act to ensure tax compliance; (viii) perform any other administrative function necessary to carry out the provisions of a tax Act; and (ix) give effect to SA's obligation to provide assistance under an international tax agreement.[20]

From the foregoing, it is evident that s 3(2) crystallises the different components involved in tax administration and amplifies the scope and ambit of the terms used in s 2 quoted above. Section 3(2) gives form and substance to the phrase "administration of a tax Act" used in s 2(c) and enhances an understanding of "objects and purposes of tax administration" as used in s 2(d). Accordingly, s 2 and s 3(2) must be read in conjunction with, and not independent of, each other. In terms of s 3(2), "administration of a tax Act" is a formal process encapsulating a broad spectrum of functions, duties and powers to be performed by SARS in relation to the affairs of a 'taxpayer', the definition whereof is discussed below. Tax collection is but a single element of this process. Tax administration under the TAA is, thus, not confined to recovering unpaid taxes. Section 3(2) is couched in terms having broad strokes (or effect). It extends to various associated or ancillary activities aimed at enhancing the efficiency and effectiveness of tax collection.

The intended scope of a definition may be determined by parameters imposed in its text. The definition in s 3(2) is introduced by the word 'means' which, generally, indicates that the definition following it is comprehensive and all-encompassing (that is, complete, fixed, finite).[21] Nothing more can be read into it. On this basis, ss 3(2)(a) - (i) appears to contain a closed list of activities comprising tax administration. However, s 3(2)(h) opens up the list by empowering SARS to 'perform any other

20 A discussion of the individual components of the tax administration process (such as, tax registration, submission of returns, maintenance of records, issuing of tax assessments, objections and appeals), falls beyond the scope of this article and is, therefore, not undertaken here.

21 See *Warwick Investments (Pty) Ltd v Maharaj* 1954 2 SA 470 (N); *Rogut v Rogut* 1982 3 SA 928 (A); *Southern Life Association Ltd v CIR* 1985 2 SA 267 (C) 269-270; *S v Tshilo* 2000 4 SA 1078 (CC) para 9; *Birkenruth Estates (Pty) Ltd v Unitrans Motors (Pty) Ltd* 2005 3 SA 54 (W); *S v Dzukuda; City of Tshwane v Marius Blom* 2013 3 All SA 481 (SCA) para 12.

administrative function necessary to carry out the provisions of a tax Act'. 'Any' is a word of wide import and unqualified generality.[22] Its effect is that *all* things related to its subject are covered by the provisions to which it relates, except things restricted by its subject matter or context. 'Any' casts wide the functions falling within the ambit of s 3(2)(h). Thus, SARS is empowered to perform a range of functions not expressly listed in s 3(2). This construction fits naturally with, first, the inclusion in the South African Revenue Service Act 34 of 1997 (s 5(1)(j)) of SARS's power to engage in "any activity, … to promote proper, efficient and effective tax administration". Secondly, the construction contended for here is also consistent with s 5(1)(k) of that Act which empowers SARS to "do anything that is incidental to the exercise of any of its powers". In the context of ss 5(1)(j) and (k) respectively, 'any' and 'anything' casts extremely widely SARS's intended authority.

Accordingly, SARS's powers are not confined to a closed list of functions enumerated in s 3(2). SARS is empowered to perform 'any' such other administrative function which is necessary to carry out the provisions of a 'tax Act'. Hoexter[23] states that implied powers may be ancillary to the express powers granted to an administrator, or may exist either as a necessary or reasonable consequence of the express powers conferred on any such decision maker. Therefore, according to Hoexter, "what is reasonably incidental to the proper carrying out of an authorised act must be considered as impliedly authorized".

The TAA (s 3(2)(h)) prescribes that SARS's authority to act is subject to the requirement that the function performed is 'administrative' and 'necessary'. These words are undefined in the TAA. It is a trite principle of interpretation that statutory words are to be interpreted textually, contextually, purposively and teleologically.[24] A statutory word must bear its primary meaning, unless cogent internal indications point to it meaning something else.[25] An 'administrative' act entails conduct that implements or gives effect to a policy, legislation or an adjudicative decision.[26] The adjective 'necessary' admits of various degrees of comparison. It is not synonymous with 'indispensable', neither does it have the flexibility of such expressions as 'admissible', 'ordinary',

22 See *Southern Life Association Ltd v CIR* 1984 47 SATC 15 (C) 18-19; *CIR v Ocean Manufacturing Ltd* 1990 3 SA 610 (A) 618; *Commissioner for Customs and Excise v Capital Meats CC (in liquidation)* 1999 61 SATC 1 (SCA) 5; *Body Corporate of Greenacres v Greenacres Unit 17 CC* 2008 3 SA 167 (SCA) para 5; *ARMSA v President of the Republic of South Africa* 2013 7 BCLR 762 (CC) paras 33-35.

23 Hoexter *Administrative Law in South Africa* (2012) 43-44. See also *Potwana v University of KwaZulu-Natal* 2014 JDR 0156 (KZD) para 34.

24 An interpreter must strike a fair balance between the language of a text and the context of the provision being interpreted. See *Bertie van Zyl supra* para 46.

25 *Northwest Townships (Pty) Ltd v Administrator, Transvaal* 1975 4 SA 1 (T) 12.

26 *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA) para 24. See also Hoexter *The New Constitutional & Administrative Law* (2002) 28.

'useful', 'reasonable' or 'desirable'.[27] The *Concise Oxford Dictionary*[28] defines 'necessary' to mean "needed to be done, achieved, or present; essential requiring to be done, essential, needed for a purpose". Thus, 'necessary' connotes a pressing need. It is often connected with a word increasing or decreasing the impression of urgency. Thus, a thing may be necessary, very necessary, reasonably necessary, absolutely or indispensably necessary.[29] In such instances, the meaning of 'necessary' is coloured by the word with which it is associated.

For the purposes of s 3(2)(h), 'necessary' must satisfy the touchstone of reasonableness. Thus, a function falls within the contemplation of this provision if its performance is 'reasonably necessary' to realise "the ostensible legislative intention or to make the statute workable".[30] The question of necessity is a factual issue to be decided with reference to the fiscal interests or needs served by the performance of a particular function. Whenever SARS seeks to invoke the administrative function, it bears the onus to prove that the necessity precondition is met.[31]

4 2 Meaning of 'taxpayer' analysed

An analysis of the definition of 'taxpayer' in the TAA is significant for various reasons. First, unpacking its meaning enhances an understanding of taxpayers potentially subject to SARS's authority under the TAA read with s 4(1)(a) and Schedule 1 of the South African Revenue Service Act. Secondly, the definition of 'taxpayer' demarcates the scope and ambit of this term in the TAA (s 2(b)) in the context of the phrase 'the rights and obligations of taxpayers … to whom this Act applies'. Thirdly, an understanding of its meaning sheds light on the categories of persons who, as taxpayers, are potential claimants of fundamental rights in the Bill of Rights that are relevant during tax administration. The TAA (s 1 read with s 151) defines 'taxpayer' as "means – (a) a person chargeable

27 *Mpande Foodliner CC v CSARS* 2000 4 SA 1048 (T) 1064C.

28 *Oxford Dictionaries Online* at *http://www.oxforddictionaries.com* (accessed 23-02-2014).

29 *McCulloch* v *Maryland* 1819 4 Wheat. 316 414. For the test for 'necessary', see *Van der Merwe v Randryk Beleggings (Edms) Bpk* 1976 2 SA 414 (O); *KBI v Van der Walt* 1986 4 SA 303 (T) 308. See also de Ville 'Guidelines for judicial reviews on "division of powers" grounds' 1995 *Stell LR* 139 153; Moosa 'The scope of the expression "necessarily incurred" in section 18(1) of the Income Tax Act' 2013 *SA Merc LJ* 184 194.

30 *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC) para 192. See also *Berg River Municipality v Zelpy 2065 (Pty) Ltd* 2013 4 SA 154 (WCC) para 28.

31 For a discussion of onus in tax matters under the TAA, see Goldswain *The Winds of Change- An Analysis and Appraisal of Selected Constitutional Issues Affecting the Rights of Taxpayers* (Doctor of Accounting Science dissertation 2012 UNISA) 105-119.

to tax; (b) a representative taxpayer;[32] (c) a withholding agent;[33] (d) a responsible third party;[34] or (e) a person who is the subject of a request to provide assistance under an international tax agreement".[35] This definition encompasses natural and juristic persons, including persons located outside of South Africa's territorial borders. Section 151(e) applies to a 'taxpayer' who is liable for a foreign tax debt to a foreign government. In terms of the TAA, SARS may recover such debt by co-operating with a foreign tax authority. To this end, SARS may take steps under s 185 of the TAA[36] to recover the debt from assets located in South Africa that are owned by the taxpayer or in which the taxpayer has a legal interest.

Whilst registration or incorporation is a legal requirement for the *de jure* existence of certain statutory juristic persons (for example, companies and close corporations), it is not a legal requirement for a natural or juristic person to be a taxpayer. Although the TAA (s 22) provides for taxpayer registration, this is not a legal pre-requisite to be a taxpayer. For example, a minor is, strictly speaking, a taxpayer by virtue of paying tax (such as value-added tax) on the purchase of any item (such as sweets). For TAA purposes, a person is *ex lege* a 'taxpayer' as defined from the moment he/she/it is caught in the web of a taxing statute. Registration as a 'taxpayer' is but a formality that is necessary to formalise and regularise a taxpayer's fiscal affairs in circumstances where the TAA or other tax law demands that registration occurs. Therefore, taxpayer registration is simply a confirmation of a pre-existing legal fact or state of affairs. Registration does not create or confer the 'taxpayer' status on anyone. This is clear from the fact that taxpayer registration does not apply to all taxpayers or for all taxes governed by

32 The TAA (s 153(1)) defines 'representative taxpayer' to mean "a person who is responsible for paying the tax liability of another person as an agent, other than as a withholding agent, and includes a person who – (*a*) is a representative taxpayer in terms of the Income Tax Act; (*b*) is a representative employer in terms of the Fourth Schedule to the Income Tax Act; or (*c*) is a representative vendor in terms of section 46 of the Value-Added Tax Act".

33 The TAA (s 156) defines 'withholding agent' to mean "a person who must under a tax Act withhold an amount of tax and pay it to SARS".

34 The TAA (s 158) defines 'responsible third party' to mean "a person who becomes otherwise liable for the tax liability of another person, other than as a representative taxpayer or as a withholding agent, whether in a personal or representative capacity".

35 The TAA (s 155, s 157, s 159) provides that the taxpayers mentioned in sub-paras (*b*), (*c*) and (*d*) of s 151 are personally liable for the tax debt otherwise payable by their (tax) principals. For a discussion of the term 'taxpayer' in the TAA, see Clegg *LexisNexis Concise Guide to Tax Administration* (2012) 86. For an interpretation of 'taxpayer' generally, see *CSARS v van Kets* 2012 74 SATC 9.

36 The TAA (s 185) empowers SARS to recover a foreign tax debt by levying execution against the local assets of a foreign tax debtor found in SA. This SARS may do if it acts in terms of an 'international tax agreement' defined in s 1 as including "an agreement entered into with the government of another country in accordance with a tax Act". See *Krok v CSARS* 2015 6 SA 317 (SCA).

the TAA. For example, a land purchaser who is liable for transfer duty under the Transfer Duty Act 40 of 1949, and a deceased estate liable for estate duty under the Estate Duty Act 45 of 1955, are not required to register for these fiscal purposes. Likewise, all recipients of goods or services are obliged to pay VAT to a supplier registered as a vendor under the Value-Added Tax Act 89 of 1991. This Act does not require a payer of VAT to register as a taxpayer to be liable for payment of such tax. Any payer of transfer duty, estate duty and VAT is a 'taxpayer', *stricto senso*.

5 Tax collection under the Tax Administration Act

The TAA (s 3(2)(e)) incorporates tax collection as a core facet of tax administration. It is in the public interest that taxes are collected.[37] Tax collectors are the engines driving a state's effort to swell the public treasury. Tax collection must occur in a principled way consistent with the Constitution and an enabling statute. The rule of law, a founding constitutional value, prohibits arbitrariness in tax collection and precludes financial considerations being used to justify an infringement of entrenched rights.[38] Thus, for example, SARS cannot require taxpayers to pay more tax than is due in law, nor can it claim taxes in advance of their due dates.[39] No tax may be collected unless there is a tax debt due and payable as determined in accordance with a statute.[40] No tax liability arises unless a taxpayer is brought within the reach of a legislative text expressing the legislature's will.[41] A tax liability arises when a taxable event[42] occurs, the nature whereof is determined by a taxing statute. For example, an income tax liability is regulated by the definition of 'taxable income' of which 'gross income' is an integral part.[43] The gross income of a 'resident' (as defined) means 'the total

37 *CSARS v Brummeria Renaissance (Pty) Ltd* 2007 6 SA 601 (SCA) para 26.

38 *Schachter v Canada* [1992] 2 SCR 679 709. See also Brand 'Financial constitutional law – a new concept in South Africa?' 2008 *TSAR* 89 97.

39 See Deak 'Taxpayer rights and obligations: The Hungarian experience' 1997 *Revenue LJ* 18 19.

40 The TAA (s 1 read with s 169(1)) defines 'tax debt' to mean "an amount of tax due or payable in terms of a tax Act". 'Tax' is defined in s 1 as including a "penalty" and "interest". A tax debt is 'due' when there is a "liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately". See *Singh v CSARS* 2003 4 SA 520 (SCA) para 25. For a discussion of the distinction between taxes 'due' from those 'payable', see *Namex (Edms) Bpk v KBI* 1994 2 SA 265 (A) 289; *Capstone 556 (Pty) Ltd v CSARS; Kluh Investments (Pty) Ltd v CSARS* 2011 6 SA 65 (WCC) para 13.

41 *Welch's Estate v CSARS* 2005 4 SA 173 (SCA) para 89.

42 The TAA (s 1) defines 'taxable event' to mean "an occurrence which affects or may affect the liability of a person to tax".

43 For the definitions of 'taxable income' and 'gross income', see s 1 of the Income Tax Act 58 of 1962. For an analysis of these terms, see *CIR v Nemojim (Pty) Ltd* 1983 4 SA 935 (A) 946.

amount in cash or otherwise[44] received by[45] or accrued to[46] or in favour of such resident … excluding receipts or accruals of a capital nature'.[47]

A tax assessment is not a prerequisite for a tax liability.[48] The TAA (s 1) defines 'assessment' to mean "the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS".[49] Thus, its purpose is to compute a tax debt or refund due to a taxpayer.[50] 'Assessment' is distinguishable from 'notice of assessment'. The latter, dealt with in the TAA (s 96), is not necessarily the same as the former.[51] Although the dictionary meaning of 'tax' includes an 'assessment', this meaning is not included in the definition of 'tax' in the TAA (s 1). This notwithstanding, if another 'tax Act' incorporates an 'assessment' as part of its meaning of 'tax', then such meaning would be covered by the TAA because the definitions clause in s 1 expressly stipulates that, for TAA purposes, "a term which is assigned a meaning in another tax Act has the meaning so assigned". Although a tax assessment is a "mental act in the nature of a decision",[52] generally no tax is recoverable through judicial intervention until after this mental act manifests itself outwardly in the form of a written assessment furnished to the taxpayer.[53] This notification is a procedural pre-requisite for the lawful enforcement thereof by SARS. The TAA codifies this requirement. Section 172(1) thereof provides that once a tax debt is payable, "SARS may, after giving the person at least 10 business days' notice, file with the clerk or registrar of a competent court a certified statement setting out the amount of tax payable and certified by SARS as correct". Section 172(3) provides for a relaxation of this notice

44 For the meaning of 'amount', see *CIR v Butcher Brothers (Pty) Ltd* 1945 AD 301; *CIR v Hersov* 1952 1 SA 485 (A) 491-493; C*SARS v Brummeria Renaissance (Pty) Ltd* 2007 6 SA 601 (SCA) paras 11-19.

45 For the meaning of 'received by', see *CSARS v Cape Consumers (Pty) Ltd* 1999 4 SA 1213 (C) 1221-1223.

46 For the meaning of 'accrued to', see *CIR v People's Stores (Walvis Bay) (Pty) Ltd* 1990 2 SA 353 (A) 365A-367D; *Cactus Investments (Pty) Ltd v CIR* 1999 1 SA 315 (SCA) 320H.

47 For the test to distinguish between capital and revenue income, see *CSARS v Founders Hill (Pty) Ltd* 2011 5 SA 112 (SCA) paras 18-52; *Stellenbosch Farmers' Winery Ltd v CSARS; CSARS v Stellenbosch Farmers' Winery Ltd* 2012 5 SA 363 (SCA) paras 23-46; *CSARS v Capstone 556 (Pty) Ltd* 2016 2 All SA 21 (SCA) paras 22-32.

48 *Namex (Edms) Bpk supra* 289; *Contract Support Services (Pty) Ltd v CSARS* 1998 61 SATC 338 351.

49 For the characteristics of an 'assessment', see *First South African Holdings (Pty) Ltd v CSARS* 2011 73 SATC 221 226E-F; *CSARS v South African Custodial Services (Pty) Ltd* 2012 1 SA 522 (SCA) paras 28-32. See also Moosa 'Letters and assessments: What is an income tax "assessment"?' 2012 *Tax Planning* 32.

50 *CIR v Lazarus' Estate* 1958 1 SA 311 (A) 326.

51 Clegg 24.

52 *Irvin & Johnson (SA) Ltd v CIR* 1946 AD 483 494.

53 *Singh supra* para 15.

requirement "if SARS is satisfied[54] that giving notice would prejudice the collection of the tax".

It is impermissible for SARS to waive payment of any tax, unless it is authorised by law to do so. This principle of taxation, traceable to *Collector of Customs v Cape Central Railways Ltd*,[55] is reinforced by s 4(1) of the South African Revenue Service Act which provides that SARS's function is to secure the widest possible enforcement of tax laws. Thus, it is incumbent on it to take all reasonably necessary steps to recover unpaid taxes.[56] This principle also finds expression in the TAA. Section 143(1) thereof provides that "[a] basic principle in tax law is that it is the duty of SARS to assess and collect tax according to the laws enacted by Parliament and not to forgo a tax which is properly chargeable and payable".[57] Consequently, the TAA stipulates the following: (i) "[t]ax must be paid by the day and at the place notified by SARS, the Commissioner by public notice or as specified in a tax Act" (s 162(1)), and (ii) "[a]s a general rule, it is the duty of SARS to assess and collect all tax debts according to a tax Act and not to forgo any tax debts" (s 193(1)). Section 193(2) refers to this latter duty as "strict" and "rigid". Thus, the legislative scheme of the TAA is structured in a way that will ensure maximum collection of tax debts due to the *fiscus*. This is a legitimate governmental objective.

The duty on SARS to collect unpaid taxes applies strictly, except as is otherwise provided by law. The TAA (s 193(2)) permits SARS to "deviate from the strictness and rigidity of the general rule referred to in subsection (1) *if it would be to the best advantage of the State"* (my emphasis). The italicised words contain the prescribed jurisdictional fact[58] that is a precondition which must exist, and be shown to exist, when a decision is taken to deviate from the stipulated norm (or general

54 For the legal meaning of 'satisfied', see *Breitenbach v Fiat SA (Edms) Bpk* 1976 2 SA 226 (T) 228A-B; *ITC 1470* 1990 52 SATC 88 92; *Farjas (Pty) Ltd v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 5 BCLR 579 (LCC) para 41. As regards proof of SARS's 'satisfaction', see *Natal Estates Ltd v CIR* 1975 4 SA 177 (A) 208.

55 1888 6 SC 402 405-406. See also *CIR v The Master* 1957 3 SA 693 (C) 701-702; *AM Moolla Group Ltd v CSARS* 2003 JOL 10840 (SCA) paras 18-20.

56 Therefore, SARS is not merely an organ of state dealing exclusively with the management of, and legislation relating to, revenue collection. See *SARS v Armsec Professional Services (Pty) Ltd* 1998 66 SATC 277 (SECLD) 279.

57 This provision is comparable to s 6A(3) of New Zealand's Tax Administration Act 166 of 1994.

58 The Court, in *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 3 SA 481 (CC) para 98, held: 'Jurisdictional facts refer broadly to preconditions or conditions precedent that [objectively] must exist before the [valid] exercise of power, and the procedures to be followed when exercising that power.' In tax administration, this often consists of the CSARS being satisfied of the existence of certain facts giving rise to a decision causing a "particular fiscal result". See *ITC 1876* 2015 77 SATC 175 para 21. For a discussion of the role of jurisdictional facts in administrative law, see de Ville *Judicial Review of Administrative Action in South Africa* (2005) 156-162.

rule) concerned. If it does not exist, then no valid deviation may take place. Under these circumstances, the administrative decision permitting the waiver of a tax debt, or any part thereof, may, on application by a competent SARS official, be judicially reviewed and set aside for illegality, irrespective of whether the objectionable decision was made in good faith or negligently.[59] However, since such illegal act exists in fact, it gives rise to valid consequences until it is set aside by a court.[60]

The meaning of the phrase "to the best advantage of the State" is fleshed out in the TAA's requirements for the granting of a 'write off' and 'compromise' of a tax debt. Section 195(1)(*a*) of the TAA provides that a senior SARS official 'may decide to temporarily "write off" an amount of tax debt if satisfied that the tax debt is uneconomical to pursue as described in section 196 at that time". Section 197(1) of the TAA provides that a senior SARS official "may authorise the permanent 'write off' of an amount of tax debt – (a) to the extent satisfied that the tax debt is irrecoverable at law as referred to in section 198; or (b) if the debt is 'compromised' in terms of Part D". In terms of s 200 of the TAA, a senior SARS official "may authorise the 'compromise' of a portion of a tax debt upon request by a 'debtor', which complies with the requirements of section 201, if – (a) the purpose of the 'compromise' is to secure the highest net return from the recovery of the tax debt; and (b) the 'compromise' is consistent with considerations of good management of the tax system and administrative efficiency".

A taxpayer does not have a right or entitlement to a write-off or compromise of a tax debt. At best, there is a right to apply for this benefit. This right is useful where the duty to pay tax is, as in South Africa, not based on economic capacity or financial ability.[61] Every compromise or write off application must be considered on its merit. The determination of its outcome amounts to administrative power to be exercised within constitutional limits,[62] and subject to the dictates of procedural and substantive administrative fairness regulated by the Promotion of Administrative Justice Act 3 of 2000 read with the TAA (such as, prior notice of an intended decision, clear grounds for a

59 *Merafong City v AngloGold Ashanti Ltd* 2016 2 SA 176 (SCA) paras 15-17; *Berg River Municipality v Zelpy 2065 (Pty) Ltd* 2013 4 SA 154 (WCC) para 27.

60 *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) paras 26-31; *Pikoli v President of the Republic of South Africa* 2010 1 SA 400 (GNP) 408C-E. The Court, in *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 834F, held that unconstitutional conduct is a nullity "even before Courts have pronounced it so". The Court held, in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) para 85, that the "anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience."

61 A contrary legal position appears in the Constitutions of Italy 1947 (Art 53) and Spain 1978 (Art 31). See Roch *Tax Administration vs Taxpayer: A New Deal?* (undated) 10 available at *http://www.eatlp.org/uploads/public/Reports%20Rotterdam/Moessner%20lecture.pdf* (accessed 01-04-2018).

62 Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa 2000 2 SA 674 (CC) para 20.

decision, and adequate notice of the right to request reasons for a decision).[63] Every decision reached must constitute a legitimate exercise of public power.[64] In terms of the TAA, a designated senior SARS official is responsible for ensuring the integrity of the process. In practice, however, decisions regarding compromise and write off applications are decided at a branch of SARS by a panel or committee of senior SARS officials. This ensures that a taxpayer's right to just administrative action is not illusory but remains real. The expressions 'may decide' and 'may authorise' confers a discretion that must not be exercised capriciously but with due regard to constitutional and general legal principles.[65] All relevant facts and circumstances must be considered, including the reason for the conferral of the discretion.[66] The decision taken must be rationally related to the purpose for which the power was granted. If not, then the decision taken is judicially reviewable on the grounds of arbitrariness and inconsistency with the rule of law.

6 Conclusion

Public finance is vital for enabling effective governance, maintaining law and order, promoting peace and prosperity, facilitating the reconstruction and redevelopment of national infrastructure, and providing access to social goods (such as, education and social security). Efficient and effective tax administration is an essential pillar of a modern, democratic state. This article shows that the TAA is unmistakably aimed at advancing the public interest. The kernel of its aims is ensuring the proper collection of tax. This purpose is reconcilable with the principle in the Constitution (s 195(1)) requiring efficiency in public administration, of which tax administration forms an integral part. Furthermore, the aims of the TAA are consistent with the South African Revenue Service Act (s 3) stating that SARS's objective is the "efficient and effective collection of revenue". In so doing, the TAA serve to enhance fulfilment of the Constitution's underlying goals. This is so because the TAA is geared towards ensuring the availability of adequate public resources for public benefit or use in the public interest.[67] Though this pursuit is a legitimate governmental purpose, each provision in the TAA remains subject to scrutiny for rationality[68] and, thus, validity.

63 For a discussion of fairness in administrative action, see *Bengwenyama Minerals supra* paras 69-70.

64 *Van Eck and Van Rensburg v Etna Stores* 1947 2 SA 984 (A).

65 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) paras 47-56; *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* 2015 2 SA 1 (CC) paras 182-183.

66 *Northwest Townships (Pty) Ltd v Administrator, Transvaal* 1975 4 SA 1 (T) 12-13.

67 *CSARS v Africa Cash & Carry (Pty) Ltd* 2015 77 SATC 242 (GNP) para 19.

68 *UDM v President of the Republic of South Africa* 2002 11 BCLR 1179 (CC) para 55.

A review of the problems encountered by a non-member spouse in accessing their half share of the pension interest during divorce in South Africa

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OPSOMMING

'n Oorsig van die problem ervaar deur nie-lid eggenote in die verkryging van toegang to hul helfte van pensioenbelang deur die loop van egskeiding in Suid-Afrika

Die deel van 'n gedeelde pensionbelang deur voormalige (maar geskeide) eggenote in gemeenskap van goedere is die onderwerp van geweldige debat in die regsgemeenskap. Die knelpunt is die betekenis en interpretasie van die wetgewing wat hierdie pensioenbelang in 1989 ingestel het. Het die wetgewing bloot net gedien as 'n kodifikasie van die reg soos op daardie stadium, of het dit nuwe beginsels in die egskeidingsreg ingevoer? Hierdie regsonsekerheid het 'n daadwerklike impak gehad op die lid-eggenoot se pensioenbelang. Die einddoel van hierdie artikel is om te besin oor die debat as agtergrond vir die bespreking van sommige van die probleme ervaar deur nie-lid eggenote in die gebruik van hulle deel van die pensioenbelang na afloop van egskeiding.

1 Introduction

The interpretation of sections 7(7)(a) and 7(8) of The Divorce Act, 1979 (the DA) is controversial. Different high court judges,[1] academic writers and practising attorneys[2] have given divergent interpretations to the sections thus giving rise to more questions than answers. Pertinent questions to this debate regarding section 7(7)(a) are: What is the definition of the pension interest? Does it form part of the joint estate? Is it an asset in the joint estate? Does the joint estate automatically include

1 *Sempapalele v Sempapalele* 2001 2 SA 306 (O); *Kgopane v Kgopane* Case No 1819/2011; *Lamb v Lamb* 2002 JDR 0463 (T); *ML v JL* 2013 ZAFSHC 55; *Motsetse v Motsetse* 2015 2 All SA 495 (FB); *Maharaj v Maharaj* 2002 2 SA 648 (D&CLD); *Chiloane v Chiloane* 2007 ZAGPHC 183 (07/09/07); *M v M* 2016 ZALMPPHC 2 (17/06/2016);

2 Marumoagae "A non-member spouse's entitlement to the member's pension interest" 2014 PER/PELJ 2488 is an excellent and thorough treatise of issues raised in these and many more judgments 2491-2497; Pienaar "Does a non-member spouse have a claim on pension interest?" 2015 De Rebus 1; Davey "Pension interest and divorce *K v K and Another*: A Critique" 2013 De Rebus 26. Davey's views are criticised by Petse AJA in *Ndaba v Ndaba* 2017 1 SA 342 SCA par 25.

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the pension interest? What is the entitlement of the non-member spouse? Does failure to plead and pray for the division of the pension interest in the divorce papers prevent a former non-member spouse from claiming a portion of the pension benefits accorded to the member?[3] With regard to section 7(8), the questions that the courts have had to answer are: Is the non-member spouse barred in perpetuity to share the member's pension interest where the court that granted the divorce fails to make the section 7(8) order? Can a court that did not grant the divorce subsequently make a section 7(8) order?

The non-member spouse usually bears the brunt of this legal uncertainty when they access their share of the pension interest. Retirement funds present administrative hurdles and technical issues when they are supposed to honour court orders in terms of section 7(8) of the DA.[4] The focus of this article is to identify and discuss some problems/hurdles confronted by a non-member spouse in accessing their share of the pension interest. These are: the protection of a member's rights by retirement funds/administrators; failure of a member spouse to inform a non-member spouse that they belong to a retirement fund and or to disclose the name thereof; resignation of a member spouse from employment during divorce proceedings; a multiplicity of court processes; rejection of divorce orders and/or settlement agreements by retirement funds; taxation of pension interest payout to a non-member spouse and the percentage of the pension interest the non-member spouse is entitled to on divorce.

The following section highlights, briefly, the raging debate regarding the meaning and interpretation of sections 7(7)(a) and 7(8) of the DA. I discuss the SCA ruling in *Ndaba v Ndaba*[5] and conclude that by answering some and not all the questions raised in the current debate, the SCA has allowed the debated to go on thus missing a golden opportunity to settle the protracted debate once and for all.

2 Sections 7(7)(a) and 7(8) of the DA

2 1 The debate and selected interpretations

This section presents the different interpretations of these sections. I point out the confusion caused by some judges and writers in conflating the common law rules governing a marriage in community of property and section 7(7)(a). I discuss *Ndaba v Ndaba* and point out that the SCA

3 Marumoagae *supra* n2 at 2497; Marumoagae "Pension interest – is there a need to plead a claim? 2017 De Rebus 1; Marumoagae "The Law Regarding Pension Interest in South Africa has been settled or has it? With Reference to *Ndaba v Ndaba* (600/2015) [2016] ZASCA 162" PER/PELJ 1 4.

4 Mothupi "Some Practical Effects of the Financial Services Laws General Amendment Act 2008 on amending Section 37D(4) of the Pension Funds Act" 2010 SA Merc LJ 216.

5 Marumoagae *supra* n2.

failed to settle this interpretative quagmire once and for all. Which means that the debate regarding the unanswered questions will continue to rage on.

As indicated above, since the insertion of section 7(7)(a) in the DA, different high courts, some academic writers, attorneys, retirement funds and administrators have interpreted the section differently.[6] There are two dominant interpretations of the section. The first one, held by some judges,[7] is that the section changed the erstwhile common law by allowing a non-member spouse to share in the pension interest of a member spouse, which hitherto belonged to them alone and was not shared on divorce.[8] In other words, it was considered that the section enabled a non-member spouse to enjoy a member spouse's pension interest. The view went on to say that it was only through an order of a court granting a divorce that a non-member spouse could enjoy these benefits. Should a court granting a divorce fail to make a section 7(7)(a) order, a non-member spouse was forever barred from enjoying a member spouse's pension interest.[9] According to this interpretation, an order in terms of section 7(7)(a) was *constitutive* of a non-member spouse's rights to share in a member's pension interest.[10] A constitutive order creates new law.[11] For instance, in Fourie's case, the Constitutional Court ordered Parliament to change the traditional common law definition of a marriage between a man and a woman to include a marriage between same-sex partners. It was also enlisted to amend s 30(i) of the Marriage Act 25, 1961 to accommodate same-sex partners and other unconventional relationships.

6 *Sempapalele v Sempapalele* 2001 2 SA 306 (O); *Kgopane v Kgopane* Case No 1819/2011; *Lamb v Lamb* 2002 JDR 0463 (T); *ML v JL* 2013 ZAFSHC 55; *Motsetse v Motsetse* 2015 2 All SA 495 (FB); *Maharaj v Maharaj* 2002 2 SA 648 (D&CLD); *Chiloane v Chiloane* 2007 ZAGPHC 183 (07/09/07); *M v M* 2016 ZALMPPHC 2 (17/06/2016);

7 *Sempapalele v Sempapalele supra* n1; *Lamb v Lamb supra* n1; *Kgopane v Kgopane supra* n1 at 6 par 11; *Motsetse v Motsetse supra* n1.

8 N1; *Eskom Pension and Provident Fund v Krugel* 2012 6 SA 143 (SCA) 149 C-D. The SCA per Maya JA (Brand JA, Lewis JA, Tshiqi JA and Petse AJA concurring) lost a golden opportunity to resolve this interpretation uncertainty; *K v K supra* n1.

9 *Ndaba v Ndaba supra* n2 par 6, Kgomo J in his high court judgment discussed by Petse JA in the majority SCA judgment.

10 *Kgopane v Kgopane supra* n3 par 14; *Eskom Pension and Provident Fund v Krugel* n 7 144 par E-F; *Sempapalele v Sempapalele supra* n1; *Lamb v Lamb supra* n1; *BSM v NAM* Case No HCA 18/2015; *Motsetse v Motsetse supra* n1.

11 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC), a same sex couple could not marry because the common law definition of marriage disallowed them to do so. Parliament was given 12 months to change the traditional common law definition of marriage and make it more inclusive of other types of relationships.

The second view held by other judges, academic scholars and attorneys, was that an order of a court was not fundamental to a non-member spouse's rights to share in the pension interest of a member spouse.[12] According to this interpretation, the absence of a section 7(7)(a) court order did not bar a non-member from sharing in a member's pension interest. In the circumstances, the court order merely declares the law as it stands, and does not change anything.[13] Reiterating the same sentiment, Magid J observed in Maharaj that:

> Indeed in this province orders for division of the joint estate of parties married in community of property are consistently refused when divorce orders are granted for the very reason that they are unnecessary.[14]

In other words, the court order is merely *declaratory* and not *constitutive* of the non-member's right to share in the pension interest.

At the heart of this debate is the legal nature of a court order under section 7(7)(a) of the DA: is it *constitutive* or *declaratory*? If constitutive, it means that should the court hearing the divorce fail to make the order, the non-member spouse is forever barred from claiming their portion of the pension interest. However, if the order is declaratory, it means that failure by the court to make the order does not affect the right of the non-member spouse to their share of the pension interest. The courts that held that the s 7(7)(a) order is declaratory based their conclusion on the marital regime of the spouses and not on the interpretation and analysis of section 7(7)(a). Accordingly, they conflated the marital regime and the section which deems the pension interest to be an asset in the member's estate not in the joint estate. None of the courts provide the 'missing link', that is, how is 'his/her estate' converted into 'the joint estate' contemplated in a marriage in community of property. In providing the 'missing link' Marumoagae argues,

> Given the language adopted in section 7(7)(a) of the DA, which deems the pension interest to be an asset in the estate of the member spouse, I submit that this section is in effect converting the promise the pension fund made to its member into a realizable value capable of being divided.[15]

In support of his submission, he argues that as the monthly premiums are deducted from the member's salary which in itself is a patrimonial benefit of the marriage, and forms part of the joint estate, the sharing of the pension interest is appropriate and is the right thing to do. If parties are married in community of property, unless there is an identifiable separate estate where one of the parties received non-patrimonial

12 *Maharaj v Maharaj supra* n1; *Chiloane v Chiloane*; *supra* n1; *D v D* (15402/2010) [2013] ZAGPJHC 194 (10/05/2013) Miltz AJ 5 par 14; *K v Government Employees' Pension Fund* Case No. A3058/2015 2016 ZA 64 (30/03/16) 9 par 13; *RN v FK* Case No 15438/2015 (23/03/16) par 17.

13 *Maharaj v Maharaj supra* n2 at 652; *Ndaba v Ndaba supra* n4 par 26; *Peters v Peters* 2008 ZAWCHC 309 2/12/2008; *Kotze v Kotze* 2013 JOL 30037; *M v M supra* n2.

14 *Maharaj v Maharaj supra* n2 at 649 par I-J.

15 Marumoagae 2014 *supra* n2 at 2509. I agree with his submission.

benefits during the course of the marriage which fell solely in his or her personal estate, such parties have only one joint estate and share in its profits and losses.[16]

The argument that the order is constitutive stems from a misunderstanding of the basic common law rules which govern a marriage in community of property, their consequences, and their legal ramifications.[17] Community of property entails pooling of all assets and liabilities of the spouses immediately on and after marriage, automatically, by operation of the law.[18] This means that immediately on the solemnization of a marriage, all assets, movable or immovable, corporeal or incorporeal brought by both spouses into the marriage become common by operation of the law, both as regards ownership and legal possession.[19] No delivery, transfer or cession is required.[20] Acquisitions by either spouse during the course of the marriage automatically fall into the joint estate. If the spouses are employed, their earnings form part of the joint estate. In our view, the pension interest forms part of the earnings of the spouses and is part of the joint estate. Consequently, both parties are each entitled to each other's pension interest by virtue of their marital regime. Accordingly, the insertion of the above-mentioned sections in the DA in 1989, did not create a new law. It only brought forward, to the divorce date the enjoyment/sharing of the pension interest. In other words, before the insertion of section 7(7)(a) the sharing of the retirement benefits was postponed to the resignation, retrenchment and/or retirement of the member; the accrual to the non-member was delayed not denied.[21]

This was the law that existed before 1989[22] and which still applies if one is married in community of property without accrual. Before 1989 an incorrect impression was created that the member's retirement benefits, did not form part of the joint estate because they were not shared on divorce.[23] Accordingly, if on divorce a member spouse's retirement benefits did not form part of the joint estate, section 7(7)(a) of the DA was an enabling law for the non-member spouse. It was only after its insertion that the member spouse could access and share their

16 *Ibid*.
17 For a detailed discussion of the meaning of a marriage in community of property see Hahlo *The South African Law of Husband and Wife* (1975) 219; (1985) 157-158; *Boberg's Law of Persons and Family* (1999) 185; Heaton & Kruger *South African Family Law* (2015) 61-82; Marumoagae 2016 Obiter 314. Also, Lamont's definition of community of property in *T v T* 2014 ZAGPJHC 245 par 15, where the husband tried to swindle the wife of her contributions to the joint estate by creating a trust.
18 Miltz AJ in *D v D supra* n12 at par 14.
19 See discussion in note 17 *supra*.
20 De Villiers CJ in *Rosenberg v Dry's Executors* 1911 AD where the judge held that although the farm was registered in the name of the deceased husband, the ownership of one half-share was in the testatrix by virtue of their marital regime.
21 Marumoagae *supra* n2 at 2492, 2493; Mothupi *supra* n4 at 215.
22 The year ss 7(7)(a) and 7(8) of the DA came into effect.
23 *Sempapalele v Sempapalele supra* n1 and cases that followed that decision.

pension interest with the non-member spouse, which was impossible before 1989.[24] Hence, the constitutive nature of the section according to some judges and writers. In our opinion, what the amendment sought to address was the conflict between the fundamental principles of a marriage in community of property and s 37A(1) of the Pension Funds Act, 1956 (PFA). Whereas the common law rules automatically entitled the non-member spouse to a half share of the member spouse's salary/ earnings/ savings or 'his estate' during the marriage and on divorce; s 37A(1) of the PFA forbade interference with a member's pension benefits before their retirement. It provided for the exceptional circumstances under which the benefits could be disturbed.[25]

The concept 'pension interest' did not exist before August 1989[26] which meant that a divorced non-member spouse had to wait for the resignation, retirement or retrenchment of the member spouse in order to access their share of the pension benefit.[27] The Divorce Amendment Act 7, 1989 sought to change the law as it was. Section 7(7)(a) deemed a member's pension interest an asset in **his estate**. Section 7(8) enabled the court to make an order to that effect.[28] The 1989 amendment to the DA necessitated the amendment of related legislation, namely, The Pension Funds Act, 1956, The Income Tax Act, 1962 and The Maintenance Act, 1998. The Pension Funds Amendment Act 11, 2007 came into force on 13/09/2007.[29] Section 28(e) of this amendment which sought to reinforce the amendment in the DA, provided that a benefit was deemed to accrue to the principal member on the date of divorce. Thus, a non-member spouse was enabled to claim their share of the member's pension interest. It was not clear among the legal practitioners and academics if the amendment applied to divorces that took place prior to September 2007. The Financial Services Laws General

24 *K v K supra* n2 lower court judgment; Pienaar *supra* n2 at 39; Marumo 2014 2493 dealing with the history of the DA and s 37D of the Pension Fund Act of 1956.

25 Section 37A(1) of the PFA provides that "save to the extent permitted by this Act, the Income Tax Act 58, 1962, and the Maintenance Act, 1998 no benefit provided for in the rules of a registered fund … or right to such benefit or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded or of being pledged or hypothecated, or be able to be attached subjected to any form of execution under a judgment or order of court of law …" Marumoagae Obiter 2016 316; Mothupi *supra* n4 at 214.

26 Marumoagae "Breaking up is hard to do, or is it? The clean-break principle explained" 2013 De Rebus 38; Nevondwe "The Law regarding the division of the retirement savings of a retirement fund member on his or her divorce with specific reference to *Cockcroft v Mine Employees Pension Fund*" 2007 3 BPLR 296 (PFA) 1.

27 Levondwe *supra* n26 at 1; Marumoagae *supra* n2 at 2491-2.

28 Jeram "Is it still necessary to obtain a court order against a fund? A rebuttal" 2017 De Rebus 1. He discusses four reasons why it is still necessary to obtain a court order in terms of s 7(8) of the DA; Marumoagae 2014 2494; Marumoagae 2013 39.

29 Marumoagae *supra* n2 at 2493; Marumoagae 2013 *supra* n2 at 40.

Amendment Act 22, 2008 came into effect on 01/11/2008. It amended section 37D by inserting s 37D(4)(d) which provides that any portion of the pension interest that is payable to a non-member spouse that was granted divorce prior to 13/09/2007 is deemed to have accrued to the non-member spouse on 13/09/2007. The amendment applied only to retirement funds registered with the PFA.[30] It was only in 2011 that the Government Employees Pension Law Amendment Act 19, 2011 introduced the clean break principle to the Government Employees' Pension Fund (the GEPF).[31]

The contention that, before 1989, the retirement benefits did not form part of the joint estate lost sight of the fact that although the non-member spouse did not share in them on divorce, they *did share* them on the member spouse's retirement, resignation or retrenchment.[32] The main hurdle was that there could be a very long period of time between the divorce and the retirement, resignation or retrenchment of the member spouse. Moreover, no interest accrued to the non-member's share of the retirement benefits from the divorce date to the actual payment on retirement, resignation or retrenchment of the member spouse.[33] This was the problem which section 7(7)(a) sought to rectify. It brought the time of accrual of the pension interest for the non-member spouse forward to the day of divorce.[34]

2 2 *Ndaba v Ndaba*

In *Ndaba,* the appellant and respondent were married in community of property in 2005. On the dissolution of their marriage in 2012, they signed a deed of settlement which was made an order of the court. They agreed to share their movable and immovable assets equally. In 2013, the appellant (wife) requested the respondent to start the process to divide the joint estate. When he seemed uninterested, she instituted motion proceedings in which she asked for an order for three things: the appointment of a liquidator, a declaratory order that she and the respondent were each entitled to 50% of each other's pension interest, and an instruction directing their respective pension funds to endorse their records accordingly.[35] The respondent retorted that their respective pension interests did not form part of the joint estate; the applicant did not claim his pension interest on divorce and it did not form part of the settlement agreement. Finally, the respondent asserted, there was no order granted in terms of which the respondent's pension interest was

30 Marumoagae *supra* n2 at 2494.
31 Nevondwe *supra* n26 6; Marumoagae *supra* n2 at 2014 2495; Marumoagae 2013 *supra* n2 at 40.
32 Carrim Divorce benefits payable to a non-member under section 37D of the Pension Fund Act 24, 1956 (LLM dissertation 2013 UL) 9; Marumoagae 2014 *supra* n2 at 2493.
33 Carrim *supra* n32 9; Marumoagae 2014 *supra* n2 at 2492.
34 *Ndaba v Ndaba supra* n2 par 26; Carrim *supra* n32; Marumoagae 2014 n2 *supra* at 2493.
35 *Ndaba v Ndaba supra* n2 par 3.

deemed to be part of the assets of the joint estate.[36] Put differently, the defence raised the following questions: Did the pension interest form part of the joint estate? Did the applicant have to plead and claim the pension interest? Did the pension interest form part of the settlement agreement? What were the implications of the absence of a section 7(7)(a) order? Marumoagae[37] added more questions pertinent to the meaning and interpretation of s 7(7)(a) of the DA which the SCA ought to have answered but failed to do so.

In the high court, Kgomo J dismissed the applicant's application on three grounds. First, he could not make an order declaring the parties' respective pension interests to be part of the joint estate so long after the dissolution of the marriage, especially given the court that granted the divorce failed to do so.[38] Second, he could not supplement the blanket order of the division of the estate that had been made by the divorce court by including the parties' respective pension interests. Third, he concluded that section 7(7)(a) of the DA contemplates that an order should be made by the court granting the divorce decree. As a result, where the divorce court failed to make an order declaring the pension interest of the member spouse a part of the joint estate, it remained outside the joint estate. Finally, the parties' settlement agreement in the divorce court did not include their respective pension interests.[39]

Dissatisfied with the outcome, the appellant took the matter to the SCA. The main question for consideration by the SCA was whether a non-member spouse in a marriage in community of property was entitled to the pension interest of the member spouse, in circumstances where the court granting the divorce did not make an order declaring such a pension interest to be an asset in the joint estate. Petse JA pointed out that the pension interest of the member spouse is by virtue of the parties' marriage in community of property, co-owned by both in equal shares; this is a common law principle. Consequently, the judge stated, section 7(7)(a) is an endorsement of this common law principle; it does not create a new marital principle, meaning that a pronouncement by the divorce court that the pension interest forms part of the joint estate is

36 *Ndaba v Ndaba supra* n2 par 5.

37 Is the non-member spouse entitled to his/her spouse's pension interest? How does a non-member spouse derive an entitlement to her member spouse's pension interest? Does the pension interest fall automatically within the joint estate by operation of the law? Is the court competent to order the member spouse's retirement fund to pay over to the non-member spouse the percentage of his/her member spouse's pension interest on divorce when such was not pleaded and prayed for in the divorce papers? Are retirement funds justified in refusing to pay a percentage of the pension interest to a non-member spouse on the strength of the decree of divorce not citing or incorrectly citing the name of the funds? Should the non-member be burdened with the obligation to approach a court for the variation of a divorce decree notwithstanding the fact that the relevant pension fund has confirmed that one of the parties to the divorce is its contributing member?

38 *Ndaba v Ndaba supra* n2 par 6.

39 *Ndaba v Ndaba supra* n2 par 6.

declaratory[40] and not *constitutive*. In other words, the pension interest automatically forms part of the joint estate during the marriage and on divorce, and there is no change in its status.

Having concluded that a section 7(7)(a) order was declaratory and unnecessary, could the SCA make an order under section 7(8)? Is there any law which prohibits a court that did not hear the divorce, the SCA in this instance, from making a section 7(8) order? This question was aptly answered by Makgoka AJA in his dissenting judgment. He dissented on the ground that the settlement agreement of the parties which was made an order of the court, excluded the pension interest; the pension interest was neither a movable nor immovable asset. Furthermore, he pointed out, neither the high court nor the SCA had jurisdiction to make a section 7(8) order. Consequently, he concluded, it was only the court which granted the divorce that could order the pension fund to pay the non-member a pension interest, in this instance, the regional court. Which meant that the appellant still had to make an application to the regional court for the section 7(8) order.[41] He concluded that the pension fund to which both the parties belonged, the Government Employees' Pension Fund (GEPF), was empowered by law to give effect to an order made in terms of section 7(8)(a); the declaratory order made by the SCA was not very helpful to the appellant.[42]

Ndaba v Ndaba answered some but not all the questions relating to the interpretation of sections 7(7)(a) and 7(8) of the DA.[43] It limited its analysis of the facts and narrowed the ambit of what needed to be decided when it said that "… the real issue on appeal is therefore whether a non-member spouse in a marriage in community of property, is entitled to the pension interest of a member spouse in circumstances where the court granting the decree of divorce did not make an order declaring such pension interest to be part of the joint estate?" In so doing, it left some questions unanswered: Can a court grant an order relating to a pension interest despite the papers being silent on the issue? Should the non-member pray and plead for such an order?

The following section discusses various problems faced by a non-member spouse in getting their share of the pension interest.

40 *Ndaba v Ndaba supra* n2 par 25.

41 This point was successfully raised in T*heron v Sanlam Preservation Pension Fund* Case No PFA/FS/19463/07/RM Pension Fund Adjudicator (PFA); *Budhoo v Sasol Pension Fund* PFA/GA/37937/2009/LPM; *GEPF v Naido*o 2006 (6) 304 SCA.

42 The upshot of this is that unless and until one of the parties approaches the regional court for an order in terms of s 7(8)(a) of the DA, the applicant's victory in this court would remain hollow and a *brutum fulmen* as far as the GEPF is concerned para 70.

43 Marumoagae *supra* n3 at 4.

3 Problems encountered by a non-member spouse in accessing their share of the pension interest

In this section, I will highlight the current difficulties encountered by a non-member spouse in accessing their share of the pension interest. These include: protection of a member spouse's rights by the pension funds and pension administrators; failure of the member spouse to tell the non-member spouse that they belong to a particular retirement fund; resignation of the member spouse from employment during divorce proceedings; multiplicity of court processes and attendant costs; rejection of divorce orders and/or settlement agreements by pension funds; uncertainty on what percentage of the pension interest the non-member spouse is entitled to on divorce; and taxation of the pension interest payout to a non-member spouse.

3 1 Protection of member spouse's rights by retirement funds/administrators

Retirement funds and administrators are very reluctant to divulge any information regarding the pension interest of the member spouse to the non-member spouse. This could be because most fund rules include confidentiality clauses for the protection of the member spouse's right to privacy.[44] A case in point is *BL v FL*[45] where the court order granted the applicant a 50% share of the first respondent's pension interest in the Transnet Retirement Fund. When the first respondent's pension interest accrued, he transferred R156 634.79 to the trust account of the applicant's attorney plus R5 090.18 for her legal costs.

Dissatisfied with the small amount received, the applicant sought a mandatory order against the first and second respondents respectively, compelling them to provide the value of the first respondent's pension interest. She also asked for a true and proper statement together with substantiating documents (par 2.1) reflecting the value of the benefits paid to the first respondent in the Transnet Retirement Fund (par 2.2). The first respondent's defence that the application was ill-conceived and that the name of the fund was incorrect was thrown out of court. It found that the applicant was entitled to the information she was asking for and ordered the first respondent to supply it.

I submit that where the member spouse is acting fraudulently and to the detriment of the non-member spouse, the pension fund/administrator should voluntarily/readily give the correct information to the attorneys of the non-member spouse. In this way, unnecessary court processes can be avoided. In this case, the first and second respondents'

44 Carrim *supra* n32 32.
45 *BL v FL* 2015 4 SA 271.

attorneys acted in bad faith and should have been made to bear the brunt of their unprofessional actions.

In *Smith v Smith*[46] the court had allocated a portion of the member's pension interest to the non-member on divorce. The latter requested information pertaining to the pension interest from the fund which refused on the ground of the member's right to privacy. The court ordered the fund to supply the requested information and observed that, in fulfilling their duty of good faith, funds are obliged to disclose to the non-members and beneficiaries such information as is reasonable for the exercise and protection of any right.[47] The failure or refusal to do so without appropriate justification would amount to the improper exercise of the fund's powers. The court concluded that the non-member spouse had a right to access information relevant to the amount due to them, including how the amount was calculated and the terms and conditions governing payment of the benefits.[48]

3 2 Failure of member spouse to tell non-member spouse that they belong to a retirement fund, and failure to disclose its name

Sometimes, a member spouse inadvertently or deliberately fails to inform a non-member spouse that s/he belongs to a retirement fund and/or the name of the fund. As a result, the latter will, on divorce, not claim their share of the pension interest. A non-member spouse's right to share in the member's pension interest will be adversely affected by lack of knowledge of such crucial information. Fritz's[49] case demonstrates the repercussions of the failure of the member spouse to disclose to the non-member spouse that they belong to a pension fund and failure to disclose its name. The deceased member spouse belonged to a pension fund during their marriage and on divorce. The non-member spouse, the wife, did not know about this and consequently did not claim her share of the pension interest on divorce. After divorce, the deceased transferred his pension interest to the first respondent, the transferee fund. When the wife claimed her share of the pension interest, the transferee fund's defence was that the deceased transferred his pension interest to the first respondent after divorce and was not a member on divorce. The point the wife was making was that on divorce, her husband belonged to the transferor pension fund. She was claiming a percentage of the pension interest before it was transferred because her entitlement was not deducted.[50]

46 S2004 2 BPLR 5431 (SCA). This case is discussed by Carrim *supra* n32 32.
47 Carrim *supra* n32 32; Nevondwe *supra* n26 5.
48 Carrim *supra* n32 32.
49 *Fritz v Fundsatwork Umbrella Pension Fund* 2013 4 SA 492 (EC) 493; *K v K* discussed by Davey J, demonstrates the same point. The wife did not claim her share of the pension interest on divorce because she did not know that her husband belonged to a pension fund (he failed to tell her) *supra* n2.
50 *Fritz v Fundsatwork supra* n49 at par H-J.

