DE JURE

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Editorial

> "It is what you read when you don't have to that determines what you will be when you can't help it." - Oscar Wilde

It is with this in mind that the De jure editorial board is proud to present the second volume for 2012. Over the past two years we have witnessed the awe inspiring power of the revolutionary use of information trough social networking. We have seen it used to create social awareness, to highlight of the plight of many previously silent martyrs and we have seen it topple oppressive institutions one after the other. Naturally, this is to be celebrated.

However, we as a society have gradually become accustomed to having information fed to us in small, digestible packets. This is a sorry state of affairs and it increasingly affects the younger academic community in particular. Therefore, it is heartening to be able to present a volume such as this with such a wide variety of excellent contributions. The articles, case discussions and notes contained in this volume are as diverse as the field of law itself. There is truly something of interest for every reader.

With the continued success of our open access website De Jure can play a crucial part in making relevant, high quality information available to all. This form of information dissemination supports the culture of wide reading and vibrant discussion that is crucial to South Africa's legal development

As a nation we have had an eventful year. Our justice system has proven itself to be continually independent and reliable.

As legal professionals and academics we are continually responsible for our own furthered education and self improvement. We need to become persistent scholars in an attempt to keep up with the ever changing legal arena we choose to participate in. Therefore I agree with Oscar Wilde, that those things we read, as part of self improvement and not just as part of necessary education are the things that will define us, and in turn define the justice system we are responsible for.

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The past, present and future of vicarious liability in South Africa

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OPSOMMING

Die verlede, hede en toekoms van middelike aanspreeklikheid in Suid-Afrika

Die onlangse – en volgens sommige, onrusbarende – tendens in Suid-Afrika om werkgewers (veral die staat) aanspreeklik te hou vir die onregmatige, skuldige dade van hulle werknemers gee aanleiding tot probleme en enige ondersoek na die moontlike middellike aanspreeklikheid van die werkgewer moet noodwendig altyd begin met die vraag of die werknemer wel 'n delik gepleeg het. Waar daar nie 'n delik is nie, is daar nie sprake van direkte of middellike aanspreeklikheid nie. Dit is belangrik om vas te stel wat die verhouding tussen die deliktspleger en sy werkgewer was waar dit vasstaan dat die werknemer wel 'n delik gepleeg het. Dit is dan juis by die vasstelling of die werknemer in die loop van sy diens gehandel het dat beleidsoorwegings na vore kom. Suid-Afrikaanse howe het oor die jare toetse geformuleer om vas te stel of 'n werknemer in die loop van sy diens gehandel het of nie. Die doel van hierdie artikel is om die probleem van middellike aanspreeklikheid onder die loep te neem. Eisers probeer altyd in die diepste sakke grawe – diè van werkgewers – en hierdie tendens sal waarskynlik voortgesit word. Hierdie artikel streef om 'n nuwe perspektief op middellike aanspreeklikheid te gee en begin deur 'n kort historiese oorsig van hierdie vorm van skuldlose aanspreeklikheid in Suid-Afrika. Die artikel bespreek ook 'n aantal spesifieke probleme, waarvan die dilemma aangaande werknemers wat op diens is of nie en die ingewikkelde vraag rondom diensbestek die eerste is. Die artikel ondersoek ook die Wet op Arbeidsverhoudinge soos wat dit op wangedrag van toepassing is en die aard van die verhouding tussen werkgewer en werknemer. Direkte aanspreeklikheid as 'n alternatiewe eisoorsaak teen werkgewers onder sekere omstandighede word spesifiek gemeld.

1 Introduction

Ellen Sturgis Hooper wrote:

> I slept, and dreamed that life was beauty;
> I woke, and found that life was duty.[1]

Sturgis Hooper's words epitomise that which is arguably the defining aspect of daily life, namely, duty. Formal duty, in the form of

1 *Beauty and Duty* (1840).

employment, often defines an individual. It is not uncommon to refer to someone as "Bob the builder" or to introduce a friend by saying: "Pearl's a singer."[2] This close association between an individual's name and his or her occupation is indicative of society's expectations that people will generally act in accordance with their duties, training and expertise. It is perhaps not surprising then that the rape victim in *F v Minister of Safety and Security*[3] expected the police officer who was on stand-by duty to take her home and not to harm her. Surely one may expect a police officer to behave like a police officer?

However, if expecting someone to act according to what we deem to be his or her "duty" was that straightforward, we would not be writing this article. The recent – and some say alarming – trend in South Africa to hold employers (particularly the government) liable for wrongful, culpable acts committed by their employees gives rise to difficulties and any inquiry into the possible vicarious liability of the employer should necessarily always start by asking whether there was in fact a wrongful, culpable act committed by the employee.[4] If not, there can neither be direct liability of the employee nor vicarious liability by the employer. Where the employee did indeed commit a delict, the relationship between the wrongdoer and his employer at the time of the wrongdoing becomes important.[5] It is then often, in determining whether the employee was acting in the scope of his employment, that normative issues come to the fore. Over the years South African courts have devised tests to determine whether an employee was in fact acting in the scope of his employment.[6]

The purpose of the article is to delve a bit deeper into the issue of vicarious liability. Plaintiffs always seek to dig into the deepest pockets – that of an employer – and this trend is likely to continue.[7] The article seeks to contrast vicarious liability with direct liability and sets out to sketch a brief historical overview of this form of strict liability in South Africa. It discusses the case of *F* as an example of an extreme situation in which vicarious liability arose.

In addition, the article discusses a number of specific issues, first of which is the dilemma around on- and off-duty employees and the problematic issue of "scope of employment". The article examines the Labour Relations Act[8] as it applies to misconduct and the nature of the

2 Written by Leibner *et al* and performed by Elkie Brooks, "Pearl's a singer" tells the tale of a performer who "sings songs for the lost and the lonely". We are also told that "her job is entertaining folks, singing songs and telling jokes, in a nightclub." Accessed from http://www.lyrics.com/pearls-a-singer-lyrics-elkie-brooks.html on 2012-03-13.
3 [2011] ZACC 37.
4 Neethling, Potgieter & Visser *Law of Delict* (2010) 365.
5 Neethling *et al* 366-368.
6 Neethling *et al* 368-371.
7 Potgieter "Preliminary Thoughts on Whether Vicarious Liability Should be Extended to the Parent-Child Relationship" 2011 *Obiter* 189 191.
8 66 of 1995.

relationship between employer and employee. In addition, vicarious liability is compared to other forms of strict liability such as that introduced by the Consumer Protection Act.[9] Finally, the article deals in some detail with Froneman J's judgment in *F* that argues that the direct – and not strict liability – of an employer may in some instances form the basis of a delictual claim against that employer.

2 Vicarious and Other Forms of Liability

Vicarious liability may in general terms be defined as "the *strict liability* of one person for the delict of another".[10] Initially foreign to South African law, vicarious liability had been borrowed from English law.[11] Many theories attempt to explain the rationale and basis of vicarious liability, such as the employer's fault in selecting the employee, the interest and profit theory, the solvency theory, and the risk or danger theory, to mention a few.[12] Regardless of the basis of vicarious liability, it is now well established that one person can be vicariously liable for the damage caused by another.[13] This type of liability is an exception to the "basic premise of the law of delict that fault is a prerequisite for liability".[14] Remember, according to the fault theory the wrongdoer had to act with fault, either intent or negligence, in order to incur delictual liability,[15] whereas strict liability is liability in the absence of fault. Recognised instances of strict liability are rare and stem mainly from modern legislation (such as the Consumer Protection Act)[16] or common law actions of Roman origin.[17] Already before the enactment of the Consumer Protection Act[18] writers argued in favour of strict product liability. In the words of Van der Walt:

9 68 of 2008.
10 Neethling *et al* 365 (authors' emphasis).
11 *Ibid;* Calitz "Vicarious Liability of Employers: Reconsidering Risk as the Basis for Liability" 2005 *TSAR* 215 217; *Grobler v Naspers Bpk* 2004 4 SA 220 (C) 277E-F.
12 For a detailed discussion, see Potgieter 2011 *Obiter* 189 191-192. See also Neethling *et al* 365-366.
13 Neethling *et al* 365.
14 Potgieter 2011 *Obiter* 189.
15 Neethling *et al* 329.
16 Botha & Joubert "Does the Consumer Protection Act 68 of 2008 provide for Strict Liability? – A Comparative Analysis" 2011 *THRHR* 305 305-319.
17 Van der Walt & Midgley *Principles of delict* (2005) par 28.
18 In terms of s 61 Consumer Protection Act, a producer, importer, distributor or retailer of goods will be liable for defective products. These categories of persons are liable jointly and severally. They are also liable wholly or partly as a consequence of (a) supplying any unsafe goods; (b) a product failure, defect or hazard in any goods; or (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be. At first glance it thus seems that the Consumer Protection Act imposes strict liability on all of these categories of persons but a closer look to the provision and the defences in s 61(4) makes it clear that a form of strict liability is only applicable to

> The recognition of strict liability in the case of products liability can be justified by various other factors: the public interest in the physical-psychological well-being of human beings requires the highest measure of protection against defective consumer products; by marketing and advertising the manufacturer creates a belief in the minds of the public that his product is safe; strict liability serves as encouragement to take the utmost degree of care; the manufacturer is, from an economic perspective, the party most capable of absorbing and spreading the risk of damage by price increases and insurance.[19]

Strict liability, however, is not only applied to product liability in South Africa. It has been applied for quite some time (and has been well-established) to the employment relationship where an employer may be held vicariously liable for delicts committed by employees. In addition, instances where vicarious liability is applied include relationships between a principal and agent; motor vehicle owner and driver as well as state and public school.[20] Potgieter[21] discusses the possibility of extending vicarious liability to the parent-child relationship and, after taking into account various theories, case law, policy considerations and foreign law, concludes as follows:

> As has been submitted, the reasons for vicarious liability of parents for the conduct of their children have to be sought in a number of policy considerations, for example the risk created by bringing a child into the world, the fact that the parent rather than the impecunious child is usually better suited to pay for (or to distribute through insurance) the loss caused by the child, the notion that possible liability for a child's conduct may cause the parent to instruct, control, supervise, guide and discipline the child more thoroughly regarding potentially damage-causing behaviour. Naturally the existence of a parent-child relationship should not without further ado give rise to parental liability, just as an employment relationship in itself does not constitute vicarious liability: prerequisites must be satisfied for liability to

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manufacturers and importers. It thus clear that distributors and retailers can escape liability by proving that "it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers".

19 Van der Walt "Die deliktuele aanspreeklikheid van die vervaardiger vir skade berokken deur middel van sy defekte produk" 1972 *THRHR* 254; in *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 4 SA 285 (SCA) 297, 300 the court stated that at that moment no urgent grounds existed to apply strict product liability in South African law and referred the possible imposition of strict liability to the legislature: "[F]urther, as to the argument that strict liability had to be imposed for commercial reasons, that it was preferable that this should be done by legislation after due Parliamentary process and investigation so as to produce a comprehensive set of principles, rules and procedures. Single instances of litigation could not possibly provide for the depth and breadth of investigation, analysis and determination necessary to produce, for use across the manufacturing industry, a cohesive and effective structure by which to impose strict liability".