3 3 Resignation of a member spouse from employment during divorce proceedings

The right of the non-member spouse to share equitably in the member spouse's pension interest will be adversely affected by the resignation of the member spouse from employment during divorce proceedings.[51] According to section 1 of the DA the pension interest means the benefits to which a member of a fund would have been entitled to in terms of the rules of the fund, had his/her membership terminated on the date of divorce on account of their resignation from office.[52] According to some courts,[53] implicit in this definition, is the fact that the member *must* be a member of the fund on divorce, failing which there is no pension interest to talk about.[54] In other words, in order to calculate the pension interest, the member spouse has to be in active employment and active fund membership at the date of divorce so that it may be deemed that s/he has resigned.[55]

In Elesang[56] the member spouse resigned from work after the issue of divorce summonses and he became entitled to his pension interest withdrawal benefit. Apprehensive that the member spouse was going to prejudice her share in the pension benefit, the applicant (wife) asked for a provisional order requesting the second respondent, the provident fund, to pay half of the member spouse's pension interest into the trust account of her attorney. The provident fund opposed the application on the ground that as the member resigned from his employment when summonses were issued, he would not be a member of the fund on divorce, which meant that the court granting the divorce would be unable to make a divorce order contemplated in section 7(7)(a) of the DA. According to the fund, the enabling section could only be invoked if the member spouse was still a member of the fund on divorce. The court observed that the member's pension benefit formed part of the joint estate and that the applicant's apprehension was reasonable and it found in her favour. This demonstrates how a member spouse with the assistance of his fund tried unsuccessfully to frustrate the rights of the non-member spouse in sharing the pension interest.

51 Marumoagae *supra* n2 at 2512.
52 Pension interest, in relation to a party to a divorce action who – (a) is a member of a pension fund … means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have terminated on the date of the divorce on account of his resignation from office; Marumoagae 2014 2496.
53 *Elesang v PPC Lime Ltd* 2007 6 SA 328 (NCPV); Marumoagae *supra* n2.
54 Marumoagae 2014 *supra* n2 at 2511-13; Marumoagae 2016 320.
55 Marumoagae 2014 *supra* n2 at 2511-13; Splitting a pension on divorce IOL 5.
56 *Elesang v PPC Lime Ltd supra* n53.

In Naidoo[57] a divorce order determined that the non-member spouse, Mrs Naidoo, was entitled to 50% of the member's pension interest, calculated on the day of divorce but payable when the benefits accrued to the defendant husband. The manager of the fund was instructed to endorse the records accordingly. However, he instead wrote to Mrs Naidoo's attorney telling him that the fund would pay Mrs Naidoo provided that Mr Naidoo was still employed on the day of divorce. As Mr Naidoo had resigned prior to the divorce date, Mrs Naidoo applied *ex parte* for an order: directing Mr Naidoo to facilitate administrative requirements for fund payment; restraining Mr Naidoo from getting her half share in the fund; interdicting the fund from paying her half share to Mr Naidoo; and directing the fund to pay her pension interest to her attorneys. The fund retorted that it was prohibited by section 21(1) of the Government Employees' Pension Law, 1996[58] from paying Mrs Naidoo. Jappie J disagreed with the fund and held that Mrs Naidoo was not a creditor but was claiming her half share of the joint estate to which she was entitled by operation of the law. On appeal to the SCA, the judges agreed with the lower court and dismissed the appeal.

3 4 Multiplicity of court processes[59]

Litigation is emotionally, physically and financially taxing for litigants generally and for a divorcing couple in particular. More so, because a divorce order is just the beginning of a litany of court processes to follow.[60] De Jong laments the postponement of the adjudication of the actual division of the joint estate to be finalized by a liquidator because it results in the piecemeal adjudication of issues that originate from one and the same divorce matter. These are the actual division of the assets, maintenance of the wife and the children, if any, and the sharing of the pension interest. A non-member spouse might have to go through a

57 *GEPF v Naidoo* 2006 6 304 SCA. In Maharaj the member spouse had resigned from work and was about to be paid his pension. The applicant successfully interdicted the GEPF from paying her husband the sum of R19 788.84, her notional half share of the pension interest on divorce, pending the division of the joint estate.

58 The section provides "Subject to section 24A, no benefit or right in respect of a benefit payable under this Act shall be capable of being assigned or transferred or otherwise ceded or of being pledged or hypothecated or, save as is provided in … section 7(8) of the Divorce Act, 1979, be liable to be attached or subjected to any form of execution under a judgment or order of a court of law."

59 *Ndaba v Ndaba* went through four court processes: in 2012 the divorce proceedings, 2013 the motion proceedings which were dismissed by Kgomo J, 2015 the SCA application where the appellant got her 50% share of the respondent's pension interest and the fourth court process back to a regional court in terms of s 7(8).

60 De Jong "The need for new legislation and/or divorce mediation to counter some commonly experienced problems with the division of assets upon divorce" 2012 Stell LR 228.

number of court processes before getting their share of the pension interest; they bear the brunt of this endless adjudication.[61]

For instance, *Eskom Pension and Provident Fund v Krugel*[62] went through four court processes. In 2001 the parties divorced and agreed in a deed of settlement that the wife would get 25% of the husband's pension interest. The fund refused to endorse its records accordingly, because, at the time of divorce, the husband had elected to be a deferred member and no longer had a pension interest in the fund as contemplated in section 7(7)(a) of the DA, read with section 37D of the Pension Fund Act. The second process was lodged by the non-member spouse to the Pension Funds' Adjudicator, in terms of section 30A of the Pension Funds Act. The adjudicator found in the non-member's favour, based on section 37D(6) and 37D(4) of the PFA. The adjudicator was of the view that section 37D(4)(d) included deferred or preserved benefits which were to be regarded as a pension interest to be shared on divorce, and thus determined that Krugel's deferment of his benefit until he was 55 years old did not prevent the non-member spouse from getting her share on divorce. The adjudicator concluded that the benefit was deemed, in terms of section 37D(4)(a), to have accrued to Krugel (par 4). The fund disagreed with the determination of the PFA and took it on review to the South Gauteng High Court (SGHC). Lamont J dismissed the application on the grounds that Mr Krugel was a member of the pension fund on divorce and owned an asset, the pension interest, which he had to share with his wife (par 5). The fourth process was an appeal to the high court by the fund. The main ground of appeal was that the member had resigned from the fund on divorce and the orders in terms of sections 7(7)(a) and 7(8) were unenforceable (par 6). The high court upheld the appeal, but agreed that the wife could still claim her money when Krugel reached 55 years of age as agreed in the deed of settlement.

3 5 Rejection of divorce orders and/or settlement agreements by retirement funds

John Anderson has cautioned that 28% of divorce settlements served on funds administered by Alexander Forbes, the largest administrator of retirement funds in South Africa, are rejected, and that the proportion of unenforceable divorce orders has increased from 8% to 24%.[63] According to Anderson, both the non-member and member spouse must ask the administrator of the fund before divorce what the current fund value is, and also the present value of the pension interest. He warned

61 Mothupi observed that the requirement of naming the fund in the order might be costly and time consuming for the non-member spouse to meet. The non-member spouse had to request an amendment of the divorce order that did not clearly name the fund. The complainant would have to hire attorneys to have the divorce order rectified, and must file a new complaint clearly stating the name of the fund involved *supra* n4 215-6.

62 N7

63 Cameron "Splitting a pension on divorce" www.iol.co.za/business/personal-finance/retirement/splitting-a-pension-on-divorce-1218453 1.

that the correct name of the fund must be used at all times failing which the divorce order/settlement agreement will be unenforceable.[64] A portion of the pension interest must be stipulated in the order and the fund must be ordered to make payment of the portion awarded to the non-member spouse, and endorse its records. Where a member belongs to more than one pension fund, the divorce order must specify the pension fund the pension interest is supposed to come from otherwise, it will not be enforceable. Echoing Anderson, a pension fund administrator stressed that fund administrators stick to the letter of the law when processing such pay-outs, to avoid any liability.[65] According to them, the divorce order must specify the percentage of the pension interest assigned to the non-member spouse. Also, the pension fund must be identified by name in the order; referral to a member's 'retirement fund' will not suffice.[66]

Sayster v SABC Pension Fund[67] illustrates some of the concerns raised by Anderson above. The complainant was a former spouse of Mr Sayster who was a member of the SABC pension fund, administered by the second respondent. On divorce the parties signed a settlement agreement which was made an order of the court.[68] When presented with the divorce order, the fund refused to pay the defendant's wife on the ground that the order did not comply with the provisions of the DA and was therefore unenforceable; the wife was advised to amend the order and re-submit it to the fund. She enlisted the services of an attorney and sought assistance from the second respondent, the administrators, who advised the attorney accordingly. The amended order was, according to the second respondent, still unenforceable for the following reasons: First, the order failed to name the fund; it purported to award a portion of something other than the 'pension interest'. The amended decree stipulated that "the pension interest shall be calculated from date of marriage until date of divorce" (par 4.3) which conflicted with the DA.

64 Jeram *supra* n28 at 2;

65 10X Investments "Divorce and your retirement fund" www.10x.co.za/blog/divorce-and-your-retirement-fund/

66 Mothupi pointed out that the defences raised by the funds and the administrators were technical and were based on the actual wording of the divorce order. This approach he concluded, prejudiced the non-member spouse and their right to share in the pension interest *supra* n4 at 215-216, 219-220; Jeram *supra* n28 1; "Divorce and retirement funds in South Africa – A guide to family law" www.divorcelaws.co.za/divorce-and-retirement-funds-in-south-africa.html 1.

67 [2016] 3 BPLR 446 (PFA).

68 The settlement agreement read: "The Plaintiff is a member of the SABC Pension Fund, persal number 013230, whereby he has acquired a pension interest as described in Act 70 of 1979, as amended. It is agreed that the Defendant is entitled to 50% of the said pension interest of the Plaintiff, calculated from date of marriage to date of divorce, being 17 January 2014. The parties herein agree and confirm that an order be made, that by producing the final divorce order made by this Honourable Court, the Administrator of the SABC Provident Fund, is ordered to endorse their records accordingly …".

Dissatisfied with the decision of the first respondent, the defendant sought assistance from the PFA.

In response to the PFA's questions, the first respondent elaborated on the reasons for declining to pay the defendant after the order had been amended: the first respondent observed that the order directed the administrators of the fund to pay, not the fund; it purported to change the definition of the pension interest in the DA; the amended order did not refer to the original order that was being amended, and how it was amended; there was no section 7(8) order asking the fund to endorse its records accordingly; and the fund concluded it would be contravening the law if it paid the complainant without a valid order. The Tribunal agreed with the first respondent's submissions and dismissed the complaint.

3 6 Taxation of pension interest payout to the non-member spouse

There are tax implications for the deduction of the pension interest. Section 37D(i)(d)(ii) of the Pension Fund Act provides for the deduction of tax on any pension interest paid to a non-member spouse, in terms of a divorce order contemplated in section 7(7)(a) of the DA.[69] Taxation of allocated pension interest is, however, exceptionally complex.[70] Before 2007, the tax deduction was, in terms of a provision in the Income Tax Act, that when a non-member spouse's portion accrued, the member spouse was liable to pay the income tax.[71] The member could recover the tax from the non-member spouse. The 2007 amendment provides that divorce orders granted after 13 September 2007 will hold the member liable for tax on the withdrawal amount at his or her average rate. However, where a court order is granted after 13 September 2007, the non-member spouse will be held liable for the tax if the election takes place after 1 March 2009. The non-member was liable to pay the tax in divorces that occurred after 1 March 2009, even if the divorce order was granted before 1 March 2009 but after 13 September 2007.[72] If the whole pension interest was transferred to another retirement fund, the transfer was cost free. Currently, any allocation of a pension interest deducted by a fund will be taxed in the hands of the non-member spouse.[73]

In *NR v ER*[74] the parties were divorced in 2006. They agreed on a deed of settlement which was made an order of the court. Clause 5 gave the wife (first respondent) 30 % of her former husband's pension interest. In terms of the amendment of section 37D(4)(b)(i) of the PFA she became

69 Carrim *supra* n32 at 14-22.
70 MacKenzie *supra* n49 at 11.
71 Freund "Splitting pension on divorce" IOL 12.
72 Sigodi A law regulating taxation of pension benefits in South Africa (LLM dissertation 2015 LU) 19; Carrim *supra* n32 14.
73 Mackenzie *supra* n49 11.
74 2012 2 SA 481.

entitled to exercise an election for the payment of her 30% interest, at any time before the member's retirement and/or resignation. The lump sum payment was taxed. The husband sought an order against his wife for the payment of the amount of R135 614.27 in respect of the tax deducted from his pension interest in the fund. The wife contended that the 30% assigned to her in clause 5 was the total due and payable to her without any tax deduction. She contended that according to the settlement agreement, he had no right of recovery against her. Furthermore, she retorted, the tax was charged to the lump sum paid to the member and not her 30% share. The court disagreed with her contention and held that the husband's right to recover the tax liability paid was not based on the deed of settlement but on the law. The court held that the wife's 30% was taxed in the hands of the member who had the right to recover the tax paid from the non-member.

3 7 What percentage of the pension interest is the non-member spouse entitled to on divorce?

According to section 7(8)(a)(i) of the DA, the court granting a decree of divorce in respect of a member of a fund may make an order assigning *any part* of the pension interest to a non-member spouse.[75] Once a divorce order is forwarded to a retirement fund, the latter must deduct the amount in question from the member's pension interest and pay it to the non-member. The divorce order must specify the percentage to be allocated. In my view this requirement is misplaced. A judge cannot determine the percentage that the non-member is entitled to when the value of the pension interest of the member spouse is unknown. At the proceedings stage, it is doubtful if the member knows how much his/her pension interest is worth, because the pension fund has not been mandated by the court to calculate it. Though it is possible to compel a pension fund to provide the non-member spouse with the breakdown of their entitlement on divorce, the pension fund is not usually joined in the proceedings.

Some judgments determine the percentage of the pension interest to be awarded to the non-member spouse as ranging from 25% to 100%,[76] while others do not. However, if according to Ndaba the non-member spouse's entitlement is based on the parties' type of marriage, and the

75 Sigodi *supra* n72 at 17; Cameron *supra* n43 at 4. This section raises more questions than answers. For instance, how does a judge determine the percentage to be awarded to the non-member spouse? At this stage of the proceedings the member spouse's entitlement has not been calculated. It is only calculated by the fund after receiving a divorce order in terms of s 7(7)(a) of the DA.

76 *D v D* 25%; *NR v ER* 30%; Chiloane 50%; *RN v FK* 50%; Peters 50%; *GEPF v Naidoo* 50%; Elesang 50%; *BL v FL* 50%; Sayster 50%; Ndaba 50%; *D de Kwaadsteniet v Lifestyle Retirement Annuity Fund Group Limited* Unreported case no 2 of 2010 (PFA) 100%. Unfortunately, these judgments are all on appeal, and consequently there is no discussion of the rationale or reasons for the percentages awarded.

pension interest forms part of the joint estate, the non-member spouse must get 50% of the pension interest after tax and other legally permissible deductions. There is no justification for them to get less.

In *D v D*[77] the defendant wife was awarded 25% of her former husband's pension interest instead of 50%. The court penalised her because she had, on resignation from her job, not shared her pension interest with her former husband. Instead, she gave it to her parents. However, I disagree with the 25% award. The defendant had worked for only 6 months when she resigned to join the plaintiff in New York. Although the position she held is not specified, it is obvious that a pension interest for 6 months' employment minus tax, is a far cry from her husband's pension interest. He held a good position as an SABC TV journalist and had, on their divorce, worked for 10 years. The court should have compensated this glaring discrepancy.

Sempapalele[78] and Maharaj[79] illustrate this point. In the former case, the applicant's claim for R263 162.47 as her half share of the pension interest failed because she did not know the actual value of the respondent's pension interest. Her claim was dismissed because it was unsubstantiated. Mrs Maharaj also did not know the value of her husband's pension interest but was assisted by the Government Employees Pension Fund which advised her that she was entitled to R19 788.84. The GEPF was interdicted and restrained from paying to the bank the sum of money in question. Her application was successful in that her share of the pension fund was secured, pending the division of the joint estate.

4 Conclusion

The article discusses the controversy caused by divergent interpretations of sections 7(7)(a) and 7(8) of the DA. It Indicates that some courts conflate the common law principles of a marriage in community of property with the provisions of section 7(7)(a). It discusses the SCA decision in *Ndaba v Ndaba* which failed to answer some questions raised by the interpretation of the sections. It highlights some hurdles encountered by a non-member spouse in accessing their share of the pension interest.

77 See sources listed in n10 *supra*.
78 *Sempapalele v Sempapalele* 2001 2 SA 306.
79 See sources listed in n2 *supra*.

Debt capitalisation: An analysis of the application of section 24BA of the Income Tax Act

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OPSOMMING

Skuldkapitalisering: 'n Analise van die toepassing van artikel 24BA van die Inkomstebelastingwet

Die kapitalisering van skuld in ruil vir die uitreiking van aandele is 'n algemene verskynsel en kan op drie wyses geskied, naamlik deur die direkte uitreik van aandele (met of sonder kontantvloei), deur skuldvergelyking en deur die omskepping van skuldinstrumente in aandele. Alhoewel bestaande literatuur aandag aan die toepassing van skuldverminderingsbepalings in die Inkomstebelastingwet skenk, is daar egter 'n gebrek aan voldoende inligting oor die mate waartoe artikel 24BA van die Inkomstebelastingwet op die verskillende metodes van skuldkapitalisering van toepassing kan wees. Die artikel ondersoek die moontlike toepassing van artikel 24BA op skuldkapitalisering. Elk van die metodes van kapitalisering word individueel ontleed aan die hand van die vereistes van artikel 24BA. Die artikel bevind dat met skuldvergelyking as metode van skuldkapitalisering, verskille tussen die waardes van inskrywingslening (wat voortspruit uit die inskryf op aandele) en die markwaarde van aandele wat uitgereik word tot toepassing van artikel 24BA aanleiding kan gee. Op grond van die bevinding word daar aan die hand gedoen dat indien die omstandighede nie voorsiening maak vir verligting van die toepassing van artikel 24BA nie, kan skuldvergelyking as 'n minder gunstige metode van skuldkapitalisering beskou word.

1 Introduction

The combination in which respectively debt and equity are used to finance assets and operations of a company (the so-called capital structure or debt-equity ratio) depends on various of factors, of which, the incidence of tax is one of the main influencing factors.[1] This is substantiated by the fact that the Income Tax Act[2] also acknowledges

1 Van der Linde *Legal responses to corporate undercapitalisation: towards a proactive approach?* (2011) 8.
2 58 of 1962, hereinafter the Act (any reference to a section in this article refers to a section in the Act unless specifically indicated otherwise).

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that debt can be akin to equity as a means of funding and contains re-characterisation rules for debt (and interest) and equity (and dividends) in sections 8E, 8EA, 8F and 8FA. Given the potential tax consequences of the funding decision a company could be able to adapt the ratio of debt and equity funding in tax planning. A method through which this can be achieved, is debt capitalisation.[3]

Debt capitalisation is an arrangement where a shareholder converts debt to equity.[4] Stated differently, debt capitalisation is the process whereby the consideration for shares issued by a company takes the form of the discharge of an existing debt.[5] Not only shareholder debt but also third party debts can be capitalised in exchange for shares.[6] When debt capitalisation occurs, the *quid pro quo* received by the creditor company in exchange for the reduction of the debt is shares in the debtor company.[7] Debt capitalisation is not only concluded at the instance of debtor and creditor companies, but can be required by regulation (as illustrated by section 25BB(8) of the Act pertaining to Real Estate Investment Trusts).

Debt capitalisation can be achieved either directly or indirectly[8] by applying different methods and the structuring of these methods should be kept in mind for tax purposes. A single transaction could have different tax outcomes than a series of transactions resulting in the same outcome as the single transaction.[9] In the context of debt capitalisations the effective outcome can be achieved by means of the following three methods:[10]

a. Direct settlement: issuing shares directly in settlement of the debt;

b. Set-off: issuing shares and setting off the subscription loan owed by the subscriber against an amount owed by the company; and

c. Conversion: converting debt to shares in fulfilment of the conversion rights attaching to the debt.

Prior to the effective date of section 19 of the Act and paragraph 12A of the Eighth Schedule to the Act on 1 January 2013, only Binding Private Ruling ('BPR') 124 issued on 22 October 2012 dealt with the tax consequences of debt capitalisation. Since then, there has been an increase in the number of BPRs issued by SARS on debt capitalisation which could be indicative of the increased focus on the tax consequences thereof by taxpayers. The initial focus on debt capitalisation has been on

3 Chadbourne and Parke LLP *Tax Issues In Debt Restructurings* (2002) 3 available from https://www.chadbourne.com/Tax_Issues_In_Debt_10-2002_Projectfinance (accessed 09-04-2017).
4 KPMG "KPMG welcomes debt capitalisation tax proposal" 2015 *Taxmail* 1.
5 SARS *Interpretation Note 91: Reduction of debt* (2016) 10.
6 *CIR v Datakor Engineering (Pty) Ltd* (1998) (4) SA 1060 (SCA) 8.
7 SARS *Comprehensive Guide to Capital Gains Tax (Issue 5)* (2015) 139.
8 SARS *supra* n 7 at 140.
9 Van der Zwan *Tax implications of capitalisation of loans* (2014) 2 available from http://www.pvdz.co.za (accessed 02-04-2017).
10 SARS *supra* n 7 at 140.

the potential application of the debt reduction provisions, however, in the more recent BPR 246 and BPR 255 the SARS concludes by indicating that the rulings do not cover any general anti-avoidance provision to the proposed transaction. In this regard, a relevant anti-avoidance aspect that emanates from Interpretation Note 91: Reduction of debt, is the potential application of section 24BA of the Act to debt capitalisation.[11]

Section 24BA is aimed at a transaction in which a company acquires an asset from a person in exchange for the issue by that company to that person of shares in that company. The provisions of section 24BA would then apply, barring the exclusions afforded in section 24BA(4), if the value of the asset and the value of the shares differs. Prior to the promulgation of section 24BA, tax schemes with uneven exchanges allowed for value to be transferred without the appropriate tax consequences.[12] These tax consequences arguably include the avoidance of donations tax when value is transferred between taxpayers. The value shifting anti-avoidance rules contained in the Eighth Schedule proved to be ineffective in regards to companies due to the fact that in many anti-avoidance transactions the 'connected person' relationship lacked.[13] The purpose of section 24BA is to ensure that the value-for-value proposition applies to all asset-for-share transactions[14] in cases where 'connected persons' as defined is not present.[15] Although the section is mainly focused on asset-for-share transactions in terms of the corporate rules contained in section 42 of the Act,[16] section 24BA(2)(a) specifically refers to its application to any transaction. The potential application of section 24BA should therefore be considered in all instances where a company issues shares and would therefore include debt capitalisation, especially whether it can be said that the company acquires an 'asset' as part of the debt capitalisation which will be addressed in section 3 to section 5 which follows.

The objective of this article is to investigate the potential application of section 24BA to each of the three methods of debt capitalisation. The article aims to conclude on whether the potential tax consequences imposed by the application of section 24BA, could result in a particular method of debt capitalisation being less favourable, compared to other methods. Section 2 of this article considers the three requirements for section 24BA to be applicable, including an analysis of relevant key terms of the three requirements. Section 3 to Section 5 deals with the different methods of debt capitalisation and the potential application of section 24BA to each method based on the three requirements of section 24BA.

11 Van der Zwan *Tax Developments – August September 2015* (2015) 3.
12 National Treasury *Explanatory Memorandum on the Taxation Laws Amendment Bill 2012* (2012) 39.
13 *Ibid*.
14 *Ibid*.
15 Lewis *Value Shifting Arrangements Still Applicable to Companies and Triggering Adverse Tax Implications* (2014) 1 available from https://www.cliffedekkerhofmeyr.com (accessed 11-05-2017).
16 *Ibid*.

2 The requirements of section 24BA

For section 24BA to apply the following requirements should be met:

a. Shares issued as consideration,

b. Asset acquired in exchange for the shares issued, and

c. The value of the shares issued and the value of the asset acquired differs.

2 1 Shares issued as consideration

The first requirement which has to be met is that a company should issue shares as consideration. A key feature of debt capitalisation is the issue of shares by a debtor company in exchange for a release from an obligation to pay debts. The remaining question is whether these shares have been issued as 'consideration', a word that is not defined in the Act.

The modern approach to interpretation of documents from the outset considers the context and the language together with neither predominating over the other.[17] This approach to interpretation therefore insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.[18] The Merriam-Webster dictionary, defines the ordinary meaning of 'consideration' as the inducement to a contract or other legal transaction; specifically an act or forbearance or the promise thereof done or given by one party in return for the act or promise of another. In terms of the Shorter Oxford English Dictionary on Historical Principles on the meaning of 'forbearance' as abstinence from enforcing what is due, especially the payment of a debt.[19] The term 'forbearance' would therefore include a situation where the creditor offers the debtor release from its obligation to pay. In the context of debt capitalisation, the creditor gives, and the debtor company accepts, a forbearance of payment of the underlying debt in exchange for the issue of the shares by the debtor company. The amount of debt reduced or forborne by the creditor constitutes the 'consideration' for the share issue. The ordinary meaning is also not limited to positive performance only but allows for an interpretation of something forborne in exchange for something else. The ordinary meaning of 'consideration' consequently includes the forbearance of a right. In debt capitalisation the creditor's right to claim payment from the debtor is forborne as *quid pro quo* for the shares issued by the debtor. This forbearance by the creditor to enforce its debt claim against the debtor should therefore also constitute 'consideration' for purposes of section 24BA.

17 *Natal Municipal Joint Pension Fund v Endumeni* (2012) (4) SA 593 (SCA) 16.
18 *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 315.
19 SARS *supra* n 7 at 77.

2 2 Asset acquired in exchange for the shares issued

The issue of shares by the debtor must be in respect of acquiring an 'asset' as defined in the Eight Schedule.[20] The term 'asset' as part of the building blocks of capital gains tax should be interpreted widely.[21] A specific method of debt capitalisation should thus result in the debtor company acquiring an 'asset' during debt capitalisation for the second requirement to be met. The main terms in the definition of 'asset' in paragraph 1 of the Eighth Schedule are 'property' and 'a right' to such property. SARS describes 'property' as anything that can be disposed of and turned into money.[22] 'A right' would include both personal rights and real rights. A real right is a badge of ownership and is enforceable against all persons, whereas a personal right is enforceable against a specific person.[23] The nature of a debt capitalisation transaction, being between a debtor and a creditor in respect of a debt owed between them is therefore submitted as a bundle of personal rights enforceable between the parties concerned and not enforceable against other persons. In debt capitalisation the second requirement for section 24BA to apply would be met only if the debtor receives 'property' or 'a right' to property that can be enforced against the creditor. This specific aspect is considered in greater detail in section 3 to section 5 below.

2 3 The value of the shares issued and the value of the asset acquired differs

The final requirement for section 24BA to apply is that the 'consideration' received by the debtor should be different from the consideration that it would have received if the asset was acquired in exchange for the issue of shares under a transaction between independent persons dealing at arm's length. This requirement for section 24BA is therefore a value-for-value consideration and requires an analysis of a number of key concepts relating to value. When dealing with the issue of shares in reduction of debt, SARS recognises the distinction between the 'market value of shares', the 'subscription price of shares' and the 'face value of debt'.[24]

2 3 1 The 'market value of shares'

The 'market value of shares' is a complicated matter as a result of valuation which can be controversial and subjective.[25] Kumleben JA in

20 Section 24BA(1)
21 Olivier "Determining a taxable capital gain or an assessed capital loss: some problems" 2007 Meditari 36.
22 SARS *supra* n 7 at 39.
23 SARS *supra* n 7 at 532.
24 SARS *supra* n 7 at 140.
25 PricewaterhouseCoopers *Valuation & Economics* (2017) 1 available from https://www.pwc.co.za/en/services/deals/valuation-and-economics.html (accessed 16-05-2017).

Sarembock v Medical Leasing Services (Pty) Ltd[26] 1991 1 SA 344 (A) indicated that as a general rule, the value of an article is to be determined with reference to the price such article would fetch in the open market.[27] Due to the nature of property, and an absence of transactions suitable for comparison there may, however, be cases where the valuation is difficult. In many cases where debt capitalisation occurs, transactions are concluded between connected persons which further complicates the determination of value. The true value of related party debt, and consequently the shares to be issued, may be difficult to determine unless as part of a scheme of arrangements in terms of the Companies Act[28] (the 'Companies Act'), or a similar business rescue operation. A related party creditor may therefore have a significant debt claim against a debtor company, but the claim may be worthless in the hands of an unrelated party. This can be due to a variety of factors, including the solvency and liquidity of the debtor, its future prospects or the industry in which the debtor operates. This is substantiated by another argument that there is a contrast between the market value of debt and the book value of debt that is the result of a lack of public quotes for debt and that debt trades infrequently.[29] This anomaly in determining market value in debt capitalisation could result in potential abuse. Parties may argue that the debt that is capitalised and shares subsequently issued have no market value, since no unrelated party will be willing to purchase the debt at face value and through this manipulate the value and number of shares issued. A possible solution for this may be found in a reference to Wessels JA in *Katzenellenbogen Ltd v Mullin,*[30] where the judge indicates that the phrase 'current value' may sometimes be more appropriate than the phrase 'market value'.[31] When there is no active market which can determine the value of shares, the current value, or book value, may be more appropriate measure of value.

2 3 2 The 'subscription price of shares'

The 'subscription price of shares' requires a distinction between the purchase price of shares and the subscription price. A subscription involves the issue of new shares and the proceeds of those shares go to the company that issued those shares.[32] The subscription price is a crucial consideration from a Companies Act perspective, as section 40 of the Companies Act requires adequate consideration to be received for the issue of shares. Although in most instances the subscription price

26 1991 1 SA 344 (A).
27 Cornelius "Banda v Van der Spuy 2013 4 SA 77 (SCA) – Quantifying a claim with the actio quanti minoris" 2013 De Jure 872.
28 71 of 2008.
29 Sweeny et al. "The Market Value of Debt, Market versus Book Value of Debt, and Returns to Assets" 1998 *The CFA Digest* 53.
30 (1977) 4 All SA 818 (A).
31 Cornelius *supra* n 25 at 873.
32 Parker *SARS ruling on a share subscription transaction followed by a share* (2016) 1 available from https://www.ensafrica.com/news (accessed 21-05-2017).

would be equal to the face value of the debt (the face value of the debt being the *quid pro quo* for the issue of shares) the subscription price is of less importance from a debt reduction taxation point of view. In support of this, SARS has used examples where, despite the value of the subscription price, a 'reduction amount' is determined with reference to the market value of the shares and the face value of the debt.[33] The subscription price for the shares however remains relevant when determining the potential application of section 24BA, since the 'asset' that the debtor acquires during debt capitalisation, is the right to enforce payment of the subscription price against the creditor.

2 3 3 The 'face value of debt'

In addition to the values relating to shares the 'face value of debt' is the last distinct value in a debt capitalisation transaction. Apart from excluding a tax debt, the Act does not provide a definition or any further guidance on the meaning of 'debt' or the 'face value' of debt. National Treasury defines 'debt' to be a sum owed by one party (the debtor) to another party (the creditor).[34] Despite the fact that debt has a market value when traded no indication in the Act that the tax consequences of debt should be determined with reference to the market value of such debt. Paragraph 38 of the Eighth Schedule merely deems a market value for an asset for purposes of calculating a potential capital gain and as result does not alter the value of the underlying debt between the debtor nor deem a market value to such debt. It could also be argued that the provisions of paragraph 38 would not apply where an asset is received in exchange for shares.[35] The market value of debt is therefore not submitted as the 'face value of debt'. Since the term 'face value of debt' is not defined and its ordinary grammatical meaning should be ascribed thereto as the context does not indicate otherwise, the face value of debt should only mean the amount that is due by the debtor to the creditor. This amount should form the base value for determining the tax consequences of debt capitalisation.

Having established the scope and the three requirements for section 24BA to apply, each of the three methods of debt capitalisation can be separately analysed for issues relevant to the particular method of debt capitalisation.

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33 SARS *supra* n 7 at 140. Section 19 and paragraph 12A of the Eighth Schedule has subsequent to the version of the guide referenced been amended and now refers to the term 'debt benefit' instead of 'reduction amount'. A comparison between the market value of the shares and the face value of the debt, however, remains relevant for the new definition of 'debt benefit' depending on the type of 'concession or compromise' in respect of that debt.

34 National Treasury *Explanatory Memorandum on the Taxation Laws Amendment Bill* (2012) 31.

35 Paragraph 38(2)(e) read with section 24BA(4)(b).

3 Direct settlement

In debt capitalisation by means of direct settlement the debtor company is released from an obligation to pay the debt to the creditor. The creditor accepts, as *quid pro quo* for the debtor's release from the obligation to perform, shares in the debtor. Debt capitalisation through direct settlement therefore involves only one transaction step, namely the issue of shares by the debtor in exchange for the release from an obligation to pay the debt. The issuing of shares would result in meeting the first requirement for section 24BA to apply.

The second requirement for section 24BA to apply is that an 'asset' should be acquired in exchange for shares issued. Given a strict interpretation of the phrases 'property' and 'a right' to property as part of the definition of 'asset', a release from an obligation to pay would not resort under the definition of 'asset' as the debtor does not acquire a right enforceable against another party but is rather released from an obligation towards the creditor. An 'asset' has also been argued as synonymous with the word 'property' as interpreted in the Constitution.[36] The property concept should as result be interpreted wider than in private law, but should be restricted to rights that are vested in the claimant and have patrimonial value.[37] From these conclusions 'property' and accordingly an 'asset' should be something that the holder thereof can control and exercise use over. During debt capitalisation, when the creditor relieves the debtor from its obligation to pay the debt the creditor elects to no longer exercise a claim against the debtor. In direct settlement as method of debt capitalisation the debtor does not acquire any rights exercisable against the creditor. The debtor merely issued shares as consideration for the settlement of debt and does not acquire an 'asset' which results in the second requirement for section 24BA not being met.

Section 24BA would therefore not apply in respect of debt capitalisation through direct issue of shares, however, the debt reduction provisions contained in the Act could still address value shifting. In terms of the debt reduction provisions, in terms of the amended section 19 and paragraph 12A, any difference between the market value of debt and the face value of debt will constitute a 'debt benefit' that may result in adverse tax consequences for the debtor company due to the value mismatch.[38]

36 Olivier *supra* n 22 at 37.

37 Van Der Walt *Constitutional property clauses: a comparative analysis* (1999) 53.

38 Paragraph (b)(i) of the definition of 'concession or compromise' in section 19(1) and paragraph 12A(1) of the Eighth Schedule, read with paragraph (a)(i) of the definition of 'debt benefit' in section 19(1) and paragraph 12A(1) of the Eighth Schedule.

4 Set-off

Set-off is recognised as a method in which obligations can be settled or terminated without requiring the exchange of performances.[39] Set-off would occur where two parties are mutually indebted to each other and extinguishes obligations as effectively as if discharged by performance.[40] The appellant in *Ackermans v CSARS*[41] further contended that there is nothing sinister about a contractual arrangement pertaining to set-off and that set-off occurs in overabundance in commercial life. However, set-off has been submitted as one of the most complex areas in the South African law of obligations[42] and SARS notes that set-off may only be applicable in certain circumstances.[43] Although SARS does not elaborate on the specific circumstances, it is submitted that set-off will only be applicable if the legal requirements are met. Based on these legal requirements, considered in section 4 1, the application of section 24BA in the context of set-off is investigated in section 4 2.

4 1 Legal requirements for set-off to occur

The four requirements for set-off to occur are:[44] (i) that both debts must be of the same nature, (ii) both debts be liquidated, (iii) both debt be due and payable and (iv) both debts must be payable by the debtor and the creditor in the same capacity and not to (or by) a third party.

For both debts to be of the same nature requires that the debts must be of the same kind for set-off to occur.[45] Debts of the same nature implies that the debts must be for the delivery of identical kinds of subject matter such as two monetary debts.[46] The debts however do need to be of the same value as debt can also be partially extinguished.[47] Both claims will be regarded as liquidated if for an amount of money which is agreed upon and capable of prompt ascertainment (or ascertainment is a mere matter of calculation).[48] The existence of a liquidated claim can be ascertained without challenge in a timely manner. For both debts to be due and payable such claims should be enforceable and consequently debts subject to time clauses or suspensive conditions cannot be set-off.[49] In the context of debt

39 Thomas et al. *Historiese Grondslae van die Suid-Afrikaanse Privaatreg* 1 (2000) 234-236; Van Deventer Set-off in South African Law: Challenges and Opportunities (LLM dissertation 2016 SU) 1.
40 Van Deventer *supra* n 34 at 1.
41 *Ackermans v CSARS* (2010) (1) SA (SCA) 73.
42 De Kock *Die uitreik van aandele ten einde verpligtinge na te kom – onkoste werklik aangegaan vir inkomstebelastingdoeleindes of nie* (MAcc dissertation 2012 SU) 54.
43 SARS *supra* n 7 at 140.
44 Van Deventer *supra* n 34 at 37.
45 De Kock *supra* n 7 at 55.
46 Havenga *et al General Principles of Commercial Law* (2009) 145.
47 *Ibid.*
48 *Tredoux v Kellerman (A 459/08)* (2009) ZAWCHC 227 8.
49 Van Deventer *supra* n 34 at 38.

capitalisation debt not yet due can also by agreement be subjected to debt capitalisation as a contractual liability arises where there is a meeting of the minds and *quasi-mutual* assent[50] and parties can change the payment terms of debts.[51]

The final requirement for set-off to occur is that debts must be payable by the debtor and the creditor in the same capacity and not to (or by) a third party. This is a common law requirement, known as the 'mutuality requirement', which means that a creditor cannot rely on set-off in a representative capacity but that the debt must be reciprocal between the debtor and creditor.[52] Furthermore, for debt capitalisation through set-off to occur regard must be given to the nature of the pre-existing debt as an asset in the hands of the creditor. If the creditor has ceded the debt such debt will not be suitable for set-off as the cessionary succeeds the creditor.[53] When a debt has been ceded, the debtor and the creditor no longer owe the respective debts to each other in the same capacity and the subscription loan cannot be set-off against the pre-existing debt. In the absence of any encumbrances on the debt, there is however nothing that prohibits set-off for capitalisation to occur.

Based on the legal requirements for set-off to occur two parties should be indebted to each other which implies that two debts are required. A single obligation cannot be set-off against an obligation that does not exist and set-off in debt capitalisation would consequently require a second debt obligation to be established. Prior to a debt capitalisation transaction being executed only one debt exists, being the pre-existing debt that the debtor company owes to the creditor. Any pre-existing shareholding of the creditor in the debtor company would not represent an enforceable obligation that can be set-off against debt due to the different nature of debt and shares.[54] In order to meet the requirement for set-off to occur a second obligation, a subscription loan, is established. Accordingly the creditor subscribes for shares in the debtor and the subscription price is not settled in cash but rather left outstanding as a subscription loan. The subscription loan is an enforceable right which the debtor then has against the creditor and which serves as the second obligation for set-off to occur. The application of section 24BA in this context is considered in the section which follows.

4 2 Consideration of section 24BA in context of set-off

The first requirement which has to be met is that a company should issue shares as consideration. In order to create the second obligation required to perform debt capitalisation through set-off the debtor company issues

50 *K2012150042 (South Africa) (Pty) Ltd v Zitonix (Pty) Ltd* (2017) 2 All SA 232 (WCC)) 18.
51 *Tredoux v Kellerman (A 459/08)* (2009) ZAWCHC 227 8.
52 Ngakane & Fletcher *To set-off or not to set-off?* CDH Dispute Resolution Alert (2017) 4.
53 Van Deventer *supra* n 34 at 36.
54 *CIR v Datakor Engineering supra* n 6 at 9.

shares as consideration for acquiring the subscription loan. The shares issued would satisfy the section 24BA requirement during the first transaction step required for debt capitalisation through set-off.

The second requirement of section 24BA is that an 'asset' should be acquired in exchange for shares issued. When a creditor subscribes for shares on loan account, the debtor company acquires an 'asset' in the form of the loan which represents an enforceable right against the creditor company to claim payment of the subscription price.[55] Accordingly, section 24BA could be applied if there is a mismatch between the value of the shares issued and the value of the subscription loan. In this determination the value at which the subscription loan is recognised is a relevant consideration.

Section 40 of the Companies Act determines that a company must receive 'adequate' consideration when shares are issued. SARS indicates that 'adequate' consideration does not mean that the subscription price will be equal to the market value of the shares.[56] This view is supported and advanced by an argument that even shares issued at a discount could amount to 'adequate' consideration in terms of the Companies Act.[57] Since the Companies Act does not require consideration to be market related a debtor company can issue shares at a premium or discount to the market value of such shares. Shares issued at a discount, or a premium, based on the market value would necessitate consideration of section 24BA.

In terms of section 24BA(3)(a)(i) a capital gain will result for the debtor company if, immediately after the issue of the shares, those shares have a market value which is less than the subscription loan (notwithstanding the fact that the issue of shares is not a disposal in terms of paragraph 11(2)(b)). The debtor company could potentially also suffer a second capital gain when set-off occurs if the value of the subscription loan differs from the value of the pre-existing debt intended to be capitalised. When the subscription loan is set-off against the pre-existing debt, the extinction of the subscription loan will result in a disposal of the asset in terms of paragraph 11. Section 40CA(a) deems the base cost of the subscription loan that is disposed of to be equal to the market value of the shares issued. The debtor company will therefore dispose of an asset (the subscription loan) of which the base cost is lower than the proceeds (face value) of the debt discharged[58] The creditor who receives the shares must reduce cost actually incurred for those shares with the excess by which the face value of the debt exceeds the market value of the shares. Where the creditor holds the shares as capital assets the base cost should be reduced, whereas for shares held as trading stock the amount taken

55 SARS *supra* n 7 at 333.
56 SARS supra n 5 at 11.
57 Brincker "The Tax Consequences of Sweat Equity" (2011) *CDH Tax Alert*.
58 Paragraph 35(1)(a) to the Eighth Schedule to the Act.

into account in respect of those shares in terms of section 11(a) or 22(1) or 22(2) should be reduced.[59]

In the event that the market value of the shares exceed the face value of the subscription loan, the excess will be deemed to be a dividend *in specie* paid by the debtor company.[60] Section 40CA in this case vests the base cost for the subscription loan which will result in a capital loss when set-off takes place (due to the base cost being higher than the face value of the debt). This benefit is however offset by the debtor having been deemed to distribute an asset *in specie,*[61] but only to the extent that no exemption or reduction in the rate of tax applicable to dividends *in specie* in terms of section 64FA applies. Section 24BA does not regulate the base cost of the shares acquired by the creditor where the market value of the shares issued is higher than the face value of the debt[62] and under normal principles, the creditor will be deemed to acquire the shares at the lower face value of the debt.

From the analysis above, section 24BA is submitted as a relevant consideration when debt capitalisation is done through set-off. If established that none of the exclusions to the section are relevant, both the debtor and creditor should consider the tax consequences of section 24BA, as both shares issued at a premium or discount to the value of the subscription loan has tax consequences.

5 Conversion

Apart from direct settlement and set-off debt capitalisation could also occur by means of conversion. Conversion is recognised in the Companies Act, which makes provision for the conversion of debt instruments into shares of a company in Part D of Chapter 2. In terms of section 43(1)(a) of the Companies Act a 'debt instrument' includes securities other than the shares of a company. Section 1 of the Companies Act defines 'securities' as any shares, debentures or other instruments issued by a company. 'Convertible securities' are in turn defined in section 1 of the Companies Act as any securities of a company that may be converted into other securities based on the terms that attach to those securities. Such convertible instruments would include convertible debentures[63] and contingent convertible capital instruments.[64] In the context of hybrid debt instruments, National Treasury indicates that a key feature of debt is the ability by the holder of the debt to redeem the capital within a reasonable time[65]. Debt which

59 Section 24BA(3)(a)(ii) of the Act.
60 Section 24BA(3)(b) of the Act.
61 SARS *supra* n 7 at 334.
62 *Ibid*.
63 SARS *Interpretation Note 43: Circumstances in which certain amounts received or accrued from the disposal of shares are deemed to be of a capital nature* (2017) 7.
64 Liebenberg et al. "Pricing contingent convertible bonds in African Banks" 2016 SAJEMS 369.

does not allow for redemption within a reasonable time would be akin to equity. The period for capital redemption or conversion of convertible debt instruments is regulated through agreement and the terms of discharging the obligation are fixed before the debt instrument is issued. In relation to a 'debt instrument', the Companies Act defines a 'security document' as a document that embodies the terms and conditions of the debt instrument, although a 'security document' is not a prerequisite for the issue of debt instruments[66] and could also occur in a private context. In the case of debentures the redemption or conversion is regulated by an indenture document[67] and bonds are regulated by a convertible bond listing.

The discharge of a debtor's obligation in terms of a debt instrument can be achieved either through the conversion of the debt instrument to shares or through the redemption thereof in cash. Section 8F(1) of the Act defines 'redeem' as the discharge of all liability to pay an amount in terms of the instrument and also acknowledges that taxpayers can 'convert' or 'exchange' debt instruments for shares. Section 24J contains a similar definition for 'redemption' of an instrument, being the discharge of all liability to pay an amount in terms of the instrument. SARS indicates that 'conversion' involves a substantive change in the rights that attach to assets.[68]

In the case of redemption in cash the debtor would not issue shares in exchange for the release from the obligation and no debt capitalisation accordingly takes place. The fact that no shares are issued by the debtor would result in the first requirement for section 24BA not being met. Indirectly debt capitalisation would then only occur in cash redemption if the creditor applies the cash proceeds to subsequently subscribes for shares in the debtor at their own discretion.

In the case of conversion of debt instruments the debtor would issue shares in terms of the provisions of the convertible instrument resulting in the first requirement of section 24BA being met. When considering the second requirement, namely if an 'asset' has been acquired by the debtor, the contractually regulated provisions of the security document would be decisive. The security document would stipulate the performance required of the debtor and the creditor respectively and the resulting rights and obligations flow as result of conversion. The proposition is that in conversion the debtor and the creditor in essence intend to release a debt obligation through the issue of shares. The

65 National Treasury *Explanatory Memorandum on the Taxation Laws Amendment Bill 2013* (2013) section 2.1.

66 Section 43(1)(a)(i) of the Companies Act defines a 'debt instrument' to include any securities other than the shares of a company, irrespective of whether or not issued in terms of a security document.

67 Johannesburg Stock Exchange *Debentures* (2017) 3 available from https://www.jse.co.za/content/JSEEducationItems/Debentures.pdf (accessed 201707-01).

68 SARS *supra* n 7 at 77.

debtor's release from a debt obligation in exchange for the issue of shares would in principle be similar to debt capitalisation through direct issue of shares. The interpretation of the phrases 'property' and 'a right' as part of the definition of 'asset' in the Eighth Schedule to the Act discussed in section 3 is consequently submitted as relevant. The debtor does not acquire an enforceable right against the creditor but is rather released from an obligation to perform and as result the debtor does not acquire an 'asset'. The second requirement for section 24BA is accordingly not met and section 24BA is submitted as not being applicable to conversion as a method of debt capitalisation.

6 Conclusion

The increase in recent BPRs relating to debt capitalisation could be indicative of the concern of taxpayers in respect of the application of the debt reduction provisions to debt capitalisation. In respect of the different methods which can be employed to perform debt capitalisation due consideration of applying section 24BA is also emphasised by findings of this article.

Debt capitalisation through direct issue of shares and conversion of debt instruments to shares would not result in the application of section 24BA. For these two methods no 'asset' as defined in the Eighth Schedule is acquired by the debtor company when shares are issued. The debtor company would merely be released from an obligation to perform in a different manner. For debt capitalisation through set-off the debtor would, however, acquire an 'asset' in the form of an enforceable subscription loan when shares are issued. In this case of set-off the interaction between the value of the subscription loan and the value of the shares issued would be decisive in the application of section 24BA. If the shares are issued at market value and the subscription loan recognised at the market value of the shares section 24BA is not applicable.[69] If the shares are issued at a discount or premium to the market value of such shares the following would apply:

a. Shares issued at a discount to the value of the subscription loan, section 24BA(3)(a) applies in terms of which the debtor will realise a capital gain;

b. Shares issued at a premium to the value of the subscription loan, section 24BA(3)(b) applies in terms of which the debtor would be deemed to distribute an asset *in specie* (resulting in consideration of dividends tax).

Despite the potential adverse tax consequences imposed by section 24BA would not apply if the debtor and creditor form part of the same

69 Despite section 24BA not being applicable the debtor would still have to consider capital gains tax consequences in respect of the set-off of the subscription loan against the debt being the subject of the set-off. As the debtor disposes of an asset (debt claim) at consideration of the subscription loan acquired possible capital gains tax could arise if the value of the debt claim (base cost) and the subscription loan (proceeds) differs.

group of companies, are connected persons (and paragraph 38 applies) or the creditor holds all the shares in the debtor after the shares have been issued. When set-off of the subscription loan against the pre-existing debt is done as a second transaction step in set-off, the debtor will realise either a capital gain or capital loss, depending on the value of the pre-existing debt compared to the base cost of the subscription loan acquired during the first transaction step.

The article has shown that the method of debt capitalisation used by taxpayers would not only be relevant in considering the application of the debt reduction provisions of the Act but also in considering the application of section 24BA. Having considered the impact of section 24BA in respect of set-off as a method of debt capitalisation, it is submitted that selecting set-off as a method of capitalisation requires careful consideration.

Disability discrimination in insurance

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OPSOMMING

Gestremdheidsdiskriminasie in versekering

Diskriminasie in die finansiële sektore soos versekering word nie alledaags onder die loep geneem nie. Die een industrie waarin daar daagliks teen persone gediskrimineer word, is versekering. Versekeringsmaatskappye groepeer versekerdes in verskillende risikogroepe volgens hulle risiko-profiele. Die omvang van risiko word meestal volgens die groep se algemene of gemiddelde kenmerke bereken. Versekerdes wat nie noodwendigerwys dieselfde risiko as ander lede van die groep inhou nie, word hierdeur benadeel deurdat hulle hoër premies betaal of verminderde dekking of voordele geniet. Die optrede deur die versekeraar stel prys-, transaksie- en statistiese diskriminasie daar. Dikwels oorvleuel die gronde vir 'n bepaalde groepering met verbode gronde van diskriminasie soos onder andere in die Grondwet uiteengesit. Faktore wat die meeste ter sprake kom, is gestremdheid, ouderdom, en geslag. Die ongeregverdigde diskriminasie affekteer die versekerde se regte op gelykheid en waardigheid.

Vanweë die ontelbare vorme en grade van gestremdheid, is dit uiteraard vir versekeraars moeilik om voldoende inligting in te win en om volgens elke aansoeker se unieke persoonlike omstandighede 'n billike toedeling te maak. Aan die ander kant, moet alle versekerdes ook dieselfde behandel word, en uitsonderings kan verswarend op ander lede van die groep inwerk. Hierdie probleem regverdig egter geensins onbillike diskriminasie nie.

Die probleem lê daarin dat daar onsekerheid heers oor wat wel geregverdigde diskriminasie of differensiasie daarstel. Versekering speel 'n belangrike rol in ons samelewing, en verswarende verpligtinge om dekking, premies en bedinge van geval tot geval aan te pas kan die versekeringsbedryf se winsgewendheid bedreig. Ander lande probeer die probleem deur teikengerigte versekeringswetgewing bestuur. Dit is egter nie die geval in Suid-Afrika nie, en kan 'n beroep op die wetgewer gedoen word om oorweging daaraan te skenk om 'n groter mate van regsekerheid in die voorgestelde nuwe versekeringswetgewing te skep, deur gevalle wat as direkte onbillike diskriminasie geag word, te identifiseer. Die voorstel is dat voorskrifte in ondergeskikte wetgewing soos Polishouerbeskermings-reëls ingebou word, ten einde vinniger aanpassings en wysigings wat met mediese en tegnologiese vordering wat gestremde persone se risikoprofiele verbeter, tred hou.

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1 Introduction

The idea of human rights in essence is a belief in the existence of a form of justice that is universally valid for all people. All sectors, public as well as private, are bound by the human rights to equality and non-discrimination.[1] The right not to be discriminated against due to a disability is addressed in the United Nations Convention on the Rights of Persons with Disabilities (hereafter the 'Convention').[2] The discussion below deals with issues raised in the Convention specifically in the context of insurance discrimination.

Discrimination in a social or socio-economic context has been part of the daily narrative.[3] Discrimination in a purely economic sense, such as in the financial sector, however has not enjoyed as much attention.[4] Discrimination is mostly regulated within the health, welfare and employment frameworks.

1 Fagan *Internet Encyclopaedia of Philosophy*, available at www.iep.utm.edu (accessed 2014-08-29). Recognised as a 'privatisation of human rights', as described by Clapham 'Human Rights in the private sphere' *Oxford Monographs in International Law* (1993) 289.

2 UN General Assembly 25 Aug 2006, signed and ratified by South Africa in 2007.

3 Discrimination is also mostly regulated within the health, welfare and employment frameworks. South Africa has no comprehensive disability legislation as is the case in other countries. See notes 4, 41–46 below. For the national position see also he Integrated National Disability Strategy White Paper issued by the Office of the President [date unknown], available at www.independentliving.org (accessed 2015-08-09).

4 Reported cases on discrimination in insurance include *Christian Roberts and Others v Minister of Social Development* Case No 32838/05 (heard in September 2007, judgment handed down only in 2010) (TPD) which dealt with age and gender discrimination between men and women for social disability grants; *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) that dealt with discrimination of same-sex partners in claiming pension and retirement benefits; *Brink v Kitshoff NO* 1996 (4) 197 (CC): discrimination against married women of certain benefits of life insurance policies; *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC): differentiated employer contributions to a pension fund based on employment; As stated, no case law has been reported on disability discrimination in insurance. The striking lack of jurisprudence is also reiterated by Webster in 'Contract Law and Human Rights' in Reid and Visser *Private law and Human Rights Bringing Rights Home in Scotland and South Africa* (2014) UCT Press 294. Only a few pages are dedicated to the issue in most of the authoritative South African constitutional law works. Authoritative case law is limited to *IMATU v City of Cape Town* 2005 (10) BCLR 1084 (LC) heard in the labour court on disability in the context of the Employment Equity Act; and *Master of the High Court v Deedat and others* 1991 (11) BCLR 1285 (N) where a trustee was removed from office after suffering stroke. The court held in the latter case that this was due to lack of capacity, and not discrimination. Discrimination on the basis of disability insurance was not at issue in these two cases.

Insurance is the industry in which people are dealt with in a discriminatory manner the most on a daily basis.[5] In a foremost case heard on discrimination in the insurance industry, the Supreme Court of Canada recognised in *Zurich Insurance Company v Ontario*, *Zurich Insurance Co v Ontario Human Rights Commission*[6] that '[a] fundamental tension between human rights law and insurance practice exists.' South African case law on insurance discrimination is scant, as cases often settle out of court.[7] To date no case law has been reported in our courts on disability discrimination in insurance.

Insurance companies in fact are in the business of discrimination when they segregate insureds into different risk groups or pools based on their risk profiles. Insurance companies are unable to price risks that they cannot analyse, assess or quantify, a practice which necessitates some form of arbitrary grouping or classification. Sometimes the act of classification coincides with discrimination on a prohibited or unjustified ground, such as race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[8] Such discriminatory conduct potentially infringes on the fundamental right to dignity.[9]

The degree of risk inevitably is determined on the basis of a specific group's common or general characteristics which are material to the risk. Some insureds placed in a group do not necessarily share the average characteristics of that group, with the result that the rate they pay or the

5 Information presented in this publication was gleaned from Kuschke *International Report on Discrimination in Insurance* presented at the AIDA XIVth World Congress (International Association for Insurance Law World Congress) in Rome, Italy on 4 October 2014. The report provided information on the current general trends in discrimination by insurers against policyholders in the insurance industry. Twenty-eight countries who participated in the study were Argentina, Australia, Belgium, Brazil, Chile, Colombia, Costa Rica, Denmark, Finland, France, Greece, Hong Kong, Hungary, Israel, Italy, Japan, Mexico, New Zealand, Poland, Portugal, Republic of China: Taiwan, Republic of Korea, South Africa, Spain, Switzerland, Turkey, Great Britain and Uruguay. Some remarks are made in this article to illustrate some of the points made, but the purpose is not to present a comprehensive comparative study.

6 1992 (2) S.C.R. 321.

7 See n4 above.

8 Section 9, Constitution of the Republic of South Africa, 1996. As the Constitution enjoys an indirect horizontal application in the relationship between individuals [s 8(2)], it impacts upon the contractual relationships between all role players in the insurance industry. Equality and non-discrimination are also the focal points of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 that binds the state and all persons, including juristic, non-juristic and even a group or category of persons.

9 The right to dignity is recognised as a foundational value in s 10 of the Constitution. See in general pars 5-5 to 5-9 in Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* (Issue 18 May 2015). The Convention Art 2(h) recognises also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person.

extent of the insurance cover is discriminatory.[10] The Convention recognises the diversity of persons with disabilities, which makes groupings difficult.[11]

Discrimination in insurance most often is based on age, gender and disability.[12] Disabled or elderly persons seem mutely to accept a generalised grouping, often unaware that such a classification can be challenged and that standard-form or adhesion insurance contracts are not cast in stone and may be amended.[13] The Convention stresses the importance of accessibility to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms.[14] Finally, to add insult to injury, disabled persons might be discriminated against in the context of insurance on more than one factor.[15]

10 The diversity of disabilities and degrees of disability complicate matters, Persons with Down syndrome serve as an example. The life expectancy of a person with Down's syndrome can be relatively short, yet some survive well into middle age. Persons diagnosed with autism and persons suffering from other genetic abnormalities can fall within a broad spectrum. Some may be fully functional provided they are on medication or receive specialised treatment often at great cost, yet others not. Some may suffer from multiple forms of disability all of which impact on their grouping.

11 Art 2(i). Cover for persons diagnosed with HIV/AIDS is addressed by statutory regulation in most countries, and is not included in this discussion as one cannot equate disability with disease. It is thus not a 'disability' in the true sense. In *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC) the court declined to comment on whether an HIV infection can be regarded as a 'disability' and protected as such under the Constitution s 9(3).

12 See in general the responses and data submitted by National Chapters of members of AIDA as reflected in the International Report on Discrimination in Insurance. The Employment Equity Act s 1 defines people with disabilities as 'people who have a long-term or recurring physical or mental impairment, which substantially limits their prospects of entry into or advancement in, employment.'

13 Webster in Reid & Visser *Private Law and Human Rights: Bringing Home Rights in Scotland and South Africa* 313 confirms that the problem is that 'courts, for example in *Barkhuizen* are willing to presume that (in the absence to the contrary), a standard form contract was as much a genuine exercise of freedom of contract as an individually negotiated one'. Many persons are unaware that they may negotiate deviations from the printed contract form presented to them during contractual negotiations and accept that it is a 'take it or leave it' scenario. According to Cheadle, Davis and Haysom 4-40(2) disability discrimination usually arises from omissions or failures to act. In the context of insurance the insurer knowingly classifies persons with disabilities into broad groupings, and could fail to differentiate on personal degrees and refined characteristics of disability. The insurer could furthermore fail to inform potential policyholders of exclusions from cover, or other alternatives available in the market.

14 Article 2(v).

15 The Convention Article 2(p) confirms this point by recognising 'the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status.'

Inequality potentially affects the validity of a contractual clause, as it may be contrary to public policy to enforce an agreement that was entered into while the person laboured under the inequality.[16] The South African Supreme Court of Appeal, since the judgment in *Barkhuizen v Napier,* has accepted that there can be 'a constitutionally-inspired public policy challenge to the enforcement of a prima facie reasonable contractual term'.[17] On the other hand one should always keep in mind that contractual autonomy to voluntarily consent to a specific categorisation and cover is a part of the rights to freedom and to dignity.[18]

It is a common understanding that insurers should be able to differentiate, but that not all types of discriminatory differentiation by insurers should be tolerated. The issue is how to identify acceptable grounds for differentiation and what are the limits for legitimate economic discrimination. The discussion below aims to comment on some of the issues pertaining specifically to the insurability of persons with mental or physical disabilities, but does not attempt to provide a comprehensive analysis.

2 Nature of insurance discrimination

The United Nations Human Rights Committee states: 'The term *discrimination* should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground[s] and which has the purpose of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.'[19] The UN Convention on the Rights of Persons with Disabilities (hereinafter the 'Convention')[20] that was signed and ratified by South Africa in 2007 describes 'discrimination on the basis of disability' as meaning 'any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.[21]

Discrimination in the insurance industry clearly falls within these broad descriptions, yet mostly is justified as a form of personalisation of

16 Constitution s 172(1)(a) that a particular term or contract is unenforceable if incompatible with the Constitution.
17 Reid and Visser *supra* n1 3 306. Ngcobo J in *Barkhuizen* found the public policy approach to be correct; dissenting judgments by Sachs J, Moseneke J and Mokgoro J also confirmed this principle.
18 Cameron J in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) par 94.
19 UN Human Rights Committee *General Comment 18: Non-discrimination* (1989). Two important constitutional issues that arise in this context are the inequality of bargaining power and outright discrimination. This article attempts to address only the latter.
20 UN General Assembly 25 Aug 2006.
21 Art 2: Definitions.

the insurance product. This claim allows insurers to maintain financially sound underwriting policies, to bring competitive offers to the market and it enables insurers to charge different premiums for the different risk profiles. Preventing poor market performance within an essential sector of the economy and promoting business efficiency and profitability and, on the other hand, acting fairly towards all insurance consumers when underwriting, poses a challenge for the industry. Insurers should take cognisance of the fact that their conduct may be unconstitutional and may affect the policies they issue.[22]

In order to maintain equity among insured persons, clearly each policyholder should be charged a premium rate proportional to the actual risk he or she transfers to the insurance fund.[23] If one person is allowed to pay less than his or her proportional share to prevent discrimination, necessarily this will lead to an overcharge against other persons, again creating inequality and a type of reverse discrimination.[24]

In insurance discrimination usually is based on universal generalisations such as the physical and physiological health status of the individual, but not on individual traits. Broad classifications include temporary, permanent, partial or recurring disabilities. A cause for concern has been raised in the case of the so-called 'marginal cases': where persons are merely temporarily lacking in the criteria required for proper risk differentiation. This definition applies especially to some mental disabilities. Examples include individuals who in the past have been diagnosed as suffering from epilepsy, dementia and schizophrenia, yet, who upon full recuperation, fail to procure sufficient cover due to their past medical history.

Discrimination in insurance is seen primarily as a form of price discrimination where higher rates are charged for minorities, or as deal discrimination where some minorities do not qualify for or are not offered the same extent of services or goods. The access offered to disabled persons to personal injury or medical insurance cover serves as an example.[25]

> Discrimination in insurance furthermore is a form of statistical discrimination, based on a theory of stereotyping. Inequality and the preferential treatment of some persons can be classified as statistical

22 See the Convention that specifically recognises the need in Art 8 on Awareness-raising.

23 As concluded by Nienaber and Van der Nest: 'Actuarial science versus equity: Contingency deductions for future loss of earnings and the HIV/AIDS pandemic' 2005 *THRHR* 546.

24 Note must however be taken of the Convention Article 5 on Equality and non-discrimination that '[s]pecific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.'

25 Price discrimination occurs when a product is sold at different prices for different classes of buyers. In most cases in insurance the different premiums charged are not related to the differences in the cost of providing the underlying cover.

> discrimination because stereotyping may be based on the average behaviour of a specific risk group.[26] Theoretically, an insurer is inclined to substitute group averages in the absence of direct information about a certain fact, characteristic or ability. This factor causes the unfair discrimination of atypical individuals from a disadvantaged group. One cautions that not all categorisations or groupings necessarily lead to prejudice, a consequence which renders them incontestable.[27]

Statistical discrimination often is applied and tolerated, for example when older people are charged more for life insurance, when people with a medical history are charged more for health insurance and when disabled drivers, who are quite capable of driving a vehicle safely and competently with adapted controls, are charged more for car insurance.

The modern insurance consumer's intolerance of discrimination in insurance became clear in the *Test Achats* case[28] in the EU where gender distinction in the calculation of motor insurance premiums was held to be discriminatory. This ruling truly put the cat amongst the pigeons. Many countries allowed insurance companies to charge men and women with identical driving records different rates or to factor in gender when deciding whether to deny coverage. Although an attempt to attain optimal equality, the judgment in this case violates the primary insurance principle that risk must be calculated by taking all relevant information into account, and that one cannot treat all persons and all risks equally.[29]

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26 This theory was pioneered by Arrow 'The Theory of Discrimination', in Ashenfelter and Rees (eds) *Discrimination in Labor Markets* (1973); Phelps 'The Statistical Theory of Racism and Sexism' 1972 *American Economic Review* 659.

27 Thomas 'Non-Risk Price Discrimination in Insurance: Market Outcomes and Public Policy' (2012) *The Geneva Papers of The International Association for the Study of Insurance Economics* 1018-5895/12 37 explains that one type of price discrimination, called 'inertia pricing' is not necessarily prejudicial. This occurs where renewal prices are higher than prices for risk-equivalent new customers. Although this practice appears to intensify competition, leading to lower aggregate industry profits, policyholders in aggregate pay lower prices. On the other hand not all customers are better off and some end up paying a disproportionate amount. The high level of switching cover between insurers to avoid this problem however is found to be inefficient for society as a whole. One should recognise the basic principle that groupings do not necessarily introduce bias.

28 *Association belge des Consommateurs Test-Achats ASBL, Vann van Vugt, Charles Basselier v Conseil des ministres* C 236/09 heard in the European Court of Justice, hereinafter the '*Test Achats'* case. The applicants brought the case to the ECJ for a preliminary ruling under Art 234 EC from the *Cour constitutionelle* (Belgium) in 2011, pertaining to the effect of The European Union's Gender Directive, Art 5(2) of the Council Directive 2004/113/EC of 13 Dec 2004 on the differentiation of motor insurance premiums based on gender. See in this regard the case discussion by Kuschke *'Association belge des Consommateurs Test-Achats ASBL, Vann van Vugt, Charles Basselier v Conseil des ministers:* Gender Equality in insurance' *De Jure* 2012 624.

29 The threat that unfair discrimination holds in attaining the goal of equality in fact goes beyond the individual or the personal affront of the claimant. Albertyn and Goldblatt 'Facing the challenge of transformation: difficulties

Rather than using general factors the insurer should assess the risk of the individual insured, applying appropriate and neutral rating variables suited to the particular circumstances and attributes as well as to the behaviour of the individual seeking insurance. This practice would require a much more intensive risk evaluation and literally would require the insurer to create bespoke insurance cover for each applicant. It is submitted that such an approach theoretically gives effect to the right to equality, but is not necessarily practically feasible.

Although insurers must be allowed to complete realistic risk assessments, they should respect principles of transparency, anti-discrimination, proportionality and good customer policy, such as Treating Customers Fairly or 'TCF'.[30] Discrimination should be avoided unless it is justified by a legitimate aim, and if the means of achieving it are appropriate and necessary demonstrating a reasonable proportion between the differentiated treatment and the aim pursued.[31] Rather than outright exclusion, various techniques can be applied to personalise the insurance product and discriminate to a lesser degree. These techniques include premium adjustments, selection of benefits, deductibles or the provision of or recommendation to procure alternative cover.

3 Equality in South African insurance practice and legislation

After the UN Convention on the rights of Persons with Disabilities (hereafter the 'Convention')[32] was signed and ratified by South Africa in 2007[33] only national laws needed to be developed in accordance with the Convention. There is no separate statute that deals in general with the rights of disabled persons.

As supreme law in our country the right to equality as set out in section 9 of the Constitution renders discrimination on one or more of the listed

in the development of an indigenous jurisprudence of equality' 1998 *SAJHR* 248 272-3 recognise that the need goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact.

30 TCF principles are introduced in South Africa by the 'Financial Services Board "Treating Customers Fairly Framework": Annexure B' on fairness in service or product delivery, and will apply for instance where a customer may not have been treated fairly, for example if sold a product such as a policy on which they subsequently may be unable to claim.

31 For a discussion on the fact that our courts have watered down 'the proper approach' in applying constitutional values in decisions pertaining to the unconstitutionality of contracts, see Woolman 'The amazing vanishing Bill of Rights' 2007 *SALJ* 762 772 – 779.

32 UN General Assembly 25 Aug 2006.

33 Effectively recalling the previous International Covenant on Economic, Social and Cultural Rights.

grounds unfair unless its fairness is established.[34] In order to prove that the discrimination is fair, one must take into account whether it reasonably and justifiably differentiates between persons according to objectively determinable criteria that are intrinsic to the activity concerned.[35] The following aspects need to be taken into consideration:[36] (a) whether the discrimination impairs or is likely to impair human dignity; (b) the impact or likely impact of the discrimination on the complainant; (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage; (d) the nature and extent of the discrimination; (e) whether the discrimination is systemic in nature; (f) whether the discrimination has a legitimate purpose; (g) whether and to what extent the discrimination achieves its purpose; (h) whether there are less restrictive and less disadvantageous means to achieve the purpose; (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances (i) to address the disadvantage which arises from or is related to one or more of the prohibited grounds or (ii) to accommodate diversity.

Discriminating factors that apply specifically to insurance products and services provided to persons with disabilities are identified as: (a) unfairly refusing on one or more of the prohibited grounds to provide or to make available an insurance policy to any person; (b) unfair discrimination in the provision of benefits, facilities and services related to insurance; and (c) unfairly disadvantaging a person or persons.[37] These are generalised provisions that provide no clear guidelines to the industry and insurance applicants so as to attain legal certainty as to the extent to which categorisation is found acceptable.

Within the last decade Kok recognised that these statutory provisions are insufficient to address the problems facing discrimination in insurance, and has urged that legislative reform is required in this regard.[38] Internationally the drive to introduce more specific insurance legislation to address this insufficiency proves this point. These developments will need to be in accordance with article 4 of the

34 The Constitution s 9(2) provides for the achievement of full and equal enjoyment of all rights and freedoms by authorising legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereinafter the 'Equality Act') gives effect to the Constitution to prevent or limit unjustified discrimination; s 6 of the Equality Act contains a general prohibition on unfair discrimination.

35 *Idem* at s14.

36 *Idem* at s14(2)(b).

37 *Idem* Part 5 Schedule of the Act.

38 Kok A 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for Legislative Reform', 2008 *South African Journal of Human Rights* 445.

Convention, promoting non-discriminatory legislation.[39] Furthermore, they will be in line with the Constitution s 9(2) that provides for the achievement of full and equal enjoyment of all rights and freedoms by authorising legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. In anticipation of the introduction of new insurance laws, initially proposed in 2014 to replace current insurance legislation,[40] this goal might be achieved in the near future.[41] Whether one should include detailed provisions on disability in financial markets and insurance in a separate disability act or whether the inclusion of some provisions in specific insurance legislation will prove to be more effective requires further analysis.

4 Some thoughts on the position in other countries

This report does not intend to provide a comprehensive discussion of legislation in any of the foreign jurisdictions. The purpose of this brief exposition is purely to indicate that discrimination in insurance enjoys attention universally and to provide some guidance as to future development in South African laws.

Most countries have introduced general anti-discrimination laws, yet few have laws that specifically target discrimination in insurance underwriting. Examples of the few countries that have legislation that applies exclusively to disability law and that includes specific sections on

39 Convention Art 4 General obligations: 1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake: (*a*) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention; (*b*) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities; and (*e*) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;

40 In accordance with the National Treasury Policy Document 23 February 2011. Acts that are in the firing line include the Long-Term Insurance Act 52 of 1998 and Short-term Insurance Act 53 of 1998.

41 The three-way test as explained by the court in the *Van Heerden* case par 37 to prevent the legislation from being contested as unconstitutional will have to be kept in mind. The first question would be whether any measure targets persons or a category of persons from a previously disadvantaged group. The second, whether it is designed to protect and advance the interests of those persons previously disadvantaged, and in the third instance, whether the statutory measure in fact promotes the achievement of equality.

discrimination in insurance include Australia;[42] Hong Kong;[43] Israel;[44] Mexico[45] and Spain.[46]

Many countries have laws that apply to financial services in general (which mostly includes insurance)[47] or general consumer laws (which might include insurance) that address the issue of insurance discrimination. In South Africa insurance legislation is silent on the issue. Insurance has also been excluded from the scope of the South African Consumer Protection Act, thus removing it from the protection created for disabled persons in our general statutory consumer law.[48]

Some countries address the issue in separate insurance statutes or Codes of Conduct that apply within the insurance industry. The following are excellent examples that relate to disability insurance discrimination.

The Hong Kong Motor Vehicles Insurance (Third Party Risks) Ordinance provides that policies *ab initio* are void if they restrict coverage due to discriminatory factors such as age, and the physical or mental condition of the driver.[49] The Hong Kong Equal Opportunities Commission 'Discussion Paper on Insurance Issues under Antidiscrimination Legislation' and 'Statement of Best Practice on Disability Discrimination' issued by the Hong Kong Federation of Insurers attempt to comprehensively regulate insurance discrimination, including disability discrimination.

Japan has enacted The Insurance Business Act[50] which provides that policy conditions and premiums may not be unfair or discriminatory, and The Law Concerning Non-Life Insurance Rating Organisation[51] that provides that all rates shall be reasonable, adequate and not unfairly discriminatory. The Spanish Insurance Act[52] expressly prohibits discrimination based on disability.[53]

The Association of British Insurers Good Practice Guide[54] on the Equality Act 2010 provides that insurers must be aware of and meet equality obligations. The Equality and Human Rights Commission *Codes of*

42 Disability Discrimination Act 1992.
43 Disability Discrimination Ordinance (Cap 487).
44 The Equal Rights for People with Disabilities, 1998.
45 General Law for the Inclusion of Persons with Disabilities 2013.
46 General Act on the rights of persons with disability and their social inclusion (2013).
47 For an example of a country with advanced specialised laws, see the Danish Law on Equal Treatment between Men and Women in connection with Insurance, Pension and Financial Services.
48 Act 68 of 2008; exempted by the promulgation of the Financial Services Laws General Amendment Act 45 of 2013.
49 Chap 272 of 30/06/1997.
50 Law No. 105 of June 7, 1995 art 4(1) and 4(2).
51 Law No 193, updated by Law No 160 art 8.
52 Act 50/1980.
53 4th AP.
54 The Guide for Consumers, and Guide for the Insurance industry of Association of British Insurers (ABI).

Practice[55] prescribes equality duties for financial service providers that specifically including the rights of persons with disabilities. A non-statutory agreement between government and the British Insurance Brokers Association promotes transparency and upon refusal/exclusion from cover brokers must refer the unsuccessful applicants to another service/product or supplier that can meet their risks. This requirement meets the universal duty to inform prospective policyholders and raise awareness.

An interesting aspect in respect of the onerous duties on insurers in Portugal can be found in the Portuguese Insurance Institute Regulation, which established conditions for insurers obtaining and applying actuarial and statistical data to in fact *guarantee* that the risk categorisation is justified, proportionate and non-discriminatory.[56] Failure to comply where the categorisation does prove to be discriminatory is a breach of statutory duty and a breach of warranty towards the insurance consumer.

These statutes and prescriptions in many respects tend to differ in substance and in the nature and scale of regulatory enforcement across most lines of insurance and policyholder characteristics. This situation becomes clear from the different positions that apply in the EU. In the USA there is no federal law specifically forbidding insurers from taking into account discriminatory factors when issuing insurance policies, although individual State's laws might differ.[57]

When attempting to introduce new anti-discrimination laws cognisance may be taken of the experience and lessons learned in foreign jurisdictions when addressing the issue.

5 Conclusion

For the purposes of this discussion, it would be more prudent to refer to differentiation rather than discrimination. Not all differentiation necessarily is discrimination.[58] It is impossible not to take person-related factors into consideration when assessing insurance risks. Individual characteristics must be considered without being classified outright as discriminatory *per se*.

> Discriminatory practice is justified and should be allowed where it is based on reasonable grounds, independently assessed and relying on a true distinction or differentiation.

55 Of 6 April 2011.
56 Notice 8/2008-R.
57 See with regards to the different positions in the various states of the USA Avraham, Logue, and Schwarcz 'Understanding Insurance Anti-Discrimination Laws' (2013) *Law& Economics Working Papers P*aper.52, available at http://repository.law.umich.edu/lawecon (accessed 2015-03-02).
58 The Convention in Art 2(e) recognises that disability remains an evolving concept.

One should keep in mind that the right to equality in fact does not prohibit discrimination but rather unfair discrimination. When determining whether discrimination is fair or not, one should evaluate the impact of the discriminatory treatment on the victim, and also weigh the importance of the limitation against the proportionality of the infringement. Discrimination from the outset is assumed or deemed to be unfair unless it is established to be fair in accordance with specific statutory criteria. This assumption places some burden on insurers to prove fairness.

The underwriting process is concerned primarily with significant risk exposures that are not common to all persons seeking insurance. What is important is that risks in each grouping or classification must be as homogenous as possible to ensure the necessary balance and equality among policyholders accepted into each classification. This requirement could prove to be challenging where disabilities are concerned as the circumstances of individuals differ greatly. Yet this fact should not detract from the important statement by Sachs J in *Minister of Home Affairs v Fourie* that '[t]o penalize people for who and what they are is profoundly disrespectful'.[59]

One can support the position that the insurance business should not follow a blanket discriminatory practice, but rather should approach insurance applications by persons with unique circumstances on a case-by-case basis. The nature of the disability on its own should not be the determining factor, but, in conjunction with statistical and actuarial and other empirical data, should be applied consciously for risk selection and classification in insurance underwriting.

The mere absence of statistics is not enough to prove irrefutably that there is no alternative to the discriminatory practice.[60] Difficulty alone in providing statistical or actuarial information is an unacceptable excuse for discriminatory conduct in a commercial relationship that infringes on a disabled person's fundamental rights.[61] The *White Paper on the Integrated National Disability Strategy* recognises that South Africa has a discriminatory and weak legislative framework which has sanctioned

59 2006 (3) BCLR 355 CC par 60.

60 The Integrated National Disability Strategy recognises the following: 'There is a serious lack of reliable information on the nature and prevalence of disability in South Africa. This is because, in the past, disability issues were viewed chiefly within a health and welfare framework. This led naturally to a failure to integrate disability into mainstream government statistical processes. Statistics are unreliable for the following reasons: (a) there are different definitions of disability; (b) different survey technologies are used to collect information; (c) there are negative traditional attitudes towards people with disabilities; (d) there is a poor service infrastructure for people with disabilities in underdeveloped areas, and (e) violence levels (in particular areas at particular times) have impeded the collection of data, affecting the overall picture'. See also the Convention Art 21 that recognises a disabled person's right of access to information.

61 *Zurich Insurance Co v Ontario Human Rights Commission* par 23.

and reinforced exclusionary barriers. As a result large sections of the legislative framework in South Africa fail to meet international human rights standards and principles with regard to the rights of people with disabilities.[62]

Furthermore, factors and differentiation methods must be applied equally and consistently to all applicants. Given the wide application of the equality clause it is clear that a possibility of a constitutional argument presents itself where a party to a contract can identify an area where he is treated differently from someone in an analogous position.

On the other hand, due to the valuable social service insurance provides the solvency and profitability of insurance companies should be protected. In South Africa, the Long-term Insurance Act confirms that it is the statutory duty of insurance companies to keep their policies actuarially sound, which implies that insurers are not bound to issue life insurance cover to any insurance applicant, yet they are bound by the universal and constitutional principle of non-discrimination. As classification of risks and the setting of premiums are the essence of insurance business, insurance companies are more likely to prosper and the interests of all their policyholders are more likely to be protected and promoted if insurers are permitted to differentiate. They should be entitled to classify risks and fix premiums in accordance with their own sound judgment, provided that they are founded upon actuarial data and prudent insurance practice. Insurers should be sensitive to the fact that these practices might result in an unfair discrimination. On the other hand, insurance applicants and policyholders also carry a duty to inform themselves of their position and of alternative coverage available when negotiating policy premiums and terms of cover.

In order to provide support to insurers the answers to these difficulties might be found in a more specified framework or guidance notes on classifications and groupings. Legislation must be easily adaptable to remain relevant and keep abreast of medical and technological advances that can positively affect the risk profile of persons with disabilities. Therefore, inclusion in subordinate legislation, such as the insurance Policyholder Protection Rules, that may be adopted without lengthy parliamentary process can be recommended.

Even though industry supervision and regulation could curb improper practices, the position in other countries has shown that a comprehensive legislated solution is not easily attainable. As an argument against restrictive legislation, McQueen confirms an emphasis on the understanding that '[t]he law [i.e. contract law] is founded on ideas of transactional equality, private autonomy, and voluntary

62 The White Paper states: '[a]lthough there has, since 1994, been some attempt to identify and eliminate discriminatory legislation from our statute books, many aspects of past discriminatory legislation still remain. In addition, some new laws and amendments contain sections which directly or indirectly lead to discrimination against people with disabilities.'

interaction, in which, within very broad limits, individuals strike their own balance of interests, rather than have it set for them by external, social or public standards'.[63] On the other hand, Woolman reiterates the following viewpoint in response to the judgment in *Barkhuizen*: 'I work within a tradition of constitutional law – of which South Africa is most avowedly a part – that recognizes rules as a necessary feature of the legal landscape'. [64]

In view of even the Constitutional Court failing to generate cognizable legal rules and meaningful legal precedent, statutory intervention might be the answer to provide greater certainty, accuracy and legitimacy in respect of differentiated treatment. Furthermore, the Constitution section 8(3) sees legislation as its 'first port of call' in giving effect to human rights, whereas common law development is relied on only where legislation is absent or deficient.[65] In the absence of South African statutory law, foreign law can offer guidance to our legislator and our courts in developing anti-discrimination laws.[66]

63 MacQueen 'Delict, Contracts and the Bill of Rights: A Perspective from the United Kingdom' 2004 *SALJ* 359 376.
64 Woolman 791.
65 Reid and Visser *supra* n13 at 349.
66 *Idem* at 351.

The lack of protection for juvenile sex offenders in South African law: a critical analysis of Section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment, Act 32 of 2007 and Section 18 of the Criminal Procedure, Act 51 of 1977

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OPSOMMING

Die gebrek aan beskerming vir minderjarige seksuele oortreders in die Suid-Afrikaanse eg: 'n kritiese analise van Artikel 50(2) van die Wysigingswet op die Strafreg (Seksuele Misdrywe en Verwante Aangeleenthede, Wet 32 van 2007 en Artikel 18 van die Strafproseswet, Wet 51 van 197

Die onlangse uitspraak deur die Suid-Gauteng Hooggeregshof in verband met artikel 18 van die Strafproseswet aangaande seksuele misdade teen beide volwasse- en jeugdige slagoffers, en gevolglik moontlik ook indirek, seksuele misdade deur beide volwasse- en jeugdige oortreders; asook die Konstitusionele Hof uitspraak ten opsigte van die Nasionale Register vir Seksuele Oortreders, wat spesifiek betrekking het op artikel 50(2) van die Wysigingswet op die Strafreg (Seksuele Misdrywe en Verwante Aangeleenthede), laat die vraag ontstaan of die Suid-Afrikaanse regsisteem enige vorm van beskerming bied aan minderjarige seksoortreeders? Hierdie artikel ondersoek twee spesifieke bepalings in Suid-Afrikaanse wetgewing met betrekking tot die grondwetlikheid en toepassing daarvan op minderjarige seksoortreders, naamlik artikel 50(2) van die Wysigingswet op die Strafreg (Seksuele Misdrywe en Verwante Aangeleenthede), asook artikel 18 van die Strafproseswet. Hierdie twee bepalings word ingevolge onlangse regspraak oorweeg om vas te stel of dit 'n skending is van die regte wat minderjarige seksuele oortreders het ingevolge die Suid-Afrikaanse reg.

1 Introduction

The recent judgment passed down by the South Gauteng High Court with regard to section 18 of the Criminal Procedure Act 51 of 1977 (CPA) pertaining to sexual crimes committed against both adult and juvenile victims and, thus indirectly, crimes committed by *both* adult and juvenile

* This article is derived from my LLB dissertation prepared under the supervision of Professor PA Carstens during the completion of my LLM. I have updated it insofar as there have been new developments in the law since the submission of the dissertation in 2014.

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sex offenders,[1] as well as the Constitutional Court judgment in relation to the National Register for Sex Offenders[2] pertaining specifically to section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA), highlights the question whether South African law affords any form of protection to juvenile sex offenders.

Consider the following scenario. Marc, a ten-year-old boy and Sally, his next-door neighbour, who is nine years old, decide to play 'doctor-doctor'.[3] During their play Marc inspects Sally's entire body in order to determine what 'disease' she has.[4] In the course of the 'examination' Sally's mother walks into the playroom and is faced with Sally naked on the floor and Marc 'examining' and touching Sally's body.[5]

In terms of the SORMA Marc's conduct amounts to a 'sexual offence' due to the fact that the Act is extremely broadly defined and includes everything from rape to kissing.[6] The ten-year-old juvenile will now be placed on the National Register for Sex Offenders ('the Register') in compliance with section 50(2) of the SORMA, which demands that the presiding officer enter the individual's (adult or child's) details into the Register.[7] In addition to this and in light of section 18 of the CPA recently being declared unconstitutional,[8] criminal proceedings can now be instituted against Marc at any time in the future, as the prescription period of twenty years in relation to the institution of criminal proceedings, provided for in terms of this section, no longer finds application to sexual offences.[9] Does this account amount to a reasonable and justifiable form of punishment in relation to the scenario at hand? Is it fair and just to place an adolescent's details on a Register that has consequences that last for the rest of their lives?

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1 *L v Frankel* (29573/2016) [2017] ZAGPJHC 140 (15 June 2017) – own emphasis added.

2 *J v NDPP* (2014) ZACC 13.

3 The term 'playing doctor/doctor-doctor' is used to describe children's exploration of one another's body, specifically one another's genitals. It is important to note that such conduct is deemed normal (as part of growing up) by child psychologists – Harris & Emberley It's Perfectly Normal: Changing Bodies, Growing up, Sex and Sexual Health (1994).

4 De Bruyn *The Constitutionality of placing a juvenile on the National Register for Sex Offenders* (LLB dissertation 2014 UP) 1.

5 De Bruyn *supra* n4 at 1.

6 *J v NDPP supra* n2 at par 79 – the *amicus curiae* argued that the section in the SORMA defining sexual conduct is too wide.

7 S 50(2)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 reads as follows:
'A court that has in terms of this Act or any other law – (i) convicted a person of a sexual offence against a child or a person who is mentally disabled … must make an order that the particulars of the person be included in the Register [own emphasis added]'.

8 See *L v Frankel supra* n1.

9 The decision of the South Gauteng High Court in *L v Frankel supra* n1, is subject to approval from the Constitutional Court in line with s 172(2)(a) of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

This article investigates two specific provisions in South African legislation pertaining to the constitutionality and application to juvenile sex offenders, namely section 50(2) of the SORMA and section 18 of the CPA. These provisions are considered in terms of case law, to determine if these sections in fact are an infringement of the rights child sex offenders have in terms of South African law.

2 The National Register for Sex Offenders

In order to critically analyse section 50(2) of the SORMA, the foundation of this provision must first be discussed. The main provision that is disputed in regard to juveniles being placed on the Register is section 50(2) of the SORMA. This section provides for a peremptory provision, namely that the presiding officer *must* place a sex offender's name on the Register.[10] The National Register for Sex Offenders is provided for and incorporated in Chapter Six of the SORMA. The main purpose of the Register is to protect children and mentally disabled people against sexual offenders or alleged sexual offenders.[11] This section continues to say that the way the legislature seeks to achieve this purpose is by establishing and maintaining a record of these sexual offenders.[12]

2 1 Objective of the Register

The purpose of the Register is to prohibit sex offenders in terms of the SORMA[13] from supervising, accessing or working with children or any mentally disabled person.[14] Section 43(b) of the SORMA[15] provides for the second objective of the Register, namely that there is a duty accompanying the existence of the Register for the employer of a sex offender to be informed of the offender's particulars appearing in the Register as soon as the employer applies for a certificate.[16] This duty comes into operation in regard to the following employment opportunities, namely the fostering, kinship, care, temporary safe-care, adoption or curatorship of any child or person that is mentally disabled.[17]

10 S 50(2)(a) of the SORMA – own emphasis added.
11 S 43 of the SORMA outlines the objects of the Register.
12 S 43(a) of the SORMA.
13 S 43 of the SORMA.
14 Jooma *The National Register for Sexual Offenders: The Solution to Protecting Children in South Africa?* (LLM dissertation 2010 UP) 5; Vlotman *The Constitutionality and Justification of the National Register for Sex Offenders* (LLM dissertation 2010 UP) 1.
15 S 43(b) of the SORMA.
16 S 44 of the SORMA – the inquiry is initiated by the employer of the sexual offender by way of applying for a prescribed certificate which clearly indicates if the details of the person are recorded on the Register or not.
17 S 43(d) of the SORMA.

2 2 Section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[18]

Section 50(2) of the SORMA places an obligation on the presiding officer to enter the details of all sexual offenders into the Register.[19] This obligation thus establishes a duty on the presiding officer and eradicates any form of discretion that the presiding officer has in terms of the circumstances of the case at hand.

When examining the contents and more specifically the wording of the SORMA, in relation to the Register, the term 'person' is used by the Legislature to refer to who must be placed on the Register by the presiding officer in terms of section 50(1) and (2) of the SORMA.[20] The word 'person' has sparked much debate in South African law with regard to whether this entails the inclusion of children in the ambit of the Act.[21] Upon closer inspection of the wording of Chapter Six of the SORMA, it becomes evident that no reference is made to 'child offender', reference is merely made to 'person'.[22] Therefore it is clear that the intention of the legislature was for the ambit of the Register to include both adult and juvenile offenders – without taking into consideration the impact of such an intention.[23]

The confusion as to whether the word 'person' includes both adults and juveniles however was resolved in the case of *S v RB; S v DK and Another,*[24] where the Northern Cape High Court took it upon itself to clarify the term 'person' in section 50(1) and (2) of the SORMA.[25] The Court decided to opt for a strict meaning of the word 'person', therefore the dictionary meaning, and held that in applying this form of interpretation the term in fact includes juveniles.[26] The Court went further, declaring if the legislature intended the application of the Register to be restricted to adult offenders, it would have stated it in a

18 32 of 2007.
19 S 50(2)(a) of the SORMA.
20 S 50(1)(a) of the SORMA reads as follows:
'A person who in terms of this Act or any other law…', and s 50(2)(a)(ii) reads as follows: '… must make an order that the particulars of the person be included in the Register'; Jooma *supra* n14 at 9.
21 See the discussion of *S v RB; S v DK* 2010 (1) SACR 447; De Bruyn *supra* n4 at 16; Jooma *supra* n14 at 17.
22 De Bruyn *supra* n4 at 16.
23 *Ibid*.
24 *S v RB; S v DK supra* n21.
25 Jooma *supra* n14 at 17-18; Vlotman *supra* n14 at 18-19; see also *Democratic Alliance v Speaker of National Assembly* [2016] ZACC 8 at par 19.
26 The Oxford English Dictionary defines the word 'person' to mean: 'A human being regarded as an individual'. It is evident from this definition that both adults and children qualify as human beings; In the Constitutional Court case of *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16 at par 28, the Court held the following when it comes to the statutory interpretation of a word: *'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to*

clear and unambiguous way.[27] This judgment however is subject to criticism, in the sense that the dictionary meaning of the word 'person' was too greatly relied on. Instead of considering the object of the legislation itself the Court focused mainly on the dictionary meaning of the word 'person' and also relied on the intention of the legislature to assist in the interpretation.[28]

In the case of *Transvaal Consolidated Land and Exploration Co Ltd v Johannesburg City Council*[29] the Court held the following with regard to dictionary meanings attached to words: 'Dictionary definitions serve to mark out the scope of the meanings available for a word, but the task remains of ascertaining the particular meaning and sense of the language intended in the context of the statute under consideration'.[30] In *De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka*[31] the Court expressly held that the dictionary definition cannot have the final say in the interpretation of a word.[32]

It must further be argued that an interpretation based on the 'intention' of the legislature also is not the preferred interpretation to be followed, hence the judgment in *S v RB; S v DK and Another*[33] can be further criticised.[34] This type of interpretation was employed at a stage when the South African legal system still followed the principle of parliamentary sovereignty. Due to the supremacy of parliament, legislation had to reflect the underlying intention of the legislature.[35] South Africa has adopted the approach which elevates the supremacy of the Constitution, therefore, an interpretation based on the underlying rights and values of the Constitution and the Bill of Rights is the preferred approach to interpret the word 'person'.[36] If the aforementioned interpretation were to be accepted, effect will have to be given to section 28(2) of the Constitution[37] and the inclusion of children in the ambit of

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this general principle, namely:
(a) that statutory provisions should always be interpreted purposively;
(b) the relevant statutory provision must be properly contextualised; and
(c) all statutes must be construed consistently with the Constitution, that is, *where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)'.*

27 De Bruyn *supra* n4 at 16.
28 *Idem* at 17.
29 *Transvaal Consolidated Land and Exploration Co Ltd v Johannesburg City Council* 1972 (1) SA 88 (W).
30 *Transvaal Consolidated Land and Exploration Co Ltd v Johannesburg City Council supra* n29 at 94G; Botha *Statutory Interpretation: An Introduction for Students* (2005) 86.
31 1980 (2) SA 191 (T).
32 Botha *supra* n30 at 86.
33 *S v RB; S v DK supra* n21.
34 De Bruyn *supra* n4 at 17.
35 Botha *supra* n30 at 66.
36 *Idem* 52-58; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit* [2000] ZACC 12 at par 23.
37 The best interest of the child principle.

the Register would be deemed unconstitutional if the best interest of the child were to be disregarded.[38]

2 3 *J v National Director of Public Prosecutions*[39]

The importance of this case lies in the fact that the Court considered whether it is explicitly unconstitutional for the details of a juvenile sex offender to be entered into the Register or whether it is merely unconstitutional for the discretionary powers of the presiding officers to be restricted by section 50(2) of the SORMA because the details of adolescent offenders are included automatically, without assessing each case on its own merits.[40]

The provision that was challenged and finally brought under constitutional scrutiny was section 50(2) of the SORMA. In the High Court case of *S v IJ*[41] the court ruled this provision to be unconstitutional, in the sense that it is a peremptory provision which must be amended to a discretionary one.[42]

The facts briefly are as follows.[43] J, a fourteen year old juvenile,[44] was charged with contravening section 3 of the SORMA[45] on account of raping three minors.[46] In addition to these charges, J was charged with assault with intent to cause grievous bodily harm, as furthermore he stabbed a girl who was twelve years old at the time.[47] J appeared in a Child Justice Court[48] where he pleaded guilty to all the aforementioned charges and was convicted and thereafter sentenced to a Child and Youth Care Centre for a period of five years.[49] Upon completion of his residence at this Centre he was required to complete a three-year imprisonment sentence on account of the three rape charges.[50] In addition to the sentence imposed on J, the presiding officer in the Child Justice Court in compliance with section 50(2) of the SORMA, made the

38 De Bruyn *supra* n4 at 18.
39 *J v NDPP supra* n2.
40 De Bruyn *supra* n4 at 2.
41 *S v IJ* 2013 (2) SACR 599 (WCC).
42 *S v IJ supra* n41 at par 93 & 136; De Bruyn *supra* n4 at 26.
43 *S v IJ supra* n41 at par 2-8; De Bruyn *supra* n4 at 24-25.
44 The Applicant in the High Court case.
45 S 3 of the SORMA – this section specifically provides for rape, and reads as follows: 'Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape'.
46 *S v IJ supra* n41 at par 2.
47 *S v IJ supra* n41 at par 3.
48 As provided for in the Child Justice Act 75 of 2008 s 24.
49 *S v IJ supra* n41 at par 4.
50 *J v NDPP supra* n2 at par 3 – The sentence was imposed based on sec 76(1) and (3) of the CJA.

order for J's details to be entered into the National Register for Sex Offenders.[51]

Counsel on behalf of J argued that section 50(2) of the SORMA awards no discretion to the presiding officer deciding the case of a child offender.[52] Instead, this peremptory provision forces the judge to enter the details of the offender into the Register by default. It was further argued that placing juvenile offenders on the Register infringes multiple constitutionally entrenched rights of the juvenile,[53] specifically sections 10,[54] 14[55] and 28(2) of the Constitution.[56] Additionally, it was argued that entering the details of a juvenile into the Register serves no purpose – the long-term consequences of the Register are aimed at the actions of an adult offender and including children within the ambit of the Register does not correspond to the purpose and objects of the Child Justice Act (CJA).[57]

The Court not only held that section 50(2) of the SORMA infringes the rights of child offenders, but to some extent the rights of adult offenders as well. Entering the details of a person (adult or juvenile) into the Register has a dire effect on each individual's right to be heard.[58] Section 50(2) disallows the offender (whether it is an adult or child) to provide the court with reasons (make representations) why his/her details should not be entered into the Register.[59] The High Court thus declared section 50(2) of the SORMA unconstitutional, based on the aforementioned arguments, as well as on the lack of application of the *audi et alteram partem* rule.[60]

This ruling was sent to the Constitutional Court for confirmation.[61] Three issues had to be considered by the Constitutional Court:[62] First, whether adult offenders should be included within the ambit of the decision of *S v IJ*;[63] second, whether section 50(2) of the SORMA has the effect of limiting constitutional rights and, if it does, is such a limitation

51 S 50(2)(a) of the SORMA reads as follows: 'A court that has in terms of this Act or any other law – (i) convicted a person of a sexual offence against a child or a person who is mentally disabled … **must** make an order that the particulars of the person be included in the Register *[own emphasis added]*'.
52 *S v IJ supra* n41 at par 53.
53 *Idem* at par 70.
54 Right to dignity.
55 Right to privacy.
56 S 28(2) reads as follows: 'A child's best interests are of paramount importance in every matter concerning the child'.
57 *S v IJ supra* n41 at par 98.
58 S 34 of the Constitution – *Audi et alteram partem* rule.
59 *S v IJ supra* n41 at par 126.
60 *S v IJ supra* n41 at par 126.
61 S 172(2)(a) of the Constitution provides that any order relating to constitutional invalidity must be confirmed by the highest court in the country, before it will come into force.
62 Z Hansungule 'The Automatic Inclusion of Child Offenders on the National Register for Sex Offenders – *J v National Director of Public Prosecutions and Another*' 2014 (Forthwith Unpublished) 5.
63 *S v IJ supra* n41.

justifiable?[64] Lastly, based on the aforementioned consideration, if it is found that the limitation is unjustifiable in terms of section 36 of the Constitution, it must be declared unconstitutional and accordingly the Constitutional Court must provide a just and equitable solution.[65]

With regard to the first issue, the Constitutional Court held that whenever faced with the rights of a child, regard should be given to section 28(2) of the Constitution, namely the 'best interests of the child' principle.[66] The Court confirmed that this principle is the starting point in all cases regarding children.[67] As a result of the importance attached to this constitutionally entrenched principle, the Court construed three guiding principles when applying the 'best interests of the child' principle.[68] First, the Court held that a general distinction between adults and children should be established in law.[69] Second, the Court held that the law as we know it should make provision for an individuated methodology when dealing with child offenders.[70] Third, the Court reiterated the High Court judgment in saying that a child offender should be given the opportunity to be heard throughout the entire criminal justice process, taking into consideration both the maturity and the age of the juvenile.[71]

In relation to the second issue; namely whether such a limitation of the rights of the child offender would be justifiable, the Court held that section 28(2) of the Constitution is subject to limitation as found in the limitation clause, which states that rights in the Bill of Rights are subject to limitation.[72] The Court however held that taking the factors mentioned in section 36 into account there are less restrictive means to achieve the same purpose or outcome that the Register seeks to achieve.[73] The argument was advanced that if section 50(2) of the SORMA were to be amended to a discretionary provision, which allows the offender an opportunity to make representations and the presiding officer to decide each case on its own merits, it would ensure a better relationship (correlation) between the limitation and its purpose.[74]

64 In terms of s 36 of the Constitution – The Limitation Clause.
65 *J v NDPP supra* n2 at par 7.
66 *Idem* at par 35.
67 *J v NDPP supra* n2 at par 35; De Bruyn *supra* n4 at 38 – The Court in *S v M* 2007 (2) SACR 539 (CC) provided us with a realistic approach to this principle by not affording s 28(2) dominance over all other constitutionally entrenched rights, but reaffirming and balancing the importance attached to the provision, hence the importance afforded to any matter involving a juvenile.
68 *J v NDPP supra* n2 at par 37-40.
69 Here the court confirmed the need for separate sentencing options for children and adults, hence the CPA for adult offenders and the CJA for juvenile offenders.
70 The enactment of the CJA reflects this principle.
71 *J v NDPP supra* n2 at par 40.
72 S 36 of the Constitution.
73 S 36(e) of the Constitution.
74 *J v NDPP supra* n2 at par 50.

Finally, the Constitutional Court came to the conclusion that limiting section 50(2)(a) of the SORMA, pertaining to child offenders specifically, is not justifiable in an open and democratic society.[75] Hence this provision was declared unconstitutional to the extent that it requires the details of child offenders to be entered into the Register automatically. Due to the failure of evidence being introduced to prove that harm will not be done to children and/or mentally disabled persons, no moratorium on the placement of child offenders on the Register could be ordered, and no pronouncement could be made as to the retrospectivity of the ruling. The Court employed the remedy of awarding the legislature fifteen months to amend the defect, during which time the pronouncement was accordingly suspended.[76]

2 4 A critical analysis of *J v National Director of Public Prosecutions*[77]

The judgment handed down by the Constitutional Court is a good starting point in realising that child sex offenders in fact are children and thus the same rights that apply to and protect child victims should apply *mutatis mutandis* to every child in South Africa, including child offenders.[78] Child offenders have the right to be heard,[79] the right to human dignity,[80] the right to privacy[81] and, most importantly, the 'best interests of the child' principle,[82] which is just as applicable to juvenile offenders as to any other child in the Republic, irrespective of the fact that they are offenders.[83]

The Court, in *J v NDPP,*[84] expressly acknowledged the aforementioned, but this article takes the view that this acknowledgement however is not enough. The Constitutional Court did not go far enough in its judgment in awarding the presiding officer a discretionary power in terms of section 50(2) of the SORMA.[85] Instead of making the provision a discretionary one with reference to adolescent sex offenders the Court should have realised that the judgment still infringes the rights of juvenile offenders because in actual fact it only replaced one word with another in section 50(2) of the SORMA.[86]

The suggestion made in this article is that the Court rather should have interpreted the word 'person' as found in sec 50(2), instead of replacing

75 S 36 of the Constitution '… based on human dignity, equality and freedom …'.
76 *J v NDPP supra* n2 at par 56.
77 *J v NDPP supra* n2.
78 De Bruyn *supra* n4 at 30.
79 S 34 of the Constitution.
80 S 10 of the Constitution.
81 S 14 of the Constitution.
82 S 28(2) of the Constitution.
83 De Bruyn *supra* n4 at 30.
84 *J v NDPP supra* n2.
85 De Bruyn *supra* n4 at 30.
86 *Ibid.*

one word with another.[87] Such an interpretation would be restrictive, such as to exclude juvenile sexual offenders from the ambit and scope of the Register.[88] In addition to a restrictive interpretation of the word 'person', an interpretation in light of the values and notions underpinning the Constitution should have been adopted, which would have led to the exclusion of children from the ambit in order to give effect to the best interests of children, as demanded by sec 28(2) of the Constitution.[89]

3 Prescription of the right to institution of prosecution

3 1 The Development of Section 18 of the Criminal Procedure Act[90]

In order to understand the recent South Gauteng High Court judgment passed down by Acting Judge Claire Hartford, on the constitutionality of section 18 of the CPA, the progression and development of this section from 1977 to 2007 needs to be addressed.[91]

Section 18 of the CPA provides for a prescription period attached to the right to institute criminal proceedings. Thus, according to this section, should the crime not fall within the list of excluded crimes set out in this section, the right to criminally prosecute someone lapses after a period of twenty years.[92] An important factor about this section, which has been visible throughout its development, is the fact that the twenty-year prescription period is subject to a list of crimes that are excluded from this provision. Thus, for example, the prescription period does not find application to the crime of murder.[93] The expansion and adjustment of the list of excluded crimes however led to the development and progression of section 18 over the last forty years.

What is important to note from the section as it stood in 1977 was that the list of excluded crimes was determined by crimes susceptible to the imposition of the death penalty as the form of punishment.[94] Then, in 1997, after the case of *S v Makwanyane*[95] the death penalty was declared

87 De Bruyn *supra* n4 at 31.
88 *Ibid*.
89 *Ibid*.
90 Criminal Procedure Act 51 of 1977.
91 *L v Frankel supra* n1 at par 21.
92 S 18(1) of the CPA.
93 As murder is included in the list of excluded crimes provided for in section 18 of the CPA.
94 In the 1977 Act, Section 18 read as follows: *'18(1) The right to institute a prosecution for any offence, other than an offence in respect of which· the sentence of death may be imposed, shall, unless some other period is expressly provided by law, lapse after the expiration of a period of twenty years from the time when the offence was committed'.*
95 *S v Makwanyane* 1995 (6) BCLR 665.

unconstitutional, which called for section 18 to be amended in order to determine which crimes were to be exempted from the twenty-year prescription period.[96] The legislature deemed it fit to amend the section by including a list of specific crimes it believed to be too serious to be susceptible to a prescription period.[97]

Following the enactment of the SORMA in 2007, section 18 of the CPA had to be amended once again as the definition of rape underwent extensive scrutiny and revision.[98] Prior to the SORMA, the common law definition of rape was restricted to the non-consensual, vaginal sexual penetration of a female by a male.[99] This definition therefore not only was restricted to vaginal penetration by a male sexual organ, but also was gender restrictive. According to the common law definition of rape a male could only rape a female, and therefore a male raping a male was not considered to be 'rape' in terms of this definition. The common law definition of rape was challenged in the case of *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae)*.[100] In the aforementioned case the definition of rape was broadened to include anal penetration by males of females,[101] but still did not provide for a gender neutral definition of rape as the Court held such a decision would intrude on the principle of legality.[102] Subsequent to this ground-breaking Constitutional Court decision the definition of rape was still flawed as it did not provide for gender neutrality. The legislature needed to address the issue of gender neutrality, which it did with the enactment of the SORMA in 2007. As a result of the amendment of the definition the term 'rape' now includes all forms of sexual penetration and the crime can be committed by and against males and females.[103] As a result of the extension of this

96 At this time, in 1997, section 18 of the CPA thus read as follows:
'18. The right to institute a prosecution for any offence. other than the offences of –
(a) murder;
(b) treason committed when the Republic is in a state of war;
(c) robbery if aggravating circumstances were present;
(d) kidnapping;
(e) child-stealing; or
(f) rape,
shall. unless some other period is expressly provided by law. lapse after the expiration of a period of 20 years from the time when the offence was committed'.