20 Wicke "Vicarious Liability: Not Simply a Matter of Legal Policy" 1998 *Stell LR* 21 22; Neethling *et al* 363.

21 Potgieter 2011 *Obiter* 203.

> follow. Although the prerequisites for vicarious liability in the traditional categories may offer valuable guidelines, the requirements for a parent's vicarious liability, should it be recognised, will have to be worked out with reference to the distinctive nature of the parent-child relationship in a particular fact-situation. In this regard it will be useful to investigate instances in other legal systems where parents are being held liable for the damage caused by their minor children.

Another interesting example is corporate criminal liability where individuals who form part of the corporate body can be held liable either on the basis of the doctrine of identification or vicarious liability.[22] In terms of the doctrine of identification "a corporate body may be identified with certain key individuals who act on its behalf" whereas vicarious liability "lays a corporate body open to liability for crimes committed by individuals in the course of their duties, or in the scope of their employment and with the intent to further the interests of the corporation".[23]

To return to the employer-employee relationship: One of the first cases that dealt with liability of an employer for delicts of his employees was *Feldman (Pty) Ltd v Mall*,[24] where the court stated that a master who uses servants creates risk of harm to others if the servant proves to be "negligent, inefficient or untrustworthy" and "[i]t follows that if the servant's acts in doing his master's work or his activities are incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party the master is responsible for the harm".[25]

It is generally accepted that the following requirements must be met in order for an employer to be vicariously liable: An employment relationship must exist at the time when the employee committed the delict and the employee must have acted within the scope of his employment.[26] For an employer to be held liable the person committing the delict must therefore be an employee[27] and must have acted in the

22 Borg-Jorgensen & Van der Linde "Corporate Criminal Liability in South Africa: Time for Change? (part1)" 2011 *TSAR* 452 453-454.
23 *Ibid*.
24 1945 AD 733.
25 741.
26 *Mkhize v Martens* 1914 AD 382 390.
27 In terms of s 213 Labour Relations Act 66 of 1995 (LRA), an employee is defined as: "(a) any person, excluding an independent contractor, who works for any person or for the State and who receives, or is entitled to receive, any remuneration; (b) any other person who in any manner assists in carrying on or conducting the business of the employer." The common law definition of an employee has been expanded in order to extend protection to as many persons as possible. The definitions of "employee" in the LRA as well as the Basic Conditions of Employment Act 75 of 1997 (BCEA); the Compensation for Occupational Injuries and Diseases Act 130 of 1993; the Unemployment Insurance Act 63 of 2001; and the Skills Development Act 97 of 1998 all expressly exclude an independent contractor from the definition of "employee". It is therefore clear that a contract of mandate which involves an independent contractor is

scope of his employment. Some kind of *nexus* must exist between the employee's wrongful conduct and the relationship between him and his employer.[28] The determination of what is inside or outside the scope of employment has proved to be quite problematic over the years. In *Mkhize*,[29] for example, it was stated that "the master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by the servant solely for his own interest and purposes and outside his authority is not done in the course of his employment, even though it may have been during his employment". In *Boland Bank Bpk v Bellville Munisipaliteit*[30] the court explained the problem regarding the course-of-employment-requirement as follows:

> Die probleem is egter om, na aanleiding van die feite van die betrokke saak, te bepaal of die gewraakte optrede deur die werknemer uitgevoer is binne of buite sy werksbestek of diensbetrekking. Die blote feit dat die gewraakte optrede plaasvind terwyl die werknemer met sy werkgewer se sake bemoeid is, is opsigself nie genoeg om die werkgewer aan aanspreeklikheid bloot te

specifically excluded from the doctrine of vicarious liability (See *Langley Fox Building Partnership (Pty) Ltd v De Valance* 1991 1 SA 1 (A) 8; *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) where the court listed factors that are indicative of an employment relationship as well as *Midway Two Engineering & Construction Services v Transnet Bpk* 1998 3 SA 17 (SCA) 23). *Niselow v Liberty Life Association of Africa Ltd* (1998 *ILJ* 752 (SCA)) dealt with the definition of "employee" in terms of the Labour Relations Act 28 of 1956. The Court in the *Niselow* case held (753I) that an employee at common law undertakes to render a personal service to an employer. The Court further held that regardless of the second part of the definition ("... any other person whomsoever who in any manner assists in the carrying on or conducting of the business of an employer") it also did not bring the individual in that case within the scope of the definition. The Court based this on distinguishing a contract of work and a contract of service. Consequently, the appellant in that case, who was an agent contracted to canvass insurance business for the respondent, was carrying on and conducting his own business rather than assisting in the carrying on or conducting of the business of the respondent. In the labour appeal court the court noted, however, that the supreme court of appeal "did not have the benefit of argument on the second part of the definition of 'employee'". (See also Smit & Botha's discussion on whether members of parliament ere employees and employers for purposes of the Protected Disclosures Act 26 of 2000 ("Is the Protected Disclosures Act 26 of 2000 Applicable to Members of Parliament? 2011 *TSAR* 815 815-829)). In 2002, the LRA and BCEA were amended to include the rebuttable presumption of employment in order to assist persons who claim to be employees rather than independent contractors. These factors are: (i) the manner in which the person works is subject to the control or direction of another person; (ii) the person's hours of work are subject to the control or direction of another person; (iii) in the case of a person who works for an organisation, the person forms part of that organisation; (iv) the person has worked for that person for an average of at least 40 hours per month over the last three months; (iv) the person is economically dependent on the other person for whom he or she works or renders services; (v) the person is provided with tools of trade or work equipment by the other person; or (vi) the person only works for or renders service to one person.

28 Wicke 1998 *Stell LR* 21 30.

29 394.

30 1981 2 SA 437(C) 444-445.

> stel nie. Die toets is of die gewraakte daad op 'n onregmatige wyse van uitvoering van die werk wat aan die werknemer toevertrou is, neerkom, of iets is wat bykomstig is tot, of verbonde is aan sy dienste.[31]

It is clear from various examples over the years that there is no general rule when it comes to the question whether the act of the employee falls inside or outside the scope of employment. It is largely dependent on the facts of each case.[32] To deal with this difficulty, the courts have developed certain sub-rules. These include the so-called deviation cases,[33] "intentional misconduct (wilful wrongdoing) where the employee did not act in furtherance of the employer's business" and unauthorised transport of passengers in the vehicles of the employer.[34] In the past, deviation cases were the focus of most cases dealing with vicarious liability and the Supreme Court of Appeal in *Minister of Safety & Security v Jordaan t/a Andre Jordaan Transport*[35] held that

> [i]n each case, whether the employer is to be held liable or not must depend on the nature and extent of the deviation. Once the deviation is such that it cannot be reasonably held that the employee is still exercising the functions to which he was appointed or still carrying out some instruction of his employer, the latter will cease to be liable. Whether that stage has been reached is essentially a question of degree.

The court then added that a close consideration of the facts will be taken into account on a case to case basis.[36]

In 2003 and 2004 two very important judgments with regard to liability of employers emerged from the Labour Court and the High Court respectively. These cases were *Ntsabo v Real Security CC*[37] and *Grobler*.[38] *Ntsabo* dealt with the statutory liability of an employer for unfair discrimination or harassment[39] of employees against other employees, whereas *Grobler* dealt with an employer's vicarious liability

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31 See also *Ngubetole v Administrator, Cape* 1975 3 SA 1 (A); *Viljoen v Smith* 1997 *ILJ* 61 (A); *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1997 2 SA 591 (W); *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 1 SA 372 (SCA); *Ess Kay Electronics Pty Ltd v First National Bank of Southern Africa Ltd* 2001 (SA) 1214 (SCA).

32 Wicke 1998 *Stell LR* 21 30; Calitz 2005 *TSAR* 215 218.

33 Wicke 1998 *Stell LR* 21 31. In *Feldman (Pty) Ltd v Mall (supra)* the court also dealt with deviation cases and said that it is a question of degree with regard to space and time when determining if the act of an employee falls within scope of employment or not.

34 Calitz 2005 *TSAR* 215 218.

35 2000 *ILJ* 2585 2588D-F.

36 See also *Viljoen v Smith (supra)* and *African Guarantee and Indemnity Co Ltd v Minister of Justice* 1959 2 SA 437 (A) with regard to this matter.

37 (2003) 24 *ILJ* 2341 (LC).

38 This case was taken on appeal as *Media 24 Ltd v Grobler* 2005 6 SA (SCA).

39 Etsebeth "The Growing Expansion of Vicarious Liability in the Information Age (part 2)" 2006 *TSAR* 752 points out that it is "evident that companies can be held vicariously liable in the case of the inappropriate use/abuse of corporate internet and email facilities, in the form of harassment, discrimination, defamation (resulting from ill-conceived wording in an e-mail), copyright infringement (where the employee carelessly downloads

for sexual harassment by another of its employees. The facts in these cases were not similar but, when compared, they clearly illustrate a development of the common law with reference to vicarious liability. The *Grobler* case included sexual harassment, applied common law remedies rather than statutory remedies, and used the High Court to enforce these remedies, whereas *Ntsabo* utilised the statutory remedies and used the Labour Court to enforce these remedies.[40] In *Ntsabo* the court found that the supervisor's conduct was a contravention of section 60 of the Employment Equity Act[41] and that it amounted to sexual harassment and constituted unfair discrimination which is prohibited in terms of section 6(3) of that Act. Damages were awarded to *Ntsabo* for breach of this duty. In *Grobler* the court held that the employer was vicariously liable for the supervisor sexually harassing Mrs Grobler. It has clearly been established that whether an employee acts within the scope of his employment or not is a subjective-objective test.[42] In *Minister of Police v Rabie*,[43] the court explained the so-called standard test[44] for vicarious liability as follows:

> It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does fall, some reference is to be made to the servant's intention [...] The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.

In 2005 the Constitutional Court in *K v Minister of Safety & Security*[45] again examined the *sufficiently-close-connection*-test (as mentioned in *Rabie* and discussed below).[46] The Supreme Court of Appeal dismissed the appeal due to the fact that the employees' acts were outside the course and scope of their employment and that the question in deviation cases was "whether the deviation was of such a degree that it can be said that in doing what he or she did the employee was still exercising functions to which he or she had been appointed or was still carrying out some instruction of his or her employer".[47] It is however possible for an

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and disseminates copyright material and software), criminal liability (if child pornography is downloaded) and even liability under the law of contract (where an employee inadvertently forms a contract through an email)".

40 See for detailed discussion Smit & Van der Nest "When Sisters are doing it for themselves: Sexual Harassment Claims in the Workplace" 2004 *TSAR* 520 520-543; Le Roux "Sexual Harassment in the Workplace: Reflecting on *Grobler v Naspers*" 2004 *ILJ* 1897 1897-1900; Whitcher "Two Roads to an Employer's Vicarious Liability for Sexual Harassment: *S Grobler v Naspers Bpk en 'n Ander* and *Ntsabo v Real Security CC*" 2004 *ILJ* 1907 1907-1924.

41 55 of 1998.

42 *Neethling et al* 368.

43 1986 1 SA 117 (A) 134.

44 *Neethling et al* 368-369.

45 [2005] ZACC 8; 2005 6 SA 419 (CC); 2005 9 BCLR 835 (CC).

46 See 3 1 4 1 below.

47 *K v Minister of Safety & Security* 2005 26 *ILJ* 681 (SCA) *par* 4.

employee to act within the course and scope of his employment and outside of it at the same time. This "dual capacity"[48] of the employee again featured in *Bezuidenhout NO v Eskom*.[49] *In casu* the court held that when there is an express instruction not to transport passengers while the employee is entrusted with driving the employer's vehicle and the passenger is then injured, the employer was not vicariously liable because the employee did not act within the course and scope of employment. This illustrates that an employer will not be vicariously liable for all actions[50] of employees. On the other hand, it must be pointed out that an employer will not escape liability merely because the conduct was "fraudulent,[51] unauthorised and undertaken for the employee's own interest".[52] If a "sufficiently close link between the employee's conduct and what the employer authorises to perform is established, the employer is vicariously liable".[53]

3 Critical Analysis of *F v Minister of Safety and Security*

3 1 Facts

The facts of the case were in short that Ms F visited a night club in George on 14 October 1998.[54] After midnight (on 15 October) she was offered a lift home by one Van Wyk. There were two other passengers in the car.[55] It was also common cause that Van Wyk was a police officer on standby duty.[56] The court referred to Standing Order 6, issued by the National Commissioner of the South African Police Service in June 1997, and explains that "standby duty" means that Van Wyk could have been called upon to "attend any crime-related incident if the need arose".[57] In addition, Van Wyk had the use of an unmarked vehicle if he needed it for

48 Le Roux "Vicarious Liability: Revisiting an Old Acquaintance" 2003 *ILJ* 1879.
49 2003 24 *ILJ* 1084 (SCA).
50 See *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* 2003 24 *ILJ* 1337 (SCA) where an employee (a barman) assaulted a patron because he was upset about the quality of service and made comments about it. The barman later followed the patron outside and assaulted him. The Court held that the employee's conduct was a personal act of aggression that was neither in furtherance of the employer's interest nor under his authority.
51 See *Minister of Finance v Gore* 2007 1 SA 111 (SCA) where the court held that the Minister of Finance is vicariously liable for the employees' deliberate dishonest actions (fraud) in the tender process. The court held the Minister is liable "if objectively seen, there is a sufficiently close link between the self-directed conduct and the employer's business" (par 28); see also Neethling & Potgieter "Middellike Aanspreeklikheid vir 'n Opsetlike Delik" 2007 *TSAR* 616 for discussion of the *Gore*-case.
52 Smit & Van der Nest 2004 *TSAR* 520 536.
53 *Ibid*.
54 Par 8.
55 *Ibid*.
56 Par 9.
57 *Ibid*.

standby duty and he was being paid the prescribed hourly tariff. Ms F also noticed that the vehicle was equipped with a police radio.

Ms F was seated on the back seat of the vehicle with one of the other passengers when they left the club. After they had been dropped off, Van Wyk asked her to move to the front passenger seat, which she did.[58] Upon moving to the front seat, Ms F saw a pile of police dockets and when she asked Van Wyk about these, he replied that he was a private detective. Ms F understood that he was a policeman.[59] Instead of driving her home as agreed, Van Wyk drove towards Kaaimansrivier and told Ms F that he wanted to see his friends before dropping her off. At that point Ms F became suspicious.[60] When they approached Kaaimansrivier, Van Wyk stopped the vehicle at a dark spot. Ms F got out of the vehicle, ran away and hid. Van Wyk left after a while.[61] After a while Ms F approached the road and hitchhiked. Van Wyk's vehicle then stopped next to her and again he offered to take her home. Ms F was desperate and agreed. She testified that she believed that Van Wyk was a policeman and she trusted him despite her suspicions.[62]

It is on their way to Ms F's home that Van Wyk unexpectedly turned off the road near Kraaibos. Again Ms F tried to flee but Van Wyk prevented her and then assaulted and raped her.[63] He threatened to kill her if she told anybody.[64] However, Ms F reported the crime and this resulted in Van Wyk's conviction and subsequent sentence.[65]

Upon reaching the age of majority in December 2005, Ms F instituted an action for damages against the Minister of Safety and Security and Van Wyk.[66]

3 2 Judgment of the High Court

Bozalek J applied the test that was laid down in *K* and found the Minister vicariously liable for the damages suffered by Ms F.[67] The court ruled that there was a sufficiently strong link between Mr Van Wyk's actions and his employer's business to justify that conclusion. The court highlighted three factors in support of its conclusion, namely Van Wyk's being in possession of a police vehicle, Ms F's understanding that Van Wyk was a policeman, and what the court refers to as the nature of the assistance that Van Wyk pretended to offer as well as the normal task of members of the police service, which is "to protect vulnerable groups such as

58 Par 10.
59 *Ibid.*
60 Par 11.
61 *Ibid.*
62 *Ibid.*
63 Par 14.
64 *Ibid.*
65 Par 15.
66 Par 16.
67 *F v Minister of Safety and Security* 2010 1 SA 606 (WCC).

women and children".[68] Not surprisingly, the Minister raised the issue of Ms F's victory potentially opening the floodgates to the state's strict liability for delictual acts committed by the police. Bozalek J's response was that the test in K was sufficiently flexible to allow a case-by-case determination of the issues.[69]

Various prominent academics (such as Neethling[70] and Scott[71]) commented on the judgment of the High Court. In his discussion of the High Court judgment, Neethling referred to *K* as well as *Minister of Safety and Security v Luiters*[72] and specifically commented that the "authoritative and well-reasoned"[73] decision of Bozalek J deserves his full support.[74] The fact is that the state is in the same position as other employers and that the state may escape vicarious liability when it can show that the official was not "*pro hac vice* an employee of the state at the time when the delict was committed."[75] The latter will be the case when the state did not at the particular time have the right to control the employee. Control, according to Neethling, "does not mean factual control but the right of control".[76] Therefore, control is not only important when it is ascertained that an employer-employer relationship existed but it is also a factor that must be taken into account when determining whether "a sufficiently close link existed between the conduct of the employee and his employment, and therefore whether the employee acted within the scope of his employment".[77]

It must, however, be noted that generally a distinction is drawn between on-duty or off-duty misconduct. If, for example, the conduct is regarded as off-duty and it is determined that it falls outside the scope and course of employment, the employer will thus not be held vicariously liable. Generally speaking, an employer can only take action against an employee if his conduct is linked to the workplace. However, when an employee's conduct falls outside the workplace the employer can hold an employee accountable for this conduct if it impacts on the business of the employer. Such conduct would impact on the employer's business "if it prejudices a legitimate business interest or undermines the relationship of trust and confidence that is a necessary component of the employ-

68 Par 18.
69 Par 19c.
70 Neethling "Vicarious Liability of the State for Rape by a Police Official" 2011 *TSAR* 186.
71 Scott "Middellike Aanspreeklikheid van die Staat vir Misdadige Polisie-optrede: Die Heilsame Ontwikkeling Duur Voort: *F v Minister of Safety and Security* 2010 1 SA 606 (WKK)" 2011 *TSAR* 135 135-147.
72 2007 2 SA 106 (CC).
73 Neethling 2011 *TSAR* 186 189.
74 See also Neethling "Liability of the State for Rape by a Policeman: The Saga Takes a New Direction: *Minister of Safety and Security v F* 2011 3 SA 487 (SCA)" 2011 *Obiter* 428 430.
75 Neethling 2011 *TSAR* 186 190.
76 *Ibid*.
77 *Ibid*.

ment relationship".[78] However, it must be pointed out that dismissal could only be justified if the misconduct, albeit on or off-duty, has a serious impact on the employment relationship.[79] On the point of misconduct and with reference to police officials, Neethling points out that:

> [t]he right of control is the highest level when a policeman is officially on duty (as in the *K* case), or where an off-duty officer has put himself on duty (as in the *Luiters* case), but the level of control is also acceptable where direct control is attenuated or limited because the officer is on standby-duty (as in the *F* case). But this does not mean that vicarious liability cannot exist where a police official committed a delict whilst off duty. Although the element of control is absent at that particular time, Bozalek J (618C-G) pointed out that the *Rabie* case (133-134) serves as authority for the proposition that the state does not necessarily escape vicarious liability for a police officer's delicts simply because he is formally off duty, dressed in private clothes and commits the delict purely for his private and selfish purposes. This will be the case where an off-duty policeman, without putting himself on duty, nevertheless *mala fide* purported to act as policeman in committing the delict in question.[80]

It must be stressed that Bozalek J also referred to the "creation of risk of harm" as formulated in *Rabie*.[81] Neethling and Scott both discuss this issue in some detail. Scott,[82] explains that the court attaches much value to the risk principle in light of the fact that Bozalek J was willing to hold the state liable, even though the employee had no previous convictions. Neethling is correct that the creation of risk-approach should be considered in *all* instances of intentional wrongdoing by an employee and that:

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78 Van Niekerk, Christianson, McGregor, Smit & Van Eck *Law@work* (2012) 269.

79 *Ibid*.

80 Neethling 2011 *TSAR* 189. Scott's (2011 *TSAR* 145) sentiments are similar to the extent where he concludes as follows: "Daar word aan die hand gedoen dat hierdie uitspraak onafwendbaar was in die lig van die presedent wat in die baanbrekende beslissing van regter O'Regan in die *K*-saak neergelê is. Die enigste werklike verskil tussen die onderhawige feitestel en die feite in daardie saak, is dat die polisiebeampte in hierdie geval, anders as in dié van *K*, nie voltyds aan diens was nie. Daar kan volle instemming betuig word met die feit dat hierdie verskil nie voldoende rede was om die onderhawige geval van die *K*-saak te onderskei en slegs om daardie rede 'n teenoorgestelde beslissing te vel nie. Die motivering wat regter Bozalek verskaf vir sy hantering van die effek van die feit dat die tweede verweerder ten tyde van delikspleging op blote bystandsdiens was, is myns insiens ten volle geregverdig en lofwaardig. Die gevolg van al die statutêre bepalings en *dicta* uit die regspraak wat die regter aanhaal ter stawing van sy interpretasie van die gevolg van bystandsdiens word trouens treffend geparafraseer in 'n enkele sinnetjie uit *Rabie v Minister of Police* 1984 1 SA 786 (W), waarin die standaardtoets finaal sy beslag gekry het: 'When a member of the South African Police Force is off duty it cannot be suggested that his statutory duties as a member of the Force or that his authority are suspended' (791F)."