97 *L v Frankel supra* n1 at par 24 – this list provided for six separate crimes to which the twenty-year prescription period (provided for in section 18) did not apply.

98 *Idem* at par 25.

99 Burchell *Principles of criminal law* (2013) 595; Snyman *Criminal Law* ((2008) 356See par 9 *Masiya v Director of Public Prosecutions, Pretoria (Centre for Applied Legal Studies, Amici Curiae)* 2007 (5) SA 30 (CC).

100 2007 (5) SA 30 (CC).

101 *Masiya v Director of Public Prosecutions, Pretoria (Centre for Applied Legal Studies, Amici Curiae) supra* n99 at par 74; Burchell *supra* n99 at 595.

102 *Masiya v Director of Public Prosecutions, Pretoria (Centre for Applied Legal Studies, Amici Curiae) supra* n99 at par 30.

103 Burchell *supra* n99 at 601-602.

definition an amendment to section 18 of the CPA in 2007[104] led to a few extra crimes being added to the list of crimes exempted from the prescription period.[105]

3 2 *L and Others v Frankel and Others*[106]

Following the amendment of section 18, twice already since the enactment of the CPA in 1977, the last in 2007 and each amendment being ten years apart, it made sense that 2017 should bring about yet another (possible) amendment to this provision. The question asked is how can one possibly still amend this section?

The facts of the court case, which may lead to the third amendment of section 18 of the CPA, are as follows.[107] The Applicants accused the First Respondent (hereafter referred to as 'Frankel') of having 'indecently and/or sexually assaulted' them between 1970 and 1989.[108] The Applicants, both female and male, were between the ages of six and fifteen years old at the time the alleged crimes were committed.[109] Only between 2012 and 2015 did the Applicants finally seek a criminal prosecution of Frankel for the acts committed against them some thirty odd years ago.[110] The Court (rightly so) however informed the Applicants that according to the twenty-year prescription period provided for in section

104 Currently, section 18 reads as follows:
'18 Prescription of right to institute prosecution
The right to institute a prosecution for any offence, other than the offences of-
(a) murder;
(b) treason committed when the Republic is in a state of war;
(c) robbery, if aggravating circumstances were present;
(d) kidnapping;
(e) child-stealing;
(g) the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002; or
(h) trafficking in persons for sexual purposes by a person as contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
(i) using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20(1) and 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.
(f) rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;'

105 *L v Frankel supra* n1 at par 25 – a total of nine crimes now form part of the list of excluded crimes found in s 18 of the CPA.

106 *L v Frankel supra* n1.

107 The amendment of s 18 of the CPA as expressed in *L v Frankel supra* n1, is subject to confirmation by the Constitutional Court, see *supra* n10.

108 The definition of rape at this time was still extremely narrow and, for example, did not include any form of penetration by a male in terms of an adolescent (or adult) male.

109 *L v Frankel supra* n1 at par 13 – the reason provided to the Court by the Applicants for only seeking justice so long after the commission of the acts were that they only now acquired: *'full appreciation of the criminal acts committed by the first respondent'*.

110 *L v Frankel supra* n1 at par 14.

18 of the CPA (in its current form), their claims are prescribed and they could no longer seek a criminal prosecution against Frankel.[111] The reason for this is that the acts committed by Frankel, during that time, merely amounted to indecent assault and/or sexual assault, as the definition of rape, as it stood then, was extremely narrow and his acts did not fall within the ambit of this definition.[112] Thus, according to section 18, the crimes committed by Frankel (at that time) did not fall within the list of excluded crimes and hence the twenty-year prescription period finds application.

The Applicants applied to have section 18 of the CPA declared unconstitutional and thus invalid[113] based on the fact that the provision does not provide for a discretionary power regarding whether prosecution may be instituted or not,[114] and secondly, that omitting to include all sexual offences (not merely rape and compelled rape) in the list of crimes exempted from prescription, infringes on their constitutionally entrenched rights to human dignity,[115] equality,[116] access to courts[117] and the right to a fair trial,[118] to mention only a few.[119] The main question before the Court, in terms of section 18(f) of the CPA was thus whether:

> [A] rational basis exists for excluding rape and compelled rape from the prescription period of 20 years but including all other sexual offences within that time limit?[120]

In finding section 18 unconstitutional and therefore invalid the Court held that this provision infringes on the right to human dignity of an

111 *Ibid*.
112 *L v Frankel supra* n1 at par 16.
113 It must be mentioned that Frankel died of cancer before the commencement of the 2017 case against him.
114 *L v Frankel supra* n1 at par 18, 28-31 – the National Prosecuting Authority (NPA) has a discretionary power in terms of s 197(2) of the Constitution to institute criminal proceedings. The Applicants argued that s 18 of the CPA infringes on this discretionary power of the NPA in that it attaches a time period within which prosecution should be instituted and therefore the NPA's discretion is severely limited.
115 S 10 of the Constitution - the Applicants' argued that any form of sexual offence infringes on your right to human dignity, not merely the crime of rape – see *L v Frankel supra* n1 par 72-76. They further relied on the Constitutional Court case of *S v Makwanyane supra* n95, where the Court held that the right to human dignity is one of the most important human rights – *L v Frankel supra* n1 par 73.
116 S 9 of the Constitution – the Applicants' submitted that s18 further infringes on one's right to equality in the sense that if a crime, which is not included in the list of excluded crimes, has been committed against the victim, then the crime is not 'harsh' enough and therefore the crime will be susceptible to the prescription period. Thus, a distinction is drawn between sexual offences based on the 'severity' of the sexual offence endured – *L v Frankel supra* n1 at par 77-78.
117 S 34 of the Constitution.
118 S 35(3) of the Constitution.
119 *L v Frankel supra* n1 at par 17-18.
120 *Idem* at par 46.

individual in that sexual offences other than rape and compelled rape infringes one's human dignity as much and to the same extent as rape does.[121] The Court further held section 9 of the Constitution, namely the right to equality, is also infringed by the current section 18 of the CPA in that a distinction is drawn between sexual offences based on the severity of the offence.[122] The Court held that no prescription period exists for rape and compelled rape, but the twenty-year prescription period exists for other sexual offences, and so the law discriminates against victims who had to endure a 'less serious' sexual offence than rape or compelled rape.[123] In considering whether section 18 infringes on the constitutionally entrenched right to a fair trial, the Court had to conduct a balancing act between the rights of the victims and the rights of the accused.[124] The Court held that the offender would not be more greatly prejudiced should all sexual offences be included in the list of excluded crimes together with rape and compelled rape.[125] In declaring section 18 inconsistent with the Constitution and invalid, the Court held that section 18 (in its current form):

> [b]ars, in all circumstances, the right to institute a prosecution for sexual offences, other than those listed in section 18(f), (h) and (i), after the lapse of a period of 20 years from the time the offence was committed.[126]

In addition to the above order the Court further suspended the aforementioned order as to constitutional invalidity for a period of eighteen months in order to afford parliament the opportunity to remedy the constitutional invalidity/defect.[127] The aforementioned order automatically raises the question of retrospectivity and whether the order granted by Hartford AJ with regard to sexual offences in terms of section 18 have retrospective effect. In determining whether the order should have retrospective effect, the Court once again implemented a balancing act, and held that such a balancing act would fall in favour of retrospectivity.[128]

In terms of the second order granted, namely the suspension for eighteen months of the main (first) order, the issue as to a possible interim relief/remedy was raised.[129] The interim relief considered and finally implemented by the Court was that of reading in, hence the third order granted, namely; subject to parliament rectifying the content of section 18 to be in line with the Constitution, alternatively the lapse of the eighteen-month period referred to in order two above, whichever of the two is the soonest, section 18(f) of the CPA would include the following words 'and all other sexual offences, whether in terms of

121 *Idem* at par 47.
122 *Idem* at par 78.
123 *Idem* at par 78-79.
124 *Idem* at par 80.
125 *Idem* at par 83.
126 *L v Frankel supra* n1 – see point number one in the Order.
127 *L v Frankel supra* n1 – see point number two in the Order.
128 *L v Frankel supra* n1 par 91.
129 *Idem* at par 107.

common law or statute' after the words 'the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively'.[130]

3 3 A critical analysis of *L and Others v Frankel and Others*[131]

The fact that this judgment speaks to the constitutionality of section 18 and affords parliament eighteen months to remedy the unconstitutionality of the provision, but, more specifically, provides for interim relief in the form of reading words into the current provision, has far-reaching consequences as to the implication of the orders granted.

It must be mentioned that this critical discussion of the judgment relates solely to its (possible) application to child sex offenders, as its implication in relation to adult sex offenders is a victory long-awaited in South African law.

If the amended section 18 of the CPA is ruled to be applicable to sexual offences committed by both adult and juvenile sex offenders, the purpose of the legislature, which saw the need for individual legislation governing the sentencing as pertaining to adult and juvenile offenders respectively, would be disregarded.[132] The aims of the CPA and the CJA are divergent. The CPA aims to enforce justice through punishment and retribution,[133] whereas the CJA focuses on rehabilitation and restorative justice.[134] Declaring the twenty year prescription period in relation to all sexual offences committed by adult sex offenders unconstitutional aligns with the purpose of the CPA, namely the enforcement of justice through punishment and retribution, but demolishing this prescription period for sexual crimes committed by juvenile sex offenders does not accord with the purpose and objectives of the CJA and cannot be said to promote rehabilitation and restorative justice.[135]

The fact that all sexual offences are now included in the list of excluded crimes found in section 18 of the CPA, means that the wide definition of a 'sexual offence' as provided for in the SORMA will lead to juveniles being placed on the Register for actions as 'innocent' as those of Marc. Not only will their details be entered into the Register with consequences lasting their entire lives, but now, if the amendment of section 18 finds application to juvenile sex offenders, the actions committed by these juveniles when they were still in their developmental phase[136] will result in the possibility of criminal proceedings being instituted when they attain adulthood, though these experimental actions

130 *L v Frankel supra* n1 – see point number three in the Order for.
131 *L v Frankel supra* n1.
132 De Bruyn *supra* n4 at 34.
133 *Idem* 35.
134 S 2 of the CJA, namely 'Objects of Act'.
135 *Idem* 48-50.
136 In par 60 of the *amicus curiae's* Heads of Argument in *J v NDPP* (2014) ZACC 13 Skelton explains that research showed child offenders, due to their

from their childhood might have been simply that 'experimental'.[137] In terms of the amended section 18 of the CPA, Marc can be criminally prosecuted for the actions he committed as a child at any time in the future.

4 Conclusion

When one considers the terms; 'sex offender',[138] 'paedophile'[139] and 'sexual predator',[140] the connotations of these terms do not depict the image of a child, who, like Marc, played 'doctor-doctor'[141] with his next-door neighbour. It must be borne in mind that even though these juveniles are viewed as sex offenders who have committed a sexual offence against fellow minors, they cannot simply be treated as adults because they committed an act viewed as adult behaviour.[142] The conduct committed by these child offenders does not reflect that their maturity levels, brain development, social skills or physical age correspond to those of adult sex offenders.[143]

What the legislature forgot in enacting the Register, together with the peremptory provision of section 50(2) of the SORMA, is the fact that the definition of a 'sexual offence' is extremely wide,[144] leading to situations in which a child such as Marc enters into the sphere of the criminal justice system, whereas the use of an alternative form of punishment would have been more appropriate in the given circumstances. The main consequence of registration laws (entering a juvenile's particulars into the Register) is that they capture many juvenile offenders, such as Marc, who are not likely to re-offend, resulting in their details remaining on the Register.[145]

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ongoing psychological development during their juvenile period, respond far better to treatment than adults do under the same circumstances; De Bruyn *supra* n4 at 40.

137 There have been numerous long-and-short term clinical follow-up studies which demonstrate the fact that a large number (about 85 percent) of the child sex offenders have no further arrests or reports of other sexual offences committed – Finkelhor, Ormrod and Chaffin 'Juveniles Who Commit Sex Offenders Against Minors' 2009 *Juvenile Justice Bulletin* 1; De Bruyn *supra* n4 at 40.

138 The Oxford English Dictionary defines the word 'sex offender' as: 'A person who commits a crime involving a sexual act'.

139 The Oxford English Dictionary defines the word 'pedophile' as: 'A person who is sexually attracted to children'.

140 The Oxford English Dictionary defines the word 'sexual predator' as: 'A person who ruthlessly exploits others'.

141 The term 'playing doctor/doctor-doctor' is used to describe children's exploration of one another's body's, specifically one another's genitals – See Harris & Emberley *supra* n3.

142 De Bruyn *supra* n4 at 39.

143 *Idem* 39.

144 See par 57 of the *amicus curiae's* Heads of Argument in *J v NDPP* (2014) ZACC 13.

145 Carpenter 'Against Juvenile Sex Offender Registration' 2013 *Law Review* 36.

The same form of punishment given to an adult sex offender cannot be applied *mutatis mutandis* to a juvenile offender who is still in the process of development on multiple different levels, and whose behaviour, conduct and thought patterns are still subject to change and influence.[146] A substantial number of these cases which deal with juvenile offenders who now enter the criminal justice system are crimes committed by minors who do not correspond to the image evoked by terms such as 'paedophile' and 'predator'.[147] Therefore these juveniles get caught up in the criminal justice system intended for serious adult offenders due to the extremely wide interpretation and ambit of the SORMA in terms of the definition of a 'sexual offence'. The Register serves as an instrument of protection for both children and mentally disabled persons, but if it protects child victims on the one hand, it infringes on the rights and well-being of child offenders, such as Marc, on the other.

When one considers the implications of both section 50(2) of the SORMA, coupled with the recent declaration of the unconstitutionality of section 18 of the CPA, Marc's details not only will be placed on the Register for the rest of his life, but now the fact that Marc played 'doctor-doctor' with Sally means that the sword of criminal prosecution hangs over Marc's head until the date of his death. What if you were held accountable your entire life for an act you committed as a child?[148]

146 De Bruyn *supra* n4 at 41.
147 Finkelhor, Ormrod & Chaffin 2009 *Juvenile Justice Bulletin supra* n137 at 1.
148 Carpenter 2013 *Law Review supra* n145 at 1.

Therapeutic jurisprudence and restorative justice: healing crime victims, restoring the offenders

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OPSOMMING

Terapeutiese regsleer en herstellende geregtigheid: die genesing van slagoffers van misdade en herstel van die oortreders

Terapeutiese regsleer, wat afgekort kan word as TR, is 'n proses waardeur die hof gebruik word om genesing vir slagoffers van misdaad en vir die oortreders te bewerkstelling, aangesien vergoeding, hoe groot ook al, nie die skade wat aangerig is ongedaan kan maak nie. TR behels die verskillende maniere waarop die reg as 'n instrument van genesing en rehabilitasie gebruik kan word en oor hoe om die anti-terapeutiese uitwerking van die reg te verminder. Verder sien herstellende geregtigheid (HG) kriminele viktimisering as skadelik vir persoonlike verhoudings. HG bied regverdigheid of gelykheid, eerder as straf, vir die oortreder as die basis vir geregtigheid aan. Die doel hiervan is om die wonde van al die partye wat deur die kriminele optrede geraak is te genees. Weens die uitwerking van misdaad word slagoffers met verskeie behoeftes gekonfronteer as gevolg van die skade wat hulle aangedoen is. Die ontwrigting en gebrek aan beheer wat slagoffers verduur is skadeliker as enige fisieke of finansiële verlies en kan nie deur vergoeding aangespreek word nie. Slagoffers van misdaad moet weer 'n gevoel van beheer en veiligheid in hulle lewens herwin. Om oortreders vir hulle dade verantwoordelik te hou lewer 'n wesenlike bydrae tot die genesing van misdaadslagoffers, maar dit is ook die eerste tree om aan die oortreders ware genesing te besorg. Dit is wat terapeutiese regsleer en herstellende geregtigheid vermag.

Die artikel ondersoek die gebruik van TR en HG in kriminele regsprosesse, met spesifieke klem op die toepassing van die konsepte in Suid-Afrikaanse regstelsels.

1 Introduction

Therapeutic jurisprudence, which is also known as TJ, is a process whereby the court is used to effect and promote healing for crime victims and offenders.[1] TJ considers the various ways the law may be utilised as

1 Slobogin 'Therapeutic jurisprudence: five dilemmas to ponder' 1995 Psychology public policy and law 193-94.

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an instrument of healing, rehabilitation, and also how to reduce the anti-therapeutic effects of law.[2] TJ incorporates law, social work, and psychology, and, furthermore, tries to address the emotional, and psychological well-being of crime victims and offenders as they encounter the legal system.[3] Most importantly, therapeutic jurisprudence stresses the human impact of all areas of the law.[4] Although therapeutic jurisprudence does not exclusively advocate a focus on therapeutic considerations, it does seek to inculcate them with legal considerations[5] with a view to finding out how the law can be used as a therapeutic agent without displacing due process.[6]

Therapeutic jurisprudence somehow encourages a client-centred philosophy according to Carl Rogers.[7] By nature, the client-centred approach is humanistic.[8] It is a non-directive psychotherapy, it is reflective, and encourages the clarification of points.[9] Therapeutic jurisprudence provides crime victims with empathetic listening in an open-minded environment, and, if the parties are genuine about their experience of the crime, healing can take place.[10]

At the introductory level of therapeutic jurisprudence, it focused primarily on the therapeutic or anti-therapeutic effects of the court system on the criminal offenders, although, it also considered the possibility of providing some sort of effect for the crime victims and the community at large.[11] Early forms of therapeutic jurisprudence considered the rehabilitation of the criminal offenders and provided healing effects for them but did very little to ensure or provide for the healing of the crime victims.[12]

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2 Erez & Hartley 'Battered immigrant women and the legal system: a therapeutic jurisprudence perspective' 2003 *Western Criminology Review* 155-156.
3 Bason 'Therapeutic jurisprudence: facilitating healing in crime victims' 2013 *Phoenix Law Review* 1018.
4 Freckelton 'Therapeutic jurisprudence misunderstood and misrepresented: the price and risks of Influence' 2008 *Thomas Jefferson Law Review* 580.
5 Hartley & Petrucci 'Practicing culturally competent therapeutic jurisprudence: a collaboration between social work and law' 2004 *Washington University Journal of Law & Policy* 133-138.
6 Hartley & Petrucci *supra* n5 at 137.
7 Bason *supra* n3 at 1019.
8 *The C Rogers Reader* (1989) eds. H Kirschenbaum & V Henderson xiv-xv.
9 Rogers xi & xiv Rogers pioneered a major new approach to psychotherapy known as the nondirective client-centered and person-centered approach Rogers believes that all individuals have within themselves the ability to guide their own lives in a manner that is both personally satisfying and socially constructive in a particular type of helping relationship we free the individuals to find their inner wisdom and confidence and they will make increasingly healthier and more constructive choices.
10 Bason *supra* n3 at 1019.
11 Erez & Hartley *supra* n2 at 155-156.
12 Nolan 'Redefining criminal courts: problem-solving and the meaning of justice' 2003 *American Criminal Law Review* 1541.

2 How therapeutic jurisprudence promote the healing of crime victims

The effect of crime on the crime victims is that it produces anxiety, fear, depression, humiliation, anger, powerlessness, and a sense of betrayal for the person who experienced it.[13] Additionally, when going through the criminal process, crime victims may experience psychologically damaging issues such as invisibility in the proceedings and the legal profession's[14] reluctance to accept the crime victims as having a *locus standi* in the proceedings; and this in spite of the fact that it is the crime victims who have suffered the harm as a result of the crime. In this way, the crime victims have been underestimated and underappreciated.[15]

There are some values regarded as having healing effects in TJ. Such values include, but are not limited to, the following: crime victims' voice; validation; respect; and self-determination which the justice system has been promoting.[16]

Therapeutic jurisprudence is meant to reduce the psychological harm experienced by crime victims as a result of the crime and also secondary victimisation by the criminal justice system.[17] Furthermore, therapeutic jurisprudence, firstly, recognises, secondly, highlights, and, thirdly, explores the potential for positive and negative impacts upon crime victims. As a therapeutic agent, it possesses a great capacity to heal and repair the psychological trauma experienced by the crime victims.[18] In order to have a successful crime victim-centred approach, therapeutic jurisprudence needs to be considered on an individual basis on three levels: viz micro, mezzo, and macro. The reason for this is that crime victims differ with regard to what outcome they consider to have a healing effect.[19] Additionally, the perception of the crime victims of a therapeutic outcome is different from the criminal justice's perception of a therapeutic outcome.[20] It is believed that the client-centred approach leads to positive therapeutic consequences for the clients;[21] it is similarly

13 Winick 'Foreword: therapeutic jurisprudence perspectives on dealing with victims of crime' 2003 *NOVA Law Review* 535.
14 Roberts et al eds. *Hearing The Victim: Adversarial Justice Crime Victims And The State* (2011) 235.
15 Bason *supra* n3 at 1020.
16 King 'Restorative justice therapeutic jurisprudence and the rise of emotionally intelligent justice' 2008 *Melbourne University Law Review* 1096.
17 Winick *supra* n13 at 540-541.
18 Wexler 'Two decades of therapeutic jurisprudence' 2008 *Touro Law Review* 17-20.
19 Sandel '10 things every social worker needs to know about domestic violence', available http://www.socialworker.com/.../10_things_every_social_worker_needs_to_know_abou (accessed 2017-01-07).
20 Bason *supra* n3 at 1021.
21 Prochaska & Di Clement 'Trans-theoretical therapy: toward a more integrative model of change' 1982 *Psychotherapy: Theory Research and Practice* 278.

true that in a victim-centred approach, the crime victim's wishes, safety, and well-being take priority in all matters and procedures.[22]

There are several reasons why crime victims are advised to be part of a therapeutic process through the criminal justice system:

> The first of such purposes is to give crime victims a voice for therapeutic reasons; the second, is to enable the interests and/or views of crime victims to be taken into consideration when making decisions; the third is to ensure that crime victims are treated with respect by criminal justice agencies; the fourth is to minimize the stress crime victims go through during criminal proceedings; the fifth purpose is to increase the satisfaction the crime victims receive from the criminal justice system; and the final purpose is to increase the crime victims' co-operation, premised on the foregoing purposes.[23] It is in this way that crime victims begin to receive healing from the impact of the crime.

The distress experienced by many crime victims in the criminal justice process is due to the fact that crime victims do not understand how the process works and why it does so.[24] It is submitted that, if the operators of the criminal justice system made the necessary time available to educate the crime victims on the process and listened to the crime victims' concerns and feedback, there would be a hundred percent assurance that the crime victims would achieve some level of healing. But, if, on the other hand, crime victims feel that their sense of voice, validation, and dignity have not been respected, they will lose confidence in the criminal justice process and hold on to their feelings of anger, vengeance, and anxiety. Such an outcome is anti-therapeutic.[25]

2 1 Elements of therapeutic jurisprudence

There are three basic steps or components of TJ that can lead to a successful healing of the crime victims or any other party affected by criminal behaviour.[26] These steps or components are:

(1) Apology;[27]

(2) Forgiveness;[28] and

(3) Reconciliation.[29]

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22 'Victim-centered approach', available at https://www.ovcttac.gov/taskforceguide/eguide/1.../13-victim-centered-approach/ (accessed 2017-01-09).

23 Sanders 'Victim impact statements: don't work can't work' 2001 *Criminal Law Review* 448-49.

24 Winick *supra* n13 at 542.

25 Winick *supra* n13 at 543.

26 Daicoff 'Apology forgiveness reconciliation & therapeutic jurisprudence' 2013 *Pepperdine Dispute Resolution Law Journal* 135.

27 Cohen 'Advising clients to apologize' 1999 *Southern Carolina Law Review* 1009.

28 Fincham 'Forgiveness: integral to close relationships and inimical to justice?' 2009 *Virginia Journal of Social Policy and Law* 358-59.

The above components can further be used to heal the impact of crime on individuals, groups, or institutions in dispute or conflict.[30] These components may not necessarily and successfully resolve conflict; they can, however, facilitate or be helpful in conflict resolution. Below are some of the ways the components can be used to facilitate conflict between the crime victims and the offenders with a view to providing healing for all the parties affected by the crime.

2 1 1 Apology

Apology takes place when the wrongdoer feels remorseful for what he has done, accepts responsibility for his action, and says that he is sorry.[31] The wrongdoer also acknowledges the harm he has inflicted on others through his actions and how the actions have affected the lives of others.[32] In the process of tendering his apology, the offender may describe his intentions not to engage in the behaviour again.

The apology is tendered directly to the crime victims by the actions of the apologiser.[33] If a face-to-face or direct apology is not practicable or possible, a letter, video, or public statement may be substituted. Other means, such as the social media, for example the internet site, Facebook or Twitter, may be used to tender the apology.[34] The apology must be sincerely done if it is to be received, and the apologiser should avoid any form of excuse, justification, rationalisation, argument, or defensive statements.[35] Additionally, the apology must result in a change of attitude or behaviour of the offender. If this is not achieved, the apology is entirely meaningless, both for the victims of the crime and the offenders.[36] The end product of an apology not sincerely tendered is that it will be neither non- rehabilitative nor sanative for the offender, while, on the other hand, it will embitter the crime victims.[37] Furthermore, the

29 Sosnov 'The adjudication of genocide: gacaca and the road to reconciliation in Rwanda' 2008 *Denver Journal of International Law and Policy* 143.
30 O'Hara 'Group-conflict resolution: sources of resistance to reconciliation' 2009 *Law & Contemporary Problems* i-ii.
31 Fincham *supra* n28 at 358-359.
32 Cohen 'Apology and organizations: exploring an example from medical practice' 2000 Fordham urban law journal 1447. Cohen states that apology has three elements**:** admitting one's fault expressing regret for one's behavior and expressing sympathy for the other's injury.
33 Daicoff *supra* n26 at 136.
34 Smith 'Apologies in law: an overview of the philosophical issues' 2013 *Pepperdine Dispute Resolution Law Journal* 1.
35 Smith & Griswold 'Speech at the interdisciplinary study of conflict and dispute resolution symposium: forgiveness: what when why?' (2009).
36 Daicoff *supra* n26 at 136. Daicoff noted that an apologiser's responsible repentant attitude as worthy of note because it helps deescalate tensions between the factions in conflict.
37 Smith 'Against court-ordered apologies' 2013 *New Crime Law Review* 40-49. Smith argued that a voluntary apology has potential for far greater benefits to the offender society and the crime victims in comparison to court-ordered coerced apologies.

quality of an apology cannot be evaluated until the offenders' behaviour is subsequently observed.[38]

2 1 2 Forgiveness

Forgiveness takes place when the crime victims accept the apology of the offenders, and in addition, show that they, the crime victims, are no longer angry with the offenders and are able show mercy to the offenders.[39] Usually the crime victims want to describe the harm done to them by the offenders' criminal actions.[40] Additionally, crime victims sometimes ask questions about the criminal's act such as, 'Why me?' and 'Why did the offender do what he did?' Answers are provided by the offender.[41] The offenders' explanation of his action to the crime victims goes beyond merely listening to or hearing the apology; this is because forgiveness involves a certain form of expression of acceptance of the apology by the crime victims.[42] The end result of an accepted apology is humour, a more lighthearted exchange, collaboration between the crime victims and the offenders with regard to the possibility of solving the criminal behaviour and how to repair the harm done with a view to preventing recurrences of the behaviour in the future.[43]

2 1 3 Reconciliation

Reconciliation may not necessarily follow apology and forgiveness. Reconciliation, however, takes place when the offender and the crime victims move away from the adversarial position of anger, blame, shame, and resentment, towards a mutual appreciation of each other with a view to brokering peace and harmony amongst themselves.[44] There is vertical and horizontal harmony when reconciliation occurs. Horizontal harmony is the kind of harmony which reconciles warring parties, conflict amongst people in a community, dispute between a criminal offender and the crime victims, while, on the other hand, vertical harmony refers to the offender being reconciled to God his Creator.[45]

38 *Ibid*.
39 Cohen 'Advising clients to apologize' 1999 *Southern California Law Review* 1015. Cohen defines apology as cessation of resentment against the offender.
40 Zehr *The Little Book Of Restorative Justice* (2002) 14-15.
41 *Idem* at 14-15.
42 Daicoff *supra* n26 at 136.
43 Scheff 'Community conferences: shame and anger in therapeutic jurisprudence' 1998 *Revista Juridica Upr* 103-04.
44 Sosnov 'The adjudication of genocide: gacaca and the road to reconciliation in Rwanda' 2008 *Denver Journal International Law & Policy* 143.
45 Daicoff *supra* n26 at 139.

3 Benefits of apology, forgiveness and reconciliation

In traditional civil and criminal legal matters, there is always guilt, shame, anger, and grief. Irrespective of the foregoing, however, offenders can still derive some benefits from rehabilitation and from not re-offending.[46] Apology, forgiveness, and reconciliation can, in addition, produce the following benefits:

(1) They reduce negative emotions of guilt, anger grief and shame;

(2) They improve the potential for individual reform;

(3) They maximize the therapeutic aspects of legal matters; and;

(4) They minimize the anti-therapeutic aspects for offenders and the affected crime victims.[47]

4 Therapeutic jurisprudence: Advancing the healing of crime victims in the criminal justice system

Advocates of therapeutic jurisprudence support the view that giving a voice to the crime victims has the effect of improving the mental condition and welfare of crime victims.[48] The harmful effects to crime victims of feeling silenced and excluded from criminal processes, as well as the therapeutic advantages of being heard, have been at the centre of scholarly discourse.[49] The neglect and abuse of crime victims in the criminal justice process only buttresses the weaknesses of justice systems which marginalised the suffering of crime victims and so magnify it.[50] Punitive measures taken against the offender do very little to heal the wounds of the crime victims' and their families as a result of the crime. Healing, instead, is an arduous, dynamic and lengthy process that requires crime victims to take active steps to facilitate their own recovery from the effects of the crime.[51]

46 Silver *The Affective Assistance Of Counsel Practicing Law As A Healing Profession* (2007) 14-15.

47 Winick *supra* n13 at & Perez 'Aging driving and public health: a therapeutic jurisprudence approach' 2010 *Florida Coaster Law Review* 189.

48 Freckelton 'Therapeutic jurisprudence misunderstood and misrepresented: the price and risks of Influence' 2008 *Thomas Jefferson Law Review* 584.

49 O'Hara 'Victim participation in the criminal process' 2005 *Journal Law & Public Policy* 240.

50 *Idem* at 239.

51 Erez 'Who's afraid of the big bad victim? victim impact statements as victim empowerment and enhancement of justice' 1999 *Criminal Law Review* 545.

5 Nature and scope of therapeutic jurisprudence

The legal system and justice mechanisms put in place by a nation affect everyone in that society in one way or another, but it is trite to state that more often than not, some people in the society, such as crime victims and their families, criminal offenders, and witnesses are more affected by the legal system than others.[52] The law affects people under its control economically, socially, and also in their interactions or relationships with others. Based on what has been said before, therapeutic jurisprudence confidently believes that the law also affects the wellbeing or otherwise of people.[53] Therapeutic jurisprudence studies the law in order to examine how it affects the wellbeing of those involved in its operation.[54] Therapeutic jurisprudence is very wide in scope; as a result, it has been extended to many areas of domestic as well as international law. Therapeutic jurisprudence was, for instance, extended to some aspects of South Africa's Truth and Reconciliation Commission after the apartheid era.[55]

5 1 Application of therapeutic jurisprudence in the South African criminal justice system

A therapeutic jurisprudence approach to sentencing through a restorative justice initiative or programme if judiciously applied will have its place in the SA criminal justice system; however, caution needs to be exercised carefully with a view to avoiding its abuse.[56] The South African judiciary should give adequate consideration to the application TJ and RJ, paying particular attention to serious cases so as not to send the wrong message to society and to the perpetrators of heinous crimes. It is noted however, that the absence of proper guidelines for the SA judicial officers to follow in the application of TJ during the sentencing phase further aggravates these concerns.[57] Although TJ and RJ may advance a new way of administering justice, the onus and responsibility is on the South African courts to impose sentences which are balanced.[58]

In addition to what has been said, a more therapeutic jurisprudence method to criminal justice can be considered at various stages of the trial process in SA if the authority deems it fit in its prosecutorial process. The stages are pleading stage, pre-sentence, sentencing and post sentencing

52 King 'Restorative justice therapeutic jurisprudence and the rise of emotionally intelligent justice' 2008 *Melbourne University Law Review* 1111.
53 Wexler & Winick eds *Essays In Therapeutic Jurisprudence* (1991) 1111.
54 King *supra* n52 at 1111.
55 Allan & Allan 'The South African truth and reconciliation commission as a therapeutic tool' 2000 *Behavioral Sciences & the Law* 459.
56 Broom 'A therapeutic Approach to the Prosecution and Sentencing of Revenge Sales' LL.M thesis University of Pretoria 2010 31.
57 Batley 'Call For Agents Of Change: Guidelines For The Use Of RJ In Sentencing' 2014 6.
58 Van der Merwe 'A new role for crime victims? An evaluation of restorative justice procedures in the Child Justice Act 2008' 2013 *De Jure* 1022.

phases.[59] Along the line of the foregoing reasoning, the Policy Directives of the National Prosecuting Authority in SA have thrown more lights on the understanding of TJ and RJ and the exercise of a prosecutor's discretion at a pre-trial level.[60]

As a result of what has been, a therapeutic or healing approach to a criminal trial may be used during the sentencing phase of proceedings, whereby the court may request any information which the court thinks relevant in the determination of an appropriate sentence.[61] Section 274 of the Criminal Procedure Act[62] gives unfettered powers to the courts in SA in this respect and paves the way for the introduction of a restorative justice procedure to be implemented or for the imposition of a condition for the postponement or suspension of a sentence.[63] In this connection, a victim-offender mediation/conference at this point of proceedings could serve as a change in healing the crime victim and restitution between all parties affected by the criminal conduct of the offender and in addressing the needs of the offender through a referral to some form of assistance programme.[64]

6 Restorative justice: Restoring the offenders

6 1 Origin of restorative justice

Many nations and jurisdictions across the globe and many cultures have their own indigenous or local means of restorative justice practices, values, and principles which are highly rooted in their community's response to crimes of various natures.[65] In the western legal system, for example, making amends to the crime victims and the community after the commission of crime is a well-entrenched form of practice of restoring justice to the crime victims.[66]

Around 1970, the restorative justice process came into the agenda of the criminal justice system when community activists, justice system personnel, and scholars started advocating restorative justice principles in response to the gender equality movement in Europe and North America.[67] Following this, many jurisdictions began to experiment with

59 Skelton & Batley 'Restorative Justice: A contemporary South African review 21(3) *Acta Criminologica* 2008 37-51.
60 Batley *supra* n57 at 5.
61 Skelton & Batley *supra* n59 at 37-51.
62 51 of 1977.
63 Section 297 of the Criminal Procedure Act.
64 Van der Merwe *supra* n58 at 1022-1038.
65 Umbreit 'Symposium restorative justice in the twenty first century: a social movement full of opportunities and pitfalls' 2005 *Marquette Law Review* 255.
66 Umbreit n56 *supra* at 225.
67 Koss & Achilles 'Restorative justice responses to sexual assault national online resource center for violence against women' http://www.vawnet.org/Assoc FilesVAWnet/AR_.RestorativeJustice.pdf. (accessed 2017-01-19).

programmes patterned after a youth programme which had had its origin in Canada.[68] As a consequence of this, restorative justice models started to be developed around the world for use with young offenders or adults for any criminal act.[69]

Presently, restorative justice is popularly used and widely practiced in different forms the world over for offenders of any crime.[70] Owing to the benefits and usefulness of restorative justice, international organisations, such as the United Nations, have encouraged and advised countries to incorporate the restorative justice process in all aspects of their criminal justice systems.

6 1 1 Restorative justice defined

Restorative justice views crime as a conflict between three sets of people:

(1) The victims;

(2) The community members; and

(3) The offenders.[71]

It is trite law that those mostly affected by any criminal act should have the opportunity to be actively involved in its settlement and resolution.[72] Restorative justice is different from the criminal justice system in that it offers an alternative to the traditional system that will allow crime victims to have a voice in their path to justice.[73]

6 1 2 Effect of restorative justice on crime victims and offenders

One of the effects of restorative justice is that, firstly, it reduces recidivism, secondly it creates more change for offenders and, thirdly, it provides healing for crime victims.[74] This is why restorative justice is an

68 Kasparian 'Justice beyond bars: exploring the restorative justice alternative for victims of rape and sexual assault' 2014 *Suffolk Transnational Law Review* 380.

69 United Nations Office on drugs and crimes *Handbook On Restorative Justice Programmes* (2006) 26-27.

70 Naylor 'Effective justice for victims of sexual assault: taking up the debate on alternative Pathways' 2010 *University of New South Wales Law Journal* 665-66.

71 Koss & Achilles. Koss and Achilles are of the opinion that restorative justice recognises three constituencies: firstly survivor/victims and secondarily victimised family and friends who suffer distress along with their loved one secondly community members who experience less safety and social connection when they perceive high levels of crime and low deterrence yet who simultaneously may be contributing to an environment of sexual violence and thirdly offenders as well as their families and friends who experience guilt and shame that is associated with being accused of crime or belonging to the interpersonal relationship context from which the offense arose.

72 Kasparian n58 *supra* at 390.

73 Kasparian n58 *supra* at 391.

74 Sanders 'Restorative justice: the attempt to rehabilitate criminal offenders and victims' 2008 *Charleston Law Review* 928.

effective alternative to the traditional imprisonment or incarceration. Additionally, because restorative justice reduces reoffending, it is submitted that it is more cost effective than the traditional form of imprisonment.[75]

Furthermore, restorative justice has positive psychological effects on offenders, and it helps the offenders to desist from criminal behaviour.[76] Similarly, restorative justice has effectively had an impact on crime victims in that it has been shown to be more satisfying for them. Crime victims mostly come out of restorative justice conferences less upset about the crime, less apprehensive, and less afraid of re-victimisation.[77]

7 Implementation of restorative justice programme

Advocates of restorative justice believe that RJ is a process rather than simply being a programme.[78] But in order to have a full understanding of restorative justice principles, it becomes important to examine the programmes that embody the various principles:

(1) 'Restorative justice programmes are naturally fit for offenders of non-violent crimes and for young offenders, but the successes of existing restorative justice programmes may provide the opportunity for expansion to inculcate other offenders into the programmes;[79]

(2) Restorative justice programmes generally focus on dialogue between the offenders and crime victims, and can include victim-offender mediation, group conferencing, or other programmes that allow crime victims and offenders to work together to create an appropriate response to the criminal act;[80] and;

(3) Restorative justice programmes include creative alternatives to incarceration and programme that can be implemented into prison life to help rehabilitate offenders.'[81]

Annette van der Merwe noted that 'within the South African context, restorative justice is described as a new way of doing justice, either as an alternative or within the criminal justice system, *and* that, while offenders are held accountable, the victim is always central.'[82]

75 Parker 'Penal reform and the necessity for therapeutic jurisprudence' 2007 *Georgetown Journal of Legal Ethics* 866.
76 Lauwaert & Aertsen eds. *Desistance And Restorative Justice Mechanisms For Desisting From Crime Within Restorative Justice Practices* (2015) 4.
77 Tyler 'Re-integrative shaming procedural justice and recidivism: the engagement of offenders' psychological mechanisms in the Canberra rise drinking-and-driving experiment' 2007 *Law & Society Review* 555.
78 Umbreit n56 *supra* at 294.
79 Todres 'Towards healing and restoration for all: reframing medical malpractice reform' 2006 *Connecticut Law Review* 715-18.
80 Umbreit n56 *supra* at 254-255.
81 Sanders n74 *supra* at 933.
82 Van der Merwe *supra* n58.

Restorative justice procedures have been associated with crimes involving children, as prescribed in the Child Justice Act,[83] but are also used in cases involving adults, particularly in light of the National Prosecuting Authorities Strategy 2020.[84]

Finally, offenders are usually advised to admit their guilt to enable them take part in restorative justice programmes.[85]

Restorative justice has been described as an alternative measure to the retributive justice method; it is, however, noted that restorative justice is not soft or mild on crime.[86] Restorative justice does not encourage incarceration or punishment, but, when the criminal fails to comply with the alternative programme of restorative justice, he will be sentenced to a term of imprisonment.[87]

8 Goals of restorative justice

The goal of restorative justice is not to create a greater sense of justice in the criminal justice system,[88] but rather to provide appropriate and meaningful responses, through judicial case dispositions, to the crime victims, the offenders and any other party affected by criminal behaviour.[89] Such meaningful and appropriate responses will include the restoration of what the crime victims have lost and a sense of vindication, as well as accountability for the offenders.[90]

There are three basic goals or objectives of restorative justice, namely: personal accountability, competency development, and community safety.

83 Various Restorative justice procedures are prescribed in terms of section 32 of the Act, such as victim-offender mediation and various diversion programmes.

84 The strategy by the National Prosecuting Authority is in line with its commitment to aligning itself with crime and recent prosecutorial trends as well as the demands of society. The Prosecuting Authority considered the broader environment growing international prosecutorial trends as well as the escalating crime rate in South Africa when formulating this strategy.

85 Drake 'Victim-offender mediation in Texas: when eye for eye becomes eye to eye' 2006 *South Texas Law Review* 660.

86 Ring 'Study finds novel sentencing program works' 2007 *Rutland Herald* b2.s

87 Parker 870.

88 Spon 'Juvenile justice: a work in progress' 1998 *Regent University Law Review* 40.

89 *Ibid.*

90 *Ibid.*

8 1 Personal accountability

In restorative justice, accountability is the responsibility for one's behaviour and taking steps to repair the harm caused by criminal act.[91] Additionally, accountability is beneficial to the criminals, crime victims, and the community where the crime was committed when all the parties affected by the crime are active participants in determining the appropriate punishment for the offender under the circumstances.[92]

The goal of accountability is to restore as many crime victims as possible and make the offenders aware of the impact of their crime.[93] Making the offenders aware of the impact of their crime does three things:

(1) it teaches offenders that actions have consequences;

(2) it shows that they are capable of repairing the harm they caused; and

(3) it demonstrates that they can avoid the same behaviour in the future.[94]

Before the offenders can accept responsibility for harming others, a support system is needed to be put in place, for example, a sense that there is an opportunity for the offenders to gain acceptance in the community in which the crime was committed.[95] In this connection therefore, accountability and support must go hand-in-hand.

The benefits of restorative justice to the offenders are numerous. They include but are not limited to, the following:

(1) Greater satisfaction with justice operators from crime victims, which include the court, prosecutors, and the prison systems;

(2) Greater community satisfaction with the criminal justice system;

(3) Increased options for creative forms of accountability because of input from the crime victims, offenders, and the community;

(4) Increased fulfillment of requirements by the offenders because the accountability strategies are fair and reasonable; and

(5) The crime victims' involvement in determining the offenders' punishment.[96]

8 1 1 Competency development

The rehabilitation and reintegration of the offenders is best achieved when offenders are allowed to build competencies and further

91 Bilchik 'Guide for implementing the balanced and restorative justice model' 2005 Office of juvenile justice and delinquency prevention report. http://wwww.ncjrs.org/pdffiles/167887.pdf. (accessed 2017-01-21).
92 Spon *supra* n88 at 41.
93 Miller 'Balanced and restorative justice: bringing victims offenders and the community to the table' 2005 *Children's Legal Rights Journal* 2.
94 *Idem* at 3.
95 Bilchik *supra* n91.
96 *Idem* at 16.

strengthen their relationships with other members of the society who are law abiding. This increases the offenders' ability to become contributing members of the society.[97] When offenders are engaged in productive activities, such as working or voluntarily taking part in a civic-based project, they acquire new and useful skills which will increase their self-esteem.[98] Contrary to the traditional justice system which is purely punitive by nature, restorative justice objectives are treatment and services to those affected by the delinquent behaviour of the offenders. This is because decision-making and skill acquisition for the offenders can be used as restorative processes.[99]

The offenders' competencies are best built and developed when the offenders are given the opportunity to provide service to people in the community. This makes the offenders less passive, and they become learners and service providers.[100]

When offenders develop their competencies, it gives a sense of hope for the criminals. The reason for this is that the principal objectives of offenders' competency development is to direct the offender's case disposition, which ultimately gives the offenders a meaningful opportunity to grow into responsible citizens.[101] In addition to the foregoing, competency development enhances the offenders' ability to do something very productive that other member of the society value.[102] This enhances the offenders' sense of self-worth and increases public affirmation of their new behaviours and learned skills.[103] Finally, the end products of competency development are measurable increases in the behaviour of the offenders and their decision-making abilities, and, secondly, the society's acceptance of the offenders.[104]

8 1 2 Society/community safety

The final objective of restorative justice is the safety of the society or community from crime and criminals with a view to its having an immediate and long-term effect as well as seeing criminals taking

97 Bazemore & Umbreit *Conferences Circles Boards And Mediations: Restorative Justice And Citizen Involvement In The Response To Youth Crime* (1999) ii.
98 Spon *supra* n88 at 43.
99 Miller *supra* n93 at 3.
100 Miller *supra* n93 at 3.
101 'Balanced and Restorative Juvenile Justice' http://juvenile.clark.wa.gov/balanced.html.com. (accessed 2017-01-28).
102 'Balanced and restorative justice practice: competency development' https://www.ojjdp.gov/pubs/implementing/competency.html.com. (accessed 2017-01-28).
103 Neff 'Self-compassion self-esteem and well-being' 2011 *Social and Personality Psychology Compass* 1.
104 'Treatment of juvenile offenders and their reintegration into society' 2010 South African police service division training: education training and development research & curriculum development 3.

responsibility for their conduct.[105] In usual sentencing, the safety of the public and the punishment of the offenders are closely related and the offenders are imprisoned to serve as deterrence.[106] But in restorative justice, societal safety requires practices that will minimise risk and promote the society's capacity to manage and control criminal behaviour.[107] Furthermore, restorative justice pays attention to the long-term benefits of humanitarian approach that brings to the foreground ambitions of forgiveness, healing, reparation and reintegration, thereby giving the offenders the opportunity to change their criminal behaviours by working with responsible members of the society.[108] The safety of the society is achieved when members of the society believe that they are able to control crime with a view to fostering peace because crime has an impact on society in a variety of ways according to the nature and extent of crime committed.[109]

There are practical steps that may be employed in improving the safety of society. One such step is a prevention policy which primarily promotes non-repressive measures to prevent crime and to minimise crime-related risks and consequences. The aim is to reduce crime to its barest minimum and its least serious while increasing the public perception of safety.[110] Furthermore, restorative justice is not concerned only with just and balanced processes; instead, it also concerns itself with effective outcomes and consequences for both the crime victims and the offenders.[111]

9 Principles of restorative justice

9 1 Focused on relationship

One of the first principles of restorative justice is that it is a relational approach which is based on relationships between the crime victims and

105 European project restorative justice and crime prevention *Restorative Justice And Crime Prevention Presenting A Theoretical Exploration An Empirical Analysis And The Policy Perspective* (2010) i.

106 Muhlhausen 'Theories of punishment and mandatory minimum sentences' 2010 *Centre of Data Analysis* 1.

107 Bucqueroux 'A comprehensive approach to reducing crime and violence in our culture' 2004 *Restorative Justice Community* 14.

108 Mantle Fox & Dhami 'Restorative justice and three individual theories of crime' 2005 *Internet Journal of Criminology* 3.

109 Adebayo 'Social factors affecting effective crime prevention and control in Nigeria' 2013 *International Journal of Applied Sociology* 71.

110 The Czech Republic 'Crime prevention strategy 2008 -2011', available at http://www.mvcr.cz/mvcren/file/crime-prevention-strategy-2008-2011-pdf.aspx. (accessed 2017-01-29).

111 Young 'Restorative justice: concepts and practices' International organisation for victim assistance, available at http://www.iovahelp.org/About/.../RestorativeJudiceConceptsAndPractices.pdf. (accessed 2017-01-29).

the offenders, and it does not focus only on the individual level.[112] The relational approach directs its attention to the relationships between and among the parties affected by the criminal act. The fact remains that the experiences, needs, and perspectives of the crime victims, the offenders and the society matter a lot and are central to restorative justice principles. These experiences, needs and perspective do not matter in contrast to, or in competition with, all the parties affected by the crime, but in relation to one another.[113] Consequent upon the foregoing, therefore, attention to the crime victims, the offenders and the society as they are in relation with one another is central to a restorative justice approach.[114]

This idea of relationships in restorative justice pays particular attention on the nature or character of the different parties involved in, or affected by, the situation and it builds a trusting relationship among the parties.[115] What restorative justice does in the circumstance is that it views the needs and perspectives of crime victims as being central to the resolution of justice issues,[116] and it reflects on commitments of equal respect, equal care, equal concern, and equal dignity.[117] In this connection, it is asserted that justice of a restorative nature is concerned with what happened, what harm resulted, and what needs to be done to make things right.[118]

9 1 1 Holistic and comprehensive

Apart from being relationally based and relationship focused, restorative justice processes are similarly relational in their understanding of issues and harms.[119] By showing an understanding of issues and harms, the restorative approach is comprehensive and holistic[120] in the manner in which it responds to crime victims and offenders' case. It is inadequate and non-restorative if the attention is narrowly focused on the crime without due consideration being given to the cause of the crime, the contexts in which the crime was committed, the implications of the

112 Llewellyn Archibald Clairmont & Crocker 'Imagining success for a restorative approach to justice: implications for measurement and evaluation' 2013 *The Dalhousie Law Journal* 301.
113 Llewellyn Archibald Clairmont & Crocker 301.
114 Llewellyn & Howse 'Restorative justice-a conceptual framework' 1998 *Ottawa Law Commission of Canada* 72.
115 Gribbon Ruddy & Thornborrow 'Restorative justice: building relationships building communities' available at http://www.iirp.edu/pdf/ON08Papers/ON08_GribbonRuddyThornborrow.pdf (accessed 2017-05-16).
116 Young 'Restorative justice: there is nothing new under the sun' 2010 *International Organisation for Victim Assistance* 5.
117 Llewellyn Archibald Clairmont & Crocker 301.
118 'Restorative justice and practices' 2006 International institute for restorative practices 1, available at http://www.iovahelp.org/About/.../RestorativeJudiceConceptsAndPractices.pdf. (accessed 2017-01-29).
119 Llewellyn Archibald Clairmont & Crocker 301.
120 'A restorative approach in school: applying the approach on the day to day' 2011, available at http://www.chs.ednet.ns.ca/Restorative%20Practices/RA-Citadel-Dec2-2011A.pdf (accessed 2017-01-29).

crime on the crime victims, the offenders and the community at large since crime increases fear, isolation, the erosion of community morale, and has a detrimental effect on overall quality-of-life, and a decrease in social and leisure activities.[121]

10 Restorative justice and the rehabilitative ideal

Modern retributivism and utilitarianism are still very relevant in sentencing policies in present day criminal justice systems.[122] But, unlike retributivism and utilitarianism, rehabilitative methods as an alternative to punitive measures of the offenders became dominant and known in the early part of the twentieth century.[123] Rehabilitation should be one of the goals of any criminal justice system. Even if it is not among the principal goals, the offenders' rehabilitation should enjoy a certain revival through the increasingly growing phenomenon of therapeutic jurisprudence through the judicial system.[124] Additionally, the rehabilitative ideal sees the offenders as one who is sick and who resorted to crimes because of the illness or sickness, or as a person who is criminally minded owing to the dysfunctional social environment in which he finds himself.[125] The rehabilitation of the offenders, if viewed differently, simply advocates that to reduce crime effectively, it is not enough to deal with the particular offence, but rather that the criminal justice system also has as its duty the curing or healing of the offenders' illness.[126] The healing of the offenders is to be actualised by penal treatment whose objective is to bring about positives changes in the character, attitude, and behaviour of convicted offenders.[127] In other words, offenders are not to be held responsible or blamed for their wrongdoing, but their criminal act should be blamed on their sickness. This is the way restorative justice views the offender and the goals of the criminal justice system. Restorative justice is the foundation of the offenders' duty to repair the harm they have caused to the crime victims.[128] It is submitted, however, that, in any restorative process,

121 'The impact of crime on victims and communities', available at http://www.cap.navaa.org/captips/13%20CAPTIPS-4-ImpactCrime.pdf (accessed 2017-01-29).