81 625B-626C.

82 2011 *TSAR* 135 143-144 (authors' emphasis).

> [a]s a general guideline an employer should be liable for an (intentional) delict by his employee if his appointment and work conditions enabled him to commit the delict (and hence created a heightened risk of prejudice) in such a manner.[83]

This heightened risk of prejudice would be present where employees (such as police officials) have been placed in a position of trust or authority and the possibility of abuse and as well as the fact that the employee was on duty (or stand-by duty, as in the *F* case) when the delict was committed, should be indicative of liability and should be of increasing weight the more the employee used the "trappings" of his work while committing a delict on duty.

It seems that employers are at risk of always getting the short end of the stick and this seems harsh. However, if the employer (in the current discussion the state) is held to be vicariously liable and all of the above-mentioned are established, the employer can discipline or dismiss an employee for misconduct. Fairness dictates that, in addition to a fair reason, the employer must follow a fair procedure. It will not make a difference if the employer decides not to dismiss the employee for his misconduct. *Sidumo v Rustenburg Platinum Mines Ltd*[84] is useful in this regard. The Constitutional Court lists the following factors that must be taken into account when a commissioner is called upon to determine whether a misconduct dismissal was fair: (i) the totality of the circumstances; (ii) the importance of the rule that has been breached by the employee; (iii) the employer's reason for imposing the sanction of dismissal; (iv) the employee's reason for challenging the sanction of dismissal; (v) the harm caused by the employee's conduct; (vi) considerations of other corrective measures; (vii) the impact the dismissal will have on the employee; and (viii) the employee's service record.[85] In addition to taking action short of dismissal (or dismissal) the employer can also exercise his right of recourse against the errant employee. For instance, an employer can make deductions from an employee's remuneration. Such deductions are, however, subject to the employee agreeing in writing to the deduction or where the deduction is required or permitted in terms of a law, collective agreement, court order

83 Neethling 2011 *TSAR* 186 191.

84 2007 28 *ILJ* 2405 (CC) par 78. See also *Lipka v Voltex PE* 2010 31 *ILJ* 2199 (CCMA) in this regard.

85 The Code of Good Practice: Dismissal sets out the requirements of a fair pre-dismissal procedure in cases of alleged misconduct. This procedure is laid out in item 4(1) as follows: "Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal inquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare a response and to the assistance of a trade union representative or fellow employee. After the inquiry, the employer should communicate the decision taken, and preferably furnish the employee with a written notification of that decision."

or arbitration award. When a deduction is made due to a written agreement it may only be made to reimburse an employer:

> (a) for loss or damage only if the loss or damage occurred in the course of employment and was due to the fault of the employee; (b) the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made; (c) the total amount of the debt does not exceed the actual amount of the loss or damage; and (d) the total deductions from the employee's remuneration in terms of this subsection do not exceed one-quarter of the employee's remuneration in money.[86]

With reference to the police services, Scott concludes as follows:

> Dit is duidelik dat daar 'n balans gevind sal moet word tussen die toenemende "wetteloosheid" van die sentrale polisiediens enersyds, en die groeiende blootstelling van die algemene publiek aan wetteloosheid en misdaad, andersyds. Inagneming van die konstitusionele imperatiewe wat betref veiligheid en sekuriteit, wat in talle meer onlangse wetgewende maatreëls en regspraak gestalte gevind het (soos deeglik uit die onderhawige saak blyk), noodsaak na my mening 'n uitspraak soos dié van regter Bozalek: mens kan as't ware sê dat hoe hagliker die posisie van lede van die publiek as gevolg van die vergrype van lede van die polisiediens word, hoe swaarder word die *konstitusionele plig* van die staat om daardie tipe gewraakte optrede goed te maak. In 'n mate kom dit dus voor – en tereg – dat die staat wesentlik en vir praktiese doeleindes as 'n versekeraar optree vir die vergrype wat tot hierdie soort nadeel aanleiding gee. Hierdie toedrag van sake is egter aan die staat self te wyte, hoofsaaklik as gevolg van die versuim van die staat om 'n goedopgeleide, professionele polisiediens te ontwikkel en in stand te hou. Hy wat met sy bewuste aanstellingsbeleid bedenklike karakters in uniform steek, moet die gevolge dra wat deur sy optrede veroorsaak word. Indien daar dan "fouteer" moet word wat die verskynsel van middellike staatsaanspreeklikheid vir polisiedelikte betref, is dit sonder twyfel te verkies dat dit in die rigting van 'n wyer staatsaanspreeklikheid sal geskied, as in die rigting van die blootstelling van lede van die algemene publiek aan 'n bestel waar die enigste remedie van die slagoffer teen 'n platsak individu is. Ter tempering behoort egter dan heroorweeg te word of die staat sonder meer regresloos behoort in te staan vir die regskostes aangegaan ter verdediging van sy werknemers in litigasie waar beslis word dat die werknemers flagrant onwettig of onregmatig opgetree het.[87]

Scott also stresses that the principle ought to be that the legal costs must be claimed from the convicted criminal (the employee) and that vicarious liability should not exempt the primary perpetrator (the employee). He adds that the employer should be entitled to claim all legal costs that stem from him being held vicariously liable from the employee.[88]

86 S 34(1) & (2) BCEA.
87 Scott 2011 *TSAR* 135 147.
88 *Ibid*.

3 3 Supreme Court of Appeal

The supreme court of appeal reversed the decision of the High Court. Nugent JA, with Snyders JA and Pilay AJA concurring, argued that the state's liability in *K* was based only on the delictual omission of the on-duty policeman involved.[89] Second, it was argued that an intentional delictual commission cannot attract the state's vicarious liability. Proper interpretation of *K* leads one to conclude that the state is not vicariously liable for the positive delictual acts of police officials but only for their omissions.[90] In addition, because Van Wyk was not on duty, he was not engaged in the business of the police service and he had not breached his duty to protect Ms F. What was even more alarming was the court's conclusion that an off-duty policeman has no duty to protect members of the public and cannot therefore be held liable for their failure to protect a victim of crime. Because there was no duty upon Van Wyk, he cannot be held personally liable.[91] In addition, the majority stated that a policeman cannot be said to be "engaged in the affairs or business of his employer" when he commits rape and it cannot even be said that rape is an "improper mode" of exercising authority.[92]

The minority as per Maya JA made a more sensible observation. They stated that although the rape had nothing to do with the performance of Van Wyk's official duties, there was a sufficiently close link "between his acts of personal gratification and the business of the police service".[93] In addition, Van Wyk had offered to take Ms F home, thereby placing himself on duty. As well, because Van Wyk was a policeman, Ms F was induced to trust Van Wyk and accept a lift from him.[94] Another interesting observation by the minority was that policy considerations underpin vicarious liability in matters such as these. It is also an employer's duty to ensure that no one is injured as a result of an employee's improper or negligent conduct when performing his duties.[95] In addition, the minority found that *K* applies to so-called deviation cases. This particular aspect was discussed in some detail by the Constitutional Court.[96]

89 Par 20.
90 *Ibid*.
91 *Ibid*.
92 Par 22.
93 Par 23.
94 Par 24.
95 *Ibid*.
96 See par 3.4 below. The minority judgment of Maya JA, however, is not without criticism. Scott "Die Hoogste Hof van Appèl Smoor Heilsame Regsontwikkeling: *Minister of Safety and Security v F* 2011 3 SA 487 (HHA)" 2011 *TSAR* 773 786 argues that although the minority judgment was less substantial than the majority judgment of Nugent AJ, the minority judgment is preferred nevertheless. The reason Scott prefers it is because it followed the constitutional imperatives (as mentioned in *K*) to protect vulnerable groups such as women and children. The majority judgment is also criticised by this author and he concludes as follows: "[i]ndien die uitgebreide en meer beredeneerde meerderheidsuitspraak van appèlregter

3 4 Constitutional Court

The substantive issue before the Constitutional Court was whether the state could be held vicariously liable for damages arising from the rape of a young girl by a policeman on stand-by duty.

It is often said that when two lawyers agree, at least one did not apply his mind. In this particular case, Mogoeng J and with him Cameron J, Kampepe J, Nkabinde J Skweyiya J and van der Westhuizen J found in favour of Ms F. Froneman J came to the same conclusion but delivered a separate judgment and Yacoob J found in favour of the Minister. These three judgments will be discussed separately.

3 4 1 Majority Judgment

Mogoeng sets out to explain that vicarious liability "means that a person may be held liable for the wrongful act or omission of another even though the former did not, strictly speaking, engage in any wrongful conduct".[97] Employment is one such relationship and the employer is vicariously liable for the wrongful acts or omissions of an employee committed within the course and scope of employment "or whilst the employee was engaged in any activity reasonably identical to it".[98]

The court then explains that there are two tests to determine whether there is vicarious liability. The first is the standard test which applies when an employee commits a delict while going about the employer's business. The second test applies in the so-called deviation cases where the wrongdoing takes place outside the course and scope of employment.[99] The court explains that the matter *in casu* is definitely a deviation case and then proceeds to the pre-constitutional case of *Feldman* as authority. *In casu* an employee used his employer's vehicle to deliver parcels as instructed by his employer and afterwards attended to personal matters. He drank alcohol, drove back to his employer's premises and negligently collided with and killed the father of two dependants. The majority held the employer liable for the minors' loss of support.[100]

Mogoeng observes that *Feldman* proposes that employees are extensions of their employers and thus they create a risk of harm to

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Nugent nugter betrag word, tref dit die leser dat dit net sowel in die pre-konstitusionele era gelewer kon wees: daar is nie eens 'n enkele beroep op die grondwetlike beginsels wat in die *Carmichele*- en *K*-sake gefigureer het nie. Bloot wat hierdie aspek betref, is die hoogste hof van appèl se meerderheidsuitspraak 'n retrogressiewe stap in 'n andersins lofwaardige en gesonde regsontwikkeling wat die grondwetlike regte van verkragte en aangerande vroue en kinders betref".

97 Par 40.

98 Par 41.

99 *Ibid*.

100 Par 42. The court quotes Watermeyer CJ in *Feldman*. See discussion in 2 above.

others where their employees are inefficient or untrustworthy and herein lies the duty: that employers should ensure that their employees do not do the opposite of what they are supposed to do. In addition, where employees do the opposite of what they are supposed to do, a link must be established between the employers' business and the delictual conduct complained of in order to hold the employer vicariously liable.[101]

The court then comments on *Rabie*.[102] Here a mechanic who was employed by the police conducted a wrongful arrest, detention and assault of the plaintiff. At the time of the arrest, the perpetrator was not wearing a police uniform and he was off duty.[103] Mogoeng comments that *Rabie* is an example of an employee's radical deviation from the tasks incidental to his employment and also comments that *Rabie* illustrates that even if a servant acts solely for his own purpose (which is a subjective enquiry relating to his intent), if there is a sufficiently close relationship between the servant's acts and the "business of his master", the latter may be liable. In determining the link, an objective test is used.[104]

This argument was employed in both *Rabie* and *K*.[105] Therefore, the court formulates the crisp legal question *in casu* as "whether there was a close connection between the wrongful conduct of the policeman and the nature of their employment". The court correctly observes that Van Wyk did not rape Ms F in the furtherance of his duties or "the constitutional mandate of his employer."[106] *Au contraire!* Van Wyk pursued his own selfish interests and if one employs the subjective test in *Rabie* and *K*, there cannot be state liability. However, the second leg of the test which pertains to the objective enquiry raises both factual questions and questions of law.[107] The normative components that would determine the Minister's liability are stated as the state's constitutional obligations

101 Par 45.
102 1986 1 SA 117 (A).
103 Par 46.
104 *Rabie* 134C-E.
105 The court quotes the following passage from *K*: "The approach makes it clear that there are two questions to be asked. The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to 'what is sufficiently close' to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights." (Par 32).
106 Par 51.
107 Par 52. The court quotes O'Regan in *K* par 32.

to protect the public, the fact that the public is entitled to place trust in the police, the significance of a policeman having been on standby duty or off duty, the policeman's rape and simultaneous omission to protect the victim and whether there is an intimate link between the policeman's conduct and his employment.[108] The court then deals with each of these aspects at length.

As far as the state's constitutional obligations are concerned, the court sets out to explain that the state has a general duty to protect members of the public against violations of their constitutional rights.[109] The court mentions at the outset that the state has obligations to prevent crime and to protect members of the public.[110] The court mentions that this aspect, together with Ms F's constitutional rights, form the "prism through which this enquiry should be conducted".[111] As far as Ms F's constitutional rights are concerned, the court mentions her rights to freedom and security of the person[112] and inherent dignity as the rights that should be protected and respected.[113]

The court deals with sexual violence against women and children in some detail and re-iterates that the state should be at the forefront in the fight against these crimes and that there is definitely a normative basis for holding the state liable for the wrongful conduct of a policeman, albeit one on standby duty.[114]

The second matter pertains to trust. This lays a normative basis for holding the state liable and it provides the factual connection between the employment and the wrongful conduct.[115] In the case of the police service, reliance is placed on each individual member to execute its constitutional mandate to the public.[116] Here, the court again refers to *K* and makes the very important point that "the employment of someone as a police official may rightly be equated to an invitation extended by the police service to the public to repose their trust in that employee".[117] In addition, when that trust is abused there is a link between the employee's employment and the misconduct complained of.[118] Therefore, where a child or a woman places trust in a policeman and that trust is violated, he would be personally liable to that woman or child and, in addition, if the policeman's employment as a policeman secured the trust that was placed in him, the state might be held vicariously liable.[119] Therefore it makes little difference whether the policeman was

108 Par 52.
109 Par 53.
110 Par 54.
111 *Ibid.*
112 *Ibid.*
113 *Ibid.*
114 Par 62.
115 *Ibid.*
116 Par 63.
117 *Ibid. K* par 57.
118 Par 64.
119 Par 66.

on standby duty or off-duty: The perception of the victim and the breach of trust are of importance here.[120]

On the interplay between the commission and the omission, the Court provided a detailed judgment. The Supreme Court of Appeal ruled that the state can only be vicariously liable for an omission of an on-duty policeman who was under an obligation to protect a victim who was harmed in his presence and not for a positive act such as rape.[121] However, this proves to be an incorrect interpretation of *K* because in the latter case the Court stressed that there was a simultaneous act (rape) and omission (failure to protect the victim) and both were equally important.[122]

Mogoeng J then turns to the question relating to a sufficiently-close connection between the policeman's delictual conduct and his employment. He states that normative factors are important here. Ms F placed her trust in Van Wyk and she was betrayed.[123] Even though Van Wyk was on standby, the use of the police car facilitated the rape. In addition, he had the power to place himself on duty and the dockets in the car made Van Wyk identifiable as a policeman.[124]

The majority concludes that the Minister is vicariously liable, even though the case is distinguishable from *K* because of the fact that the policemen were on duty and Van Wyk was not.[125]

3 4 2 Froneman J

A very interesting point in *F* is that Froneman J also holds the Minister liable but for different reasons than the majority judgment as discussed in the previous paragraph. Interestingly, the learned judge observes that the majority holds the state liable on the basis of vicarious liability and believes that the "close connection" test as in *K* was correctly applied *in casu*.[126] As a means of introduction, Froneman J states:

> We should recognise that state delictual liability in circumstances where the state has a general constitutional and statutory duty to protect people from crime is usually 'direct', and not 'vicarious' in the sense traditionally understood by that term. This is because the state invariably acts through the instruments of its organs – state officials performing public duties. The difficult normative issue of when the state is liable in delict for their conduct should in my view no longer be dealt with as an aspect of vicarious liability

120 Par 68.
121 Par 69.
122 Parr 71-73.
123 Par 78.
124 Parr 80-81.
125 Also refer to Neethling & Potgieter "Deliktuele staatsaanspreeklikheid weens polisieverkragting" *LitNet Akademies* 9(1), March 2012 (accessed at www.LitNet.co.za on 27-07-2012).
126 Par 88.

> but rather as part of the normal direct enquiry into whether the elements of our law of delict are present when instruments of the state act.[127]

Froneman J identifies four reasons why it is necessary to move beyond vicarious liability. The first of these relates to the reason why the court in *K* found it necessary to use the "language of vicarious liability".[128] The second is to acknowledge the difficulties related to the language of vicarious liability where the state's constitutional and statutory duties are concerned, the third is the state's acting through its organs and employees and the fourth is the question whether wrongfulness as a delictual requirement is more suited to limit state liability than the "sufficiently close link" test.[129]

The judge mentions that the main judgment does not deal with direct liability because it was not argued. Nevertheless, Froneman J considers the pleadings and the evidence an appropriate basis for considering the state's direct liability. He mentions that possible prejudice that may have been caused by using direct liability could have been addressed by calling for further argument or for referring the matter back to the high court but as that had not taken place, the judge proceeds to apply the "substantive normative considerations pioneered by *K*".

As far as the language of vicarious liability is concerned, Froneman J begins by explaining that vicarious liability in its traditional formulation "may imply that there is no normative link between the conduct of an innocent employer ... and the culpable conduct of the employee".[130] However, there is a normative link between the employer-employee relationship and the delict and this link is the requirement that the delict must have been committed in the course and scope of the employee's employment.[131] According to the judge, this requirement gave rise to two "fallacies", which was that scope of employment was a question of fact, and also that this rule had to be treated as separate from the reasons of justification for the rule.[132]

According to Froneman J, *K* exposed both these false assertions. He states that vicarious liability has a normative character which relates not to the wrongfulness issue but to the "sufficiently close connection" investigation.[133] In addition, *K* uses the language of vicarious liability as this was the basis upon which state delictual liability was always approached. The learned judge provides a short historical overview of vicarious state liability and then concludes that even though *K* applied the values of the Constitution, that judgment still uses traditional vicarious liability.[134] He doubts whether it is at all appropriate and quotes

127 Par 89.
128 Par 90.
129 *Ibid.*
130 Par 93.
131 *Ibid.*
132 Par 94.
133 Par 96. Froneman J refers to par 32, 45 and 49 of *K*.
134 Par 98.

Baxter[135] who argues that where state officials act, they are not employees but rather the state or public authority itself.

The next nine paragraphs of the judgment deal with the difficulties of vicarious liability and these may be summarised as the overlap between vicarious liability and direct liability on the one hand, and the potential conceptual difficulties on the other. As a means of introducing the discussion on these difficulties, Froneman J refers to O'Regan J in *K* where she concluded that the state was vicariously liable in delict for three reasons. First, the state and policeman had a general statutory and constitutional duty to prevent crime and protect members of the public. Second, on the facts, the policeman had a specific duty to assist K and third, the harmful conduct of the policeman constituted a simultaneous commission and omission because the omission was their failure to protect K from harm.[136]

From this observation the Supreme Court of Appeal in *F* deducted that only omissions by policemen provided a basis for delictual liability and where there was a positive act, there could not be vicarious liability. The SCA also interpreted *K* to signify that where the policemen were personally liable for their omissions, the state was vicariously liable, but the state could also have been directly liable for its own omission.[137] In addition, Froneman J mentions that with the breach of public duties, it is essentially about the legal duty not to cause harm negligently to another and normally this forms part of an enquiry into wrongfulness that is already dealt with when looking at the conduct of the employee.[138] Overall, it seems that the distinction between vicarious liability and direct liability is not all that clear and for this reason, according to Froneman J, as well as because of "potential conceptual difficulty", the question is whether the delictual liability of the state should not perhaps be approached differently.[139]

This then brings Froneman J to a discussion of direct liability of the state.[140] He begins by stating that the state is a legal person in South

135 Baxter *Administrative law* (1984) 63-632.
136 Par 100.
137 Par 101.
138 Par 104.
139 Par 108.
140 Although Neethling 2011 *Obiter* 428 437-438 also in the latter part of 2011 commented on the Supreme Court of Appeal's judgment in *F* his concerns regarding direct liability are noteworthy. He feels that the state can only be vicariously, and not directly, liable for delicts of employees because "[o]n the face of it, there does not seem to be any room for direct liability of the state where the sate itself committed a wrong or delict acting through employees. Seen in this light, Nugent JA's submission that the SCA decisions in *Van Duivenboden*, *Van Eeden*, *Hamilton* and *Carmichele* (in 2004), none of which was even based on intentional police wrongdoing, should have been founded upon direct liability of the state acting through the instrument of its employees, cannot be accepted. In this regard Nugent JA made no attempt to explain how the conduct of employees acting as functionaries of the state for the purposes of its direct liability, differs from their conduct acting in the

African law.[141] In addition, organs of the state are only permitted to perform the functions entrusted to them by the Constitution.[142] This is also true of the police service and "the acts of state organs are at the same time acts for which the state is liable, because they are the state's own acts".[143] The time is then right to further develop *K* and to accept direct and not vicarious liability as the basis for the state's delictual liability. According to Froneman J, direct liability had been dismissed in *Mhlongo and Another NO v Minister of Police*,[144] but that was before the 1996 Constitution.[145]

The matter of wrongfulness is discussed in detail. Froneman J starts a novel argument by explaining that the requirement for wrongfulness as well as the "sufficiently close connection" test involve questions of fact and law. However, it does matter whether the court makes this normative assessment in respect of wrongfulness or as part of the "close connection" test. So, where a state employee breaches a public duty there is direct liability. The remainder of the discussion does not introduce anything new on wrongfulness and only reiterates that constitutional values must be taken into account in establishing whether there was wrongfulness.[146] One of these constitutional values is accountability and that was evident in cases such as *Minister of Safety and Security v Van Duivenboden*[147] and *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*.[148]

What is strange about Froneman J's remarks on wrongfulness is that he states that this element "is determined on the assumption of negligent state conduct on the part of the official directly involved in the breach of a public duty" and that "[w]hen one turns to the actual determination of negligence this assumption obviously falls away".[149] However, it is not

course and scope of their employment for the purposes of the state's vicarious liability. This can only lead to confusion and create legal uncertainty in an area where clarity existed beforehand. Clearly, in all these cases it was the employees who, while acting in the execution of their legislative duties, negligently breached their duty to prevent crime and protect the public. For their wrongs or delicts the state was correctly held vicariously liable."