122 Gabbay 'Justifying restorative justice: a theoretical justification for the use of restorative justice practices' 2005 *Journal of Dispute Resolution* 390.

123 Allen *The Decline Of The Rehabilitative Ideal: Penal Policy And Social Purpose* (1981) 57.

124 Winick *supra* n13 at & Wexler *Judging In A Therapeutic Key: Therapeutic Jurisprudence And The Courts* eds. (2003) 1.

125 Brunk *Restorative Justice And The Philosophical Theories Of Criminal Punishment In The Spiritual Roots Of Restorative Justice* ML Hadley ed. (2001) 42.

126 *Williams vs New York* 1949 337 US 241 248 The United States Supreme Court Justice Hugo Black stated that retribution is no longer the dominant objective of the criminal law reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.

127 Allen *supra* n123 at 57.

128 Merideth 'Restoring a focus on victims in criminal justice' 2009 *Washington University School of Law Restorative Justice Seminar* 4.

offenders should be accorded due respect, and the offenders should be permitted to give an explanation for the reasons that led them to commit the crime.[129]

The indeterminate method of sentencing the offenders has been the channel that enabled rehabilitation to take place, but it is the duty of probation officers to carry out the rehabilitative ideal.[130]

11 Justifications for restorative justice

The justification for restorative justice is that it is not concerned about how much punishment was inflicted on the offenders or how much treatment is provided for the crime victims, but rather by how much reparation, resolution, and reintegration was achieved for all affected by crime.[131] Additional justification for restorative justice states that: 'Restorative justice has implications for enhancing and building support for a more empowering, holistic, and effective re-integrative approach to rehabilitation; and it defines a new role for criminal justice professionals in enhancing the safety and security of communities.'[132] 'Restorative justice resists crime by building safe, secure and strong communities. Restorative justice prioritises results or outcomes over procedural goals; this is because the test of any response to crime must be whether it is helping to restore the injured parties.'[133]

Advocates of restorative justice are of the opinion that RJ repairs broken social bonds, it encourages offenders to make reparation to the society, it reintegrates the criminals into the communities, it gives the crime victims the opportunity to receive compensation, and it enables crime victims to be satisfied with the process engaged in the restorative justice programme.[134]

12 Conclusions

In this article, a comprehensive examination of therapeutic jurisprudence and restorative justice has been considered. It has been discovered that therapeutic jurisprudence recognises that the law can be a healing agent: 'can have therapeutic or anti-therapeutic consequences

129 Van Schijndel *Confidentiality And Victim-Offender Mediation* (2009) 396.
130 Bunzel 'The probation officer and the federal sentencing guidelines: strange philosophical bedfellows' 1995 *Yale Law Journal* 940.
131 Daly & Immarigeon 'The past present and future of restorative justice: some critical reflections' 1998 1 *The Contemporary Justice Review* 26.
132 Bazemore & Umbreit 'Rethinking the sanctioning function in juvenile court: retributive or restorative responses to youth crime' 1995 *Crime & Delinquency* 296-316.
133 Van Ness 'New wine and old wineskins: four challenges of restorative justice and a reply to Andrew Ashworth' 1993 *Criminal Law Forum* 301-306.
134 Daly & Immarigeon *supra* n131 at 30.

for individuals involved in both the civil and criminal justice systems.[135] Asks this question: can or should legal rules, procedures, and lawyers' roles be reshaped to enhance their therapeutic potentials while, at the same time not subordinating principles of due process?'[136]

One of the greatest advantages of TJ is the use of socio-psychological insights into the law and its applications.[137] Therapeutic jurisprudence as a field of legal study is geared towards the establishment of humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully.[138]

Therapeutic jurisprudence is perceived by scholars as being: 'A sea-change in ethical thinking about the role of law; as a movement towards a more distinctly relational approach to the practice of law which emphasises psychological wellness over adversarial triumphalism';[139] as a field that supports an ethics of care;[140] a discipline that places great importance on the principle of a commitment to dignity.[141] According to Amy Ronner, in the practice of therapeutic jurisprudence, the parties must be given a voice, validation and voluntariness.[142] Ronner argued that litigants are entitled to a voice or the opportunity to narrate their experience or story to a decision maker. If the litigants are given a voice and their story is taken seriously, they feel a sense of validation. Voice and validation create a sense of voluntary participation, one in which the litigants experience the proceeding as less coercive. By nature, 'human beings prosper when they feel that they are making, or at least participating in, their own decisions'.[143]

Finally, TJ provides a perfect framework to integrate social science findings and wisdom regarding the benefits of apology, forgiveness, and reconciliation clearly into the law. It further stresses the need for healing, rehabilitation, and change in behaviour. Therapeutic jurisprudence explains why, in many legal matters, apology, forgiveness, and

135 Peebles 'Therapeutic jurisprudence and the sentencing of sexual offenders in Canada' 1999 *International Journal of Offender Therapy and Comparative Criminology* 280.

136 Klotz 'Cognitive restructuring through law: a therapeutic jurisprudence approach to sex offenders and the plea process' 1992 *University of Puget Sound Law Review* 581.

137 Wexler 'Therapeutic jurisprudence and changing conceptions of legal scholarship' 1993 *Behavioral Sciences and the Law* 19.

138 Wexler 'Therapeutic jurisprudence and the criminal courts' 1993 *William and Mary Law Review* 279.

139 Warner 'Public judgment on sentencing: final results from the Tasmanian jury sentencing study trends and issues in crime and criminal justice series paper no. 407' 2011 *Australian Institute of Criminology* 3.

140 Letourneau 'Effects of sex offender registration and notification on judicial decisions' 2010 *Criminal Justice Review* 295.

141 Lowenstein *Paedophilia: The Sexual Abuse Of Children Its Occurrence Diagnosis And Treatment* (1998) 19.

142 Glab 'Perpetrators and pariahs: definitional and punishment issues for child sex offenders and therapeutic alternatives for the criminal justice system' 2016 *QUT Law Review* 99.

143 Glab *supra* 142 at 99.

reconciliation are important goals. Creative problem solving and holistic justice are the benefits of apology, forgiveness, and reconciliation in legal issues under therapeutic jurisprudence and restorative justice.

The article has also examined restorative justice not as being a replacement for the traditional court system, but rather as an alternative. It is not a legal book or a set of procedures, but it is a different way of thinking and doing justice.[144] A global acceptance and implementation of restorative justice programmes requires a paradigm shift and restorative justice advocates have agreed that a paradigm shift is more important than dozens of pieces of legislation.[145] As a result of this, the acceptance of restorative justice will demand, or need, a different way of thinking and doing things.[146]

Restorative justice as a means of bringing back offenders into society can emphasise the importance of treating the true cause of crime. It sees offenders as human beings who can change from their criminal ways, improve their choices, and it can involve the crime victims and community members in the process of punishment and restoration because restorative programmes bring about a lower rate of recidivism than traditional incarceration.[147]

When the criminal justice system and its operators continue to pay attention to punitive measures such as offenders' incarceration instead of restorative and rehabilitative programmes, it is trite law that the system is ignoring the evident problems of crime and neglecting, or failing, to see offenders as human beings who are capable of change.[148] It is noted on this backdrop that: 'Rather than restoring or correcting a deficit in the offender, moral rehabilitation aims to repair a breach in the relationships between the offender, the crime victims and the community that the offence has created'.[149]

It is submitted at this juncture that it is most appropriate to turn towards restorative justice and therapeutic jurisprudence, implement positive rehabilitative programmes for the offenders, restore crime victims, and address the impact of the crime on the crime victims and the community.[150]

144 Sanders 'Restorative justice: the attempt to rehabilitate criminal offenders and victims' 2008 *Charleston Law Review* 937.
145 *Idem* at 938.
146 *Idem* at 938.
147 Parker 'Penal reform and the necessity for therapeutic jurisprudence' 2007 *Georgetown Journal of Legal Ethics* 863.
148 Sanders *supra* n144 at 939.
149 McNeill 'When punishment is rehabilitation' 2012 *The Springer Encyclopedia of Criminology and Criminal Justice* 9.
150 Smit 'Restoring crime victims and communities affected by crime' 2007 *Victim Advisory Council Newsletter* 2.

Prejudice emanating from non payment of pension interests due to what is contained in or omitted from divorce decrees

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OPSOMMING

Nadeel voortspruitend uit die nie-betaal van pensioenbelange as gevolg van wat ingesluit of uitgesluit word uit egskeidingsbevele

Hierdie artikel benadruk die praktiese uitdagings verbandhoudend met aftreefondse se weiering om dele van hul lede se pensioenbelang aan nie-lid eggenote uit te betaal na gelang van hoe egskeidingsbevele opgestel is. Daar word gedemonstreer dat nie-lid eggenote belas word met aansoek doen vir 'n wysigingsbevel om te voldoen aan sodanige fondse se onredelike eise om 'korrekte' egskeidingsbevele. Hierdie artikel voer 'n argument dat, sodra die pensioenbelang 'n bate geag word in ooreenstemming met artikel 7(7) van die Egskeidingswet, Wet 70 van 1979, daar dan geen regverdiging is vir die fondse om te weier om die nie-lid se deel van die lid se pensioenbelang, soos ter datum van egskeiding, te betaal nie. Daar word verder geargumenteer dat die regsbelang wat die nie-lid eggenoot in die lid se pensioenbelang, verkry in terme van die partye se huweliksgoederebedeling, die betaling van sodanige belang in elk geval regverdig, omdat daar nie voldoen is aan die bepalings van die artikel 7(8) van die Egskeidingswet nie

1 Introduction

Section 7(7) of the Divorce Act[1] (hereinafter referred to as DA) provides a statutory mechanism which opens up the member spouse's pension interest to be split or shared when the member divorces. This section turns the pension interest which is ordinarily not a patrimonial asset in the marriage into an asset in the estate of the member spouse by deeming it as such for the purposes of divorce. Thereafter, section 7(8) of the DA empowers the court first to make an order that any portion of the member's pension interest be paid to the non-member spouse. Secondly, it empowers the court to instruct the registrar of the court to inform the retirement fund concerned to make such payment to the non-member spouse as a result of the parties' divorce. Sections 7(7) and 7(8)

* I wish to thank the anonymous reviewers for their careful reading of this contribution and their insightful suggestions, which I believe have improved this paper. I nonetheless, take full responsibility for all the shortcomings of this paper.

1 70 of 1979.

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of the DA are applicable at the dissolution of all marriages entered into in community of property or out of community of property with the application of the accrual system in terms of the Matrimonial Property Act.[2] These provisions should be read in conjunction with various other pieces of legislation, including the Pension Funds Act[3] (hereinafter referred to as PFA) which regulates different aspects of the South African retirement industry.[4] Section 37D (4)(a) of the PFA provides for the so 'called clean break principle' by allowing non-member spouses of members of retirement funds regulated by this legislation to be able to claim their share of their member spouses' retirement benefits as at the date of divorce. In order to claim, non-member spouses need not wait for the accrual of such benefits based on any of the contingencies outlined in the rules of such retirement funds, which can be later on after the divorce.[5] The clean break principle was subsequently translated to other retirement funds which are regulated by their own legislation.[6] The judicial interpretation of sections 7(7) and 7(8) of the DA as well as section 37D(4)(a) of the PFA has been subject to controversy leading to inconsistent approaches by various divisions of the High Court. The major controversy related to whether or not the pension interest automatically forms part of the joint estate or accrual for the purposes of division when the parties divorce. This discussion has already received adequate academic attention and despite its relevance, it is nonetheless, beyond the scope of this paper.[7]

This paper focuses on a challenge that arises in practice relating to retirement funds tendencies of refusing to make payments of parts of members' pension interests to non-member spouses based on what is either contained in or omitted from divorce decrees. In particular, I demonstrate that retirement funds often reject divorce orders that do not precisely state their names or those that totally do not mention their names on the basis that such orders do not comply with section 7(8) of the DA. I proceed to demonstrate that this tendency is used to justify the contention that in order for retirement funds to make payment of portions of their members' pension interest to non-member spouses,

2 88 of 1984.
3 24 of 1956.
4 See Government Employees Pension Law 21 of 1996, Transnet Pension Fund Amendment Act 41 of 2000, South African Post Office SOC Ltd Amendment Act 38 of 2013, Post and Telecommunications Related Matters Act 44 of 1958, Temporary Employees Pension Fund Act 75 of 1979, and Associated Institutions Pension Fund Act 41 of 1963 and Social Assistance Act 13 of 2004 as well as the Income Tax Act 58 of 1962. Over the years there has been various amendments to all these statutes.
5 MC Marumoagae 'A Critical Discussion of a Pension Interest as an Asset in the Joint Estate of Parties Married in Community of Property' 2014 1 *Speculum Juris* 55-73 65.
6 *Ngewu and Another v Post Office Retirement Fund and Others* 2013 4 BCLR 421 (CC) and *Wiese v Government Employees Pension Fund and Others* 2012 6 BCLR 599 (CC).
7 Marumoagae 'Non-member's Entitlement to the Pension Interest of the Member's Pension Fund' 2014 *PER* 2488-2524.

divorce decrees should specifically mention the names of retirement funds that should make such payment. This contention is examined with reference to the relevant provision of the PFA which not only provides for the naming of retirement funds in the decree of divorces but also the identification of such retirement funds thereon. It will be shown that retirement funds rely only on one aspect of the relevant provision and disregard the requirement relating to the identification of retirement funds in the divorce decrees to the detriment of non-member spouses. An argument is advanced that this prejudices non-member spouses who are forced to apply for the variation of divorce orders in order to reflect the names of retirement funds at great costs before they can be paid their portions of the member spouses' pension interests. It is further shown that this position justifies a view that in order for the non-member spouse to be paid the portion of the member spouse's pension interest, he or she must plead and pray for such an order in the pleadings.

In this paper, I start by illustrating how the Supreme Court of Appeal in 2016 interpreted sections 7(7)(a) and (8) of the DA. In particular, I demonstrate how this court challenged the thought that it is necessary to claim and pray for the pension interest in the divorce pleadings in order for the court to make an order in terms of section 7(8) of the DA. Secondly, I outline practical challenges experienced by non-member spouses as a result of retirement funds' rejection of divorce orders that are regarded as non-compliant with relevant statutory provisions. Finally, given the fact that majority of marriages are in community of property, I demonstrate that it is possible for retirement funds to make payment of the portions of their members' pension interests to the non-member spouses when divorce decrees are silent on both the names of retirement funds and percentages that must be paid when parties are married in community of property. However, when parties are married out of community of property with the application of the accrual system, retirement funds will not be able to determine the percentage or amount that must be paid to the non-member spouse. The resolution of the latter issue is subject of my further research.

2 *Ndaba* judgment

On 4 November 2016, the Supreme Court of Appeal delivered judgement which sought to clarify the manner in which the law regulating pension interests in South Africa should be understood.[8] Petse JA writing for the majority, started by highlighting that there are several conflicting decisions of various divisions of the High Court regarding the interpretation of sections 7(7)(a) and (8) of the DA.[9] After reviewing some of these conflicting judgements, he then authoritatively held that:

8 *Ndaba v Ndaba* 2017 (1) SA 342 (SCA).
9 *Idem* at par 2.

> [f]irst, s 7(7)(a) is self-contained and not made subject to s 7(8). It deems a pension interest to be part of the joint estate for the limited purpose of determining the patrimonial benefits to which the parties are entitled as at the date of their divorce. The entitlement of the non-member spouse to a share of the member spouse's pension interest as defined in the Act is not dependant on s 7(8). To my mind, it would be inimical to the scheme and purpose of s 7(7)*(a)* if it only applies if the court granting a divorce makes a declaration that in the determination of the patrimonial benefits to which the parties to a divorce action may be entitled, the pension interest of a party shall be deemed to be part of his or her assets. The grant of such a declaration would amount to no more than simply echoing what s 7(7)(a) decrees. For the same reasons it was not necessary for the parties in this case, to mention in their settlement agreement what was obvious, namely that their respective pension interests were part of the joint assets which they had agreed, would be shared equally between them.[10]

This is arguably the most important paragraph in *Ndaba* and also constitutes the point of departure for the argument that I am advancing in this paper. Petse JA's remarks were clearly directed to the specific facts that he was confronted with, wherein the parties' settlement agreement which was made an order of court was silent on how the pension interest ought to be dealt with.[11] Petse JA provided clarity in relation to the role of section 7(7)(a) and section 7(8) of the DA in the broader scheme of disputes relating to pension interests in South Africa. First, he correctly demonstrated that the operation of section 7(7)(a) of the DA is triggered only when the member spouse is divorcing and at that date renders his or her pension interest to be part of his estate. This enables the non-member spouse to be able to claim part of that pension interest if the parties are married in community of property, or at the very least, for the value of the pension interest to be taken into account when the accrual is calculated if the parties are married out of community of property subject to the accrual system. The parties' marital regime entitles the non-member spouse once the pension interest has been deemed as an asset in the member spouse's estate to claim a portion thereto. Petse JA's reasoning clearly indicates that such an entitlement to claim the pension interest is not dependent on the court acting in terms of section 7(8) of the DA declaring that the non-member spouse should receive a particular portion of the member spouse's pension interest. On the facts of this case, Petse JA was convinced that it was obvious that once the pension interest had been deemed as an asset it also became part of the parties' joint estate and as part of the joint estate there was no need for the appellant to go out of her way to mention that it was part of the joint estate and that it would be shared equally between them. This means that once the pension interest is regarded as part of the joint estate pursuant to the deeming provisions, then it follows that the appellant

10 *Idem* at par 25.

11 *Idem* at par 2 and 5. The court further stated that '[t]he divorce order granted by the trial court incorporated a provision that '... the deed of the settlement between the parties ... [annexed thereto] is made an order of the court.' The parties' deed of settlement in turn provided, *inter alia*, that their joint estate would be divided equally between them'.

derived a right to share the portion of pension interest. It can be argued that Petse JA's approach supports a contention that it is not compulsory when parties are married in community of property to specifically plead a case for a pension interest in their pleadings. In that once the pension interest has been deemed to be an asset in the member spouse's estate, the fact that the parties are married in community of property will make the deemed asset part of the parties' joint estate.

Petse JA went further and endorsed academic view that criticised cases that 'espouse the proposition that for the pension interest of a member's spouse to form part of the joint estate upon divorce, it is necessary that it be claimed by the non-member spouse in his or her summons or counter-claim'.[12] It is submitted that these obiter remarks by Petse JA justifies an argument that I am advancing in this paper that there is no need to plead and pray for a pension interest in order for retirement funds to pay portions of the member spouses pension interests to non-member spouses. In actual fact, Petse JA unequivocally held that '[t]he joint estate in this case must necessarily include the pension interest of either party as contemplated in s 7(7)(a) of the Act'.[13] Once the pension interest has been deemed to be part of the member's pension interest, it is difficult to understand why in order for the non-member spouse to receive a portion thereto, he or she must first make an averment in his or her pleading and pray that the court order that he or she should be paid his or her portion. The current legal position is indeed that the court must make an order directing the retirement fund to pay any part of the pension interest to the non-member spouse in terms of section 7(8) of the DA. Without such court orders, retirement funds in practice generally refuse to make payments of portions of their members' pension interests to non-member spouses. There is a need to reflect on the soundness of this legal position in light of Petse JA's interpretation in *Ndaba*. Such a reflection should not amount to an abstract academic debate but should be approached from a practical point of view in light of the experiences of non-member spouses when their divorce decrees are rejected by retirement funds, which I will do in the next section.

Petse JA's approach attracted a discussion by two pension law legal practitioners. First, Marumoagae argued that based on Petse JA's judgment in *Ndaba* he hoped 'that retirement funds … will no longer burden divorce litigants with the duty to plead and pray for pension interest in order for divorce decrees to order retirement funds to pay pension interests to non-member spouses'.[14] This elicited a reply from Jeram, who without referring to any part or page of Marumoagae's article argued that 'Marumoagae … concludes that the court ruled that it is not necessary for the pension fund to be identified and ordered to pay the

12 *Idem* at par 28
13 *Idem* at par 34
14 Marumoagae 'Pension interest – is there a need to plead a claim? (2017) Jun *De Rebus* 39.

benefit in order for such a fund to pay the non-member spouse. It is this conclusion that I respectfully disagree with, as in my view, this was not the court's ruling, nor does it reflect the current position in law'.[15] Marumoagae replied to Jeram and argued that Jeram misinterpreted his earlier argument in that he did not argue that *Ndaba* ruled that it is not necessary for the pension fund to be identified and ordered to pay the member's portion of the member's pension interest in accordance with section 7(8) of the DA.[16]

In his reply, Marumoagae clarified that based on paragraph 52 of Petse's judgement in *Ndaba* which is quoted above, his argument was 'that where there is no settlement agreement, it is then equally not necessary for the parties to plead and pray for a joint estate, particularly when they are married in community of property'.[17] In other words, the non-member spouse should not be at the mercy of the court to declare that he or she is entitled to receive a portion of the pension interest because section 7(7) of the DA in conjunction with the marriage in community of property already enables the sharing of the pension interest. The sharing of the pension interest where parties are married in community of property is a statutory consequence based on the parties' marital regime which is not dependent on judicial determination. Thus, once it has been shown that the parties' marital regime enables sharing and the pension interest has been deemed to be part of the member's estate, the court does not have discretion to refuse to grant an order that the non-member spouse should be paid his or her portion of the member spouse's pension interest. The divorce courts' only discretion relate to the actual percentages or amounts that must be paid to non-member spouses, the determination of which would depend on the facts of the cases.

In *Ndaba*, Makgoka AJA wrote a dissenting judgment which has been endorsed by Ramabulana who referred to it as a well-reasoned judgment.[18] Unfortunately, I do not share the same sentiments. Makgoka AJA generally agreed with Petse JA's exposition of the law but disagreed with the application thereof on the particular facts of the case. This led

15 Marumoagae 'Is it still necessary to obtain a court order against a fund? A rebuttal'(2017) Jun *De Rebus* 24.

16 Marumoagae 'Enforceable orders against retirement funds after divorce: A rejoinder' (2017) Jun *De Rebus* 35.

17 *Ibid*.

18 '*Ndaba v Ndaba* – reconciling the irreconcilable' (2017) Jun *De Rebus* 51. Ramabulana opines that 'The finding of the majority is not as flawless as it could have been. Even if the majority disagreed with the minority on the incorrect classification of pension interest as neither an immovable nor a movable asset, there was nothing preventing the parties from including the third heading of incorporeals under which pension interest could be counted. Thus, the reasoning of the majority in this aspect contradicts the *maxim expressio unius est exclusio alterius* and confirms the suggestion by the minority that the majority may have adopted a sympathy approach, which under the circumstances was woefully inappropriate as the judgment on this issue was still unenforceable against the fund'.

him to take a different interpretative route which sought to weigh the settlement agreement with what was contained in the appellant's prayers in her particulars of claim. I am of the view, with respect, that this was a misdirection. In my view, Makgoka AJA ought to have dealt with the settlement agreement on its own without any reference to the prayers in the summons because the settlement agreement was an actual order of the trial court, not the prayers in the particulars of claim. It is common in practice when parties litigate to plead and pray for a variety of things but later settle on completely different things. For instance, a plaintiff may pray for forfeiture of patrimonial benefits in terms of section 9(1) of the DA but eventual settle on the division of the joint estate. It cannot be that if the matter is appealed to a higher court, then such a court wishes to hold him or her on how his or her prayers were crafted in his or her pleadings. It is submitted that Makgoka AJA ought to have confined his analysis to the settlement agreement which was eventually made an order of court in order to determine whether or not such settlement agreement could be interpreted to include the parties' pension interest.

It was an uncontested fact in *Ndaba* that there was a settlement agreement which was silent on the pension interest. In other words, there was no specific clause in the settlement agreement which the trial court made an order of court wherein parties expressly waived their rights to each other's' pension interest. Makgoka AJA was persuaded by the respondent's argument that the appellant in her pleadings renounced her claim towards the respondent's pension interest.[19] This led Makgoka AJA to express a view that the parties 'agreed to exclude their respective pension interests from the division of their joint estate'[20] without pointing to a particular clause in the parties' settlement agreement. In his judgement, Makgoka AJA highlighted the fact that the appellant's combined summons expressly excluded a claim for the pension interest.[21] Makgoka AJA appears to have interpreted this fact as having a direct link to the settlement agreement. In that, because the appellant had excluded the pension interest in her prayer which was inserted in her particulars of claim, that was an illustration of her frame of mind at the time she concluded the settlement agreement and was thus consistent by not including her claim of the pension interest in the settlement agreement. It is submitted that this reasoning is not sound in law.

Makgoka AJA proceeded to deal with the subheadings of the settlement agreement and contended first that anything which did not

19 See *Ndaba supra* n8 at par 5.
20 *Idem* at par 39
21 *Idem* at par 47. The justification for this was that '… was assisted by one Mr Sentsho, whom she believed to be an attorney (who later turned out not to be). According to the appellant, she had indicated to Mr Sentsho that she wished to share in the respondent's pension interest. Mr Sentsho informed to her that if she included a prayer for sharing in the respondent's pension interest, it would bring about a lot of administrative difficulties'.

fall within the identified movable and immovable assets was not included in the division of the joint estate. Secondly that '[p]ension interests are neither immovable nor moveable property'.[22] He reasoned that 'traditionally, the pension interests did not form part of the assets of the parties. Only by special legislative enactment in the form of s 7(7)(a), were they deemed so'.[23] He further justified his approach by stating that '[t]he situation would have been entirely different had there been no heading. In that event, the clause providing for the equal division of the joint estate would have constituted a so-called blanket division. That would have brought the pension interests within the purview and reach of the deeming provisions of s 7(7) of the Divorce Act'.[24] In other words, if there are no headings in the settlement agreement and provision for a pension interest is not specifically made in therein, a pension interest can nonetheless, still be read into that settlement agreement. Thus, the headings of the settlement agreement and the items listed thereunder indicated that the pension interest was not made part of the settlement agreement. I do not agree with this approach. It is submitted that Makgoha AJA's reasoning is unsound for the reasons given by Petse JA as follows:

> *Old Mutual Life Assurance* approved of the description of a pension interest in the South African Law Commission's Reports dealing with the division of pension benefits on divorce in Project 41 (March 1995) and the sharing of pension benefits in Project 112 (June 1999), namely, that a 'pension interest' is a notional asset which 'simply establishes a method of ascertaining the value of the 'interest' of the member of the pension or retirement annuity fund as accumulated up to the date of the divorce'. This notional asset 'is added to all the other assets of the party concerned in order to determine the extent of the other party's claim to a part of the first-mentioned party's assets'. … However, sight must not be lost of the fact that the parties in this case were married in community of property. Consequently, one of the invariable consequences of such a marriage is that, subject to a few exceptions not here relevant, the spouses became co-owners in undivided and indivisible half-shares of all the assets acquired during the subsistence of their marriage. And, absent a forfeiture of benefits under s 9(1) of the Act or an express agreement between the parties to the contrary, each spouse is entitled to a half-share of the joint estate – whatever it entails.[25]

Petse JA proceeded to correctly hold that '[i]t therefore goes without saying that the parties' entitlement to each other's pension interests,

22 *Idem* at par 51.
23 Ibid.
24 *Idem* par 52.
25 *Ndaba supra* n8 at par 33. See also *Old Mutual Life Assurance Company (SA) Ltd and Another v Swemmer* 2004 5 SA 373 (SCA).
26 *Idem* at par 35, he further held that '[b]y its very nature, movable property comprises both corporeal and incorporeal things. According to the learned authors of *Wille's Principles of South African Law* typical examples of incorporeal movables, inter alia, include real rights such as a pledge, notarial bond, mortgage bond, or any rights in *personam* that are connected with the transfer of movable property from one person to

which can be satisfied by a money payment, falls squarely within the rubric of movables'.[26] Makgoka AJA further accepted that the appellant was not properly represented, the respondent's attorneys drafted the settlement without the parties negotiating the terms thereto, and that '[i]f the appellant had negotiated with them for the inclusion of the pension interests in the settlement agreement, she would surely have enquired about its non-inclusion, on being presented with the settlement agreement'.[27] He then concluded that '[t]he drafters of the settlement agreement were therefore entitled to draft the settlement agreement on the basis of the pleadings, unless the appellant had conveyed to them a contrary attitude with regard to the pension interests'.[28] It cannot be doubted that lawyers generally draft legal documents to benefit their clients and would push for their clients' desired outcomes in legal negotiations. Makgoka AJA approach made it impossible for him to address the entitlement of the appellant to the portion of the respondent's pension interest. In particular, he rushed to exclude the pension interest from the settlement agreement without any particular clause in the settlement agreement making provision for such exclusion. As such, his analysis could not lead him to engage Petse JA's sound reasoning that, it was not necessary for the appellant to mention in the settlement agreement that the pension interest fell within the joint estate and could be shared equally. [29] Thus, he missed an opportunity to reflect on the implication of Petse JA's approach and how it ought to be understood in the broader context of divorce litigation. Had he engaged Petse JA in this regard, he would have expressed a view as to whether Petse JA's remarks were confined to the fact of the case or should be understood as advancing a view that there is no need generally to plead and pray for pension interests when parties are married in community of property. In other words, Makgoka AJA's approach made it impossible for him to express a view on whether a non-member spouse was obliged to pray and plead for a pension interest in order for the court to make an order directing a retirement fund to pay a portion of the member's pension interest to the non-member spouse.

3 Payment to non-member spouse

3 1 Prejudice suffered by non-member spouses

Section 7(8) of the DA is an effective practical tool that retirement funds use to frustrate non-member spouses when they claim parts of their member spouses' pension interests upon divorce. If an order has not been made in accordance with section 7(8) of the DA directing

another or which can be satisfied by a money payment'. See also Marumoagae 'The law regarding pension interest in South Africa has been settled! Or has it? With reference to *Ndaba v Ndaba* (600/2015) [2016] ZASCA 162' (2017) 1 *PER* 1-22 at 13.

27 *Ndaba supra* n8 at par 59 and 65.

28 *Idem* at par 59.

29 *Ndaba supra* n8 par 28.

retirement funds to make such payment, no payment will be made. Retirement funds also refuse to make payment when divorce orders have been made in accordance with section 7(8) of the DA but the names of such retirement funds have either been incorrectly spelt therein or have not been inserted. Retirement fund's strict approach to divorce decrees which they view as not being compliant with section 7(8) of the DA prejudices non-member spouses. This strict approach negatively affects litigants who are instituting divorce proceedings either on their own or with the assistance of legal practitioners who lack the necessary expertise in this area of law. In most 'do it yourself' divorces wherein the instituting party will be given a *proforma* divorce summons to fill out for themselves or with the assistance of the Registrar of the court, chances of failing to properly make out a case for a pension interest remains high and can be disastrous leading to such a party not being able to claim his or her share of the member spouse's pension interest. It could not have been the intention of the Legislature for legally unassisted or poorly assisted divorce litigants to be prejudiced by the requirement that they must ensure that the names of retirement funds are stated in their divorce decrees. It is worth noting that the court will only be able to state the name of the retirement fund on the divorce decree when a proper averment has been made in relation thereto in the pleadings and a prayer reflecting a pension interest is clearly reflected thereon. It is unfortunate however, that most legally unrepresented litigants are not able to properly plead and pray for a pension interest. In practice however, the Registrars of courts do make an effort to insert the relevant information in the *proforma* divorce forms that are usually used as 'fill in the missing information' summons to assist legally unrepresented divorce litigants. However, this is a highly technical area of family law which requires adequate legal training and assistance from even an experienced Registrar of court who does not have adequate knowledge of pension law may be detrimental to the pension interest claim of the legally unrepresented litigant.

The retirement funds' strict approach indicates the importance of knowing which retirement fund the member spouse is a member of, in order to ensure that a claim in the pleadings is made for the payment of a specified amount or percentage from a particular retirement fund. However, in practice, it is not always easy for lawyers generally and non-member spouses in particular to find out which retirement funds' member spouses are contributing to. It is also difficult to find out the relevant retirement fund from the employer because of the alleged respect for privacy and confidentiality rights of member spouses by employers. Thus, non-member spouses are likely to institute divorce proceedings either without proper names of relevant retirement funds or at the very least merely stating general averment that the other party is a member of a retirement fund and the non-member spouse is entitled to a particular percentage thereto. If the member spouse attains legal representation, the non-member spouse might be lucky if in the member spouses' defending pleadings there is reference to the correct retirement

fund. Unfortunately, this does not often take place in practice and non-member spouses after the institution of divorce proceedings are forced to make interlocutory applications to compel the disclosure of correct retirement fund names at great expenses. This however, is not the luxury that is open to unrepresented non-member spouses who end up with divorce decrees that are likely to be rejected by retirement funds. Once divorce orders are rejected by retirement funds, non-member spouses are forced to approach courts to request variation of such orders. Such non-member spouses would be forced to seek legal advice at great costs to get the order to comply with section 7(8) of the DA as demanded by his or her member spouse's retirement fund.

It is important however, to note that there may be reasons behind retirement funds strict interpretation of the relevant provisions. The members of the board of management of retirement funds have a duty to uphold the rules of their retirement funds and all applicable laws. If indeed, there is a rule in the retirement fund rules that stipulates that payment will only be made to the non-member spouse once a court order directing the fund to pay has been received, such a rule will be followed to the latter by the fund. It appears also that the boards of retirement funds are also attempting to play it safe in that if their member was in future to challenge their decision to pay a portion of his or her pension fund to his or her former non-member spouse, they can defend themselves on the basis that they merely complained with a valid court order. I am nonetheless, of the view that given the fact that boards of retirement funds are able to act on advice of service providers such as their contracted firm of attorneys, they should receive legal advice on the interpretation of the cases discussed in this paper which appears to suggest that payment can be made notwithstanding, the fact that the court order did not mention the name of the fund. In particular, retirement funds regulated by the PFA ought to obtain legal advice on the proper construction of section 37D (4)(a)(i)(aa) of the PFA which will be discussed in the next section.

3 2 Naming or identifying the retirement fund

Regional Magistrates Courts in particular, are inundated with applications to vary divorce decrees in order to insert correct retirement fund names, more particularly where the parties were representing themselves or received poor legal representation.[30] Because of the possibility of retirement funds refusing to pay parts of their members' retirement benefits upon divorce to the non-member spouses due to either their names not being reflected on the divorce decree or incorrectly spelt, this lead to the justification of an unfortunate contention that in order to ensure payment, it is important that a proper case for the payment of pension interest is made on the divorce pleadings. In that this will lead to the naming of the retirement fund on the divorce decree. Over and above section 7(8) of the DA, retirement funds which are regulated by the PFA rely on section 37D (4)(a)(i)(aa) of the PFA to refuse to pay portions of their members' pension interest to the non-member spouses on divorce.

Section 37D (4)(a)(i)(aa) of the PFA provides that '… on the written submission of the court order by the non-member spouse [pension interest] must be deducted by the pension fund or pension funds named in or identifiable from the decree'. This provision clearly requires the non-member spouse to submit a divorce decree which either names or identifies the retirement fund which must make payment of the pension interest.

The statutory provisions regulating pension interests in South Africa are not easy to understand and to fully comply with in practice. Divorce litigants and legal practitioners often fall victim to non-compliance with the relevant provision which lead to non-member spouses' claim not being paid by retirement funds. The Pension Funds Adjudicator in *Dosson v Cape Municipal Pension Fund* observed that:

> The many complaints before this tribunal indicate that the pension funds are frequently incorrectly cited, or not mentioned by name at all, although they can usually be identified from context. In the circumstances where the fund is clearly identifiable, although not named, it seems unduly onerous to require a party whose claim has fallen due to make formal application for rectification of the divorce order.[31]

It is submitted that it does not make sense for a retirement fund to refuse to pay the non-member spouse's share of his or her member spouse's pension interest when such a fund despite the deficiencies on the divorce decree has nonetheless, established that the member spouse concerned is its member. It is undesirable for retirement funds to continue to insist that their names should be properly reflected on the divorce decrees in order for payment to be made. Initially, the office of the Pension Funds Adjudicator issued determinations which had the effect that if the settlement agreement or the court order does not refer to the pension interest and does not mention the retirement fund's name, the divorce decree will not bind the retirement fund and will only be binding as between the spouses.[32] This was the basis within which retirement funds further justified refusing to pay parts of their members' pension interests

30 See *Barnard v Municipal Gratuity Fund* [2009] 2 BPLR 143 (PFA) para 41, where the Pension Funds Adjudicator observed that 'many complaints before this tribunal indicate that pension funds are frequently incorrectly cited, or not mentioned by name at all, even though they can be identified from the context. Further, many of the complaints before this tribunal involve people who are not legally qualified to understand the requirement that a Fund should be named clearly in the decree of divorce. It also happens that people who are legally qualified sometimes fail to understand and comply with the requirement relating to the naming of a fund in a divorce order. Thus, it is unduly onerous to require a party whose claim has fallen due to make a formal application for rectification of the divorce order even in circumstances where the fund is identifiable from the facts or circumstances'.

31 2009 1 BPLR 12 (PFA) par 5.13.

32 *Ibid*.

to non-member spouses.[33] In 2009, the Pension Funds Adjudicator adopted a different approach in *Barnard v Municipal Gratuity Fund.*[34] In realising the injustices of allowing retirement funds to refuse to pay portions of their member's pension interests based on some or other legal technicality, the Adjudicator observed that:

> … many of the complaints before this tribunal involve people who are not legally qualified to understand the requirement that a fund should be named clearly in the decree of divorce. It also happens that people who are legally qualified sometimes fail to understand and comply with the requirement relating to the naming of a fund in a divorce order. Thus, it is unduly onerous to require a party whose claim has fallen due to make a formal application for rectification of the divorce order even in circumstances where the fund is identifiable from the facts or circumstances.[35]

The office of the Pension Funds Adjudicator is a special pension tribunal that has been established under the PFA[36] to dispose of complaints lodged under this Act in a procedurally fair, economical and expeditious manner.[37] The accessibility of this tribunal led to the multiplicity of complaints being made which enabled the Pension Funds Adjudicator to appreciate the burden placed on non-member spouses by retirement funds tendencies to strictly require that their names should be precisely stated on divorce decrees. In particular, the Pension Funds Adjudicator observed that:

> It is further clear that the requirement that a fund should be named in the order tends to be costly and time consuming and could result in financial prejudices to the non-member spouse. This is due to the fact that a Complainant has to request an amendment of a divorce order if the fund concerned is not named clearly in the order. This is time-consuming and costly as the Complainant has to pay attorneys in order to rectify the divorce order and he/she must re-lodge a new complaint which clearly states the name of the fund involved. Further, a Complainant's rights to his/her benefit in a fund will be prejudiced by the delay as a result of a technical requirement relating to the naming of a fund.[38]

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33 *Ibid*. See also *Kapot v Liberty Group Limited* PFA/WE/34972/2009/TN para 5.3 where it was determined that '[t]he divorce order is silent about the payment of pension interest by the respondent, or any other fund, to the complainant. It is also evident from the order that no fund is identified or identifiable in it, so it is impossible for the respondent to pay pension interest to the complainant because the order does not comply with the requirements of section 37D(4)(a)(i)(aa) of the Act. Therefore, without an order to the effect that a fund administered by the respondent must pay pension interest to the complainant, it cannot be compelled to do so'. See also *Areias v Momentum Retirement Annuity Fund and Another* 2013 1 BPLR 23 (PFA) par 5.5-5.6 and *Budhoo v Sasol Pension Fund* PFA/GA/37937/2009/LPM par 5.8.

34 2009 2 BPLR 143 (PFA).

35 *Idem* at par 41.

36 Section 30B of the PFA.

37 Section 30D of the PFA

38 *Barnard supra* n34 at par 42.

The Pension Funds Adjudicator was not starting a textbook academic discussion of the plight of non-member spouses but was reflecting on the true practical challenge that non-member spouses often after receiving divorce decrees are placed in by retirement funds. Retirement funds even when they have determined that ultimately they will have to pay, they nonetheless, raise legal technicalities that not only delay payment to non-member spouses but also financial burden them. This is as a result of retirement funds regulated by the PFA relying only on the first part of the requirement laid out in section 37D (4)(a)(i)(aa) of the PFA. They rely on the part that requires retirement funds to be named in divorce decrees. First, retirement funds interpret the requirement that their names must be named in the divorce decrees strictly. In that, divorce decrees should precisely state their registered names as they appear in their official documents, hence any deviation would be regarded as contrary to what the PFA provides for. For instance, I was once forced to apply for a variation order for my client's divorce decree which was rejected by the retirement fund because it stated 'provident fund' instead of a 'pension fund'. I had to request the court to change the name 'provident' and replace it with 'pension' in the divorce decree. Secondly, most if not all retirement funds that are regulated by the PFA disregards the requirement that the retirement fund concerned must be identifiable from the divorce decree. This requirement has not yet received academic and judicial interpretation and it is not exactly clear what it practically entails. It is not easy to think about ways in which the retirement fund could be identifiable from the divorce decree other than by stating it thereto.

Nonetheless, an argument can be made that even where the name of the relevant retirement fund was not stated in the divorce decree leading to the court not to make any order in terms of section 7(8) of the DA, it is nonetheless, possible at the very least to still identify the relevant retirement fund from the divorce decree. It is submitted that the name of the member spouse that appears on the decree of divorce with identity numbers which some magistrates and judges at times insert in divorce orders can be a viable means of identifying the relevant retirement fund. If one of the parties is a member of a retirement fund as a matter of fact, then his or her name and identity number is linked to a particular retirement fund. Thus, once an order has been granted and for example the non-member spouse approaches the member spouse's employer with the order and he or she is directed to the relevant fund, then the relevant retirement fund would have been identified. In other words, such a retirement fund was identifiable from the divorce decree through its own member's name and identity number which was reflected thereon.[39]

39 *M v M* [2015] 2 All SA 495 (FB) *para 22* where the court held that '[w]here a settlement agreement provides for a blanket division of a joint estate or a court order orders a blanket division of a joint estate, all pension funds to which any of the spouses belong and had an interest in at the date of

It is further submitted that the trade of the member spouse whose name appears on the divorce decree would also lead to the identification of the relevant fund which the non-member spouse should claim from. For instance, most public employees such as teachers, nurses and policemen are members of the Government Employees Pension Fund. However, there are private teachers and nurses who are not contributing to the Government Employees Pension Fund but to private retirement funds that their employers are associated with. Under such circumstances, once an order is granted, the employer may direct the non-member spouse to the relevant retirement fund. Employees of public enterprises such as Eskom are also contributing to retirement funds established specifically for such parastatals. Perhaps in future we may receive judicial guidance on how to interpret the requirement relating to identifying a retirement fund from the decree of divorce where there is no information that directly points to any retirement fund. The Pension Funds Adjudicator has interpreted section 37D (4)(a)(aa) of the PFA in *Barnard v Municipal Gratuity Fund* as follows:

> Having regard to the fact that the word 'identifiable' is not defined in the Act, its ordinary, literal and grammatical meaning should be given effect to in order to ascertain the intention of the Legislature. The ordinary and literal meaning of the word 'identifiable' means something that can be proved or is recognisable … . Therefore, in order to prove something or recognise something some form of exercise or conduct or act needs to be carried out in order to prove or recognise the fund in question. The question that follows is what kind of conduct or act needs to be carried out in order to identify a fund from a divorce order. It is clear that a factual inquiry or a reasonable investigation has to be conducted in order to identify [the retirement] fund from an order. The intention of the Legislature in using a broad word like 'identifiable' from the divorce decree indicates that some form of investigation needs to be carried out in order to identify or prove or recognise a fund. Thus, in the event of an omission to name a fund or failure to clearly name a fund from a decree of divorce the question is whether a fund can be identifiable or be recognised after a reasonable investigation.[40]

It is submitted that the Pension Funds Adjudicator's interpretation is not necessarily useful in as far as identifying the relevant fund directly from the divorce decree is concerned. It does however, provide guidance on what should be done once the non-member spouse has somehow figured out the non-member spouses' retirement fund. Once the retirement fund has been issued with the divorce decree, in terms of the Pension Funds Adjudicator interpretation, there must be some form of investigation to determine whether the person stated on the divorce decree is indeed a member of the fund concerned. This might take the form of looking into the retirement fund records to determine if any of the persons mentioned on the divorce decree is the member of the fund. The first step of the investigation may be to enquire from the employer as to which retirement fund the employee who appears in the divorce decree belongs.[41] Should such information be provided, the second step would be to approach the retirement fund or its administrator. That in my view, would constitute the reasonable investigation as contemplated by the

Pension Funds Adjudicator. In other words, upon receipt of the decree of divorce, the retirement fund should take initiative to determine if the person against whom a claim for a portion of the pension interest is made is a contributing member to the fund. Once such reasonable investigation has been conducted and it is clear that the person named on the divorce decree is the member of the fund, the fund would have been properly identified and thus liable to pay the non-member spouse's portion of its member's pension interest. Also, if after the divorce, the non-member spouse through his or her own initiative is able to locate the correct retirement fund to which the member spouse belongs to, then such a retirement fund on the basis of section 37D (4)(a)(aa) of the PFA, would have been identified.

There is no similar provision that requires the name of the retirement fund to be named or at the very least to be identifiable in other pension law related statutes that established and regulates other retirement funds such as the Government Employees Pension Fund.[42] These retirement funds often refuse to make payment to non-member spouses directly on the basis of section 7(8) of the Divorce Act.[43] While the Adjudicator's determinations do not set precedent and are by and large directed at retirement funds regulated by the PFA, nonetheless, her remarks in *Barnard* are highly persuasive. It is submitted therefore that there is a need for all retirement funds when they have been identified as retirement funds which are affected by divorce decrees presented to them, after reasonable investigation and satisfying themselves of the

divorce are involved, in the sense that all such pension interests are deemed to be part of the joint estate. It then appears to be clear that all the pension funds involved as aforesaid are identifiable from the decree of divorce since the only question is whether the spouses were members of and had a pension interest at the date of divorce. Strictly speaking it would then not even be necessary to enter a specific name of a pension fund in a court order'

40 *Barnard supra* n34 at para 47. The Adjudicator relying on *S v Toms; S v Bruce* 1990 2 SA 802 (AD) at 807H–808A where it was stated that '[t]he primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature. One does so by attributing to the words of a statute their ordinary, literal, grammatical meaning. Where the language of a statute, so viewed, is clear and unambiguous effect must be given thereto, unless to do so would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature', stated that '[t]he questions that follow is what is identifiable, what is required in order to identify a fund from a decree of divorce and what is the Legislature's intention in this regard. It is trite law that this tribunal similarly to a court of law has a duty to interpret an Act of Parliament so as to give effect to its intention' (par 45).

41 In practice, different employers react differently to such enquiries. While other may provide the required information, others, will simply say that they are bound by confidentiality rules from disclosing such information.

42 See for instance the Government Employees Pension Law Proc 21 of 1996 and Transnet Pension Fund Act 62 1990.

43 See generally *Government Employees Pension Fund v Naidoo and Another* [2006] 3 All SA 332 (SCA).

membership of those identified thereto to make payments to non-member spouses.

3 3 Specifying a percentage or amount in the divorce decree

In *Ndaba*, Petse JA held that '[s]ection 7(8) … creates a mechanism in terms of which the Pension Fund of the member spouse is statutorily bound to effect payment of the portion of the pension interest (as at the date of divorce) directly to the non-member spouse'.[44] According to Jeram 'it is still necessary to obtain an order in terms of s 7(8) of the Divorce Act 70 of 1979 (the Divorce Act), if the fund is to be co-opted into payment of any assigned pension interest and the SCA ruling does not alter that position'.[45] One thing that seems to be clear regarding section 7(8) of the DA is that there are considerations of convenience and efficiency associated with it. On the one hand, the court is empowered to direct a particular retirement fund to make payment to the non-member spouse if sufficient facts relating to such retirement fund have been provided to the court in the pleadings. On the other hand, once an order has been adequately made in terms of this provision, it will be clear to the retirement fund as to the exact portion of the pension interest that must be paid to the non-member spouse. In *Sempapalele v Sempapalele and Another,*[46] the court was of the view that enough facts must be placed before the court in order for the court to make a decision relating to the sharing and splitting of the pension interest.

It appears that there is general consensus that at the end of the day, the divorce decree must be able to direct the retirement fund to act in a particular way. In actual fact, the Pension Funds Adjudicator has determined that it will be 'sufficient if it is clear from the divorce order that a specific percentage or amount of the pension interest is assigned or due to the non-member spouse.[47] On this reasoning, it is not necessarily important for the name of the retirement fund to be included in the divorce decree. All that is important, it seems, is for the retirement fund to be identifiable from the divorce decree and an indication to be made as to the portion of the member spouse's pension interests that must be paid to the non-member spouse. In other words, on this interpretation, a retirement fund which is totally silent on the pension

44 *Ndaba supra* n8 at par 28
45 *Supra* n15 at 24.
46 2001 2 SA 306 (O).
47 *Barnard supra* n34 at par 60. See also South African Law Reform Commission '1995 Report on the sharing of pension benefits on divorce' 12-13 which submitted that A share of the pension interest of a member spouse is not to be awarded to the non-member spouse without more ado. It entails a consideration of various factors some of which may only be established by evidence. Sufficient facts must be put before the Court to enable it to arrive at a proper decision and indeed to make an appropriate award, which need not necessarily be half the value of the pension interest. At the very least the value of the pension interest must be furnished'. This suggestion was implemented by the insertion of section 7(8) into the DA.

interest is unenforceable. Unfortunately, in practice, due to the reasons advanced above[48] there are divorce decrees that are silent not only on the names of the retirement funds but the percentage or amount that must be paid to the non-member spouse. On this interpretation, it appears as if, the non-member spouse would end up being forced to apply for the variation of the divorce order in order to get a divorce order that complies with section 7(8) of the DA. For as long as section 7(8) of the DA is in operation, non-member spouses would continue to be frustrated with the legal processes by retirement funds.

The basis of my argument is that there should be some legislative framework that empowers retirement funds to accept divorce decrees that either do not reflect their names or do not state the percentage of the pension interest that must be paid to the non-member spouse. The quantification of the portion that must be paid to the non-member spouse will not be entirely challenging when the parties are married in community of property. The retirement funds actuaries may treat such divorce decrees as providing for blanket division of joint estates, unless they provide otherwise. The non-member spouse maybe paid half of the amount which the member spouse would have been eligible to receive had he or she exited the retirement fund on the date of divorce. However, difficulties relating to the quantification of the pension interest if the divorce decree is silent on the percentage or amount that must be paid to the non-member spouse will arise if the parties were married in community of property with the application of the accrual system. Under such circumstances, the amount due to the non-member spouse will depend on the calculation of the accrual as at the date of divorce. This will take into account all the assets which will be part of the accrual calculation. Given the fact that the accrual should be determined at date of divorce, it follows therefor that the pension interest should be determined at same date.[49] If the pension interest was specifically excluded from the accrual determination in the parties' antenuptual contract, then the retirement fund will not have to make payment. However, if it was not excluded, then given the fact that on the date of divorce in terms of section 7(7) of the DA the pension interest was deemed to be an asset in the estate of the member spouse, it is submitted that when determining the accrual, the court ought to take the pension interest into account. If the value of the pension interest is taken into account in the determination of the accrual, then the member spouse would have a claim to the extent to which the member's pension interest increased the member's estate in accordance with the formula provided for in section 3(1) of the Matrimonial Property Act. It is worth noting that such a claim does not arise automatically but will only arise if the non-member spouse's estate is smaller than that of the member spouse.

48 See the discussion in par 3.1 of this paper.
49 See generally *W v W* (46463/2007) [2010] ZAGPPHC 587 (24 February 2010).

During divorce proceedings information is placed before the court which enables it to objectively determine the accrual.[50] In particular, the court is able to determine the percentage which must be paid to the non-member spouse after a thorough assessment of all the assets and calculations arising therefrom.[51] Without such calculations and subsequent court order, it will be impossible for retirement funds to ascertain exactly what should be paid to non-member spouses. As such, the argument that has been made that retirement funds on presentation of divorce decrees of parties married in community of property that are silent on both their names and percentages that must be paid cannot be sustained when parties are married subject to the accrual system. Under such circumstances, courts should be provided with sufficient information including the value of the member's pension credit in order to properly calculate the accrual and determine a percentage or amount which must be paid to the non-member spouse from the member's pension interest. It is always advisable for anyone who is contemplating divorce generally and those married out of community of property with the application of the accrual system in particular to seek legal advice in order to protect their rights. Such legal assistance should ensure that pension interests once deemed to be part of the member spouses estate are taken into account in the calculation of the accrual, unless if specifically excluded from the application of the accrual in the ante-nuptial contract.

50 *N v G and Others* (18159/2013) [2018] ZAWCHC 29 (12 March 2018) para 15 where the court was of the view that '… it is evident when one considers the provisions of chapter I of the Matrimonial Property Act as a whole that the legislature contemplated a system of accrual determined by objective criteria, save where the parties might otherwise contractually agree – for example by agreeing that an inheritance should be included in the calculation of an accrual, rather than excluded as is the default position in terms of s 5. The accrual system as provided for in terms of the chapter works on the basis set out in ss 2-5 of the Act. Section 4 provides in general terms that '[t]*he accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage*'. Its more specific provisions provide for what is ordinarily to be included in or left out for the purposes of determining the accrual and how the effect of inflation is to be accommodated in calculating the accrual. The respective net values at the commencement and dissolution of the marriage are matters of objective fact, not matters to be determined by agreement. It is not open to the parties by means of a declaration to invent the objectively determinable facts by declaring or stating fictitious values. The way in which they are entitled *by agreement* to alter the ordinary operation of the accrual system is by excluding or including specified types of assets that ordinarily would be included or excluded in terms of the statute for the purpose of determining the respective accruals; *not* by misrepresenting or misstating the objectively determinable commencement values'.