141 Par 109.

142 *Ibid*.

143 *Ibid*.

144 1978 2 SA 551 (A).

145 Par 110.

146 Par 121.

147 2002 6 SA 431 (SCA).

148 2001 4 SA 938 (CC). See also Neethling & Potgieter (n 124). The authors do not seem to prefer vicarious liability to direct liability or *vice versa*. Instead, they summarise that one may consider replacing the constitutional court's "constitutional" approach to vicarious liability with direct liability as the requirement of a sufficiently close connection in vicarious liability cases which deal with rape is over extended.

149 Par 125.

necessary to dwell on this issue as the judge ultimately applies the test for wrongfulness first on the particular facts.

In applying the principles so laboriously explained, Froneman J asks first whether Van Wyk and the Minister owed Ms F a public, legal duty and what the nature and content of such a duty might be.[150] In dealing with this issue, the judge remarks that Van Wyk's conduct constituted a commission because of the rape and a simultaneous omission because of a failure to protect her.[151] In Froneman J's opinion, the facts do point to the existence of a legal duty which was intentionally disregarded by Van Wyk. The judge states:

> Similar considerations apply here. I accept that there is no general obligation on the police to protect citizens from crime where they are not on duty. But the converse, that they never have that obligation when not on duty, is not true either. While off-duty, they are entitled to arrest without a warrant. They may place themselves on duty when the occasion warrants it. When they are placed in possession of police resources by virtue of their status as police officials when they are off-duty, particular circumstances might oblige them to assume their protective duties towards the public. Those circumstances would arise where, objectively, vulnerable people place their trust in them because they are police officials.[152]

In Froneman J's opinion, wrongfulness had been established.

As far as negligence is concerned, the judge explains that Van Wyk's actions were deliberate and negligent. No explanation is provided for this particular conclusion. However, it is the judge's mission to find that the state is directly liable and it is well-known that once wrongfulness had been determined, the next step is to determine fault. The judge finds that there is no evidence that the state took other reasonable measures to prevent Van Wyk from committing a delict. He was allowed to continue service despite his previous convictions and this factor alone points to the foreseeability of harm.[153] The judge fails to deal in detail with the second leg of the test for negligence, which is preventability and one is left to assume that it was within the Minister's power to suspend or dismiss Van Wyk and in doing so prevent him from using police facilities to perpetuate crime.

3 4 3 Minority Judgment

Yacoob J, with Jafta J concurring, ruled that the Minister was not vicariously liable and they reiterated that the test for vicarious liability was laid down in *K*. They are of the view that, unless the court holds that this particular case was decided incorrectly, the flexible test in *K* should be applied.

150 Par 136.
151 Par 137.
152 Par 146.
153 Par 148.

The first observation that is made is that Van Wyk "had not been on duty, either subjectively or objectively".[154] In any event, it is not a decisive factor whether a policeman is on or off duty but, according to the minority, Van Wyk was on a "frolic of his own".[155] In addition, there was "no official police promise of safe carriage".[156] On the matter of trust, the learned judges conclude that there were no reasonable grounds for Ms F to trust Van Wyk, rather, she had every reason to distrust him and went with him because she was in a desperate situation.[157]

On the matter of a simultaneous commission and omission, the minority argued that neither existed because Van Wyk was not on duty.[158] In the circumstances they conclude that there was not a sufficient connection between Van Wyk's deeds and his employment as a policeman.[159]

4 Some Observations

From the case under discussion various observations may be made. It does seem that government liability cases are on the rise and some do involve disturbing, violent conduct by policemen such as the one in Van Wyk.

The first observation is that, when properly applied, vicarious liability serves a purpose in our society. One cannot fault the logic applied by the majority in *F*. Here, one can re-iterate the sentiments of Neethling after the Supreme Court of Appeal's decision and before the Constitutional Court's judgment, that:

> [t]he only difference between *K* and *F* was that in *K* the policemen were on duty when raping K, while in *F* the rapist was on stand-by duty. The core question in *F* was therefore whether a policeman on stand-by duty is on par with a policeman on duty so that according to the standard test for vicarious liability he can be found to have acted within the course and scope of his employment when raping a woman while on stand-by duty.[160]

It is therefore submitted that Mogoeng J *et al* came to the correct conclusion on the facts as all the elements of vicarious liability had been proven. There is definitely a place for vicarious liability in South African law even though it is a well-known fact that this enables a plaintiff to recover his damages from a defendant who is not a so-called "man of straw".[161] In addition, where all the elements of vicarious liability had been proven, the employer should be held liable.

154 Par 155.
155 Par 168.
156 Par 169.
157 Parr 173-174.
158 Par 175.
159 Par 177.
160 2011 *Obiter* 428 438.
161 Potgieter 2011 *Obiter* 189 191.

The second observation is that the aspect of control should not be confused with course and scope of employment. While it is true that control is a factor that is looked at in evaluating whether an employer-employee relationship did exist or whether a sufficiently-close relationship existed between the conduct of the employee and his employment, control cannot be equated to scope of employment because a wrongdoer who was not necessarily under the control of his employer could still have acted within the course and scope of his employment.[162]

The third observation is that although a majority of the Constitutional Court had re-affirmed the basis of vicarious liability in the employer-employee relationship, it is also necessary to consider the alternative to vicarious liability as suggested by Froneman J.[163] Although Froneman J agrees with the majority in holding the Minister liable, he argues that the basis for liability *in casu* is direct – as opposed to vicarious – liability. Now this is intriguing, as direct liability of the state had been severely criticised before.[164] Why then is it mentioned again by Froneman J and do the reasons for his judgment make sense? Furthermore, is direct liability only a possibility in cases involving the state or is it a possibility for all actions against employers?

It is trite law that in order for a defendant to be liable in delict, the plaintiff needs to prove on a balance of probabilities that the defendant had committed a wrongful, culpable act which caused damage to the plaintiff.[165] It is also a well-known fact that conduct for purposes of delictual liability may be in the form of a commission or an omission. One can see how state organs may be liable for positive acts (such as the confiscation of property or the poisoning of residents' water) and then it is also evident that actionable omissions will include instances where a state organ had a legal duty to act positively to prevent harm.[166] Also, liability only follows if such an omission is in fact wrongful. The existence of wrongfulness is always determined with reference to the legal convictions of the community or the *boni mores*.[167] In *Carmichele*,[168] the Constitutional Court pronounced that in some circumstances, such as with an omission, there may also be a legal duty on the state to take positive steps to protect fundamental rights, such as the right to life, human dignity and freedom and security of the person as entrenched in the Bill of Rights.[169] Failure to do so would be wrongful.

162 See 3.1.2 above.
163 Par 109.
164 Neethling 2011 *Obiter* 428 437-438.
165 Neethling *et al* 4.
166 Neethling *et al* 30, 57, 76-77.
167 Neethling *et al* 57.
168 2001 (4) SA 938 (CC).
169 Parr 27-29 and 72-74. See also Neethling, Potgieter & Scott *Case book on the Law of delict* (2006) 26.

In addition to conduct having to be wrongful, it should also be culpable. There is a primary distinction between intent and negligence as forms of fault.[170] In order to establish intent, there should be the direction of the will and consciousness of wrongfulness and the test for intent is subjective.[171] Negligence on the other hand is where a person is blamed for an attitude of carelessness, thoughtlessness because he failed to adhere to the objective standard of care required of him and test for negligence is that of the reasonable person or bonus paterfamilias.[172] Therefore, a *diligens paterfamilias* or reasonable person in the defendant's position would foresee the reasonable possibility of his conduct injuring another and he would take reasonable steps to prevent such harm. Where the defendant had in fact failed to take such steps, he would have acted negligently.[173]

It is against these general rules pertaining to the first three elements of the delict that Froneman J's judgment should be viewed. In the first instance one must agree with Froneman J that the state is a legal person[174] and as such should perform the functions entrusted to it by the Constitution.[175] Therefore, on the issue of the act as a delictual element, acts of state organs such as the police are acts of the state[176] and failures to act positively where there is a constitutional duty to do so, constitutes wrongfulness.[177] Froneman effectively uses *Carmichele* in stressing that the constitutional value of accountability is here the *boni mores* and it goes without saying that constitutional values should be taken into account in establishing wrongfulness.

On the issue of fault, Froneman J states that Van Wyk's actions were both "deliberate and negligent" and fails to explain this statement any further.[178] While it is easy to see that Van Wyk had every intention of raping Ms F and that fault in the form of intent is present, it is not certain why Froneman J thought Van Wyk to be negligent as well. However, for purposes of this argument Van Wyk's intent suffices. What is interesting is that Froneman J then also observes that the state was negligent in not taking reasonable measures to prevent Van Wyk from committing a delict, this despite the fact that his previous convictions made him a time bomb and that it was foreseeable that he could cause harm to members of the public. Therefore, the state's failure to take reasonable steps to prevent Van Wyk from causing harm is indicative of the state's negligence. Although Froneman J does not discuss preventability of harm in detail, one can argue that, if the Minister had proper policies in place

170 Neethling *et al* 123.
171 Neethling *et al* 126.
172 Neethling *et al* 131.
173 *Kruger v Coetzee* 1966 2 SA 428 (A) 430; Neethling *et al* 133.
174 Par 109. See also Okpaluba & Osode *Government Liability: South Africa and the Commonwealth* (2010) 16.
175 Par 109.
176 *Ibid*.
177 Par 121.
178 Par 148.

to discipline the obviously-errant Van Wyk, he would not have been in possession of the police vehicle and could not have offered Ms F a lift home. If the wrongful, culpable act of the state then caused harm to a victim such as Ms F, there is no reason why she should not be able to hold the Minister directly liable.

The question whether the state had taken reasonable steps to prevent harm also ties in with the risk theory in connection with state liability. According to Wiechers, the legal basis for holding the state liable for the actions of its employees lies in the risk theory, which postulates that if an employer empowers his employees to perform certain functions, he must bear the risk that those employees may cause damage to individuals.[179] In addition, the state's mandate is to serve the citizens of South Africa in accordance with the Constitution. One need only look at the principles of *Batho Pele*[180] to realise that the idea of service is central to the government's functions. Therefore, a government body has the duty not to infringe any of the human rights guaranteed in the Bill of Rights and sometimes, in the case of an omission, there may even be a duty on the state to take positive steps to protect these rights.[181] By employing unsuitable individuals such as Van Wyk, the state runs the risk of being held liable, not only on the basis of vicarious liability, but on the basis of being directly to blame for their culpable failures.

Of course, when litigating on the basis of direct liability, fault on behalf of the government body should be proven and this may prove tricky in some instances. However, this should not be an obstacle for a victim in employing direct liability. In addition, there should also not be policy considerations prohibiting a litigant from proceeding on the basis of direct liability. One such objection could possibly be that it would open the proverbial flood gates and that government's coffers would soon be emptied because of a multitude of lawsuits. This is a legitimate concern. After all, as Scott so aptly states, it seems as though we are experiencing an all-time low in the quality of normal policing functions as policemen commit serious crimes almost on a daily basis; fire arms are being stolen and sold *en masse*; service pistols are used in countless incidents of domestic violence; and the former chief of the South African Police Service and Interpol was even found guilty of corruption.[182] However, it

179 Wiechers *Administrative Law* (1985) page number as quoted by Olivier "Delictual liability of the South African Revenue Service: The wrongfulness element" 2009 *TSAR* 740 744.

180 *Batho Pele* means "people first" and these principles are access, which means to offer integrated service delivery, openness and transparency, which means to create a culture of collaboration, consultation, which means to listen to the customer's problems, redress, which means to apologise when necessary. In addition there are the principles of courtesy, service standards, information and value for money. See http://www.info.gov.za (accessed on 2012-03-21).

181 *Carmichele* par 1

182 Scott 2011 *TSAR* 135 147. The writer states that all these factors would explain why we are dealing with "near absolute liability" in cases concerning the police.

is submitted that proper application of the delictual elements should avoid that.

5 Concluding Remarks

Life is duty – that is certain. There is no escaping the fact that the state exists to serve the citizens of South Africa and to evade this duty continuously and openly creates the risk of delictual liability. It is submitted that the state as an employer can be held vicariously liable for delicts of its employees or organs but, in addition, there is no reason why direct liability should not be an option. With both causes of action, the pure application of the principles of the law of delict will prevent unfair results.

In practice, this proposal means that a plaintiff who sues the state has the option of pleading the elements of vicarious liability and, in the alternative, direct liability, or *vice versa*. The time has come to accept that there is no basis for denying a plaintiff an action against the state based on direct liability. With direct liability, the factual and normative enquiry is evident in the test for wrongfulness, whereas the same factual and normative enquiry takes place in establishing "course and scope of employment" in vicarious liability.

It is submitted that Froneman J's judgment paves the way for recognising the possibility of direct liability and that the time is ripe for employing that particular cause of action. Although this is not the function of the law of delict, it may just be that a positive spin-off of direct liability may be that it would serve as a deterrent for state organs and that they would make a greater effort to take reasonable steps to ensure that they perform their constitutional duties.

Grave concerns about the state of the police service are not groundless. Typically, employers in general terms can only discipline or take action against employees when their misconduct is within the work context, except where the employer can prove that the off-duty misconduct impacts on its business. As pointed out by Neethling, the right to control is not only applicable when a policeman is on duty but can also be extended to situations when they are on standby-duty or even when they are off-duty and then place themselves on duty and commit a delict. It is submitted that Neethling is correct: the creation of risk approach should be considered in *all* instances of intentional wrongdoing by an employee and the general guideline should be that an "employer should be liable for an (intentional) delict of his employee if his appointment and work conditions enabled him to commit the delict (and hence created a heightened risk of prejudice) in such a manner". This should thus compel employers (especially the state) to take active steps to prevent employees working from them from causing harm to others (and the public at large). If the state as an employer takes proper steps in curbing such behaviour and dismiss employees who abuse their

authority and trust, then instances such as *F* or *K* will not be the order of the day. Accountability is ultimately the responsibility of the employer (in this case the state) and the saying "I am not my brother's keeper" will not be applicable here because it already has been established in *Feldman* that a master who uses servants creates risk of harm to others if the servant is negligent, inefficient or untrustworthy.

A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform (Part 2)

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OPSOMMING

'n Vergelyking tussen formele skuldadministrasie en skuldhersiening – die voor- en nadele van hierdie maatreëls en voorstelle vir regshervorming

Ongeveer 'n dekade gelede het die Departement van Justisie en Konstitusionele Ontwikkeling, na aanleiding van klagtes deur verbruikers oor die misbruik van die administrasieprosedure, 'n projek ter hervorming van hierdie prosedure van stapel gestuur. Hierdie projek is egter opgeskort vanweë 'n onafhanklike inisiatief van die Departement van Handel en Nywerheid om verbruikerswetgewing, wat in 2007 in die Nasionale Kredietwet 34 van 2005 gekulmineer het, te hervorm. Ongelukkig het die wetgewer met die invoering van die skuldhersieningsprosedure ingevolge die Nasionale Kredietwet 'n gulde geleentheid laat verbygaan om die reg insake skuldverligtingsmaatreëls behoorlik en volledig te hersien. Daarbenewens het die wetgewer ook nie die verhouding tussen skuldhersiening en ander bestaande skuldverligtingsmaatreëls, in die besonder administrasiebevele, behoorlik oorweeg nie. In die eerste gedeelte van hierdie artikel wat in 2012 *De Jure* 80 verskyn het is administrasie ingevolge die Wet op Landdroshowe 32 van 1944 en skuldhersiening ingevolge die Nasionale Kredietwet geanaliseer om sodoende sekere positiewe en negatiewe aspekte rakende hierdie twee prosedures te identifiseer. In hierdie tweede gedeelte van die artikel word 'n vergelyking tussen administrasie en skuldhersiening gedoen en voorstelle ter regshervorming gemaak. Die skrywers doen aan die hand dat Suid-Afrika 'n volledige hersiening van sy huidige skuldherskeduleringsmaatreëls benodig en dat die wetgewer vir een enkele maatreël wat op alle skuldherskeduleringsgevalle van toepassing is, voorsiening moet maak. Na aanleiding van die vergelyking tussen administrasie en skuldhersiening belig die skrywers die hoofkwessies wat die wetgewer na hul mening in ag moet neem wanneer so 'n nuwe prosedure ontwerp word.

4 Some Comparisons Between Administration and Debt Review

4 1 Gateways

4 1 1 Monetary and Other Limitations

As indicated, administration applications have a monetary cap of R50,000, whereas debt review has no monetary cap. It is submitted that this cap excludes many debtors from the relief offered by way of an administration order, especially those debtors whose debts are not of a credit agreement nature and who are thus not eligible for debt review. Debt review applies only to credit agreement debt to which the NCA applies whereas administration is not subject to such limitation. However, administration orders may not include *in futuro* debt whereas it appears that many of the debts included under debt review in terms of the NCA will be of an *in futuro* nature.

It should further be noted that whereas the administration procedure appears to address the issue of over-indebtedness only by providing for restructuring of debt, debt review in terms of the NCA addresses the issue of both over-indebtedness and reckless credit as the debt counsellor is obliged to consider same and the court can be approached later to order debt restructuring to cure over-indebtedness and also to declare credit reckless.[162]

In terms of section 86(2) of the NCA credit agreement debt may not be included in the debt review where the credit provider has already taken steps to enforce the agreement.[163] However, with regard to administration orders, judgment debts are included in the order. In terms of section 74P(2) of the MCA the court in which proceedings have been instituted against a debtor in respect of any debt[164] must suspend such proceedings as soon as it has received notice of the administration order.[165]

There is no statutory limitation on the number of times a debtor may apply for administration or debt review.[166] Therefore, it appears that a

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162 S 86(6) & 87(1)(b). A declaration of reckless credit may in some instances have the effect of relieving a consumer from the debt altogether. For a detailed discussion see Boraine & Van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" 2010 *THRHR* 650 and Van Heerden & Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" 2011 *De Jure* 44.

163 See the discussion in par 3 3 1 above.

164 Except a debt due under a mortgage bond or a debt referred to in s 74B(3) – s 74P(2) MCA.

165 See the discussion in par 2 7 above.

166 See, however, *Changing Tides 17 (Pty) Ltd v Grobler* (unreported case no 9226/2010) (GNP) par 12 where it was held that a consumer is not entitled

debtor may, after the administration order has lapsed in terms of section 74U, or in the case of debt review, after a clearance certificate has been issued, once again apply for administration or debt review. However, contrary to other legal systems, where a limitation is indeed placed on the number of times a debtor may qualify for debt relief by way of debt-reorganisation within a specified period of time,[167] it should be noted that neither administration nor debt review affords the debtor any discharge of debt.

4 1 2 Who May Apply and Methods of Access

Administration and debt review are only available to natural person debtors and not to juristic persons. Where the consumer is a juristic person[168] in terms of the NCA, Chapter 4, Part D, which regulates over-indebtedness and reckless credit, does not apply.[169]

Administration may only be initiated by means of an application by an individual debtor made to a magistrate's court in terms of sections 74 and 65I of the MCA.[170]

The NCA provides a number of methods to access its debt relief provisions. A consumer may on own initiative approach a debt counsellor for debt review in terms of section 86. If a consumer had not approached a debt counsellor prior to litigation, and the proceedings are proceedings in which a credit agreement is being considered, the consumer may invoke section 85 of the NCA in terms of which the court in its discretion may refer the consumer for debt review.[171] As pointed out above,[172] section 86(11) of the NCA also allows a consumer in respect of whom a debt review has been terminated in accordance with section 86(10) to request the court to allow the debt review to resume.

Although it is usually the consumer who initiates and applies for debt review by a debt counsellor, only the debt counsellor has *locus standi* to approach a magistrate's court by way of application with a

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to delay enforcement of a credit agreement by again applying for debt review ito s 86(1) NCA prior to enforcement but after an earlier debt review iro the said credit agreement was terminated in accordance with s 86(10) NCA.

167 See eg s 1328(f) American Bankruptcy Reform Act of 1978 (commonly known as the Bankruptcy Code or Code) and s 288 Dutch *Wet Schuldsanering Natuurlijke Personen*.

168 S 1 NCA defines a juristic person so as to include a partnership, association or other body of persons, corporate or unincorporated, or a trust if there are three or more individual trustees, or where the trustee is itself a juristic person, but does not include a stokvel.

169 S 6 NCA.

170 Par 2 2 above.

171 Par 3 3 3 above. It appears that such referral will not readily be granted. See Van Heerden & Lötz "Over-indebtedness and discretion of court to refer to debt counsellor – *Standard Bank Ltd v Hales* 2009 3 SA 315 (D)" 2010 *THRHR* 502.

172 Par 3 3 4 above.

recommendation for debt restructuring in respect of the consumer's credit agreement debt in terms of section 86(7)(c).[173] However, it is clear that in those instances where a debt counsellor finds a consumer to be not over-indebted, the consumer has *locus standi* to approach the court to be declared over-indebted and to have his or her credit agreement debt restructured.