51 See *BS v PS* (291/2017) [2018] ZASCA 37 (28 March 2018) at par 3(c).

4 Conclusion

This paper demonstrated the practical challenges experienced by non-member spouses when their divorce decrees are declared by retirement funds to be non-compliant with relevant statutory provisions. In particular, it was shown that if divorce decrees do not properly reflect the retirement funds which should make payment, non-member spouses are forced to approach divorce court in order to amend divorce decrees in order to comply with section 7(8) of the DA. It is crucial that the law is sensitive to the practical realities that litigants are faced with during the process of divorce. It is unfortunate that in practice retirement funds will be prepared to make payment only when the divorce order instructs them to do in terms of section 7(8) of the Divorce Act. It was argued that this should not be the case only in relation to marriages in community of property. In that there appears to be no need for retirement funds to refuse to pay portions of members' pension interests to the non-member spouses solely on the basis that they were not ordered to do so in terms of section 7(8) of the DA. the Pension Funds Adjudicator has determined that 'the requirement that there should be a specific order to pay the non-member spouse is contrary to the intention of the Legislature which is to remove some of the hardships that the non-member spouse experience when claiming her/his portion of the pension interest.[52]

52 *Barnard supra* n34 at par 60.

The nursing profession in South Africa – Are nurses adequately informed about the law and their legal responsibilities when administering health care?*

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OPSOMMING

Die verpleegprofessie in Suid-Afrika – Is verpleegkundiges op hoogte van die reg en hul regsverantwoordelikhede in die gesondheidsorg?

Hierdie artikel focus daarop om te bepaal hoe ingelig verpleegsters is oor die reg en die norme en standaarde wat die verpleegprofessie in Suid-Afrika reguleer. Die doel van die artikel is tweeledig: Eerstens, poog dit om vas te stel wat die internasionale norme en standaarde is wat in ander jurisdiksies toegepas word. Om hierdie rede is 'n wye spekrum van eerste wêreld, derede wêreld en outluikende ekonomiese jurisdiksies, waaronder die Verenigde State, Nieu-Seeland, Australië, Spanje, Thailand, Singapoer, Indië, Mexiko en Nigerië, geskies om vas te stel wat die internasionale standaarde is wat deur verpleegkundiges in die uitvoer van gesondheidsorg toegepas word en of dit vergelykbaar is met die poeisie in Suid-Afika. Wat voortspruit uit 'n oorsig van die internasionale, praktykregulasies, is dat daar 'n noemenswaardige ooreenkoms is met betrekking tot die uitdagings wat bestaan. Baie studies toon die gebrek aan kennis van die reg en verantwoordlikhede as 'n algemene rede vir die bron van wanpraktyk problem onder verpleegsters. Tweedens, ontleed die artikel ook die bestaande wetgewing in Suid-Afika krities om vas te stel of dit by die implementering daarvan voldoende is om vepleegkundiges die nodige kennis te gee on hulle in staat te stel on hul rol te verstaan wanneer gesondheidsorg aan pasiënte toegedien word. Alhoewel die bevindinge getoon het dat die meerderheid verpleegkundiges in Suid-Afrika kennis dra van die toepaslike wetgewing en hul regsverantwoordelikhede, is daar ook 'n beduidende aantal verpleegkundiges wat geen begrip van die reg het nie en ook nie die omvang van hul diens en die verantwoordlikhede wat daarmee verband hou ten volle verstaan nie. Waar skuiwergate geïdentifiseer is, word strategieë voorgestel om die gehalte gesondheid deur verpleegkundiges aan pasiënte wat aan hulle sorg toevertrou is te verbeter.

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1 Introduction

Nursing is a vital part of the healthcare system and nurses[1] are described as the 'heartbeat of healthcare.'[2] They direct their energies towards the prevention, promotion, maintenance and restoration of the individual's health. Expansive knowledge is required for nurses to perform their duties and render holistic patient care competently, ethically and legally. What is apparent is that the nurse's role has changed significantly over the past two decades and includes wider specialisation, greater autonomy and more accountability.[3] Nurses pledge to take responsibility for the care they provide and to answer for their own decisions. They are expected to perform their actions in accordance with the requirements of the nursing professional bodies and the law. When nurses are aware of their legal responsibilities and obligations, they would undoubtedly be better prepared to care for persons in their care to achieve better productivity and quality in their service delivery.[4] This article focuses on ascertaining how well informed nurses are about the law and their legal obligations in the *milieu* in which they operate and administer services to persons who are entrusted to their care. While, the first part of the article seeks to establish what are the norms and standards that are employed by nurses in administering health care in other international jurisdictions, to assess whether this is comparable with the position in South Africa, the latter part analyses the existing regulations in South Africa. The thrust of the discussion here is to determine whether existing legislation and policies are adequate to provide nurses with the required knowledge to enable them to fully appreciate their role and responsibilities when administering health care to patients.

2 Background

In South Africa, there has been an alarming increase in medical malpractice litigation in both the public and private healthcare sector. According to Aon insurance company in South Africa, claims in excess of

1 The Nursing Act 33 of 2005 defines a 'nurse' as a person registered in a category under section 31(1) in order to practice nursing or midwifery. Professional nurse, practitioner, nurse auxillary, staff nurse means a person registered in terms of section 31. Section 31 makes provision for a nurse to be registered to practice as a professional nurse, midwife, staff nurse, auxillary nurse and auxillary midwife. Section 43(1) stipulates the use of titles as Registered Professional Nurse, Registered Midwife, Registered Staff Nurse and Registered Auxillary nurse. The reference to 'nurse' in this article will be used as a general term with reference to all of the categories described in the Nursing Act.

2 Botha 'Nurses are the Heartbeat of Healthcare' (2014) *The Gremlin,* available at http://www.thegremlin.co.za/2014/05/12/nurses-are-the-heart beat-of-healthcare/ (accessed 2016-02-27).

3 Scivener 'Accountability and Responsibility: Principle of Nursing practice B' (2011) *Art and Science, Nursing Standard* 25(29) 35-36.

4 Mali & Mali 'Effect of Self-Instructional Module on Knowledge Regarding Medico Legal Responsibilities among Nurses' (2014) 3 (3) *IJSR*, 617 -618.

five million rand have increased by 900% and on average, one in every five claims are in excess of one million rand, representing a 550% increase in the last decade.[5] In a public address in March 2015, the Health Minister of South Africa, Mr Aaron Motsoaledi stated that medical litigation has reached crisis levels, calling it an 'explosion' of medical malpractice litigation.[6]

It is therefore imperative for nurses to know and understand the legal environment in which they practice.[7] The current healthcare challenges of resource deficiencies, high acuity patients, increased complexity of information, advanced technology and more challenging disease profiles means that the nurse must know and understand the legal rights and implications essential for them to practice. These include the legal environment, regulation of nursing practice, standards of care, prevention of malpractice, professional liability, insurance and issues related to nurses.[8] Nurses must be able to understand the law that governs their practice in order to obviate risks and lawsuits. This knowledge of legal responsibilities for the nurse is integral with the expanding demands in their clinical roles.[9] The question that arises therefore is: do nurses have the necessary legal knowledge in order for them to understand their practice and their responsibilities?

South Africa is faced with what has been referred to as a 'nursing crisis.' Much of this can be attested to critical human resource constraint, disinterest in the profession, lack of a caring ethos, and an apparent imbalance between the needs of the carer and the needs of the community.[10] The nursing crisis alluded to above has been quadrupled by the enormous disease burden, the array of health sector reforms, gender stratification, and the existence of strong professional silos and hierarchies. Addressing these challenges is vital in order to strive towards Universal Health Coverage (UHC) in South Africa which aims to ensure that everyone is able to access the health care services they need, irrespective of whether they have the ability to pay for it.[11] As a result of the rapid expansion of the scope of nursing care and knowledge, nursing staff face greater responsibilities and require increasingly more skills.

5 Aon 'Soaring medical malpractice claims demand statutory intervention' available at https://www.aon.co.za/index.php/en/news-articles/302-soaring-medical-malpractice-claims-demand-statutory-intervention (accessed 2017-03-15).

6 'SA's shocking medical malpractice crisis' (2015) *Health 24* available at https://www.health24.com/News/Public-Health/SAs-shocking-medical-malpractice-crisis-20150309 (accessed 2016-02-27).

7 Haffiz & Reshi 'Preparation of An Information Booklet and Its Impact on Staff Nurses Regarding Their Legal Responsibilities in Selected Hospitals of Kashmir Valley' (2016) 5(1) *IJSR* 1714-1717.

8 *Ibid*.

9 *Ibid*.

10 Rispel 'Transforming nursing policy, practice and management in South Africa' (2015) 8(10) *Global Health Action* 127-139.

11 *Ibid*.

New specialities develop and nursing professionals rightly call for appropriate remuneration, authority and status.[12]

Historically, there was a distinct difference between the role and functions of a nurse and a physician. The nurse functioned within a delineated framework where it was adequate for the nurse to wait for the doctor to prescribe the order and medical treatment regime before they would follow that order. The nurse was expected to assist the physician and not question the physician's order, his practice or competency. The role of the nurse has changed dramatically over time. The *locus* of authority for the patient care decision making is now a shared function. The nurse's responsibility has been increased to encompass the actual examination, diagnosis and treatment without direct supervision of a physician. As a result of the higher acuity level of patients, the development of highly specialised technology and a heightened emphasis on independent nursing practice, the present position of nurses has increased accountability with a corresponding increase in legal liability. The increased utilization of less-skilled personnel, in an attempt to meet the health-needs impact on quality patient care. These personnel are used outside their scope of practice, creating a high-risk environment for patients and healthcare workers.[13] Therefore, there must be comprehensive education on legal aspects that guides the nursing practice and a thorough understanding of the law for nurses to be adequately protected and to be held accountable for their legal obligations.[14] This begs the question of what exactly does the accountability of a nurse entail.

3 The nurse's accountability and responsibility

Safety and quality of patient care is determined by the environment in which care is provided. Nurses are expected to apply their knowledge, skill and experience to care for the needs of the patient. When care falls short of standards, due to resource allocation or the lack of an understanding of relevant policies and legislation, the nurse bears this responsibility. The nurse is responsible for maintaining and updating nursing skills and competencies, having proper documentation, and fully understanding one's role as a healthcare practitioner. A nurse is bound to a standard of conduct that is expected of a reasonably prudent nurse.[15] While all nurses are required to be familiar with the relevant legislation and regulations governing their profession, the practical reality is that this is not the case. As consumers are becoming increasingly aware of their legal rights in health care, all nurses are

12 See Verschoor, Fick, Jansen & Viljoen *Nursing and the Law* (2007) 3.
13 Dorse *Legal and Ethical aspects of nursing practice in selected private hospitals in the Western Cape Metropolitan Area* (MCur dissertation 2008 University of Stellenbosch) 86.
14 Cavico & Cavico 'The Nursing Profession in the 1990's: Negligence and Malpractice Liability' (1995) 43(4) *Cleveland State Law Review* 557-626.
15 Lacer 'Nurses and Lawsuits: A Medico legal Perspective' (2010).

therefore expected to have a thorough knowledge of their legal responsibility. The researcher, therefore, maintains that it is absolutely essential that nurses know and understand their legal rights and responsibilities in the domain of their practice.

4 An overview of the nursing profession internationally

4 1 Nursing regulations and the practice in other countries

Although nurses share a common profession, internationally their educational preparation, regulation, and practice patterns are diverse and vary in complexity and scope. There are differences in credentialing requirements that include professional licensure, use of titles, and accreditation of educational programs.[16]

Acquiring global standards for the education of nurses has been promoted by the International Council of Nurses (ICN) for over a century. Achieving that goal remains challenging and is complicated by the discrepancies in nursing education throughout the world. The minimum criteria for entrance is university level education in many countries, but this criteria of university education for nursing remains challenging, with disparities in the programs currently offered in different parts of the world. Furthermore, the issue is compounded because there are countries that still consider initial nursing education at the secondary school level to be adequate. The *curricular* in nursing education programs are diverse and varied across the world. Nurses from the Philippines complete a baccalaureate degree. Denmark, Ireland, New Zealand, and Spain also have single programs for qualifying as a nurse. In the United States, there are three educational pathways to become a registered nurse: a 2-year associate degree, a 3-year diploma program, or a baccalaureate degree. Also in the United States, the model of nurse-midwife is common, for other countries midwifery is considered a profession separate from nursing. In a nutshell, universal nursing education standards have not been achieved. Global standards continue to be a goal of the future and these will be guidelines that serve as benchmarks for the profession.[17]

Another significant difference in nursing education globally is the regulation of the profession. Statutory nursing regulation is prevalent in most countries with the aim of ensuring a safe and competent nursing workforce. However, in contrast, there are still countries with no nursing regulation, rules, or other regulatory mechanisms that emanate from the government. In some countries, there is provision for nursing regulation,

16 Nicholas, Davis & Richardson 'The Future of Nursing: Leading Change, Advancing health: International Models of Nursing' (2011) *Institute of Medicine* 565-642.

17 *Ibid.*

either in statute or in other systems of rules, however, for various reasons no mechanisms exist that establish a legal framework for nursing as an autonomous regulated profession and licensure is not a mandatory requirement. Some countries require nurses to pass an examination after completion of their nursing education before they can practice. Nurses in the Philippines, Australia, Thailand, Singapore, the Cameroons, Korea, and Poland take a licensing exam that provides national licensure and registration as a first level (registered) nurse. Other countries, such as Mexico, do not require a post-graduation examination. The nursing schools administer an exit or qualifying examination and upon passage, the student is granted a diploma. The diploma allows the graduate to practice as a nurse. Titles are used to inform the public of the scope of practice and the professional identity of a healthcare worker and differ by country. The nurse's role and responsibilities may also differ by country, although the titles may be the same.[18]

It may be argued that although the common objective of the profession is universal with the main aim of restoring and promoting health, alleviating illness and protection of the patient, there remains an inconsistency on how the profession is regulated across the world and it is this discrepancy that may potentially be the root cause of varying standards in the delivery of care. Some of the factors contributing to nursing negligence have been documented as an inappropriate delegation whereby nursing tasks are delegated to unlicensed assistive personnel. Early discharge, nurse shortage, advances in technology, increased autonomy and responsibility of the hospital, better-informed customers and expanded legal definitions of liability are comparable contributors as in the South African context.[19]

Studies conducted on international and national grounds have revealed that nursing staff knew little of the law pertinent to their work and workplace. A study in Barbados has revealed that the majority of respondents did not know the contents of the law specific to their codes of practice and the workplace.[20] It was identified in this study, that nursing professionals were unaware of how to deal with ethical and legal issues that they faced as they had insufficient knowledge of the law pertaining to them. A strong recommendation was to devise a means to sensitise them through practical education in ethics and ethical and legal approaches.[21]

Sharmil examined the awareness of nurse's knowledge on legal aspects of health care in Madras, India. Qualitative data was collected and the findings provided information about the present knowledge of nurses on legal aspects of health care where 43.3% of the nurses in the

18 *Ibid*.
19 Croke 'Nurses, Negligence and Malpractice' (2003) 103(9) *AJN* 54-64.
20 Hariharan, Jonnalagadda, Walrond & Moseley 'Knowledge, attitudes and practice of healthcare ethics and law among doctors and nurses in Barbados' (2006) 7(7) *MNC Medical Ethics* 1-9.
21 *Ibid*.

study had inadequate knowledge and 56.7% had moderate knowledge. In order to provide quality care and legal protection, the interventions suggested was the updating of legal knowledge through continued education.[22]

To determine the nurse's knowledge in ethics, Osingada *et al* have concluded from a quantitative study conducted in Uganda that nurses exhibited very little knowledge in ethics and recommended structured continuing programs in developing their knowledge on ethics in practice.[23] Nurse's knowledge was also examined by Oyetunde and Ofi in hospitals in Nigeria where 41.6% demonstrated a knowledge deficit about the laws of the land and its application and 77.6% demonstrated a deficit in knowledge regarding laws governing their practice.[24]

In a study conducted by Mali and Mali in India, the nurse's knowledge was assessed regarding medico-legal aspects. The results revealed that nurses had inadequate knowledge regarding medico-legal responsibilities.[25] To corroborate this finding, Indian nurses participated in a separate but similar study whereby knowledge of legal awareness was assessed and found to be hugely lacking.[26] Similar to the above findings, Kaur *et al* recommend the need for an information booklet that will help independent learning in nurses of knowledge regarding legal responsibilities.[27] This recommendation arises from the findings of a study conducted to assess the knowledge regarding legal responsibilities in nursing. Although the results revealed a moderate to good knowledge base of legal responsibilities, the authors confirm the deficit of aspects such as the law and legal terms and its application thereof.[28]

What is evident from an overview of international regulations pertaining to the nursing practice is that similar challenges exist throughout the world. The main priority and common thread, however, remains the safety of the patient and the enhancement of regulations governing practice to protect this vital human right. Irrespective of where one lives in the world, one's well-being depends on how health issues are managed. It is apparent that South Africa is not unique in the challenges experienced in the nursing profession. This is highlighted in the plethora

22 Sharmil 'Awareness of Community Health Nurses on legal aspects of Health Care' (2011) *IJPH* 199-218.

23 Osingada, Nalwadda, Ngabirano, Wakida, Sewankambo & Nakanjako 'Nurse's knowledge in ethics and their perceptions regarding continuing ethics education' (2011) 8 *BMC Research Notes* 319.

24 Oyetunde & Ofi 'Nurse's knowledge of legal aspects of nursing practice in Ibadan, Nigeria' (2012) 3(9) *JNEP* 80.

25 Mali & Mali 'Effect of Self-Instructional Module on Knowledge Regarding Medico Legal Responsibilities among Nurses' (2014) 3(3) *IJSR* 617-624.

26 Kumar, Gokhale, Jain & Mathur 'Legal Awareness and Responsibilities of Nursing Staff in Administration of Patient Care in a Trust Hospital' (2013) 7(12) *JCDR* 1-11.

27 Kaur, Sodhi & Sharma 'A Study to Assess the Knowledge Regarding Legal Responsibilities in Nursing' (2014) 2(1) *IJHS* 50-53.

28 *Ibid*.

of cases dealing with malpractice issues of nurses that have been brought before our courts.

5 An examination of South African case-law illustrating the challenges experienced by nurses

Registered nurses execute tasks previously performed by other healthcare practitioners while ancillary staff performs roles usually associated with registered nursing staff. The challenge lies where the boundaries between healthcare staff continue to shift. In the past ten years there has been a revolution in the legal responsibilities of nurses as these reforms have led to attitude changes toward nurses by the legal, medical, and public realms. To avoid legal charges of negligence, nurses must keep abreast of the rapidly changing areas of technology, documentation, and patient care. Regardless of the healthcare setting, professional nurses are morally, ethically, and legally accountable for their nursing judgments and actions.

Nurses have a crucial role to play in providing patients with the necessary care. As indicated, empowering the nurse with the relevant legal knowledge from inception is vital in preventing incidents of nursing negligence. If the nurse does not have the necessary knowledge and understanding of the laws governing their practice, the rights and laws protecting the patient, and that which govern and regulate the healthcare institution, there is a likelihood that such an inadequacy may result in harmful consequences for the patient, the institution, and the nurse. The following cases highlight this predicament.

In *Goliath v MEC of Health in Province of Eastern Cape,*[29] the Supreme Court of Appeal upheld the appeal with costs for damages to the plaintiff where a swab was left in the plaintiff's abdomen post-surgery resulting in sepsis. In this case, both the doctor and the nurse were placed on trial, however, the failure to ensure the duty of care in this instance lies with the registered nurse who is in charge of her theatre and is responsible for a swab count. It is on her nod that the doctor will 'close' a patient once she confirms her swab count. A similar outcome had arisen in the *Van Wyk v Lewis* case, where the surgeon had left a swab in the plaintiff's abdominal cavity following surgery. Although the court found that the defendant Lewis, was not negligent, the court held that it was the general practice that the attending registered nurse carried the responsibility to ensure that all swabs were accounted for.[30]

29 *Goliath v Member of the Executive Council for Health in the Province of the Eastern Cape* [2015] JOL 32577 (SCA).
30 *S v Van Wyk*; *S v Lewis* [2002] JOL 9345 (C).

Such negligence is again brought to the fore in *Micheal v Linksfield*[31] where a young man suffered a cardiac arrest resulting in cerebral anoxia which left him in a vegetative state whilst under general anaesthetic during a surgical procedure. Negligence was alleged during the resuscitation procedure as a result of the failure of the registered nurse to operate the resuscitation equipment correctly. As a nursing professional, competency in operating emergency equipment is vital and regarded as a basic requirement for safe practice. In this instance, it was unacceptable that the registered nurse practitioner was ignorant of the operating emergency equipment in her immediate work environment.

In *Ntsele v MEC for Health, Gauteng Provincial Department*[32] the medical staff had failed to exercise skill and diligence in the medical profession to the pregnant plaintiff and as a result, the plaintiff's child suffered hypoxia and perinatal asphyxia resulting in cerebral palsy. The court found in favour of the plaintiff as emergency care was not diagnosed and instituted. As nurses initiate their professional obligations, their legal responsibilities also begin.

Hoffman v MEC of Eastern Cape[33] also highlights the registered midwife's lack of reasonable care administered to a pregnant mother and her unborn child. From the evidence, it was obvious that the registered midwives failed to identify medical problems of distress with the baby and the mother timeously thus resulting in a delay in their actions and death of the child. The court found that the required level of skill and care was not evident by the attending midwives. A similar unfavourable outcome is seen in the matter of *NP v MEC for Health, Eastern Cape*.[34] As a result of poor nursing assessment, a child was born with a physical deformity that proved to be avoidable had a reasonable standard of care been adopted.

The application and implementation of laws and malpractice theories are used to determine direct or indirect liability for injuries when a nurse is placed on trial. What is clearly evident from an examination of case-law, depending on the circumstances of the case, the hospital, the physician and the nurse may all be held liable. Nurse liability, however, is generally based on negligence principles. A nurse can only be held liable for injuries if they owed a duty of care to the patient, they breached this duty of care, and the breach resulted in measurable damage to the patient,[35] as has been reflected in case-law.

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31 *Michael and Another v Linksfield Park Clinic* (Pty) Ltd and Another [2002] 1 All SA 384 (A).

32 *Ntsele v MEC for Health, Gauteng Provincial Government* [2013] 2 All SA 356 (GSJ).

33 *Hoffman v MEC, Department of Health, Eastern Cape and Another* [2011] JOL 27750 (ECP).

34 *NP v MEC for Health, Eastern Cape* [2014] (1196/2012) 28 (Unreported).

35 LaMance 'Nursing Liability Laws' (2014), available at http://www.legalmatch.com/law-library/article/nurse-liability-laws.html (accessed 2016-08-24).

6 The legislative framework that regulates the nursing profession in South Africa

6 1 Regulation of the profession

Regulation of the nursing profession encompasses the welfare of the public through the improvement of education standards, practice standards and delivery of care to patients by ensuring that competency on all domains is inherent to nurses in order to provide quality care at all times. It ensures professional identification of nurses who meet the criteria for registration and provides for disciplinary hearings of those who wilfully or negligently harm the health of their patient.[36]

The State as the chief custodian of its people has to ensure that those who are responsible for the welfare of people have the essential knowledge, skills, and ethical integrity necessary to ensure safe health care delivery standards. In the 19th century, the registration of doctors and nurses was inaugurated. The regulatory control was provided through an Act of Parliament, the Nursing Act 33 of 2005 as amended (hereinafter referred to as the Nursing Act). The profession was granted the right to a regulatory authority which was to ensure that all its actions were in the public interest. Through the delegated function, Parliament was thus assured that it was and is currently carrying out its responsibilities to its citizens. This authority comprises accountability and responsibility. In South Africa, this regulatory body is the South African Nursing Council (hereinafter referred to as SANC). The nurses have the autonomy to determine the quality of care rendered and are accountable for their professional actions to SANC, or to the courts for alleged breach of the law and *vice versa*. However, SANC is, in turn, accountable to the State through representatives of the people. The minister designated in the Act is responsible to Parliament for this.[37] The regulatory mechanism of the nursing profession in South Africa is through a register. As the *locus* of control of any profession, the register does not only give identity to the body of persons who possess specialised knowledge, skills, standards and ethical integrity, but it also allows for control over such persons whose names are subject to public scrutiny.[38]

6 2 The influence of the law on professional practice

Laws generally, and relevant legislation in particular, are endorsed to regulate and control the practice of health professionals. Such laws form the protective framework for the health, safety and welfare of the citizens of a country so that they are protected against unauthorised, unqualified

36 See Searle, Human & Mogotlane *Professional Practice: A Southern African Nursing Perspective 5th ed* (2009) 49.
37 *Ibid*.
38 See Armstrong, Bhengu, Kotze, Nkonzo-Mthembu, Ricks, Stellenberg, Van Rooyen & Vasuthevan *A new approach to Professional Practice* (2013) 73.

and improper practice by the health professionals. This originates from the concept of justice for all, as it provides for the protection not only of the health users, but also for the health professional as it defines the parameters of their practice.[39]

Justice is a fundamental component for the attainment of social peace and human welfare. Legislative instruments influence social control for rules of action as they are binding and enforced on all citizens of the country. In a profession, the law identifies who shall serve in such a profession and enforces its member's acts and omissions.[40] In such an environment, it is absolutely essential, that nurses understand the law affecting the nursing profession. They are therefore required to be trained and to have a thorough knowledge of the related Acts that impact on their practice in South Africa.[41] The relevant and applicable legislation is dealt with in *seriatim* below.

6 3 An examination of relevant and applicable legislation

6 3 1 The Constitution of the Republic of South Africa[42]

Chapter 2 – the Bill of Rights of the Constitution articulates the principles that are fundamental to the ethics of nursing. The ethical principles of beneficence, non-maleficence, autonomy and justice are reflected in the Bill of Rights. This contains the detailed provisions concerning civil, political, economic and social rights. Ethical principles of beneficence align to the right to life (section 11), access to health care (section 27-(1)) and access to information (section 2-(1)). Non – maleficence is reflected in the Constitution as the 'right to an environment that is not harmful' (section 24-(a)), 'not to be treated in a cruel, inhumane or degrading manner' (section 12 -(1)) and 'not to be subjected to medical or scientific experiments without consent' (section 12-(2)(c)). A person's right to bodily and psychological integrity (section 12(2), dignity (section 10), privacy (section 14) and life (section 11) reflects autonomy. Justice and fairness echoes 'the right to equal treatment and non-discrimination -(section 9) and the right to lawful, reasonable and procedurally fair administrative treatment (section 33)'.[43] It follows that these rights and ethical principles must be observed and respected for the purpose of health care in a medical setting. The Constitution and the rights entrenched therein serve as the backdrop for the ethical and legal practice for nurses, patients and for SANC.[44]

39 Searle, Human & Mogotlane *supra* n36 at 149.
40 *Ibid*.
41 See Mellish, Oosthuizen & Paton *An Introduction to the Ethos of Nursing* 3rd ed (2010) 3.
42 The Constitution refers to the Constitution of the Republic of South Africa, unless otherwise stated.
43 Mathibe-Neke *The role of the South African Nursing Council in promoting ethical practice in the nursing profession: a normative analysis* (MSc (Med) dissertation 2015 University of Witwatersrand) 23-24.
44 Reference here is made to Chapter 2 of the Constitution of Republic of South Africa.

6 3 2 The National Health Act, 2003 (Act 61 of 2003)

Prior to the implementation of the National Health Act 61 of 2003 (hereinafter referred to as the National Health Act), the National Patients' Rights Charter was formulated by the Department of Health and launched in 1999 to serve as a guideline to people seeking health services, as well as to health institutions concerning the rights and duties of people in the health sector. The guidelines in the National Patients' Rights Charter are similar to those mentioned in the National Health Act and the Health Professions Council of South Africa's (HPCSA) guidelines and also have as part of its mission, the realisation and protection of the patients' rights to access to health care as well as to privacy and a healthy and safe environment.[45] It, therefore, follows that the National Health Act combines the country's health system in a common goal to promote and improve health care delivery within the aforementioned guidelines. The Act promulgates the obligations imposed by the Constitution and other relevant health legislation including nursing care, rights of the health users and the responsibilities of the healthcare provider.[46]

6 3 3 The Nursing Act, 2005 (Act 33 of 2005)

Nurses have a duty to be trained and to formulate an understanding of the elements of the law relating to their practice, training and other issues of the nursing profession. Chapter 2 of the Nursing Act articulates the regulation and practice requirements for the nurse.[47] The Nursing Act enables the nurse to recognise the professional council duties and the relevant sections that detail the regulations or rules that guide and regulate the profession.[48] Sections 1 to 4 of Chapter 1 is explicit in detailing SANC's roles, responsibilities and objectives of the profession.[49]

The Nursing Act is the binding force to provide recognition and cohesion to the nursing profession and has been promulgated so that it is in the interest of the public. The fundamental purpose of the Act is to ensure regulation by statute by implementing a sound and effective level of nursing service to all citizens. The Nursing Act provides for the existence of SANC, which as has been described above, is responsible for the regulatory processes applied in nursing in South Africa.[50]

45 Mellish, Oosthuizen & Paton *supra* n41 at 169.
46 The relevant and applicable sections in this regard are Chapter 1 and Chapter 2 of the National Health Act 61 of 2003.
47 See Chapter 2 of the Nursing Act 33 of 2005.
48 Searle, Human & Mogotlane *supra* n36 at 155.
49 See Chapter 1 of the Nursing Act 33 of 2005.
50 Searle, Human & Mogotlane *supra* n36 at 155.

6 4 Other regulatory structures

6 4 1 The South African Nursing Council (SANC)

South Africa attained a significant milestone by being amongst the forerunners in the world to achieve State registration for nurses with the establishment of SANC in 1944. SANC is a statutory body established and legally recognised by Parliament. It exists as a legal entity in its own right with powers and the authority to independently control the activities and other issues related to the profession.[51] The core purpose of SANC relates to public protection through maintaining professional standards and conduct, and improving knowledge and skills of the nurse practitioners. This assents with the state's main responsibility to the public of safe and quality health care.[52] There is a close collaboration between government and SANC as the Nursing Act assigns powers to SANC. Although SANC has the independence to regulate the profession, it is accountable to government in terms of its activities and the profession. Amongst a host of functions, an important function of SANC is the regulation and control of professional conduct. The Nursing Act, as referred to above, provides for disciplinary control of the profession by SANC. This strives to ensure that the ethical practice of nursing is primarily intended to protect the public. It attempts to protect the nursing practitioner and the interests of the public so that the trust between the public and the profession is maintained.[53]

In cases of misconduct, SANC is given quasi-judicial powers to enquire into charges of misconduct and to impose sanctions, or penalties where misconduct is evident. The procedure for misconduct and the penalties are prescribed by law, as the outcome may have severe social and economic consequences.[54] The advocacy role of SANC should be aimed at enhancing professionalism in the nursing profession which entails a commitment to society that demonstrates a nursing practitioner's scientific knowledge, accountability and responsibility.[55] McCleod – Sordjan postulates that although SANC's vision is clear in articulating the standards of professional practice, there is a need for development in areas where legal accountability and liability need emphasis. It is provided that precise guidelines on legal aspects will only serve to further enhance the nursing knowledge base in the interest of all stakeholders.[56]

51 *Ibid*.
52 *Ibid*.
53 See Armstrong, Bhengu, Kotze, Nkonzo-Mthembu, Ricks, Stellenberg, Van Rooyen & Vasuthevan *A new approach to Professional Practice* (2013) 74.
54 Searle, Human & Mogotlane *supra* n36 at 156.
55 McLeod-Sordjan 'Evaluating Moral Reasoning in Nursing Education' (2014) 21(4) *IJHCP* 474-480.
56 *Ibid*.

6 4 2 Regulations Relating to the Scope of the Practice (hereafter the Scope Regulations)

The scope of practice of a nurse entails 'the acts and procedures which may be performed by the scientifically based physical, chemical, psychological, social, educational and technological means applicable to health care practice'.[57] An important regulatory function is to determine the scope in which a practitioner may function. In the Nursing Act, the scope of practice is outlined in section 30 and details are provided in the regulations and rules according to section 58 and 59. Therefore the Regulations provide for the legal scope of practice for professional nurses and all practitioners are legally obliged to comply with these prescriptions.[58] It is vitally important that a practising nurse know their scope of practice as well as the scope of other categories in the profession. The Regulations on the scope of practice for nurses define the scope of practice of registered persons, the conditions under which registered persons may carry out their professional obligations, the control which will be exercised by SANC over the practice of registered persons and the inspections which will be carried out regarding nursing education institutions.[59]

Although the scope of practice is composed as a flexible framework in order to make provision for different areas of practice and allow new developments in health and nursing care, a limitation to the Regulations is that it does not specify the skills and methods which the nurse should use when caring for a patient. Researchers have argued in favour of this limitation as there cannot be a list of tasks because it negates the true nature of nursing which is more than tasks and procedures. However, the broad guidelines that allow for the expansion and development of the nurse's role in order to keep pace with technology and advances in the health and nursing industry have also led to nurses uncertainty in the limitations and boundaries of their scope leading to them practicing care without acquiring full competency.[60]

With regard to a study undertaken by Lubbe in South Africa to determine the nurse's scope of practice and the implication for quality nursing care, it was found that there were an alarming number of risk assessments performed by nurses not licenced or enrolled to perform the assigned tasks. This highlighted implications for quality nursing care and potential risk for the patient and the institution. The author surmised the need for emphasis of nurses performing tasks within their scope of practice for which they are licenced or enrolled. Nurses that lack the

57 The South African Nursing Council Government Notice Regulation No.2598 (R2598) of 1985 as amended.
58 Geyer 'Scope of Practice' (2009) 20(1) *Professional Nursing Today* 4-5.
59 Searle, Human & Mogotlane *supra* n36 at 177.
60 Geyer *supra* n58.

required competency are not adequately prepared to perform tasks unsupervised even in the current global nursing shortage crisis.[61]

The findings in this study validate a review of a more defined scope of practice that provides a more detailed outline of the permissible interventions and procedures for the various categories of nurses. This will obviate nurses acting outside their prescribed domains of practice and rendering safe, competent care that meets the ethical and legal realms of the profession. Therefore, the researcher emphasises the need for nurses to be knowledgeable of their legal obligations in order to empower their decision making when commissioned to render care. A thorough understanding of their legal responsibilities will guide their actions and protect the patient and the nursing professional. The strategies discussed hereunder are proposed in response to the gaps that have been identified and the problems experienced in the nursing profession.

7 Strategies for providing quality health care

In a South African study conducted by Dorse, nurses from selected private hospitals were evaluated on their knowledge regarding legal aspects in their practice. Although the findings from the study indicate that the majority of the nurses are knowledgeable about their legal responsibilities and the legislation governing their practice, the results also revealed that there are a significant number of nurses who lack important knowledge on some aspects. These aspects include: nurses operating outside of their scope of practice, that they do not operate within the legal guidelines of the profession, and do not understand their scope of practice. Nurses do not always adhere to the patient's rights. They function in an unsafe working environment and do not feel skilled or sufficiently competent to perform their duties. Nurses do not address patient safety in all aspects of care. They do not inform families of potential risks that might arise, and it has been observed that lower categories of staff do not operate under direct supervision.[62]

What is evident is that there is a crucial need for nurses to be kept abreast of their legal liability and current trends and legal developments that apply in their day-to-day care. It has been established that sufficient information is disseminated during the training of nurses for the various categories. However, what has emerged is that nurses find the application of this knowledge challenging. Nursing is a service-oriented profession and it must advance and keep pace with the advancing technology, newer problems, and growing demands of consumers. The following strategies have been identified to ensure that there is

61 Lubbe 'Nurses' Scope of Practice and the Implication for Quality Nursing Care' (2013) *Journal of Nursing Scholarship* 58-64.

62 Dorse *Legal and Ethical aspects of nursing practice in selected private hospitals in the Western Cape Metropolitan area* (MCur dissertation 2008 University of Stellenbosch) 38.

continuous and intensified efforts by nurses to provide quality health care services: -

7 1 The inclusion of a module on medical law and practice in the nursing curriculum

Nurses have an obligation to act within their scope of practice, competence and legal boundaries. Their foremost responsibility is to safeguard the patient and family against harm, abuse, neglect and deprivation. It is therefore submitted that knowledge on medico-legal responsibilities will better prepare student nurses and encourage accountability for their actions. As discussed, the legal framework for nurses is vast and overlaps with other significant legislation that impact their practice. Thus, it is submitted that a module of this nature will also empower the nurse to appraise the laws governing their practice and impose an appreciation of ethical and legal issues. It is proposed that this will equip the nurse with applicable knowledge and an understanding of aspects relevant to their daily practice. Especially for the registered nurse practitioner who has a wider scope of practice compared to other categories, this should be considered as a mandatory module as its significance will be valuable in practice as it is the Registered Nurse whose function encompasses decision making, supervision, delegation and management of patient care. Aspects of medical law may include subject matter such as medical law and practice, forensic nursing, human rights, and HIV and the law. The aim of equipping nurse practitioners with knowledge on legal aspects relevant in the current and dynamic healthcare environment may be achieved if the relevant knowledge is disseminated in the appropriate context.

7 2 To facilitate and support interdisciplinary education

In order to translate a succinct approach to education and training on medical law and its relevant matters to enhance safe nursing practice, it is necessary that opportunities be created for in-service training, lectures, seminars, continuous professional development modules and workshops by medico-legal experts and medical expert witnesses. To corroborate the findings of the studies by Osingada et al, Mali and Mali and Sharmil as discussed above, it was revealed that there is a marked deficiency in legal knowledge amongst the nurses. The education and training that is suggested will enable nurses to update and keep abreast of legislation in the current health care context. The transference of experience, knowledge and information will prove to be educational for the nurse practitioner as the realities of the nature of the incidents and cases will enable a beneficial encounter for the nurse.

7 3 A need for reflection on medico-legal incidents that occur at institutions

A common response after an unfavourable incident is to attempt to conceal and avoid the details of the matter in fear of negative publicity or

the possibility of a defamation suit to those involved. Reflection of the events and debriefing will provide a safe evaluation of one's practice. It allows one to revisit the event, thus enabling identification of strengths, weaknesses and potential opportunities for improvement should a similar incident recur. The nurses must be debriefed using the ethical and legal framework to reinforce the nurse's actions and decisions in context. Real incidents with medico-legal implications may be used for reflection exercises within larger groups as well to introspect on one's own practice.

7 4 To enable the availability of resources such as legal nurse consultants or legal advisors at institutions

When decision making is challenging and ethical issues arise, knowledge and expertise may be critical for both the patient and the nurse. Often, the nurse is faced with situations where the struggle between ethical and legal obligations arise. There may be uncertainty and indecisiveness due to a lack of knowledge on matters pertaining to their actions. Although decision making and problem-solving regarding legal matters may improve with experience and rank, there may be some legal issues that remain unclear and obscure to an inexperienced individual. The researcher submits that making such resources available will be of immense value and may potentially even obviate a medico-legal incident. Whilst there is no education and training currently available in South Africa for legal nurse consultants, it is proposed that more experienced nursing professionals may be identified and trained as expert witnesses, advisors and consultants who may, therefore, be utilized as a valuable resource in this regard.

7 5 To establish a medico-legal forum for nurses

A forum of this nature comprising nurses as well as legal experts can be established to meet (on a suggested quarterly basis), to conduct a mortality review of all patients within a specified period to identify and discuss legal and ethical issues related thereto. An analysis of patient cases in such a forum may also emphasise the nurse's shortcomings in the delivery of care and foster a more conscientised approach. A comprehensive, purposive and systematic review of these cases can aid in identifying the causes of the nursing malpractice, morbidity or mortality associated with these cases. One will need to define and analyse the nursing care related injuries and insults and explore and develop preventative measures and strategies for safer practice. It is submitted that the sentiment that 'when human error is systematically studied, valuable lessons can be learned and safety is improved'[63] certainly rings true with the practice.

63 See Beckmann *Nursing Negligence: Analyzing Malpractice in the Hospital Setting* (1996) 1-2.

8 Concluding remarks

The healthcare institution is one of the most dynamic and complex organisations in society. It encompasses a multitude of functions, with nursing care constituting the single largest component of the healthcare industry.[64] The nursing function is the mainstay of the organisation in fulfilling its objectives in relation to patient care. The primary purpose of the nursing function is to provide safe, individualised, comprehensive and effective care to patients through the execution of the nursing process. Nurses play an integral role in providing society with widespread and all-inclusive healthcare. The knowledge that is garnered through education and clinical practice forms the basis of safe and effective nursing care. The nurse practitioner is the only member of the health care team responsible for the hospitalised patient over a 24 hour day. His or her interventions are guided by policies and procedures established by the country, the profession, and the healthcare institution in accordance with accepted standards of care.[65]

The research undertaken has revealed that relevant legal knowledge and an understanding and application of the law is a key element for a safe and competent professional practice. The strategies that have been highlighted above are submitted to enhance a nurse's understanding of laws governing the nursing practice and are to be implemented to address the gaps that have been identified. In light of this submission, the following quotation by Ashton cited by Oyetunde and Ofi, is most appropriate – 'if more nurses are knowledgeable about the laws of the land and that which governs their practice, there will be little or no problems in nursing practice since laws guide human conduct.'[66]

64 *Ibid*.
65 *Ibid*.
66 Oyetunde & Ofi 'Nurse's knowledge of legal aspects of nursing practice in Ibadan, Nigeria' (2012) 3(9) *JNEP* 80.

Clinical legal education: Interviewing skills

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OPSOMMING

Kliniese regsopleiding: Vaardighede in onderhoudsvoering

Vaardigheidsopleiding, wat onderhoudsvoering insluit, is aanvullend tot 'n kliniek se oogmerk van sosiale geregtigheid, aangesien dit studente bemagtig om uitspraak uit te stel, om vanoor 'n verskeidenheid te kommunikeer en oplossings te soek. Onderhoudsvoeringvaardighede is 'n basis van kliniese regsopleiding, 'n leermetode in 'n lewende-kliënt kliniek. Aangesien studente oor die algemeen sonder kliniese toesig onderhoude voer, is hul opleiding in die verband noodsaaklik. In die bespreking van onderhoudsvoeringopleiding, val die klem op die voorbereiding van studente, wat die taking van vooropgestelde idees en aannames insluit, asook beradingsvaardighede. 'n Verskeidenheid van ondervragingstegnieke word bespreek en daar word aangedui dat onderrigliteratuur die veronderstelling ondersteun dat die manier waarop vrae gestapel word belangriker mag wees vir die bevordering van begrip as die kognitiewe vlak van die vraag. Periodieke opsommings help die studente om 'n beter begrip van die sake te vorm. 'n Bondeling van optredes wat binne konteks geïnterpreteer moet word, is nie-verbale aanduidings, gedrag wat obstuksies tussen die studente en hul kliënte mag vorm, spieëlgedrag en prosedie. Regsanalise en strategieë met potensiële oplossings waarvoor studente verantwoordelikheid moet aanvaar, aangesien hulle handelinge andere mag beïnvloed, word bespreek. Die doelstellings van kliniese regsopleiding, soos van toepassing op onderhoudsvoering, word aangedui.

1 Introduction

In live-client university law clinics students interview and advise clients. Clinical legal education (CLE) is the teaching methodology applied in clinical courses.[1] Client interviewing forms part of the main goals or outcomes identified for CLE.[2] Interviewing skills were identified as an

1 Quigley 'Introduction to clinical teaching for the new clinical law professor: a view from the first floor' (1995) *Akron Law Review* 463.

2 Steenhuisen in De Klerk et al *Clinical law in SA* (2006) 266-279. Seven main goals (outcomes), each with their own sub-goals were identified. The following are associated with the sub-goal of consultation skills: professional responsibility, legal ethics, personal norms/morality, professionalism, social awareness, judgment and analytical abilities, recognition of relevant facts and applicable law, understanding strategy, tactics, decision making, process, procedure, substantive law, client counselling, legal research, factual investigation and legal services to the community.

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essential skill across a number of jurisdictions,[3] including South Africa.[4]

Although clinicians are present or generally available in the clinic whilst students are conducting interviews with clients,[5] they are seldom a party to such interviews.[6] The majority of scholars opine that students should conduct client interviews without clinician supervision.[7] Input by the clinician is however required before clients are advised.[8] As students generally start interviewing clients early on in their clinical course,[9] it is essential that students are trained and instructed in this essential skill, which must meet the CLE course outcomes.[10]

In the law clinic students need to have conversations with clients to learn the facts relating to their legal problems. Only then substantive law will be analysed and applied to the legal problem. When students are preparing for interviews, they have to be cognisant of any preconceptions and assumptions they may have about their clients.[11]

In discussing the interview, the focus will be on note-taking, questioning techniques and non-verbal cues as clusters of behaviours to be interpreted within context.[12] Legal analysis and strategy will be

3 Du Plessis *Clinical legal education: Law Clinic Curriculum design and assessment tools* (2016) 47, 48.

4 *Ibid*; Haupt in De Klerk et al *Clinical law in SA* (2006) 55 – 71.

5 Clinicians are focused on directing all the attending students on how clients are to be serviced after students relay clients' legal problems to them. Du Plessis 123.

6 Du Plessis *supra* n3 at 122, 41-44. It is impossible for clinicians to attend all interviews.

7 ACLE 2017 (Australian Clinical Legal Education), available at http://press.anu.edu.au/publications/australian-clinical-legal-education 144 (accessed 2018-06-01). They however cautioned that the best model no doubt depends on the individuals involved, that is, both the supervisor and the student. 'Students should be prepared for their work with real clients by observing and discussing interviews, advocacy activities and other client work conducted by practitioners'.

8 Interviews are also conducted without direct supervision in e.g. England and Australia. Du Plessis *supra* n3 at 128, 129; Brayne in Webb and Maughan *Teaching Lawyers' Skills* (1996) 173.

9 As in South Africa from the early 1970s, see De Klerk et al *Clinical law in SA* (2006) 264. Students at Monash, Australia consult independently within a few weeks from the start of their clinical course, see Evans & Hyams 'Independent evaluations of clinical education programs: Appropriate objectives and processes in an Australian setting' 2008 *Griffith Law Review* 60. See Du Plessis *supra* n3 at 16, 17 for current statistics at South African law clinics.

10 Schrag 'Constructing a clinic' 1996 *Clinical Law Review* 175, 180–85; see also Babich 'The Apolitical Clinic' 2004 *Tulane Lawyer* 10; Du Plessis *supra* n3 at 32, 33.

11 Salinas *Effective client interviewing and counselling* (2016) 21, 175; UWE *supra* n11 at Bristol (University of West England, Bristol) 2012–2013. Legal Practice Course, available at www2.uwe.ac.uk/services/Marketing/students/Newstudents/Ch2-Lawyers-Skills.pdf (accessed 2014-06-02) 8; Tremblay 'Interviewing and counseling across cultures: Heuristics and biases' *Clinical Law Review* 2002 373.

12 UWE *supra* n11 at 7. This will include a discussion on prosody.

discussed,[13] with potential solutions to be found by way of legal and non-legal options,[14] as well as the identification of further steps and the ending of an interview.[15] The final consideration will be whether the proposed CLE outcomes, applicable to interviewing skills, were met.

2 Clinical legal education: Skills and outcomes

O'Regan J stated that the lives of law graduates 'are determined in a real sense by the skills and habits that they have acquired at law school' and that 'much of the test of what constitutes a competent lawyer is skills-based rather than content-based'.[16]

Interviewing skills, or, as often referred to as consultation skills, were among the essential skills identified in research across a number of jurisdictions.[17] In synergy are the identified skills of ethics, the capacity to deal sensitively and effectively with clients from a range of social, economic and ethnic backgrounds and disabilities, effective communication techniques, recognition of clients' financial, commercial and personal constraints and priorities, effective problem-solving, legal research, time and risk management, to recognise personal strengths and weaknesses, legal analysis and reasoning, factual investigation and counseling skills.[18] These skills are all associated with interviewing skills and form part of the interviewing process. The results of a three year Australian project shows, in focusing on skills associated with interviewing skills, that the following additional skills are developed:[19]

> [A]ccepting and assuming responsibility for matters of great importance to real clients, improving problem-solving abilities, discovering facts and figuring out how to turn them into admissible evidence, and 'traditional skills' such as interviewing, case planning, investigating facts, counseling, legal writing, witness examination, oral argument, legal professionalism, such as values and ethics,[20] and strengthening students' emotional awareness and sense of ethical behaviour.[21] During the interviewing process, the CLE teaching

13 Salinas *supra* n11 at 98, 110-112, 138, 142.
14 *Idem* at 145 – 150.
15 *Idem* at 54; UWE *supra* n11 at 23.
16 O'Regan 'Producing competent graduates: The primary social responsibility of law schools' 2002 SALJ 247.
17 Du Plessis *supra* n3 at 35.
18 Du Plessis *supra* n3 at 34 – 37; For detail in the South African environment, see De Klerk (2006) 29 – 262 and specifically Haupt 55 – 71.
19 ACLE *supra* n7 at 74.
20 Schrag *supra* n20 at 183–184; see also Curran, Dickson and Noone 'Pushing the boundaries or preserving the status quo? Designing clinical programs to teach law students a deep understanding of ethical practice' 2005 International Journal of Clinical Legal Education 104; Kerrigan 'How do you feel about this client?' A commentary on the clinical model as a vehicle for teaching ethics to law students' 2007 *International Journal of Clinical Legal Education* 37; Cody at 'What does legal ethics teaching gain, if anything, from including a clinical component?' 2015 *International Journal of Clinical Legal Education* 1.
21 Cody *supra* n20 at 1.

> method can meet the aims of personal and professional development such as, for example, cross-cultural awareness, the role of emotions, creativity, exercising authority and learning to learn.[22]

Learning outcomes for the basic skills and processes involved in interviewing and advising clients were suggested as, on completion, students should be able to:

> state the purpose of the client interview; use all information-seeking techniques confidently; listen actively and respond with appropriate follow-up to what you have heard; summarise information to check understanding; structure an interview so that necessary information is acquired and given; give appropriate advice to the client; and state the processes whereby rapport with clients can be developed.[23]

3 Supervising student interviews

In South Africa, there is a lack of supervision capacity during interviews due to the large student numbers in proportion to available clinicians.[24] The lack of direct supervision during interviews need however not be insurmountable. Opinions on student supervision during interviews vary. Australian research observed that the clinic at the University of New South Wales emphasised direct supervision of students during the first interview.[25] Clinical programmes outside New South Wales tend to use the approach developed at Monash 'whereby the student, after taking the client's instructions and consulting with the supervisor, returns to the client and advises them, unaccompanied by their supervisor'.[26]

Givelber indicates that there is 'absolutely no empirical support' that learning can only occur under professional supervision.[27] English clinical scholar Hugh Brayne indicates that for his first four years as a clinical supervisor, he 'sat in on every student interview', thinking 'that I had a professional responsibility to do so'.[28] After discussions with clinicians in the United States, he hardly ever sat in on student–client interviews, avoiding usurping the student's relationship with the client. Brayne indicated that his previous approach had come from 'a failure to separate the two goals of legal service and student learning'.[29] Australian researchers noted Brayne's argument, in favour of allowing students to

22 Schrag *supra* n20 at 182, 184-185.
23 UWE *supra* n11 at 26.
24 Du Plessis *supra* n3 at 109.
25 ACLE *supra* n7 at 136.
26 This procedure is also followed at the Wits Law Clinic, see Du Plessis *supra* n3 at 27.
27 Givelber, Baker, McDevitt and Miliano 'Learning through work: an empirical study of legal internships' 1995 *Journal of Legal Education* 1, 3. They however found that 'both the characteristics of the job and the presence of supervision play important roles in students' evaluations of their work experiences'.
28 Brayne *supra* n8 at 172 – 173.
29 *Ibid*.

conduct their interviews and provide advice without their supervisor present, persuasive.[30]

4 Preparing students for interviews with clients

Where students are conducting interviews without direct supervision,[31] student preparation and instruction are essential. Students will meet with a client who will present them with a problem. The client will need assistance in having the problem solved. During a client interview students have to ask themselves certain questions, such as: 'what is the client's question that I am being asked to answer?'; 'What information do I have available to help me answer the question?'; What information do I need to get from the client to help me answer the question?' During an interview, students have to talk to the client to get the information in order to enable them to answer the questions.[32]

The information gained from the client constitutes the facts of the legal problem. Students then need to apply the law to the information. From the legal analysis, an answer can be communicated to the client.[33] Taking a problem-solving approach is therefore as important in the student-supervisor relationship as it is in the student–client relationship.[34] Students need to appreciate the central significance of their clients,[35] building a bridge to a strong professional relationship, facilitated by effective interviewing and client counselling skills.[36]

4 1 Working with preconceptions and assumptions

In preparing for the interview, students must not make any assumptions about the client's knowledge or the emotional impact the case may have. They must not assume that the client will be willing to accept certain risks, or even that the client's case is capable of a legal resolution.[37] In teaching interviewing skills, students' possible stereotypical views must be addressed',[38] such as 'the effects of race, class and … gender on the

30 ACLE *supra* n7 at 144. They however cautioned that the best model no doubt depends on the individuals involved, that is, both the supervisor and the student. 'Students should be prepared for their work with real clients by observing and discussing interviews, advocacy activities and other client work conducted by practitioners'.
31 Du Plessis *supra* n3 at 27-29. The clinician is not attending the interview, but is present in the clinic for student consultation.
32 Salinas *supra* n11 at 12, 14
33 *Ibid.* The details of the problem will generally first be discussed with the supervisor before the client is advised.
34 ACLE *supra* n7 at 150, 151. Students should expect to receive clear instructions from their supervisors rather than have their supervisors provide them with answers.
35 Ibid.
36 Salinas *supra* n11 at 21.
37 UWE *supra* n11 at 8.
38 See Tremblay *supra* n11 at 373.

interaction between lawyer and client,'[39] cognisance of cultural, age or factual differences,[40] and to adhere to some basic cultural protocols.[41] Failure may result in clients withholding certain information from the students, making advising difficult.[42] The teaching of diversity issues in preparing students for interviews is therefore essential.

Bryant developed 'the five habits of cross-culture lawyering'.[43] In brief, habit one provides students with a framework within which to analyse how similarities and differences between the lawyer and client may influence lawyer-client interactions,[44] as these might affect students' abilities to understand clients and to form relationships with them as lawyers.[45] In terms of habit two students are asked to identify and analyse the possible effects of similarities and differences on the interaction between the client, the legal decision-maker (e.g. the Judge or magistrate) and the lawyer.[46] Habit three teaches students a method for exploring alternative explanations for clients' behaviours. The habit of 'parallel universes' thinking invites students to look for multiple interpretations, especially at times when the student is judging the client negatively. [47] Habit four focuses on cross-cultural communication, identifying some tasks in normal attorney-client interaction that may be

39 Jacobs 'People from the footnotes: the missing element in client-centered counselling' *Golden Gate University Law Review* 345, 346.

40 Salinas *supra* n11 at 175. The term 'flavour' may mean salty or spicy to one, as opposed to meaning bland or mild to someone else. Clients maintaining good eye contact whilst speaking may indicate to the students 'that they are being attentive and speaking honestly. However, for some cultures, maintaining eye contact may be an indication of disrespect'. Also see Du Plessis *supra* n3 at 124–128, 132–135 for a full discussion of language barriers, fear, racial, cultural and religious differences as student challenges during interviews.

41 Du Plessis *supra* n3 at 125-135. Some clients consult from, often rural, areas where certain customs are strictly adhered to, often causing an inability to distinguish between cultural or indigenous customs, religious practices and the law regulating the society. For a discussion of how these are addressed in Australia, see Cody *supra* n20 at & Green 'Clinical legal education and Indigenous legal education: what's the connection?' 2007 *International Journal of Clinical Legal Education* 51-64.

42 For a full discussion see Du Plessis *supra* n3 at 125-135. Cultural custom may prevent clients from discussing details about money, particularly with females, strangers or people younger than them; in some cultures family ties are formed that do not correlate with the concept of a family in a legal sense; and confusion around language expression.

43 Bryant *supra* n43 at 'The five habits: building cross-cultural competence in lawyers' 2001 *Clinical Law Review* 1–62.

44 *Ibid.* Habit One: Degrees Of Separation And Connection. Students are asked to list and diagram similarities and differences between themselves and their clients. Differences create the possibility of cultural misunderstanding, bias and stereotyping. Similarities illustrate the connections between students and clients.

45 Bryant *supra* n43 at 13. Students are made aware that culture is dynamic and the importance of different identities changes as the situation changes. See pp 14-15 for a discussion of the Venn diagram.

46 Habit Two: The Three Rings. Bryant *supra* n43 at 15-16 for a discussion of this habit.

47 *Idem* at 16, 17. Habit Three: Parallel Universes.

particularly problematic in cross-cultural encounters as well as alerting students to signs of communication problems.[48] Habit five involves exploring one-self as a cultural being. Students must face the sometimes ugly side of cultural blinders – bias and stereotype.[49] The application of these habits during cross-culture interviewing may assist students in developing impartial interviewing skills, enabling them to address any of their own preconceptions and assumptions regarding a client. Application may furthermore be beneficial during student reflection when their interviewing skills are assessed.[50]

4 2 Interview preparation

Students must proactively try to counter any possible distractions they anticipate.[51] Clients are frustrated when students are distracted, inattentive or side-tracked, which may affect their confidence and comfort with complete disclosure of the facts relating to their cases.[52] If possible within the clinical setting, clients must be seated to limit any power dynamic.[53] A circular table interview, as opposed to students and clients sitting on opposite sides of a desk would be ideal. Clinical settings however seldom support this ideal. Power dynamic can, however, be limited when students refrain from displaying personal items such as laptops, cell phones, any indulgent personal items or their own coffee and snacks. Students should also not take any incoming phone calls, especially not making comments such as, for example: 'My apologies, but this call is really important' during the interview.

Physical barriers, such as open laptops or stacks of files on the desk, create distance between the interviewing students and the clients, making them feel less connected, or intimidated and less likely to open up to the attorney-client relationship.[54] In order to avoid distractions, clients should not be seated facing the door or a corridor where people are passing by during interviews.

Students may prepare a roadmap, ensuring that the interview has a logical sequence and structure without being too rigid. A short roadmap of what the interview will look like and an outline of what should be covered will assist new and inexperienced clients with their

48 *Idem* at 17-19. Habit Four: Pitfalls, Red Flags And Remedies.
49 *Idem* at 19. Habit Five: The Camel's Back. Students are encouraged to create settings in which bias and stereotype are less likely to govern, promoting reflection and change of perspectives with a goal of eliminating bias. It recognises innumerable factors that interact with bias and stereotype to negatively influence an attorney-client interaction
50 See Du Plessis *supra* n3 at 131- 132 for a discussion on students' reflective journals in assessing students' interviewing skills.
51 Salinas *supra* n11 at 167; UWE *supra* n11 at 9.
52 Salinas *supra* n11 at 166. See Lauchland & Le Brun *Legal Interviewing Theory, Tactics and Techniques* (1996) 70 for a full discussion.
53 Salinas *supra* n11 at 118; UWE *supra* n11 at 9.
54 UWE *supra* n11 at 9

understanding and expectations.[55] Roadmaps will differ depending on whether the client is attending a first or subsequent interview. At the start of an initial interview, students may present the following roadmap to the clients: the interview will start with the discussion of administrative items, whereafter the students will explain professional responsibility, confidentiality and conflicts of interest to the clients. The client will then have the opportunity to tell his or her story, explaining the facts of the case. The students will thereafter summarise the facts the client presented and discuss some legal issues that were identified. The students may thereafter discuss some initial possible solutions to the client's legal situation, including legal and non-legal options they may want to explore.[56] The interview may thereafter come to end by students providing the client with a short summary of the main points of the interview, as well as discussing further steps to be pursued in the next few weeks.[57]

5 Conducting the interview

5 1 Note-taking

Note-taking skills are important for students in establishing them as effective interviewers and they must explain the need to take notes to their clients.[58] Students will have to, when action is taken after the interview, rely on accurate notes,[59] preferably taken by hand. Psychological studies on the effectiveness of different styles of note-taking[60] found that laptop users did relatively well on factual questions, but fell short on conceptual questions which involve comparing and analysing the information gleaned.[61] When the interviewer types on a keyboard, the tendency to describe, verbatim, what he or she hears is very strong. A laptop screen is furthermore a physical barrier between the student and the client. When the student looks at the laptop instead of the client, it sends the message that the student is not listening. As the application of facts to the law is conceptual, it was concluded that

55 Salinas *supra* n11 at 123-127. Clients will have a better understanding of what to expect during the interview. The speed and level of sophistication will depend on clients' levels of education and whether they are familiar with the attorney-client relationship. Also see Lauchland & Le Brun *supra* n52 at 82.

56 It is important that the client is informed that the facts and possible legal solutions will first be discussed with the clinician in attendance.

57 Salinas *supra* n11 at 98 – 103.

58 UWE *supra* n11 at 24. It was suggested that '[n]othing is more off-putting to a client than the sudden scribbling down of something they have just said. On the other hand, you need to be able to recall accurately the details of the interview'. Also see Lauchland & Le Brun *supra* n52 at 101.

59 UWE *supra* n11 at 24. Having to go back to clients asking for information they have already given, may irritate clients and is unprofessional.

60 Glover 'Lawyers Should Take Notes by Hand' available at https://lawyerist.com/lawyers-take-notes-hand/ (accessed 2018-06-14).

61 *Ibid*.

attorneys, and therefore students, should take notes by hand.[62] Taking notes with pen and paper whilst actively listening to the client may possibly generate better questions and improve retention of information.[63]

It is suggested that,[64] during the interview, students should take a 'listen first' approach by actively listening to the client's story. During each stage of the interview, students should confirm their understanding of the information, whereafter they can note it down. At the end of the interview, students should use their notes to summarise the information, confirming its accuracy with the clients.[65]

5 2 The interview

Students must be confident when greeting the client,[66] observing their non-verbal communication. They should open the conversation with some initial, uncontroversial, but short small talk,[67] letting the client know that they are there to help.[68] For many clients it will be their first experience with an attorney, some having pre-conceived ideas or misconceptions. When clients feel uncared for, they may withhold significant facts or forget to give information. The initial meeting will set the tone for the rest of the interview, as the first few minutes will be significant in establishing a strong professional relationship. Before the actual interview starts, clients must be made aware of matters impacting the attorney-client relationship, such as confidentiality, legal professional privilege and conflict of interest.[69]

62 *Ibid.* The study found that when the interviewer takes notes by hand, he or she has to pay attention and decide what is important.

63 A recommended note-taking methodology is the Cornell Note-Taking System whereby, in short, a page is divided into unequally sized quadrants, with one quadrant for notes, one for key points and one for a summary, forcing a review and summary of notes. The fourth quadrant is given over to 'next actions,' essentially the to-do's that result from the meeting. See Cornell University 'The Cornell Note-taking System' available at http://lsc.cornell.edu/study-skills/cornell-note-taking-system/ (accessed 2018-06-14).

64 UWE *supra* n11 at 24.

65 *Ibid.* Soon after the interview, students should write up their notes clearly and accurately, as notes taken at the time may serve their short term memory well, but may cause them problems if they have to rely on them days or even weeks later.

66 Before the interview starts, attorneys usually deal with administrative items. Salinas *supra* n11 at 115. I accept, for purposes of this article, that paralegals or other designated law clinic staff attend to these prior to the interview with the students.

67 UWE *supra* n11 at 10; Malkus, Stevenson & Williams 'Engaging students for transactional practice' 2011 Institute for Law Teaching and Learning Conference New York Conference paper 1 – 10.

68 Ibid 31; Salinas *supra* n11 at 32-34.

69 Salinas *supra* n11 at 117-119; Lauchland & Le Brun *supra* n52 at 152– 163.

The continuum of most interviews is that, in one way it can be conducted as an interrogation,[70] and in another way it can be conducted as a free-flowing two-way conversation.[71] Students must not feel compelled to force the client to speak right away, but acknowledge the client's concerns about the legal problem, whilst establishing rapport,[72] and letting clients know that what they say is important and that the students' opportunities for application of the law to the facts of the case will follow later. What is required of the students is to pay attention, knowing that the client is just as important as their educational goals.[73] Clients must be allowed to explain matters in their own words, expressing their feelings, as if in conversation. Clients must not be put on the defense at the start of the interview with questions such as 'Is that true?', thereby erasing any prior established rapport. This may also confuse clients or make them anxious.[74] Students must heed their tone of voice, especially in establishing trust and rapport. When the tone is too forceful, clients may misinterpret what is being said. With the correct tone of voice, the student encourages the client to be as open and honest as possible, providing the necessary information needed for the case. Clients can also be discouraged when what students say does not correspond with their non-verbal communication.[75]

5 3 Questioning methods

General education literature supports the premise that the way in which questions are sequenced may be more important in promoting understanding than the cognition level of the question.[76] Appropriate sequencing of questions allows the students and clients to focus first on the fundamental aspects of the legal problem that is discussed.[77]

A number of key questions, each with a purpose to elicit information from the client, can be applied. A variety of question types may be used in each interview, the appropriateness of which may vary during the different phases of the interview.[78]

To encourage clients to speak, students should use open-ended questions which will allow clients to describe the problems as they see

70 In an interrogation, one of the parties is an unwilling participant where the agenda is totally controlled by the interrogator. UWE *supra* n11 at 11.
71 In a free-flowing conversation, both parties are willing to communicate and do so openly. UWE *supra* n11 at 11.
72 'Rapport' described in the Cambridge English dictionary as having a good understanding of someone and an ability to communicate well with them. See 'Rapport', available at https://dictionary.cambridge.org/dictionary/english/rapport (accessed 2018-06-01); also see Lauchland & Le Brun *supra* n52 at 78 – 81; ACLE *supra* n7 at 163.
73 Salinas *supra* n11 at 40-48.
74 Ibid.
75 Maranville:https://courses.washington.edu/civpro03/resources/interviewing.doc; Salinas *supra* n11 at 49, 51.
76 Brophy & Good *Third Handbook of Research on Teaching* (1987) 189–193.
77 *Ibid.*
78 Lauchland & Le Brun *supra* n52 at 54.

it.[79] Open-ended questions are the 'what', 'why', 'how', 'when', 'where' questions that are impossible to answer in a single word or with a shrug,[80] prompting clients have to construct the answers in their own words.[81] During this phase, students should rather take notes of details requiring clarification than interrupting clients.[82]

They should summarise periodically to confirm their understanding and encourage clients to correct any misunderstandings.[83] Students should not be afraid of silence, as clients often need time to think a response through, or they may battle to find the right words to explain themselves. When students fill the silence with another question in encouragement, which is often close-ended, they not only restrict the available answers, but limit clients' opportunity to use their own words.[84]

During the initial stages of the interview clients will be discouraged from talking when students use close-ended-, narrowing-, multiple choice- or leading questions. Close-ended questions require only 'yes' or 'no' or 'don't know' answers, or require very specific information,[85] limiting the scope of the answer.[86] Close-ended questions pass the initiative to the students, tempting them to frame the situation in their terms, constructing an interpretation which differs from that of the clients,[87] essentially highlighting to the clients what the relevant facts of the case should be, even before hearing all the facts from the clients.[88] Clients may not relay highly relevant information or disregard important facts as students did not specifically ask questions relating thereto, leading to assumptions about the case.[89] Close-ended- or clarifying questions can be asked later, pertaining to specific detail, or to focus on relevant legal issues or sift through some peripheral information.[90]

79 Salinas *supra* n11 at 130.
80 For example, 'What happened?' 'Why did you think that?'. UWE *supra* n11 at 11. More ways to ask an open-ended question without really asking a question are 'Tell me more', 'I see', 'Go on', 'Help me understand a little more about what may have happened' see Salinas *supra* n11 at 171. Also see Lauchland & Le Brun *supra* n52 at 54, 95.
81 Salinas *supra* n11 at 58, 81; UWE *supra* n11 at 11; Lauchland & Le Brun *supra* n52 at 54.
82 Interruption is also referred to as verbal tracking. For a discussion, see Lauchland & Le Brun *supra* n52 at 56.
83 Ways to address clients are: 'So the situation so far is that ...', 'Have I got that right?' UWE *supra* n11 at 11. A full summary of the factual information should be relayed back to the client in reflection at the end of the interview. See Salinas *supra* n11 at 132.
84 UWE *supra* n11 at 11; Salinas *supra* n11 at 38.
85 *Ibid.* Examples of close-ended questions requiring specific information may be, for example: 'So, you were in an accident?'; 'Was this raining?'
86 Lauchland & Le Brun *supra* n52 at 54.
87 UWE *supra* n11 at 12.
88 Salinas *supra* n11 at 59.
89 *Idem* at 56, 59, 130.
90 Salinas *supra* n11 at 171; Lauchland & Le Brun *supra* n52 at 55.

Multiple choice questions, like close-ended questions, allow for a very restricted range of possible responses. These are questions such as: 'Do you want compensation or your job back or both?'[91] The same objections, as stated for close-ended questions, apply.

Leading questions expect a particular answer and suggest to clients that the students already formed an interpretation of events which may not be the same as theirs, but that they are invited to agree with the interpretation.[92]

Value-laden questions may often be careless phrasing which may affect the client's recall and should be avoided. For example: a client should be asked to describe an assailant rather than asking a question such as 'how big was he?'[93]

During the decision-making phase, students may use hypothetical questions, such as 'if you are offered a settlement, then …?'[94] By asking this type of question, students put propositions to the client to test his or her responses.

Funnelling may be used in subsequent interviews. The funnelling method of interviewing is a technique commonly used in the experiential education setting where the processing of information is done in a very specific sequence and can be used when more detail in a discussion needs to be developed.[95] The students will start by asking a general open question, preferably relating to facts, prompting clients to regurgitate basic facts they already know.[96] This is followed up by asking about the context of the problem scenario ('who', 'when', 'where').[97] Further questions ('how', 'why') explore the dynamics of the problem scenario.[98] Finally, the students can confirm their understanding by using close-ended questions. The inverted funnel, where 'the sequencing of questions begins with very closed questions and gradually opens out to embrace wider issues'[99] is useful when advising clients when they have to decide on the action to be taken.

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91 UWE *supra* n11 at 12.

92 Ibid; Lauchland & Le Brun *supra* n52 at 54. 'Leading questions suggest answers and thus pose the risk for distorting the client's answer and promoting unethical behaviour by the lawyer'. See Maranville:https://courses.washington.edu/civpro03/resources/interviewing.doc

93 Lauchland & Le Brun *supra* n52 at 55.

94 *Ibid*.

95 Barnum 'Questioning skills demonstrated by approved clinical instructors during clinical field experiences' 2008 *Journal of Athletic Training* 284-292. 'The critical factor in funnelling is the need to listen to what your client is telling you. Only when you do this can you ask further questions effectively.' See UWE *supra* n11 at 12.

96 *Idem* at 284-292.

97 *Ibid*.

98 UWE *supra* n11 at 9. 'How' questions make clients apply what they know. 'Why' questions help clients synthesize and analyse the situation.

99 UWE *supra* n11 at 9,10.

5 4 Non-verbal communication

Non-verbal communication consists of a combination of eye-contact, posture, facial expressions, gestures, relative positions and touch.[100] For example: do clients look away when detailing a particular fact? Do they slouch? Are they covering part of their face with their arm? Do they smile, laugh, tremble? These may be as important as the facts, providing more meaning to what has already been told. Students should caution not to presume to automatically understand nonverbal behaviour and should be confident that they are reading it correctly. They must be cognisant of cultural, age or factual differences. Certain non-verbal communication is universal: smiling, frowning or scowling, whilst others are culturally determined. 'The thumbs-up, the V-sign and degrees of proximity are interpreted differently in different cultures.'[101] The strength of the message from non-verbal communication is many times stronger than that from words alone.[102] Students may mirror some of the clients' nonverbal behaviour as a technique to help build trust and rapport, helping to put clients at ease, as they might feel a non-verbal connection.[103] For example, when clients speak in a soft tone of voice, students should speak back to clients in the same tone. Barriers can be created when students respond loudly and aggressively. Mirroring that works include: when clients lean forward in their chairs, it may be an indication of wanting to be heard and regard that what they are say as important. Students should also lean forward. Students should not mirror clients' behaviour when they speak angrily or scream, but talk back calmly.[104]

5 4 1 Clusters, context and congruence

Non-verbal communication and behaviours should not be seen as individual, isolated signals, but as clusters of behaviours, meaning that several behaviours in combination will reinforce the non-verbal message.[105] For example: a client's 'posture, positioning of arms, legs, hands and fingers, combined with facial expression, all contribute to the sense that this is a person listening critically to what is being communicated to them'.[106] Non-verbal behaviour must be interpreted within context.[107] For example: a client sits trembling while describing witnessing an attack, causing students to think she is reliving it, whilst

100 UWE *supra* n11 at 6; Salinas *supra* n11 at 175.
101 Salinas *supra* n11 at 175; UWE *supra* n11 at 6.
102 UWE *supra* n11 at 7 where reference is made to a patient of Freud's who initially spoke positively about her marriage, whilst unconsciously slipping her wedding ring on and off her finger. Later discussions brought out her underlying unhappiness in her marriage.
103 Salinas *supra* n11 at 175-177.
104 *Ibid*.
105 For discussion and examples, see Pease *The Definitive Book of Body Language* (2005); UWE *supra* n11 at 6.
106 *Ibid*.
107 UWE *supra* n11 at 6.

she in fact just feels cold.[108] Congruence entails that the non-verbal communication behaviours must be consistent with the other aspects of communication.[109] For example: 'If two people are shouting, and their non-verbal cues are angry and aggressive, we are entitled to infer that they are angry and aggressive. If the same scene involved the participants' laughing, we would have to interpret it differently'.[110]

5 4 2 Prosody

Meaning can be added to communication by making use of non-word sounds such as grunts or sighs.[111] Prosody is when these are combined with pauses, changes in pitch, rhythm and stress.[112]

6 Active listening

Active listening is a key component of the process of building an initial perception of the client's legal position and consists of confirming the client's narrative against your framework of understanding, asking appropriate follow-up questions and summarising your understanding by reflecting back to the client.[113] Students should be fully attentive when listening to what and how clients say or what they don't say,[114] listen to any goals, values and feelings attached thereto,[115] analysing, as the client speaks, the information and appropriating it to their understanding of the situation.[116] Failure to listen actively may result in clients not able to uncover all their concerns and, consequently, students' advice may be flawed.[117]

6 1 Understanding clients, empathy and reflection

Clinical legal educators will often, when teaching interviewing skills, accentuate a client-centred approach, highlighting the importance to listen to, and treat, clients as persons and not just as legal problems.[118] This will reflect their social justice values, such as their rights to dignity

108 *Ibid*.
109 UWE *supra* n11 at 7.
110 *Ibid*.
111 Also referred to as intentional listening. Lauchland & Le Brun *supra* n52 at 47.
112 UWE *supra* n11 at 7.
113 UWE *supra* n11 at 15-18.
114 Bolton states that 'even at the purely informational level, researchers claim that 75% of oral communication is ignored, misunderstood or quickly forgotten. Rarer still is the ability to listen for the deepest meanings in what people say.' Bolton *People Skills* (1987) 30.
115 Salinas *supra* n11 at 64. Also see UWE *supra* n11 at 16, 17. Students need to acknowledge emotions such as, for example, anger, distress, disappointment, outrage and anxiety. Students should acknowledge and confront strong feelings openly, as it may be a prerequisite for progressing with the client's case.
116 UWE *supra* n11 at 15.
117 *Ibid*.
118 ACLE *supra* n7 at 110.

and equality.[119] Students must pay attention to how clients feel about their legal problems, their values and emotions associated therewith, and what their goals are in relation to their cases.[120] Empathic responses and reflection, [121] as active listening, strengthen already established trust, rapport and professional relationships.[122] In teaching these skills as part of CLE the students' 'capacity for self-direction is dependent on their ability to be self-aware and to reflect on the implications of their experiences for future action.'[123] It is the students' ability to reflect, and then to alter their part in the process to produce a better outcome, which develops them as practitioners.[124]

6 1 1 Empathy

When 'just skills' are taught, the potential to explore the implications of students' use or non-use of a legal skill may prevent them from appreciating that their own values about the clients and their legal problems are reflected in the way they apply the skill.[125] Legal problems are often not isolated,[126] but are accompanied by a secondary narrative which may have some influence on the problem.[127] Empathy is developed by effective interviewing skills. Students don't have to feel sorry for their clients to empathise. Students should be reminded that they may interview clients from across the social spectrum, some who may have acted contrary to their moral views. Students may not judge the clients, which must be reflected in their verbal and body language. Empathy includes their understanding of their clients' feelings and experiences. In empathising (not sympathising), the students will try not only to follow the client's narrative, but to understand it through their unique perspectives on their cases. An empathic student will try to understand the clients' difficulties and what may make them less difficult. [128] Empathetic responses start with phrases like: 'I imagine' or 'It must be like'.[129] Students should also pay attention to the client's confirmation of your empathic responses.

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119 Ibid.

120 Salinas *supra* n11 at 135. Empathising with clients will assist the attorney in understanding what the clients' legal problems are about and what motivate them. Reflecting these back to clients will assist in a more effective legal analysis.

121 Reflecting back to the clients the values and emotions attached to their stories, an essential element of active listening indicates to the clients an understanding of how they feel about what happened factually. This sets the stage for empathy and further establishes trust and rapport, encouraging client to open up. See Salinas *supra* n11 at 73–75.

122 Salinas *supra* n11 at 95, 188.

123 Quigley 'Seizing the disorienting moment: Adult learning theory and the teaching of social justice in law school clinics' 1995 *Clinical Law Review* 37, 50.

124 ACLE *supra* n7 at 163.

125 ACLE *supra* n7 at 109.

126 Du Plessis *supra* n3 at 124; De Klerk (2007) 97.

127 Salinas *supra* n11 at 87.

128 Salinas *supra* n11 at 92 – 94.

129 Also see Lauchland & Le Brun *supra* n52 at 50, 51.

6 1 2 Reflection[130]

Moon observes that reflection is a means of working on what we already know,[131] a good starting point for the use of reflection within clinical teaching.[132] What students recognise as a client's values during reflection may assist them during further interviews in exploring possible solutions or in defending the case.[133] In the context of CLE, reflection may be used to develop a student's client skills,[134] such as accurate fact-gathering.[135] When students go beyond simply taking instructions, and consider how the facts may affect their clients, their process of reflection started.[136] Students must reflect information back to the clients, through paraphrasing or summary,[137] asking clarifying questions, allowing clients to correct any inconsistent, contradictory or misunderstood information.[138] Students should also reflect on any emotional context and summarise emotional cues, as they indicate what clients think and feel about the legal problems.[139]

Summary and reflection should only start when clients start slowing down, or start repeating information, or when students' notes are so many that comprehension becomes difficult. The interview can be

130 See Lauchland & Le Brun *supra* n52 at 51 – 54 for exercises on reflection during interviewing.

131 Moon *Reflection in Learning and Professional Development: Theory & Practice* (1999) 1.

132 ACLE *supra* n7 at 172-173. 'What the student knows prior to meeting with a client might be a collection of assumptions arising from the circumstances the client is in (that is, what legal issue they may have) and the "truths" that students might hold about those circumstances'.

133 Salinas *supra* n11 at 76.

134 For detailed discussions on reflection, see Moon *supra* n131 at 10, Dewey *How We Think* (1910), as cited in ACLE *supra* n7 at 157–160, Schön 'Educating the Reflective Legal Practitioner' 1995 Clinical Law Review 231-249, Kolb *Experiential Learning* (1984)157–160, Gibbs *Learning by doing: a guide to teaching and learning methods* (1988), as cited in ACLE *supra* n7 at 157–160.

135 ACLE *supra* n7 at 161-162. The authors use the example of 'the student who assumes a client who cannot recall detail must be lying; if the student has the opportunity to consider the experience of their client, including the client's personal history and circumstances, then the student may start to question this assumption - that their client is receiving counselling for post-traumatic stress, or that the client suffered a brain injury that interferes with memory or, simply, that the client fears losing' what he or she is claiming in the case 'due to the circumstances they are being asked to describe'.

136 Ibid.

137 Their summarisation can start with the phrases: 'It sounds like …', 'It appears like …', 'From what I gather …', 'As I understand it …'. Salinas *supra* n11 at 179-180.

138 Paraphrased facts may set the foundation of what the attorney regards as relevant. This indicates to the client that students have been listening and are gaining an understanding of the important facts. See Salinas *supra* n11 at 70-75.

139 Salinas *supra* n11 at 181. Words to use in summarising the emotional context are, for example: happy, frustrated, upset, troubled, angered, confused, determined or strengthened.

paused to summarise for purposes of confirmation of the correctness of the facts presented. At this point during the interview students can transition between open-ended and close-ended questions to focus on specific details of the narrative.[140]

6 2 Counseling skills

Students should not shy away from talking to clients about their concerns, goals and values,[141] remembering that the legal work impact on other people, organisations and companies.[142] Clients who never consulted an attorney before may be particularly anxious and some basic counselling skills will be necessary.[143] Part of students' interviewing skills training therefore is in accepting that, in practice, they will be attorneys and counsellors, and that they don't have to be experienced therapists to practice basic client counselling skills.[144]

7 Advising clients

Clinics, through CLE, contribute to developing the strategic planning skills of attorneys that will involve decision-making on whether to take or withhold action in achieving clients' goals.[145] Students, although having to engage in the complexity of analysing the client's case where there often are multiple actors that may affect the outcome,[146] they need to be cognisant of the fact that the client must decide what he or she wants the students to do, or what steps he or she wants to take.[147]

140 *Idem* at 185.
141 Client counselling was identified as an applied practice skill for South Africa, see Steenhuisen *supra* n2 266 – 279.
142 Salinas *supra* n11 at 161.
143 *Idem* at 162-163. The amount of counseling skills that will be used, depend on clients' education and sophistication levels. Fewer such skills are required with more sophisticated clients. Also see Malkus *supra* n67 on understanding client's goals.
144 Salinas *supra* n11 at 159, 162-163. For detailed discussions on counselling skills in the legal environment see Redmount 'An Inquiry Into Legal Counseling' *The Journal of the Legal Profession* 181 – 209 available at https://www.law.ua.edu/pubs/jlp_files/issues_files/vol04/vol04art06.pdf (accessed 11-06-2018); Schoenfield 'Interviewing and counseling clients in a legal setting' 1977 *Akron Law Review* 313 – 331 available at https://www.uakron.edu/dotAsset/f36260e3-b1e8-4aef-8795-7b33b650a857.pdf (accessed 11-06-2018); Goodpaster 'The Human Arts of Lawyering: Interviewing and Counseling' 1975 *Journal of Legal Education* 5-52; Lauchland & Le Brun *supra* n52 at 122 – 125; Chapman *Essential legal skills: Interviewing and Counselling* (1993),Chapter 5; Binder, Bergman & Price *Lawyers as counsellors: A Client-centred approach* (1991) Chapters 15 – 22.
145 Sullivan, Colby, Welch Wegner, Bond & Shulman *Educating Lawyers: Preparation for the Profession of Law* (2007) 26, 29.
146 Milstein 'Clinical legal education in the United States: In-House clinics, externships and simulations' 2001 *Journal of Legal Education* 375, 379.
147 Lauchland & Le Brun *supra* n52 at 129, 130.

Giddings indicates that the range of uncertainties that attorneys have to address will become evident when students are supervised effectively.[148] Students will generally consult their clinicians before advising clients. A key objective of CLE is to assist students to develop the ability to deal with unstructured situations.[149] This process involves supervision rather than direction: '[s]tudents need to invest in the quality of their decisions and this process is facilitated by having supervisors help students reflect on their experiences and not by displacing students as the lawyers for their clients.'[150]

Clinicians should emphasise to students the importance of safeguarding client interests, and should talk through the processes used to provide advice that enables clients to make decisions. In advising clients, students must assume responsibility for their actions in a much more direct way than in other forms of legal education, recognising that their actions will influence the well-being of others.[151]

7 1 Legal analysis and strategy

Lauchland developed a problem-solving formula with the acronym CAFLIT to assist in analysing a client's case.[152] CAFLIT stands for completing the analysis with a view to addressing the client's Concerns by summarising the Alleged Facts of the case, whereafter the applicable Law is explained to the client, articulating the legal Issues. Theories can now be developed on resolving the issues.[153] Another legal analysis strategy, developed by Wade,[154] uses the acronym MIRAT. The elements are selecting the Material facts and ascertaining the legal Issues whereafter the legal Rules are argued and Applied to reach a Tentative conclusion.

Students must, as a starting point, address the client's concerns, whereafter the facts must be summarised and the law applied. Legal issues must be clarified, some of which may differ from the client's concerns. The students must apply the problem-solving formula that they

148 'This includes uncertainty as to what has taken place and why, whether a client's account is likely to be accepted by relevant third parties, which legal doctrines are relevant to the issues facing the client, and how those doctrines are likely to apply'. See Giddings *Promoting justice through clinical legal education* (2013) 55–56.

149 Ibid.

150 Chavkin 'Experiential learning: A critical element of legal education in China (and elsewhere)' 2009 *Pacific McGeorge Global Business and Development Law Journal* 3, 17.

151 Giddings *supra* n148 at 69.

152 Lauchland & Le Brun *supra* n52 at 104, using the acronym CAFLIT, indicating Concerns, Alleged Facts, Law, Issues and Theories.

153 For a full discussion see Lauchland & Le Brun *supra* n52 at 104 – 113.

154 For a full discussion see Wade 'Meet MIRAT: Legal reasoning fragmented into learnable chunks' 1990-1991 Legal Education Review 283 for the discussion of al alternative strategy with the acronym MIRAT, indicating Material facts, Issues, Rules/research, Argument/application and Tentative conclusion.

developed through their CLE instruction on how to resolve the issues and address the client's concerns. Only then a strategy can be developed.

7 2 Potential solutions – legal and non-legal options

In proposing potential solutions to clients' problems, students should provide in layman's terms a detailed, yet easy-to-follow summary of their initial legal analysis. All options must be explored and the advantages or benefits, as well as the disadvantages or risks and the consequences must be discussed with the client.[155] An approach which students may use, is to ask the client what he or she thinks the best or worst outcomes would be, setting parameters within which to discuss possible solutions.[156] Students must not guarantee any results, cautioning the client that the case is at the interview stage and more information may be needed and research done to fully evaluate the case.[157] Additional work may be outlined.[158] Students must inform the client that, in the final instance, they remain the decision-makers.[159]

8 Ending an interview

Students must summarise the discussions and confirm actions that they and the clients need to take.[160] The students must make sure that the clients have no further queries, whereafter they should thank the clients and confirm that a written summary of their matter will be sent to them within a specified time.[161]

9 Meeting learning outcomes

In paragraph 2, skills and outcomes in the CLE programme, when focusing on interviewing, were discussed. A study on CLE outcomes, comprising multiple international jurisdictions,[162] compares favourably with the outcomes, with specific sub-goals,[163] stated for South African university law clinics,[164] as they pertain to interviewing skills. These are: professional responsibility, legal ethics, judgment and analytical abilities,

155 Lauchland & Le Brun *supra* n52 at 119, 122-123.. The students should attempt to imagine how clients see their concerns and establish priorities of the options to be taken.
156 Ibid.
157 Salinas *supra* n11 at 112, 138, 142. When framing the legal analysis to the client, the following words are suggested: 'generally', 'usually', 'typically' or 'often'.
158 During the analysis phase of the interview, further documents for review and other individuals to be interviewed can be identified. Salinas *supra* n11 at 143.
159 Ibid 143.
160 Lauchland & Le Brun *supra* n52 at 135-139.
161 Salinas *supra* n11 at 154, UWE *supra* n11 at 24.
162 For a full discussion of the study see Du Plessis *supra* n3 at 31-53.
163 Steenhuisen *supra* n2 266–279.
164 For a full discussion see Du Plessis *supra* n3 at 31-53.

understanding process and procedure, synthesis, social awareness, legal services to the community, applied practice skills, consultation skills, recognition of relevant facts and applicable law, understanding strategy, tactics and decision making, draft legal documents, client counseling, negotiation, legal research and reflection.

For detailed outcomes specifically relevant to interviewing skills, the possible learning outcomes for CLE as proposed in Australian Best Practices are beneficial.[165] Students should be able to demonstrate:

> critical analyses of legal concepts through reflective practice; an ability to practise 'lawyering' skills; developed interpersonal skills, emotional intelligence and self-awareness of their own cognitive abilities and values; an understanding, and appropriate use, of the dispute resolution continuum;[166] an awareness of lawyering as a professional role in the context of wider society and of the importance of professional relationships,[167] developing a personal sense of responsibility, resilience, confidence, self-esteem and, particularly, judgment; a consciousness of multi-disciplinary approaches to clients' dilemmas – including recognition of the non-legal aspects of clients' problems; a developing preference for an ethical approach and an understanding of the impact of that preference in exercising professional judgment; a consolidated body of substantive legal knowledge, and knowledge of professional conduct rules and ethical practice; and an awareness of the social issues of justice, power and disadvantage and an ability to critically analyse entrenched issues of justice in the legal system.[168]

It is submitted that, should students follow the guidelines and instructions as set out herein, the proposed outcomes, as applicable to interviewing skills, will be met.

10 Conclusion

In its most complex and analytical form, skills teaching, which includes interviewing skills, can be seen as 'truly complementary to a clinic's social justice mission, enabling students to suspend judgment, to communicate and listen across differences and to explore solutions creatively'.[169] Schön correctly stated that 'this privileging of the knowledge over its application in practice was an inversion of the natural

165 Evans *et al Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (2017), available at www.jstor.org/stable/j.ctt1q1crv4 (accessed 04-04-2018). For a full discussion see ACLE *supra* n7 at 81-82.

166 Negotiation, mediation, collaboration, arbitration and litigation.

167 Including the imperatives of corporate social responsibility, social justice and the provision of legal services to those unable to afford them.

168 ACLE *supra* n7 at 81-82.

169 Lopez 'Learning through service in a clinical setting: the effect of specialization on social justice and skills training' 2000 *Clinical Law Review* 307; also see Bryant *supra* n43 at 33.

order of things because the delivery of high-quality work for the client is the reason why we have professions in the first place'.[170]

In discussing the teaching of interviewing skills, emphasis was placed on student preparation, which included working with preconceptions and assumptions,[171] and counselling skills.[172] It was indicated that, during the interview students, who are questioning and taking notes,[173] are on a fact-gathering hunt when listening to and understanding the client's story.[174] In discussing a number of questioning techniques, it was indicated that general education literature supports the premise that the way questions are sequenced may be more important in promoting understanding than the cognition level of the question,[175] and that periodic summaries serve to confirm students' understanding of the cases.[176] It was shown that the strength of the message from non-verbal cues is many times stronger than that from words alone.[177] Students should be instructed on behaviour that may create barriers between them and their clients,[178] the value of mirroring their clients' behaviour,[179] and prosody.[180] These are clusters of behaviours to be interpreted within context.[181] It was illustrated that active listening skills consist of three components,[182] which include empathy and counselling skills.[183] It was indicated that empathy is developed by effective interviewing skills and will reflect students' social justice values.

Clinicians, in student training, should accentuate a client-centred approach whereby clients are listened to and treated as persons and not just as legal problems.[184] An Australian professor, in response to the Carnegie Report, observed: 'If students receive the message that

170 Neumann 'Donald Schön, The Reflective Practitioner, and the Comparative Failures of Legal Education' 1999 *Clinical Law Review* 401-426. The Carnegie Report in the United States called for an integration of realistic and real-life lawyering experiences throughout the curriculum, see Sullivan *supra* n145.

171 Salinas *supra* n11 at 21, 175; UWE *supra* n11 at 8; Tremblay *supra* n11 at 373.

172 Salinas *supra* n11 at 2016:161-163.

173 Available at http://lsc.cornell.edu/study-skills/cornell-note-taking-system/; https://lawyerist.com/lawyers-take-notes-hand/ UWE *supra* n11 at 24; Mazzone: https://www.attorneyatwork.com/tech-tips-note-taking-digital-dictation-apps/ (accessed 04-04-2018).

174 Salinas *supra* n11 at 129.

175 Brophy & Good *supra* n76 at 189–193.

176 Salinas *supra* n11 at 132.

177 UWE *supra* n11 at 7.

178 Salinas *supra* n11 at 176-177.

179 *Ibid*.

180 UWE *supra* n11 at 7.

181 *Ibid*. This will include a discussion on prosody.

182 '(a) checking what the client is saying against your frameworks of understanding; (b) following up points that you hear by appropriate questioning; and (c) checking that you have understood by summarising and reflecting back what you have heard'. See UWE *supra* n11 at 15-18.

183 Salinas *supra* n11 at 159-161.

184 ACLE *supra* n7 at 109-110.

intellectual capacities are prized beyond all else, then they will rely upon that in their future behaviour as legal practitioners. They will tend to be unconcerned about the impact their behaviour has on others'.[185] The students must reflect on what the client said and their understanding of what the clients are going through, either by paraphrasing some of the facts or by way of summary.[186] In discussing a selection of theorists,[187] Moon indicated that 'reflection is a means of working on what we already know'.[188] In CLE, reflection may be used to develop students' client skills,[189] where they go beyond simply taking instructions and gathering facts, but also consider how the facts may affect their clients.[190] In discussing legal analysis and strategy,[191] it was indicated that potential solutions may be found through legal and non-legal options.[192] It was also shown that the proposed CLE outcomes, applicable to interviewing skills, were met. In teaching [interviewing] skills in CLE, it is the students' 'capacity for self-direction [which] is dependent on their ability to be self-aware and to reflect on the implications of their experiences for future action,'[193] and then to alter their part in the process to produce a better outcome, which develops them as practitioners.[194]

It was indicated that, although clinicians are present or generally available in the clinic while students are conducting interviews with clients, they are seldom party to such interviews.[195] Student training and instruction in this essential skill which, in synergy incorporate a number of other identified skills,[196] is therefore essential, particularly as the information gained from the client during the interview constitutes the facts of the legal problem. It was however indicated that the lack of direct supervision during interviews is not insurmountable. This article may form the basis for creating a student manual on interviewing skills. CLE instruction at many of the South African university law clinics includes plenary- and tutorial sessions.[197] This article may further serve as an outline for plenary instruction on interviewing skills, which may be

185 Davis 2008, as quoted in ACLE *supra* n7 at 2017:165.
186 Salinas *supra* n11 at 70–75. During this reflection students may ask clarifying questions, allowing clients to correct any misunderstood information.
187 Dewey helps us to understand how we think and Schön, Kolb and Gibbs suggest the processes by which those ways of thinking might work together to produce new insights and action. See ACLE *supra* n7 at 157–160.
188 Moon *supra* n131 at 1.
189 Active listening ensures that students become aware of their clients' concerns and anxieties, whilst obtaining the information required to advise them. Failure to listen actively may result in clients not able to uncover all their concerns and consequently students' advice may be flawed. See UWE *supra* n11 at 15.
190 ACLE *supra* n7 at 161-162.
191 Salinas *supra* n11 at 98, 110-112, 138, 142.
192 *Idem* at 145 – 150.
193 See Quigley *supra* n123 at 37, 50.
194 ACLE *supra* n7 at 163.
195 See discussion in para 1.
196 See discussion in para 2.
197 Du Plessis *supra* n3 at 40 -44.

reinforced during tutorial sessions students attend with their clinicians,[198] further allowing clinicians to consider interviewing skills as an assessable component of the CLE course.[199]

198 Du Plessis *supra* n3 at 26 – 30, indicating that the clinical pedagogy should comprise of the clinical experience, the classroom component and the tutorial component.

199 See Du Plessis *supra* n3 at 122 – 132 on the assessment of interviewing skills.

Aantekeninge/Notes

Remarks on lending reforms ushered in by regulation 23A of the Affordability Assessment Regulations

1 Introduction

The prescriptive reforms espoused by Regulation 23A of the National Credit Amendment Act 19 of 2014 (hereafter 'Regulation 23A') arguably should be commended as a proactive step in the quest for equity in the lender-borrower relationship in South Africa. It comes on the heels of the amendment of 82 of the National Credit Act 34 of 2005 (hereafter 'the NCA') which historically gave the credit provider the power to design an evaluative mechanism to determine affordability. While lending and borrowing are not recent phenomena (Finlay *Consumer Credit Fundamentals* (2009) 33; Morgan 'History and economics of suretyship' 1927 *Cornell L. Rev*. 153) it is the economic consequences of that relationship that have caught the attention of both financial participants and the regulators. More specifically a familiar feature among regulators has been an intensified effort aimed at reforming procedures that address consumer over-indebtedness (Niemi-Kiesiläinen 'Consumer bankruptcy in comparison: Do we cure a market failure or a social problem? 1999 *Osgoode Hall L.J*. 473; Tabb 'Lessons from the globalization of consumer bankruptcy' (2005) 30 *Law & Soc. Inquiry* 763). Such strategies are premised on an understanding that over-indebtedness is a social malaise and that there is need to protect consumers from the economic distress that comes with indebtedness (Turunen and Hiilamo 'Health effects of indebtedness: a systematic review' 2014 *BMC Public Health* 489; Averett and Smith 'Financial hardship and obesity' 2014 *Economics and Human Biology* 201). Equally critical is the realisation that indebtedness has an impact on the level of economic activity and as consequence, on the stability of the financial system (Niemi-Kiesiläinen 'Consumer bankruptcy in comparison: Do we cure a market failure or a social problem?' 1999 *Osgood Hall L.J*. 473; Tabb 'Lessons from the globalization of consumer bankruptcy' 2005 *Law & Soc. Inquiry* 763).

Regulators in South Africa have grappled with the issue around lending since the now-repealed Usury Act 73 of 1968 as well as the Credit Agreements Act 75 of 1980, the forerunners to the regulation of consumer credit. Since then the National Credit Act 34 of 2005 has sought to provide comprehensive mechanisms for minimising both reckless lending and irresponsible borrowing. More specifically, its preamble states that the purpose of the NCA is to promote a fair and non-

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discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; to provide for debt re-organisation in cases of over-indebtedness.

Despite that objective, consumer indebtedness statistics point to the fact that the NCA has not been highly effective (Ellyne and Jourdan 'Did the National Credit Act of 2005 facilitate a credit boom and bust In South Africa?' available at www.essa.org.za/fullpaper/essa_2798.pdf, accessed on 2018-04-01). The new guidelines ushered by Regulation 23A have therefore been hailed as a game changer (The Department of Trade and Industry Media statement 'The DTI Publishes Affordability Assessment Regulations for public comment', available at https://www.thedti.gov.za/editmedia.jsp?id=3104, accessed on 2018-04-01). This is mainly because the new framework introduces a more stringent lending criterion aimed at promoting responsible lending and borrowing in the regulated credit market. It is the purpose of this note to examine the new dispensation, to describe the paradigm shift and to consider if and how it archives the much-needed objective of arresting household or consumer indebtedness by avoiding reckless lending as well as encouraging responsible borrowing in South Africa.

2 Consumer credit and indebtedness in perspective

It has been recognised that household credit health is linked to economic welfare (Prinsloo 'Household debt, wealth and saving'2002 *SA Reserve Bank Quarterly Bulletin* 63; Baiyegunhi, Fraser and Darroch 'Credit constraints and household welfare in the Eastern Cape Province, South Africa' 2010 *African Journal of Agricultural Research* 2243). More specifically,

> [e]asing the access to credit is considered by classic economic theory an important factor for economic growth and for contributing to economic well-being. Debt may be necessary to maintain a stable consumption level and to boost the economy in more timid periods (Porto 'Over-indebtedness in Brazil: Do we need more regulation?', available at http://ssrn.com/abstract=2126713, accessed on 2018-04-01).

Unfortunately, judging by myriad reports of consumer borrowing, South African consumers have alarmingly found themselves over-indebted (see e.g. The Reserve Bank of South Africa's Quarterly Bulletin March 2016, available at https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/7195/01Full%20Quarterly%20Bulletin%20%E2%80%93%20March%202016.pdf, accessed on 2018-04-01). To put this gloomy assertion into perspective one just needs to consider the recent World Bank Survey which concluded that South Africans rank as the biggest borrowers in the world (World Bank 'Africa Region: Sustaining

Growth and Fighting Poverty amid Rising Global Risks.' Regional Update (2016)). More particularly, according to the National Credit Regulator (NCR)' latest report, 'the total value of new credit granted increased from R120.08 billion to R123.64 billion for the quarter ended September 2017… The number of applications for credit increased by 483,000 from 9.39 million in June 2017 to 9.87 million in September 2017, representing an increase of 5.15% for the quarter.' (National Credit Regulator, Consumer Credit Market Report -Third Quarter; September 2017, available at http://www.ncr.org.za/documents/CCMR/CCMR%20 2017Q3.pdf, accessed on 2018-04-01).

This is despite the fact that the NCA has since come into effect in 2006, prohibited credit providers from entering into reckless credit agreements (see sections 80 and 81) and this would have been expected to plug the rise in indebtedness. Clearly, the reality is that this has not been the case. For instance, the 'introduction of the NCA has also seen banks aggressively issue more credit. This is ironic, as the NCA was actually introduced to restrain reckless credit granting.' (Marisit 'Impact of the new National Credit Act on the debt recovery and credit bureau industries' at 27, available at http://www.marisit.co.za/wp-content/ uploads/2014/11/impact-of-the-national-credit-act.pdf, accessed on 2018-04-01). Such an ironic outcome and the regulatory gaps are what the new regulations seek to close (Ntuli in the Department of Trade and Industry Media statement 'The DTI Publishes Affordability Assessment Regulations for Public Comment', available at https://www.thedti.gov.za/ editmedia.jsp?id = 3104, accessed on 2018-04-01).

The bulk of consumer debt statistics are not only an indictment on the nation's excessive consumption culture (Nyaruwata 'Addressing over-indebtedness in South Africa: what role should supply-side and demand-side interventions play?', available at www.ekon.sun.ac.za/mini conf2009/nyaruwata_paper.pdf) but are also a manifestation of a milieu which is characterized not only by outdated and lax regulation but also weak enforcement of such legislation. (See for instance Kelly-Low 'The National Credit Act: New parameters for the granting of credit in South Africa' 2007 *Obiter* 229). This is exacerbated by the prevalence of lenders who market unsolicited loans. This is also compounded by predatory and deceptive advertising (Otto 'Over-indebtedness and applications for debt review in terms of the National Credit Act: Consumers beware! *First Rand Bank Ltd v Olivier* 2009 *SA Merc LJ* 272; Kelly-Low 'The prevention and alleviation of consumer over-indebtedness' 2008 *SA Merc LJ* 200).

This environment is also exacerbated by facilities that offer pre-approved credit including credit cards and the laxity on credit providers when it comes to conducting affordability assessments (Otto 'Over-indebtedness and applications for debt review in terms of the National Credit Act: Consumers beware! *First Rand Bank Ltd v Olivier* 2009 *SA Merc LJ* 272; Kelly-Low 'The National Credit Act: New parameters for the granting of credit in South Africa' 2007 *Obiter* 229). Furthermore, macroeconomic factors such as higher interest cycles increase the cost of

credit and add to the erosion of consumers' buying power. With such erosion to their income the consumers are forced to borrow or purchase on credit in order to supplement their income (see generally Hawkins *Cost, Volume and Allocation of Consumer Credit in South Africa* (FEAsibility, 2003)).

Consumer indebtedness or the propensity to borrow is exacerbated by factors such as the fact that some micro-lenders are not registered as well as the borrowers' financial imprudence or poor financial illiteracy (Piprek 'Financial Literacy Scoping Study and Strategy Project Final Report' (FinMark Trust, 2004); Kelly-Low, Nehf and Rott *The Future of Consumer Credit Regulation: Creative Approaches to Emerging Problems* (2008) 3). In this setting, borrowers take credit without a proper understanding not only of the costs of servicing the loan, but also of how to manage their finances appropriately. Coupled with lack of transparency on the part of lenders' terms and conditions, this environment has the effect of boosting unsustainable indebtedness. In addition, calamities such as job losses and medical expenditures may have an effect of changing the initial conditions upon which the borrowing contract was based (Willis 'Against financial literacy education' 2008 *University of Pennsylvania Law School*, Research paper, no.10; DeVaney and Lytton 'Household insolvency: A review of household debt repayment, delinquency, and bankruptcy' 1995 *Financial Services Review* 137). The South Africa borrowers have not been blameless either. It has been shown that most of them rarely furnish true, adequate or correct information when applying for credit and that impedes credit providers from conducting accurate affordability tests (see statement by Deputy Director-General of Consumer and Corporate Regulation Division at the DTi, Ntuli 'The DTI publishes affordability assessment regulations for public comment', available at https://www.thedti.gov.za/editmedia.jsp?id = 3104, accessed on 2018-04-01).

The ensuing section seeks to highlight some of the changes that have been brought about by the new dispensation.

3 Addressing reckless lending through the affordability assessment regime

As indicated above, the evaluation of the NCA exposed severe gaps in lending practices. More particularly, there was no uniformity in the way affordability assessments were undertaken in the industry. Prior to the coming into effect of the regulations and the National Credit Amendment Act 19 of 2014 (hereafter the 'Amendment Act'), section 82 of the NCA stated that, prior to entering into, or amending, a credit agreement with a consumer 'a credit provider *may* determine for itself the evaluative mechanisms or models and procedures to be used in meeting its assessment obligations under section 81, provided that any such mechanism, model or procedure results in a fair and objective assessment (my emphasis).' As such, the NCA provided for a flexible credit assessment regime in which the whole process was at the

discretion of the lender to determine the models for affordability assessments.

Unsurprisingly, however, such a policy resulted in an in inconsistent application of the assessment processes and standards (Paile 'The impact of the National Credit Act on household debt levels in South Africa', available at http://wiredspace.wits.ac.za/bitstream/handle/10539/14754/The%20impact%20of%20the%20National%20Credit%20Aact%20o%20household%20debt%20levels%20in%20South%20Africa.pdf?sequence=1, accessed on 2018-04-01).

3 1 Regulation 23A

With a view to curbing that, the Amendment Act introduced Regulation 23A into the National Credit Regulations, 2006 with effect from 13 March 2015. More specifically, Regulation 23A's new Affordability Assessment scheme introduces a raft of mandatory policies and practices. These include:

3 1 1 Non-discretionary validation of a consumer's gross income

In essence much as credit providers are at liberty to make use of their own models determining affordability, such mechanisms must, however, not be inconsistent with the affordability regulations as contained in Regulation 23. Aside from providing that the credit provider conducts a fair and objective assessment, at its enactment, section 81(2) did not contain further guidelines on how the affordability assessment should be conducted nor did any other provision or Regulation contained therein.

Furthermore, such latitude in implementing section 82(2) resulted in a situation which was characterised by discrepancies and gaps in the manner that affordability assessments were conducted. It has been suggested that some credit providers never even undertook such assessments (see e.g. Van Heerden and Renk 'Perspectives on the South African responsible lending regime and the duty to conduct pre-agreement assessment as a responsible lending practice', available at https://repository.up.ac.za/bitstream/handle/2263/45344/VanHeerden_Perspectives_2015.pdf;sequence=1, accessed on 2018-04-01). On its part, Regulation 23A (3) provides that a 'credit provider *must* take practicable steps to assess the consumer or joint consumer's discretionary income to determine whether the consumer has the financial means and prospects to pay the proposed credit instalments (my emphasis).' In the case of employed borrowers who receive a salary, it is now mandatory that the lender take practicable steps to validate the borrowers' gross income by demanding through evidence in the form of the latest three payslips; or latest bank statements showing latest three salary deposits. In the case of those who do not receive a salary, the lender must require the latest three documented proof of income; or latest three months bank statements. For self-employed consumers

including informally employed or those who do not receive a payslip from their employer, the lender must demand to be furnished with the latest three months bank statements or the latest financial statements (see Regulation 23A (3)).

The obligation to calculate discretionary or disposable income and current financial obligations is clearly meant to ensure that there is disclosure through which the lender can determine whether the potential borrower would be in a position to make the payments when they become due without missing payments. In order to enable such a decision to be reached Regulation 23A provides that the lender must consider the gross income (all income earned from whatever source without deductions) of the customer and subtract statutory deductions, necessary expenses as well as other payment commitments disclosed by the consumer. In addition, note should be taken of the consumer's credit record with the credit bureaux.

3 1 2 Calculation of the consumers existing financial income

Under section 81(2) (iii) the amended section the NCA simply provided that;

> A credit provider must not enter into a credit agreement without first taking reasonable steps to assess –
>
> ….
>
> iii) existing financial means, prospects and obligations.

Under the new dispensation, not only must the lender assess the consumer's income, he or she must actually calculate the consumers existing financial means, prospects and obligations. To assist in that regard, not only does Regulation 23A provides for a template, a minimum expense norms table but also a requirement for '(a) credit providers to ascertain gross income; (b) statutory deductions and minimum living expenses to be deducted to arrive at a net income, which must be allocated for payment of debt instalments; and (c) when existing debt obligations are taken into account, the credit provider must calculate discretionary income to enable the consumer to satisfy any new debt.' In essence, therefore, Regulation 23A buttresses section 81(2) (a) (iii) by providing a standardised method which assists in deciding credit affordability. To ensure that the lender has discretion, Regulation 23A (11) allows the lender, on exceptional basis and where the same is warranted, to accept the consumer's declared minimum expenses which are lower than those set out Minimum Expense Norms table. This is permissible for as long as the questions prescribed by or set out in Regulation 23A are satisfactorily answered by the consumer. Such a practicable framework goes a long way towards assisting the lender in determining whether the consumer would be able to afford the credit. In like manner, that evaluative mechanism avoids a situation where the borrower attempts to under-declare their expenses with a view to create an impression that they are credit-worthy.

3 1 3 Debt re-payment history as a consumer under credit agreements

In general, section 82(2) of the NCA provides that the lender should not enter into a credit agreement without first taking reasonable steps to assess the debt re-payment history of a consumer. This requirement has now been strengthened by a duty to undertake that assessment within seven business days immediately preceding the initial approval of credit or the increasing of an existing credit limit. In terms of mortgages that must be done within fourteen business days. This has an obvious advantage in that it enables that assessment to be undertaken based on current information (see e.g. Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets,* Bloomsbury Publishing, 2012).

3 1 4 Avoiding double counting

In order to avoid exposure to, and the unfairness that would come from double counting, section 23 A(14) provides that '[w]here a credit agreement is entered into on a substitutionary basis in order to settle off one or more existing credit agreement, a credit provider must:

(a) record that the credit being applied for is to replace other existing credit agreement/s; and

(b) take practicable steps to ensure that such credit is properly used for such purposes.

3 1 5 Disclosure of the credit cost multiple and the total cost of credit

It is common-cause that financial service providers often have better information relating to, for instance, the fees and risks of their products or services than consumers (Agarwal, Chomsisengphet, Mahoney and Stroebel 'Regulating consumer financial products: Evidence from credit cards' 2014 *The Quarterly Journal of Economics* 111; Bertrand and Morse 'Information disclosure, cognitive biases, and payday borrowing' 2011 *The Journal of Finance* 1865). Owing to asymmetric information, transparency can only be brought about by requiring lenders to provide consumers with information that would enable them to make informed decisions. Not only does that requirement enhance transparency but it also goes a long way towards curbing illegal or abusive collection practices. To that end regulatory intervention in South Africa has come in the form of section 23(15) which compels the credit provider to disclose the total cost of finance to the customer. In particular, the section provides that:

A credit provider must:

(a) disclose to the consumer the credit cost multiple and total cost of credit in the pre-agreement statement and quotation;

(b) ensure that the credit cost multiple disclosures for credit facilities is based on one year of full utilisation up to the credit limit proposed;

(c) ensure that the attention of the prospective consumer is drawn to the credit cost multiple and that the cost of credit as disclosed, is understood by the prospective consumer;

(d) disclose a total cost of credit which includes but not limited to, the following items:-

(i) the principal debt;

(ii) interest;

(iii) initiation fee…

A responsible disclosure obligation in this manner is crucial for meeting the requirement to treat consumers fairly as *inter alia,* it enables customers to compare the costs connected borrowing across both the products and lenders. Likewise, it enhances competition among lenders or sellers of financial products (Renuart, Keest and Carter *The Cost of Credit: Regulation, Preemption, and Industry Abuses* (National Consumer Law Center, 2009); Faircloth and Mack *Problems Surrounding the Mortgage Origination Process: Congressional Hearing* (DIANE Publishing, 2000)).

4 Brief remarks on the new lending requirements

Credit has been characterized as the lifeblood of the economy. (See e.g. Tiller 'The subprime crisis and the effects on the U.S. banking industry', available at https://www.lagrange.edu/resources/pdf/citations/2009/07Business_Tiller.pdf, accessed on 2018-04-01). As such it cannot be doubted that access to credit is sometimes a crucial component in attaining financial inclusion (Mehrotra and Yetman 'Financial inclusion – issues for central banks' 2015 *BIS Quarterly Review* 84; Bilbiie 'Limited asset market participation, monetary policy and (inverted) aggregate demand logic' 2008 *Journal of Economic Theory* 162). The NCA arguably recognises that (see e.g. The Microfinance Review 2013 'From Microfinance to Financial Inclusion' at https://www.bankseta.org.za/downloads/BANKSETA%20Microfinance%20%20Review%20Report%202013.pdf, accessed on 2018-04-01). Hence the dual role it plays (or the regulatory dilemma it is exposed to); on one hand it recognises the need to promote the development of the credit market and at the same time, it is expected to protect the consumer by ensuring transparent, fair and responsible lending (in this regard, see the objectives in section 3 of the NCA. See also Porteuos 'Policy focus note 2: Consumer protection in credit markets', available at http://www.microfinancegateway.org/sites/default/files/mfg-en-paper-consumer-protection-in-credit-markets-jul-2009.pdf, accessed on 2018-04-01).

Much as that is a truism, and especially owing to the alarming statistics alluded to above, it is essential that regulators do not lose sight of the devastating effects of irresponsible lending as well as the use of credit products. In an ideal world, and according to the neo-classical

model of market regulation the customer is regarded as 'a rational actor able to make responsible decisions best suited to his or her needs, assisted by the provisions of relevant, accurate and timely comparative information' (Devenney *Consumer Credit, Debt and Investment in Europe* (2014) at 167. See also Prigden 'Putting some teeth in TILA: From disclosure to substantive regulation in the Mortgage Reform and Anti-Predatory Money Lending Act of 2010' 2012 *Loyola Consumer Law Review* 615).

In reality, however, there is a need for paternalistic intervention. Such an approach is premised on that perception that oftentimes consumers tend to make adverse choices and so a paternalistic policy seeks to minimise this risk by reshaping consumer's situation by, for instance, encouraging or pressurising the consumer into a choice that enhances his benefits by either swelling the cost of the detrimental activity, or by limiting the consumer's liberty enter into that activity (see generally Epstein 'The Neoclassical economics of consumer contracts' 2008 *Minn L Rev* 803; Kant *Political Writings* (1991) 74). In essence, such an approach seeks to protect the consumer not only from information asymmetries but also against being irrational or against self-gratification which culminates in exposure to indebtedness. As such, there is a need to strike a delicate balance between the need to support the financial sector's lending objective and the implementation of measures aimed protecting the consumer (Camerer *et al* 'Regulation for conservatives: Behavioural economics and the case for asymmetric paternalism' (2002) *U Pa L Rev* 1211; Irwin *Implications of behavioural economics for regulatory reform in New Zealand* (2010)). This is what the Affordability Assessment regulations attempt to achieve by making mandatory provisions which were not enshrined in the NCA.

Much as it is lauded as a positive step towards minimizing indebtedness, the new dispensation seems to have failed to address the underlying factors that engender demand for credit (Gropp 'Did consumers want less debt? Consumer credit demand versus supply in the wake of the 2008-2009 financial crisis' (2014) Federal Reserve Bank of San Francisco Working Paper 2014-08). For as long as the current macroeconomic environment which pushes consumers to supplement their finances persists, consumers will continue to borrow.

On account of the fact that the new regulations bring uniformity in the provision of credit, they undoubtedly are a game changer. However, the mere crafting of a high-sounding piece of legislation should not be the end in itself. Rather, policy-makers must be proactive and not reactionary (for this recommendation see for instance Wilson *International Responses to Issues of Credit and Over-Indebtedness in the Wake of Crisis* (Ashgate, 2013); van Heerden and Renke 'Perspectives on the South African responsible lending regime and the duty to conduct pre-agreement assessment as a responsible lending practice', available at http://repository.up.ac.za/dspace/bitstream/handle/2263/45344/VanHeerden_Perspectives_2015.pdf?sequence = 1&isAllowed = y, accessed on

2018-04-01). They should be able to respond to issues happening 'on the ground' in as far as the credit market is concerned. In like manner, there is need to promote financial inclusion as well as heightened consumer financial education such as budgeting as well as simple financial concepts such as interest. It would also be beneficial if consumers understood the potentially devastating effects of ill-managed debt (Hilgert and Hogarth 'Household financial management: The connection between knowledge and behaviour' 2003 *Federal Reserve Bulletin* 301; Sebstad and Cohen 'Assessing the outcomes of financial education' *Working Paper No.3. Microfinance Opportunities*, Washington DC, 2006).

5 Conclusions

The embarrassing statistics that have projected South Africa among the worst in the world justify the recent paternalistic regulatory intervention. However, the new framework ushered by the Affordability Assessment regulations is just the beginning and the government should not be overly optimistic about the fundamental paradigm shift. What needs to be borne in mind by all stakeholders is that on its own this structure will not solve the scale or the age-old problem of reckless lending. There is a need for concerted effort and new strategies by all stakeholders to address the social and economic factors that fuel the problem. These could include exploring the possibility of microfinance platforms that offer low-interest loan schemes (The International Financial Consumer Protection Organisation 'FinCoNet report on responsible lending: Review of supervisory tools for suitable consumer lending practices', available at http://www.finconet.org/FinCoNet-Responsible-Lending-2014.pdf, accessed on 2018-04-01). These could avert problems debt arising for example, from opportunistic lending practices.

Perhaps, as the government celebrates the new regime under Regulation 23A, a cautionary sum up would be appropriate: 'regulation without necessary enforcement capacity can hinder and damage nascent credit markets in developing countries by causing further fragmentation. Greater emphasis on consumer protection is necessary; but deciding on when, and what form, to introduce it is a vital dimension of the regulator's dilemma today (Porteuos 'Policy focus note 2: Consumer protection in credit markets' at 16, available at http://www.microfinancegateway.org/sites/default/files/mfg-en-paper-consumer-protection-in-credit-markets-jul-2009.pdf, accessed on 2018-04-01).

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Onlangse regspraak/Recent case law

The Prosecutor v Omar Hassan Ahmad Al-Bashir, International Criminal Court, July 2017

Achieving clarity on immunities and the full implication of a United Nations Security Council referral to the International Criminal Court

1 Introduction

On 6 July 2017, Pre-Trial Chamber II of the International Criminal Court delivered judgment concerning the Republic of South Africa's non-compliance with the court's request in terms of article 87(7) of the Rome Statute to arrest and surrender Sudanese president Omar Hassan Ahmad Al-Bashir (*The Prosecutor v Omar Hassan Ahmad Al-Bashir* ICC-02/05-01/09-302) (hereinafter *Al-Bashir*). The aforesaid article 87 deals with requests for cooperation by the International Criminal Court to member states. Article 87(7) specifically stipulates that where a state party fails to comply with the court's request, the court may make a finding to that effect and refer the matter either to the Assembly of States Parties or, where the matter was initially referred to the court by the United Nations Security Council, to that body.

The *Al-Bashir* judgment in The Hague was preceded by national jurisprudence, respectively in the North Gauteng High Court (*Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* 2015 5 SA 1 (GP)) and the Supreme Court of Appeal (*Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 3 SA 317 (SCA)).

This contribution is not concerned with the court's references to the possible significance of the 1948 Genocide Convention, the effect of South Africa's interactions with the court in 2015 after Al-Bashir had already arrived on South African soil, or whether or not a referral of South Africa to the court's States Assembly or the United Nations Security Council is warranted. These, I would argue, are of little consequence to the main findings.

Instead, this note aims to show that, above everything else, the judgment contributes to legal certainty on member states' obligations towards the International Criminal Court. More specifically, it goes a long way towards clarifying the legal status of so-called Chapter VII referrals by the United Nations Security Council to the court, and the implications this has for states parties – not only for their duties in respect of the court,

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but also in respect of non-states parties. Particularly the latter aspect has supplemented South African national jurisprudence, which had previously not clearly defined or dealt with the legal status of Security Council referrals to the International Criminal Court.

2 The run-up to the 2017 hearing in The Hague

The alleged gross violation of human rights in the Darfur region of Sudan saw the first United Nations Security Council referral to the International Criminal Court by way of Resolution 1593 (*UN Security Council Resolution 1593 (2005) on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan,* 31 Mar 2005, S/RES/1593). Passing this resolution, the Security Council invoked its powers in terms of Chapter VII of the United Nations Charter to restore international peace and security in the region.

Resolution 1593 was preceded by another four resolutions (Resolution 1502 of 2003, Resolution 1547 of 2004, Resolution 1556 of 2004, Resolution 1564 of 2004), which progressively expressed the Security Council's concern over the genocide in Darfur. Resolution 1593 further followed on a 176-page report by a United Nations commission of inquiry, which had established that the Sudanese government was responsible for serious violations of international human rights and humanitarian law, amounting to crimes under international law (United Nations *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council Resolution 1564 of 18 September 2004* (2005) 3).

Prior to Resolution 1593, the closest the Security Council got to referral to the International Criminal Court to preserve and restore international peace and security was the establishment of ad-hoc international criminal tribunals such as those for the former Yugoslavia and Rwanda. Significantly, neither the Security Council's authority to, as part of its Chapter VII powers, set up international criminal tribunals, nor its authority to refer a situation to the International Criminal Court, has ever been seriously challenged in national or international jurisprudence, not even in *Al-Bashir* (cf Heyder 'The U.N. Security Council's Referral of the crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Court Criminal Court's Functions and Status' 2006 *Berkeley Journal of International Law* 650 et seq).

The International Criminal Court issued two warrants of arrest against President Al-Bashir in terms of article 13(b) of the Rome Statute. The first was on 4 March 2009 for war crimes and crimes against humanity; the second followed on 12 July 2010 for the crime of genocide (*Southern Africa Litigation Centre v Minister of Justice and Constitutional Development supra* par 15, 16 of applicant's founding affidavit). These followed on investigations by the court prosecutor. President Al-Bashir is suspected of being criminally responsible

> … for attacks against a section of the civilian population of Darfur, Sudan, including murdering, exterminating, raping, torturing and forcibly transferring large numbers of civilians, and pillaging their property' (*Southern Africa Litigation Centre v Minister of Justice and Constitutional Development supra* par 17 of applicant's founding affidavit).

Acting in terms of article 89(1) and 91 of the Rome Statute, the court registry consequently requested member states to cooperate in arresting and surrendering President Al-Bashir should he set foot in their territories. Therefore, when the court learned from press reports in May 2015 that the Sudanese president intended to visit South Africa for an African Union summit in Johannesburg from 7 to 15 June that year, the court registrar requested the relevant South African authorities to cooperate by arresting and surrendering Al-Bashir in accordance with section 86 and 89 of the Rome Statute. In the event that South Africa was impeded or prevented from executing the request, the country was urged to 'consult with the Court without delay in order to resolve the matter' (*Al-Bashir* par 5-6).

On 11 June 2015, the court registry was contacted by the South African embassy in the Netherlands to request an urgent meeting in terms of article 97 of the Rome Statute. The request was acceded to, and a meeting between the South African embassy delegation, the court registry and the office of the prosecutor took place the next day, presided over by the presiding judge of the chamber (*Al-Bashir* par 7-9). During the meeting, the presiding judge pointed out that the issues tabled by South Africa had already been decided by the court on a previous occasion and, therefore, had 'no suspensive effect' on South Africa's obligations under the Rome Statute to cooperate with the court and arrest and surrender President Al-Bashir (*Al-Bashir* par 10).

On 13 June 2015, the day when the Sudanese president indeed entered South Africa, South Africa's chief state law adviser again met separately with members of the court registry and the prosecutor's office. Later that day, the presiding judge rejected a request from the prosecutor's office for an order to reconfirm and clarify South Africa's obligation to arrest President Al-Bashir (*Al-Bashir* par 13-14).

South Africa failed to arrest Al-Bashir before his departure from Johannesburg on 15 June 2015. Consequently, proceedings in terms of article 87(7) and regulation 109 of the Rome Statute were initiated in the International Criminal Court, and the matter was finally heard on 7 April 2017 (*Al-Bashir* par 26).

3 South Africa's submissions to the International Criminal Court

For the purposes of this contribution, South Africa's submissions can be split into two broad arguments. The first is the argument on international customary law immunity, in essence asserting that the country had not failed its obligations towards the International Criminal Court. The

second is the argument on the legal status of United Nations Security Council Chapter VII referrals to the International Criminal Court – an issue which, as mentioned in the introduction, had not been extensively dealt with nor decided by South African courts prior to this matter.

3 1 Advancing the argument on international customary law immunity

In arguing its case for not having arrested the Sudanese president, South Africa's first submission was that 'three fundamental errors' had occurred in the manner in which the article 97 consultations were conducted between the South African embassy delegation and the court in June 2015. These were that the court had wrongly dealt with both South Africa's request for consultations and the consultations themselves; that the court treated the consultations as 'quasi-judicial' instead of diplomatic and political, and that no rules applicable to such consultations were available under article 97 (*Al-Bashir* par 27).

Going into more detail, South Africa argued that it had not been afforded the opportunity to be 'appropriately represented' at the consultations, and that for want of rules of procedure under article 97 of the Rome Statute, the court 'should have erred on the side of caution in its approach to the request' (par 28).

Moreover, the questions serving before the International Criminal Court and those that had served before South Africa's national courts were different, the country asserted. The question before the International Criminal Court was whether South Africa had violated its obligations in terms of the Rome Statute and international law in general, and not whether it had violated its legal obligations under its domestic law (par 29).

The presiding judge's indication during the consultations that the issues tabled by South Africa had already been decided by the court, the country regarded as inconclusive – not only because the court's appeals chamber had not yet ruled on the matter, but also since, in spite of a prior ruling, 'the basic and most fundamental rule' was that each case ought to be argued and considered on its own merits (par 30).

South Africa maintained that the obligation to arrest and surrender Al-Bashir was ambiguous and uncertain, which was simply compounded by the court's previous inconsistent decisions in this regard. It argued that Pre-Trial Chamber I's decisions on non-compliance by Malawi and Chad (ICC-02/05-01/09-139 and ICC-02/05-01/09-151 respectively) 'conflated the presence' of the jurisdiction of an international court 'with the absence of immunity from national jurisdiction' (*Al-Bashir* par 31). Similarly, South Africa challenged the chamber's decision on non-compliance by the Democratic Republic of the Congo (ICC-02/05-01/09-195), particularly the court's finding that Resolution 1593 constituted a waiver of Al-Bashir's immunity. In its written submissions, South Africa

contended that it was 'questionable' whether the Security Council had the authority to waive head-of-state immunity (*Al-Bashir* par 31).

In essence, therefore, South Africa relied on customary international law not to arrest Al-Bashir on account of his head-of-state immunity. Yet in its written submissions to the International Criminal Court, the country also reverted to its assertion that South Africa was obligated to provide immunity to Al-Bashir in terms of article VIII (1) of the host agreement it had concluded with the African Union – an argument raised and rejected in both national lawsuits regarding this matter (*Southern Africa Litigation Centre v Minister of Justice and Constitutional Development supra* par 30; *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre supra* par 42).

3 2 Advancing the argument on the legal status of United Nations Security Council Chapter VII referrals to the International Criminal Court

Under this argument, South Africa firstly advanced that Resolution 1593 could not be interpreted as meaning that Al-Bashir's immunity was waived; that only Sudan could waive immunity, and if it did not, it was a matter between Sudan and the Security Council. To hold otherwise, South Africa said, would be to pass the responsibility for non-compliance with Security Council resolutions onto individual states, creating the possibility that South Africa could become liable to Sudan because of Sudan's 'rights under international law' (*Al-Bashir* par 34).

In addition, South Africa submitted that nothing in the context of the Security Council resolution suggested a waiver of (Sudan's) immunity, and that it was not up to the International Criminal Court to 'unilaterally' decide that the resolution waived immunity. If such a departure from 'the rules of international law' was indeed the Security Council's intention, this would have been explicitly indicated (par 35). Resolution 1593, South Africa maintained, was to be interpreted in a manner consistent with existing international law, including the law on immunities.

Finally, referring to the 'political and diplomatic contexts' of the matter, South Africa argued that it was 'a leading player in peace efforts' and could therefore not 'disengage from the African Union or adopt a policy that would suggest that it is not going to host AU heads of state' (par 40).

4 The International Criminal Court's judgment – derogation from immunities, and the full implications of a Security Council referral

The court first analysed whether South Africa was entitled not to comply with the court's request for arrest and surrender based on the two arguments the country raised – the first being international customary law that allowed serving heads of state immunity against prosecution,

and the second, Al-Bashir's immunity on account of the host agreement South Africa had concluded with the African Union (par 64-66).

The latter argument had already failed to convince the two national courts in litigation on the Al-Bashir matter, and did not satisfy the International Criminal Court either. Heads of state were clearly not staff members of the African Union Commission nor delegates or representatives of intergovernmental organisations attending the summit (par 66-67).

Therefore, the court immediately turned to the immunity afforded to serving heads of state under international law. In this regard, the court confirmed that in terms of customary law, there was no exclusion of immunity for serving heads of state sought for international crimes by another state, even if such exclusion was sought on behalf of an international court (par 68). This led to the question whether there was any 'derogation to the general regime of immunities under international law when the Court seeks the arrest and surrender' of a serving head of state (par 71).

4 1 Article 27(2) of the Rome Statute: States parties' cooperation with the International Criminal Court

With reference to article 27(2) of the Rome Statute, the court noted South Africa's argument that this provision was concerned only with the court's jurisdiction – in other words, ensuring that the court's jurisdiction would never be ousted by a defence of official capacity – but did not have any effect on states' rights and obligations towards the court (par 71). In essence, South Africa asserted that it was not the obligation of the court's member states to ensure that suspects of international crimes were arrested and handed over at the court's request.

The court rightly rejected this argument, for two reasons. Firstly, if article 27(2) were to be assigned the meaning that South Africa claimed it had, it would bar the court from ever exercising its jurisdiction. On the interpretation of the provision, the drafters clearly could not have intended for it to be understood as 'narrowly' as South Africa suggested (par 74). Secondly, and closely linked to the first reason, the court argued that requiring 'special procedural rules' – outside and additional to article 27(2), as South Africa asserted – to cooperate with the International Criminal Court with regard to persons who enjoyed official immunity would create 'an insurmountable obstacle to the Court's ability to exercise its jurisdiction' (par 75).

Considering both the vertical and horizontal levels of operation of article 27(2), the court found that the vertical operation – between a state party and the court – clearly indicated that a state party's immunity, including its head-of-state immunity, could never be used as a reason for it not to cooperate with the court. This finding the court elaborated on in its interpretation of article 98, which is presented in paragraph 4 4 below.

The court confirmed that functional immunity based on official capacity was provided for in international law – not for the individual's benefit, but to avoid interference with the functioning and sovereignty of states (par 77-78).

Next, the court went on to articulate what I believe to have been a missing link in the South African government's reasoning before both the International Criminal Court and the national courts, rendering its arguments fundamentally flawed: When states parties ratified the Rome Statute, they 'accepted the irrelevance of immunities based on official capacity, including those they may otherwise possess under international law'. It follows then, as a 'necessary corollary', that states parties would give effect to requests for cooperation by the International Criminal Court (par 78). This also leads me to believe that the South African government, as many other states, appears to have equally misconceived their obligations in terms of the United Nations Charter – a point I will argue later on.

The court also proceeded to confirm that the horizontal application of article 27(2) – between states parties to the Rome Statute – equally implied that one state party, by way of the obligations created *inter partes* by an international treaty, was duty-bound to arrest and hand over an individual of another state party at the court's request. Again, immunities would be irrelevant, as both states had voluntarily ratified the Rome Statute (par 79-80).

Having established states parties' obligation to cooperate with the court in respect of other states parties, regardless of immunities, the court in the next section of its judgment turned to states parties' obligation in respect of non-states parties.

4 2 The Rome Statute and non-states parties – article 98(1)

Of course, the irrelevance of state immunities as provided for in article 27(2) of the Rome Statute does not apply to non-states parties.

The applicable framework in the Rome Statute that would apply to non-states parties is found in article 98(1). The court briefly confirmed its interpretation of that provision, namely that the International Criminal Court may not request a state party to arrest and surrender an individual from a non-state party without first obtaining a waiver of immunity from the state whose official is impugned. However, the court did not leave off here.

Next, it turned to what I regard as the crux of the debate and jurisprudence regarding Al-Bashir, South Africa and the International Criminal Court.

4 3 When the International Criminal Court's jurisdiction is triggered by a United Nations Security Council resolution

In the court's analysis of the effect of Resolution 1593, it referred to the legal authority of such resolution as a 'sui generis regime', in other words, a unique framework of legal authority separate from the Rome Statute. This was so, the court reasoned, because obligations in matters referred to it by the United Nations Security Council did not stem from state membership of the International Criminal Court, and thus ratification of the Rome Statute, but from membership of the United Nations in terms of its charter (par 83).

At the risk of stating the obvious, the jurisdiction of the International Criminal Court in the matter of Al-Bashir was triggered by a Security Council resolution taken in terms of that body's powers under Chapter VII of the United Nations Charter. Moreover, as pointed out earlier, that resolution followed on a number of previous resolutions as well as an extensive report in which the human rights abuses and violations of humanitarian law were reported to the Security Council. As also mentioned in the introductory parts of this contribution, Resolution 1593 marked the Security Council's first referral to the International Criminal Court. Prior to Resolution 1593, the closest the Security Council got to referral to the court for the purpose of restoring international peace and security was the establishment of ad-hoc international criminal tribunals. Apart from being unsuccessfully disputed in proceedings such as those before the International Criminal Tribunal for Rwanda (see eg *The Prosecutor v Joseph Kanyabasi* ICTR case 96-15-T par 9), the Security Council's power to take measures to restore international peace and security has never been seriously challenged. It was certainly not challenged in the *Al-Bashir* case.

So, the court pointed out, in lawfully triggering the International Criminal Court's jurisdiction as provided for in article 13 of the Rome Statute, the Security Council was fully aware that the 'legal framework' of the Rome Statute would apply from that point onwards. The process that would ensue was always to be undertaken in terms of the court's legal framework. Put differently, the court was to exercise its jurisdiction according to the provisions of its statute in its entirety (par 85).

Again, the obvious needs to be stated: The United Nations is a political body and not a court. Therefore, it previously set up ad-hoc criminal tribunals, by resolution, to deal with problems that only a court of law, and not a political body, was equipped to address. In fact, from the perspective of the United Nations acting on behalf of the international community, one of the very reasons why the International Criminal Court was established as a permanent court was the extreme costs associated with establishing ad-hoc tribunals every time the Security Council needed to seek and restore justice by holding the chief perpetrators who threatened peace and security accountable in a court

of law. In its judgment in *Al-Bashir* (par 86), the court confirmed this and came to the logical conclusion:

> [I]n other words, the only legal regime in which this Court may exercise the triggered jurisdiction is the one which is generally applicable to it, its Statute *in primis*.

Also, in addition to triggering the jurisdiction of the International Criminal Court, the Security Council imposed an obligation on Sudan to cooperate with the court – an obligation it would ordinarily not have, being a non-member state. This the court's appeals chamber established in a matter similar to the *Al-Bashir* case, namely *Prosecutor v Saif Al-Islam and Abdullah Al-Senussi* (22 Nov 2013, ICC-01/11-01/11-480 par 18), countering South Africa's argument that the matter had not been conclusively decided by the court's appeals chamber, as alluded to in paragraph 3 1 above.

Therefore, the court unequivocally found that for the limited purposes of matters referred to it by the Security Council, non-states parties whose officials' conduct is the subject of the referral have 'rights and obligations analogous to those of States Parties to the Statute' (par 88). Although acknowledging that this finding constituted an expansion of the applicability of an international treaty so as to also have consequences for states that have not accepted such treaty, the court found that the United Nations Charter did permit the Security Council to impose obligations on states (par 89). Ironically, the court substantiated this extension by referring to an advisory opinion of the International Court of Justice in 1971 regarding South Africa's continued presence in Namibia despite Security Council Resolution 276 to withdraw from the territory.

A consequence of the court's interpretation and findings on the lawful obligations resulting from a referral to it by the Security Council was that article 27(2) of the Rome Statute, which excludes immunity, became fully operative in the court's interaction with Sudan (par 91). This had two implications: Firstly, Sudan could not claim immunity for Al-Bashir, and secondly, a state party could not divest itself of its obligation to cooperate with the court for the arrest and surrender of a serving head of state at the court's request. Bringing the argument the proverbial full circle, this further implied that article 98(1) of the Rome Statute did not find any application, meaning there was indeed no immunity to be waived, while article 27(2) did find application, meaning immunity was no defence (par 91-93).

4 4 Further elaboration on article 98

Despite the court's finding regarding the inapplicability of article 98(1) in the *Al-Bashir* matter, it still deemed it necessary to elaborate on the meaning of article 98 in light of presentations made by South Africa in the course of the proceedings. The court recognised that there might be perceived tension between a state party's duty to cooperate with the

court on the one hand, and the state's obligation to respect immunities under international law. Yet article 98 left it to the court, and not to the state party, to 'address the matter' (par 100).

To recap, article 98, in essence, provides that the court may not proceed with a request for surrender or assistance that would require a requested state to go against its obligations under international law

> … with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of immunity.

The court emphasised that article 98 provided no rights to states parties to refuse cooperation, nor was it a source of substantive rights or 'additional duties' to states parties, as the article 'addresses the court' (par 99-100). Article 98, the court ruled, left it to the court, and not the state party, to resolve the matter.

The court found further confirmation of its interpretation of article 98 in the wording of rule 195 of its Rules of Procedure and Evidence, which in essence provides that all the requested state is required to do is to notify the court of any potential problem with the execution of the request, and then to provide the court with 'any information relevant to assist *the Court* [own emphasis added] in the application of article 98'.

With reference to the general duty to cooperate, the court pointed out specific explicit instances provided for in the Rome Statute where the obligation to cooperate could indeed be qualified or suspended. This could for example happen as provided for in article 89(2), which permits the state to postpone the execution of the cooperation request where the request is challenged before a national court on the principle of *ne bis in idem* (double jeopardy), until, in light thereof, the International Criminal Court makes a determination as to the admissibility of the case before it. Another example where a state may lawfully postpone execution is provided for in article 90 of the Rome Statute, namely where the requested state is confronted with competing requests for surrender by another state party and the court. Again, the requested state is allowed to postpone the execution of the court's request until the court decides on the admissibility of the case (par 103). Section 98, however, is construed in different terms, not affording the requested state the ability to refuse cooperation or postpone execution, nor the discretion to choose whether to cooperate or not to cooperate with the court (par 104).

Finally, the court spelled out that, as is evident from the stipulations of articles 98, 89 and 90, in each scenario where the drafters of the Rome Statute had foreseen potential problems with regard to the execution of a cooperation request, the phrasing made it abundantly clear that it was the court, and not the state party, that had the final say in the matter. The state party, the court emphasised, could not unilaterally refuse compliance with the court's request for arrest and surrender, as South Africa indeed had done (par 108).

Of course, we know that the South African government not only flouted its international obligations towards the International Criminal Court, but also the order of its national court in the matter – a sad indictment of its commitment to the rule of law. It is doubtful whether South Africa will appeal the *Al-Bashir* judgment.

5 General comments and conclusion

Apart from the clear instructions on the legal position regarding immunities and the full implications of a Security Council referral to the International Criminal Court emanating from the *Al-Bashir* judgment, two general observations also seem appropriate. The first relates to the reasons why the court was established, and the second to the Security Council's extension of its institutional mandate to preserve international peace and security.

The perpetration of horrific crimes against humanity did not cease with the prosecution of the World War II war criminals. In fact, those responsible for these atrocities have often gone unpunished due to the unwillingness of state courts to prosecute them (Seguin 'Denouncing the International Criminal Court: an examination of the U.S. objections to the Rome Statute' 2000 *Boston University International Law Journal* 86). Hence the International Criminal Court came about, the establishment of which took centuries to achieve (Cassese *International Criminal Law* (2003) 327). At a practical level, the reason for establishing a permanent court instead of ad-hoc tribunals was to secure a professional staff corps trained in criminal investigation and prosecution, who could respond swiftly to any new crisis before evidence could be destroyed (Kirsch and Holmes 'The Rome Conference on an International Criminal Court: The Negotiating Process' 1999 *American Journal of International Law (AJIL)* 8). In an increasingly unstable world, this is an institution to be respected and maintained.

Now turning to the United Nations, the body assumed a more active role in world affairs at the conclusion of the Cold War than during the war, when consensus could rarely be achieved because of the likelihood of a veto vote in the Security Council (Crawford 'The ILC adopts a statute for an international criminal court' 1995 *AJIL* 415). According to Akhavan ('The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' 1996 *AJIL* 501), increased institution-building of the United Nations regime following the Cold War was inevitable due to the countless incidences of human and humanitarian rights violations (also see Akhavan 'Beyond Impunity: can International Criminal Justice prevent future atrocities?' 2001 *AJIL* 27). Arguably the single most significant and valuable contribution to the development of international criminal justice by the United Nations was the establishment of the ad-hoc tribunals at the behest of the Security Council, acting in terms of its Chapter VII powers. This has settled the principle that the United Nations can lawfully intervene in matters that fall under a state's domestic jurisdiction (cf Tocker 'Intervention in the Yugoslav Civil War: the United

Nations' right to create an International Criminal Tribunal' 1994 *Dickinson Journal of International Law* 546). In *The Prosecutor v Joseph Kanyabashi* (ICTR case 96-15-T par 13), for example, the trial chamber addressed the matter of state sovereignty by stating that United Nations membership entailed certain limitations on member states' sovereignty because, pursuant to article 25 of the United Nations Charter, all member states had agreed to accept and carry out the decisions of the Security Council in accordance with the charter.

I specifically mention state sovereignty, as it would appear from the arguments raised by South Africa in *Al-Bashir* that government is unaccustomed to accepting the higher authority that membership of the United Nations and the International Criminal Court implies. And it is this serious misconception of the implications of both United Nations and International Criminal Court membership, I would argue, that has obscured South Africa's reasoning from the very beginning of the debacle concerning the Sudanese president.

It is hoped that the clear and well-reasoned judgment of the International Criminal Court in *Al-Bashir* has provided government and its advisors with a better understanding of international criminal law and justice, and appreciation for the fact that, in the words of Mlambo J, courts of law are the wrong forum 'for the ventilation of regional and international policy considerations' (*Southern Africa Litigation Centre v Minister of Justice and Constitutional Development supra* par 34).

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Mhlongo v S; Nkosi v S 2015 (2) SACR 323 (CC)

The right to be discharged at the end of the prosecution's case in the context of possible co-accused incrimination

1 Introduction

The subject of this note is whether or not a co-accused person in criminal proceedings has a right to be discharged at the end of the state's case, where there is insufficient evidence on which a reasonable court might convict him or her; but there is a reasonable possibility that the other co-accused persons may incriminate him or her and hence supplement the state's case. This subject was recently argued before the Constitutional Court in *Mhlongo v S; Nkosi v S* 2015 (2) SACR 323 (CC); however, apparently because a decision in this regard was not deemed necessary, the Constitutional Court did not make a conclusive decision on the subject and left the door open (par 41). I suggest that this constitutes an

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unfortunate missed opportunity that our country's apex court could have used to ensure the alignment of this aspect of our law with our country's commitment to human rights. This note is structured as follows: Part 2 describes the background of the Makuna murder trial from which *Mhlongo v S; Nkosi v S* arose; Part 3 describes the various appeals against the convictions in the Makuna murder trial and the relevant aspects of the Constitutional Court's judgement in *Mhlongo v S; Nkosi v S*; Part 4 critically analyses the current legal position regarding the subject of this note with illustrative reference to the conduct of the Makuna murder trial; Part 5 concludes this note with a critical assessment of the post-*Mhlongo v S; Nkosi v S* legal landscape.

2 The Makuna murder trial

On 3 August 2002, Warrant Officer Johannes Makuna was shot twice in front of his home in an apparent botched attempt to rob him of his bakkie. His daughter, who was present during the incident, saw two assailants, and a neighbour also saw two men running away from the scene following the shots. The assailants only managed to rob Warrant Officer Makuna's service pistol. Warrant Officer Makuna was rushed to hospital, but died of his injuries.

After police investigations failed to deliver any leads, a substantial monetary reward for information was published by the police. About two months after the murder on Warrant Officer Makuna, a certain Mr Thabo Matjeke, who has been incarcerated for another serious offence *subsequent* to the murder on Warrant Officer Makuna, saw the reward notice and contacted the investigating officer. Mr Matjeke promised information in return for the reward. Soon, he made two extra-curial confessions: One to a magistrate and one to a police officer during a pointing-out excursion. Although the storyline of these two confessions is similar, there are material differences between the two confession statements. Also, I suggest that the basic components of the storyline, namely that *eight* men crammed into *one* Toyota Cressida sedan and then ventured through the streets looking for a bakkie to rob, is inherently improbable. In these confessions, Mr Matjeke incriminated not only himself, but also seven other persons, who were subsequently all arrested. Three of the implicated persons also made extra-curial statements, ranging from partial corroboration of Mr Matjeke's version, to complete denials. Mr Matjeke and all seven the persons whom he incriminated were charged with the murder of Warrant Officer Makuna, the robbery of his firearm, and some lesser offences. They stood trial in the then Bophuthatswana High Court. As this case is unreported, I refer to it as the 'Makuna murder trial'.

The admissibility of the various extra-curial incriminating statements was challenged, and a trial-within-a-trial was conducted, during which all the co-accused who made incriminating statements disavowed the content thereof and averred that the police enticed or forced them to make the statements. At the conclusion of the trial-within-a-trial, the trial

judge decided to admit all the extra-curial statements into evidence against the makers thereof. These extra-curial statements essentially constituted the prosecution's entire case: no fingerprints, no DNA evidence, and no reliable eyewitness testimony as to the identity of the assailants could be presented. Despite this dearth of independent corroborative evidence, the trial court decided to admit the extra-curial statements as evidence against all the co-accused, purportedly (but erroneously) relying on the judgement of Supreme Court of Appeal (SCA) in *S v Ndhlovu* 2002 (2) SACR 325 (SCA). The *Ndhlovu* rule entailed that an extra-curial admission, but not a confession, by one co-accused is admissible as evidence against another co-accused if required by the interests of justice. The interests of justice in turn required inter alia 'strong corroboration in all the other evidence' of the incrimination of the co-accused (par 44). Most disturbingly, the trial court initially consistently referred to Mr Matjeke's extra-curial statement to the magistrate as a 'confession' (which it was), but later – in a transparent attempt to have this statement superficially fit the *Ndhlovu* mould – the trial court made a *volte face* and reclassified Mr Matjeke's 'confession' as an 'admission'.

Given the trial court's erroneous application of the *Ndhlovu* rule, and its consequent finding that the extra-curial statements are evidence against all the co-accused, none of the co-accused was discharged, and the trial proceeded against all the co-accused. In his testimony in the main trial, Mr Matjeke again disavowed his extra-curial statements and denied any involvement in the crime. However, later during the trial, he requested to *re-open* his defence, which request was granted. During his second testimony in the main trial, Mr Matjeke came up with a newfangled version of events that incriminated all his co-accused while attempting to underplay the involvement of himself and Mr Makhubela (Accused 3). Mr Makhubela testified directly after Mr Matjeke's second testimony in the main trial, and essentially rehashed Mr Matjeke's latest version of events, which differed materially from Mr Makhubela's own self-incriminatory extra-curial statement. The four co-accused persons who did *not* make extra-curial statements responded as follows: Mr Boswell Mhlongo (Accused 2), Mr Alfred Nkosi (Accused 4), and Mr Thembekile Molaudzi (Accused 5) testified in their own defence and insisted that they knew nothing about the crimes that were committed; Mr Leonard Motloung (Accused 6), who was released on bail, disappeared.

The trial court explicitly rejected Mr Matjeke's last version as per his second testimony and the corroboration thereof by Mr Makhubela as a last-minute concoction. However, relying on the extra-curial statements (by these very men whom the trial court declared liars) that were admitted into evidence against all the co-accused, the trial court convicted all seven remaining co-accused and sentenced them all to life imprisonment. In so doing, the trial court lent credence to the basic narrative of Mr Matjeke's extra-curial statements that is premised on an inherent improbability and ignored the material differences between Mr Matjeke's extra-curial statements, and the material differences between

Mr Matjeke's extra-curial statements and the other extra-curial statements. Moreover, the trial court ignored the complete void of independent corroborative evidence.

3 The appeals; the Constitutional Court's decision

After a prolonged struggle to get the transcripts of the trial court proceedings, all seven the co-convicted appealed to the full bench of the Northwest High Court. However, the full bench confirmed the trial court's decision and dismissed the appeal. All the co-convicted except Mr Matjeke and Mr Makhubela then petitioned the SCA, but without success. One of the co-convicted, Mr Molaudzi, then applied for leave to appeal to the Constitutional Court, but again without success (*Molaudzi v S* 2015 (2) SACR 341 (CC)). However, sensing that the tide may be turning after the SCA's denouncement of *Ndhlovu* in *Litako & others v S* [2014] 3 All SA 138 (SCA), Mr Mhlongo and Mr Nkosi approached the Constitutional Court, which decided to grant them a hearing. In *Litako*, the SCA held inter alia that the differentiation between confessions and admissions inherent in the *Ndhlovu* rule infringes on a co-accused persons right to equality, and restored the common law status quo ante *Ndhlovu*, namely that no extra-curial statements – whether confessions or admissions – by one co-accused can ever be used as evidence against his or her co-accused.

The gist of the applicants' argument in *Mhlongo v S; Nkosi v S* was that the *Ndhlovu* rule is unconstitutional; in the alternative, should the Constitutional Court find that the *Ndhlovu* rule is constitutional (contra *Litako*), it was argued that the courts below applied the *Ndhlovu* rule erroneously given the lack of independent corroborative evidence. Of particular relevance to the subject of this note, it was specifically argued on behalf of Mr Mhlongo and Mr Nkosi that the paucity of evidence presented by the prosecution against these co-accused – either based on the unconstitutionality of the *Ndhlovu* rule or on the erroneous application thereof – should have caused the trial court to mero moto discharge these men at the end of the prosecution's case.

In a unanimous judgement penned by Theron AJ, the Constitutional Court held that the *Ndhlovu* rule is unconstitutional and that the extra-curial statements by some of their co-accused should not have been admitted as evidence against Mr Mhlongo and Mr Nkosi. However, the Constitutional Court did not make a conclusive ruling on the question of whether Mr Mhlongo and Mr Nkosi should have been discharged at the end of the prosecution's case in the trial court, but left the door open. The Constitutional Court held as follows in *Mhlongo v S; Nkosi v S* (par 41, my emphasis):

> The extra-curial statements being inadmissible, the question is now: what remains of the case against the applicants? At the close of the State's case, the only evidence against the applicants was the extra-curial statements of the co-accused. If the trial court had correctly declared the evidence inadmissible, the applicants *may have been entitled to be discharged* at that stage.

The reason why the Constitutional Court did not feel obliged to rule on the question of whether Mr Mhlongo and Mr Nkosi should have been discharged at the end of the prosecution's case in the trial court is explained in the subsequent sentence:

> In any event, at the end of the trial, the evidence as a whole was insufficient to ground the applicants' convictions. Counsel for the State correctly conceded this.

Accordingly, the Constitutional Court vitiated the convictions and sentences of Mr Mhlongo and Mr Nkosi, but without deeming it necessary to consider the issue of discharge at the end of the prosecution's case, given the overall insufficiency of evidence against the applicants. In a ground-breaking judgement on the principle of res judicata, *Molaudzi v S* 2015 (2) SACR 341 (CC), the Constitutional Court also vitiated the conviction and sentence of Mr Molaudzi, who was similarly situated to the applicants in *Mhlongo v S; Nkosi v S,* but whose application for leave to appeal to the Constitutional Court was previously dismissed.

4 Critique on the current legal position

In *S v Shuping* 1983 (2) SA 119 (BSC) the Supreme Court of Bophuthatswana per Hiemstra CJ reviewed the case law history of discharge applications and formulated the test for discharge as follows (at 120):

> At the close of the State case, when discharge is considered, the first question is: (i) is there evidence on which a reasonable man might convict; if not (ii) is there a reasonable possibility that the defence evidence might supplement the State case? If the answer to either question is yes, there should be no discharge and the accused should be placed on his defence.

Part (ii) of the *Shuping* test ('*Shuping* (ii)') was considered by the SCA in *S v Lubaxa* [2002] 2 All SA 107 (A). While rejecting *Shuping* (ii) in the context of possible *self-incrimination* based on an accused person's rights to dignity and freedom (parr 18–19), the SCA – albeit obiter – accepted *Shuping* (ii) in the context of possible *co-accused incrimination*. Regarding the latter context, the SCA reasoned as follows (parr 20–21):

> The prosecution is ordinarily entitled to rely upon the evidence of an accomplice and it is not self-evident why it should necessarily be precluded from doing so merely because it has chosen to prosecute more than one person jointly. While it is true that the caution that is required to be exercised when evaluating the evidence of an accomplice might at times render it futile to continue such a trial …that need not always be the case.
>
> Whether, or in what circumstances, a trial court should discharge an accused who might be incriminated by a co-accused, is not a question that can be answered in the abstract, for the circumstances in which the question arises are varied. While there might be cases in which it would be unfair not to do so, one can envisage circumstances in which to do so would compromise the

> proper administration of justice. What is entailed by a fair trial must necessarily be determined by the particular circumstances.

I suggest that this obiter dictum fails to convince. Why should an accused person's rights to dignity and freedom – and the consequent right to be discharged in the absence of a prima facie case – be of less import if the accused person happens to be prosecuted together with other persons? The decision to prosecute accused persons together or separately is the prerogative of the prosecution; as such, the prosecution must accept the consequences of its decision. (It should also be noted that the prosecution can of course apply for the separation of trials.) Accused persons should have equal protection and benefit of the law – irrespective of whether they are prosecuted on their own or with co-accused.

Furthermore, the premise on which the SCA built its argument in *Lubaxa*, namely that the 'prosecution is ordinarily entitled to rely upon the evidence of an accomplice' must be qualified. A corollary of the presumption of innocence is that the duty to prove the prosecution's case rests exclusively on the prosecution, and not on the defence. In the event that one co-accused incriminates another, the prosecution can rely on such incriminating testimony; however, this happenstance does not mean that the prosecution can shift its duty to any degree to the co-accused to prove the prosecution's case.

This interlinks closely with an accused person's right to a fair trial, and in particular the right to remain silent. Consider the following exchange between counsel for Mr Motloung (Accused 6) and the trial judge in the Makuna murder trial (Record of the trial before the Constitutional Court p284 lines 3–24):

> COURT: Yes?
>
> MR MOJUTO: Depending on the evidence of accused 1, we will testify.
>
> COURT: No, do not come with that. It is either he will testify or he will not testify. You make a decision. The state's [case] is closed. Your case does not depend on accused 1. Where do you get this new concept? If accused 1, 2, 3 and 4 were not there, what were you going to say?
>
> MR MOJUTO: M'Lady, the evidence against accused 6 solely depends on the statement made by accused 1.
>
> COURT: Mr Mojuto, I am not here to play games.
>
> MR MOJUTO: That is correct.
>
> COURT: Yes, what do you decide?
>
> MR MOJUTO: May I take instruction?
>
> COURT: Yes. I do not know if also you understand the implication of the hearsay evidence that was just admitted, whether you do understand how it works.
>
> MR MOJUTO: I do, M'Lady.
>
> COURT: So, it was not necessary for you to even make a submission that it will depend on accused 1's evidence or accused 2's evidence. Yes?

MR MOJUTO: M'Lady, the accused will testify.

I suggest that the above is a vivid illustration of the negation of an accused person's right to a fair trial: An accused person can only properly exercise the right to remain silent if he or she *knows* what case he or she must meet; if the case that an accused must meet is not the prosecution's case (given that the prosecution failed to make a prima facie case) but rather the 'reasonable possibility' of incrimination by his or her co-accused – the nature and scope of which is entirely *unknown* – the accused person's right to remain silent is clearly violated.

Even before the onset of our new constitutional dispensation, *Shuping* (ii) was not followed in the context of possible co-accused incrimination by the Venda Supreme Court in *S v Phuravhatha & others* 1992 (2) SACR 544 (V) 551G–J. After the dawn of our constitutional dispensation, the Witwatersrand Local Division (WLD) – after a thorough human rights analysis – resoundingly rejected *Shuping* (ii) in the context of possible co-accused incrimination in *S v Mathebula & another* 1997 (1) SACR 10 (W) 31D. However, the SCA in *Lubaxa* merely mentioned *Mathebula* and *Phuravhatha*¸ *but failed to consider the arguments presented in these cases*. This constitutes the most conspicuous shortcoming of the *Lubaxa* judgement. Furthermore, as I have argued above, the SCA's own arguments in favour of keeping *Shuping* (ii) alive in the context of possible co-accused incrimination fail to convince. In the subsequent case of *Nkosi & another v S* 2011 (2) SACR 482 (SCA), the SCA had a second opportunity to properly analyse this issue, but missed the opportunity by uncritically relying on its prior *Lubaxa* obiter dictum.

5 Conclusion

In *Mhlongo v S; Nkosi v S* the Constitutional Court was invited to engage with the issue of an accused person's right to discharge at the end of the prosecution's case, but declined. I suggest that this omission may prevent the *Ndhlovu* rule to rest in peace and allow it to haunt our criminal justice system, as illustrated by the following possible argument based on *Shuping–Lubaxa–Nkosi*: Although the extra-curial statement by co-accused X is inadmissible against X's co-accused (because the *Ndhlovu* rule is valid no more), the existence of such an extra-curial statement that incriminates X's co-accused (as if the *Ndhlovu* rule is still quasi-valid) constitutes a 'reasonable possibility' that the prosecution's case might be supplemented by the testimony of X, should X decide to testify; in the premises X's co-accused are not entitled to discharge. Should any court be persuaded by this argument, the result may likely be a spectacle similar to the one seen in the Makuna murder trial: An unconstitutional fracas between co-accused who are all fighting in the darkness of not knowing what case they must meet. Absent a clear rejection of *Shuping–Lubaxa–Nkosi*, the ghost of the *Ndhlovu* rule may still wreak havoc.

At least, by holding that an accused person in the context of possible co-accused incrimination 'may' have the right to be discharged at the end

of the prosecution's case, the authoritativeness of the *Shuping–Lubaxa–Nkosi* judgements are now questionable. However, the Constitutional Court appears to be waiting for a specific constitutional challenge to these judgements before making a definite decision on the issue of the right of an accused person to be discharged at the end of the prosecution's case in the context of possible co-accused incrimination.

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