4 1 3 Jurisdiction

Administration orders are heard by the magistrates' courts exclusively. Although it may seem that only the magistrate's court is clothed with the jurisdiction to hear debt restructuring applications, the view has been expressed that the high court may also do so where the debt review is initiated as a result of an invocation of section 85 of the NCA.[174]

The court where the debtor resides, carries on business or is employed will have jurisdiction in respect of an application for an administration order.[175] Due to the fact that the NCA contains no provision specifying geographical jurisdiction of the court to be approached for purposes of a court ordered debt restructuring, uncertainty prevailed and arguments were raised that the appropriate court should be the court where the debt counsellor is located. This aspect now also appears to have been resolved as a result of the declarator applied for by the NCR in *National Credit Regulator v Nedbank Ltd.*[176] The court held that the appropriate court to approach in such instance would be the magistrate's court that has jurisdiction over the consumer, which means it will be the court of the area where the debtor resides, is employed and carries on business.[177]

4 2 Administrators and Debt Counsellors

Debt counsellors are rather strictly regulated by the NCR which was created by the NCA as a regulatory body. In case of administration orders there is no regulatory body except when the administrator is for instance also an attorney or an accountant that might be disciplined by their respective professional bodies in the event of misconduct. In order to apply for registration, debt counsellors must meet certain requirements with regard to their education, working experience and competence and must *inter alia* also undergo some prescribed training[178] whilst there are no such requirements for administrators. The court hearing an application for administration has a discretion to appoint any person as an administrator.[179]

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173 *National Credit Regulator v Nedbank* (GNP) *supra* 311.
174 *Standard Bank v Panayiotts supra* par 16–31. See further Roestoff *et al* 2009 *PER* 257.
175 S 74(1) MCA.
176 *National Credit Regulator v Nedbank* (GNP) *supra*.
177 *Idem* 314.
178 R 10 CR.
179 S 74E MCA.

Section 74J of the MCA lists some of the duties[180] of an administrator and although there is no regulatory body for administrators the court has certain statutory powers to deal with an administrator who fails to meet his or her statutory duties. An administrator may be removed from office on good cause shown and replaced by another administrator appointed by the court.[181] Where an administrator fails to enforce an administration order, any creditor may do so and reclaim his or her costs from the administrator *de bonis propriis*.[182]

An important regulatory measure regarding all moneys received by an administrator from or on behalf of debtors whose estates are under administration is section 74J(7) of the MCA that requires administrators who are not practising attorneys to deposit such moneys in a separate trust account that is deemed to be not part of the administrator's assets in the event of insolvency or death. Where the administrator is a practising attorney, such moneys must be deposited in the formal attorney's trust account.[183] In general the remuneration of an administrator is capped to 12.5 per cent of the regular payments received from the debtor for the purposes of distribution amongst the creditors.[184]

Section 86 read together with regulation 24 to 27 of the NCA Regulations sets out various duties of the debt counsellor, *inter alia*, that he or she must provide the consumer with proof of the debt review application, must notify credit providers and registered credit bureaux thereof and must review and assess the consumer's financial affairs and credit agreements in order to determine whether the consumer is over-indebted and whether reckless credit has been extended. In *National Credit Regulator v Nedbank Ltd*[185] the court held that a debt counsellor is a neutral[186] person whose function is to assist the court and who might incur costs *de boniis propriis* for failure to comply with his or her duties.[187] The debt counsellor's remuneration consists of an initial application fee of R50. A debt counsellor may also claim the fees prescribed by the Debt Counselling Association of South Africa (DCASA).[188]

180 See par 2 5 above.
181 S 74E(2) MCA. See also *Stander v Erasmus supra* 324.
182 S 74N MCA.
183 An administrator who fails to carry out this duty will be guilty of an offence – see s 74W MCA.
184 S 74L(2) MCA – see the discussion in par 2 6 above.
185 *National Credit Regulator v Nedbank* (GNP) *supra*.
186 R 1 CR. In *National Credit Regulator v Nedbank* (GNP) *supra* 313, Du Plessis J indicated that the role of the debt counsellor is that of a neutral functionary who does not seek to advance any particular party's case
187 *National Credit Regulator v Nedbank* (GNP) *supra* 312.
188 The NCA in s 86(3)(a) read with sch 2 CR, currently only provides for an application fee of R50. One of the initial concerns after commencement of the NCA was that the prescribed fee is so dismal that no one would be willing to practise as a debt counsellor. As a result, a recommended cost and fee structure was drafted by DCASA which was endorsed by the NCR.

4 3 Debt Incurred After Administration or Debt Review

Agreements or debts that were not initially included in the administration order may subsequently be included and become part of that order.[189] However, a debtor who is subject to an administration order and incurs debt without disclosing it is guilty of an offence.[190]

Where a debt restructuring order has been granted by the court no provision is made in the NCA for inclusion of other credit agreement debt owing to credit providers that were not initially part of the restructuring recommendation. The NCA also does not specifically provide for any offences with regard to over-indebtedness but sanctions the debtor who incurs further credit agreements whilst under debt review by denying him the remedies pertaining to over-indebtedness and reckless credit granting. Moreover, a credit provider who enters into a credit agreement with a consumer in respect of whom a restructuring order has been granted, runs the risk of such agreement being declared reckless credit.[191]

4 4 Distributions to Creditors

Administrators may handle vast amounts of money and make distributions to creditors[192] whilst distributions in terms of debt review are the responsibility of PDAs.[193] In this regard the trust accounts of those administrators who are not members of existing professional bodies remain a major concern since there is no proper body to regulate administrators and the security expected from them to fulfil their statutory duties are not on a firm footing. Section 74E(3) of the MCA provides that an administrator who is not an officer of the court or a practitioner, must provide security to the satisfaction of the court for due and prompt payment to the parties entitled thereto but even this requirement seems to be troublesome in practice.[194] It is thus clear that misappropriation of funds by administrators is a major concern[195] whilst it is not an issue in case of debt review due to the payment structure.

Currently debt counsellors are bound to this fee structure as a condition of their registration as debt counsellors.

189 S 74H MCA and par 2 5 above.

190 S 74S MCA and par 2 7 above.

191 Ss 88(4) & (5) NCA and par 3 3 6 2 above.

192 See eg the facts in *Stander v Erasmus supra.*

193 It is currently a condition of registration for debt counsellors that they only use PDAs accredited by the NCR.

194 One of the abuses noted by Boraine 2003 *De Jure* 231 regarding administration orders, is the evading by non-attorneys of the requirements of the Act pertaining to security by forming arrangements with attorneys to pose as the appointed administrators – *cf* the facts in *African Bank Ltd v Weiner* (C) *supra*.

195 Eg the facts in *Stander v Erasmus supra*.

Administrators are compelled to make distributions every three months[196] whilst the NCR apparently compels PDAs to make distributions on a monthly basis in the case of debt review.

4 5 Role of Creditors

In the case of administration, creditors may in principle oppose an application on the basis that the applicant does not comply with the statutory requirements, or that the debtor has the means to pay the debt, or that his debt is not reflected or not reflected correctly. In terms of section 74B of the MCA any creditor, whether he has received notice of the order or not, may object to any debt listed in the statement of affairs. After granting of the order, any creditor who has not received notice of the application may also object to any debt listed in the order or to the manner in which payments are to be made in terms of the order.[197] In considering the creditor's objection, the court may uphold or refuse it, or postpone consideration thereof for hearing after notice to the persons concerned and on such conditions as the court may deem fit.[198] One of the advantages of administration compared to debt review is that creditors and the court may interrogate the debtor with regard to his or her financial situation.[199] The evidence obtained in this way will obviously influence the court when exercising its discretion to grant the administration order.

Section 86 of the NCA provides no opportunity for the credit provider to oppose a pending debt review whilst it is being conducted by a debt counsellor. As indicated, section 86(10) provides for termination of a debt review, but only after at least 60 business days (which is a relatively long period) after the debt review application was made to the debt counsellor. However, as indicated, such termination is not necessarily a dead end for an over-indebted consumer due to the provisions of section 86(11) which allow a magistrate's court to order that debt review may resume in respect of a credit agreement that is being enforced by litigation.

In case of debt restructuring by the court, the NCA does not indicate under what circumstances creditors may oppose the restructuring in court. Where the restructuring has been accepted in terms of section 86(8)(a) all the credit providers involved would have agreed and the filing of the consent order would be a mere formality. However, in other circumstances where the debt counsellor has determined that the consumer is over-indebted and no voluntary re-arrangement is agreed to by the credit providers, the debt counsellor must make an application to court in order to achieve a court-induced restructuring.[200] It is submitted that a credit provider who is opposed to the debt restructuring terms as

196 S74J(1) MCA.
197 S 74F(3) MCA.
198 S 74F(4) MCA.
199 S 74B(e) MCA and *Madari v Cassim supra* 38.
200 Ss 86(7)(c), 86(8)(b) & 87 NCA.

recommended by the debt counsellor may then oppose the application for debt restructuring in terms of ordinary application procedure principles as it has been held that the application procedure is the proper procedure by which to approach a court for purposes of court-induced restructuring.[201] However, unlike the position with regard to administration,[202] the NCA does not allow a credit provider to oppose or object to the debt restructuring order once a debt restructuring order has been granted by the court.

4 6 Preliminary Procedures

4 6 1 Time Periods for Service of Application

In case of administration the application may be brought with three calendar days' notice to creditors.[203] In the case of debt review the application to court for debt restructuring may be brought with 10 court days' prior notice in accordance with rule 55 of the Magistrates' Courts Rules. It is submitted that the time period allowed for notice of a debt restructuring application is much more advantageous for purposes of ensuring that creditors are properly informed of the application, than in the case of an administration order.

4 6 2 Manner of Service

Applications for administration orders are normally served by registered post.[204] Service of applications for court-ordered debt restructuring in terms of the NCA has been a very contentious issue as credit providers wanted such service to be done by the sheriff, which of course had extreme cost implications for the already over-indebted debtor with a large number of creditors. In *National Credit Regulator v Nedbank Ltd*[205] it was held that apart from service by the sheriff the parties can also agree to service by fax or email.[206] It should also be noted that the new rule 9(3)(f) of the Magistrate's Court Rules contains a proviso to the effect that a debt counsellor who makes a referral to court in terms of section 86(7)(c) or 86(8)(b) of the NCA may cause the referral to be served by registered post or by hand.[207]

4 7 Procedure in Court and Powers of Court

4 7 1 Contents of Application

An application for administration must contain pertinent information

201 *National Credit Regulator v Nedbank* (GNP) *supra* 310, 320.
202 S 74F(3) MCA.
203 S 74A(5) MCA.
204 Ito s 74A(5) MCA the application may be delivered to creditors personally or by registered post.
205 *National Credit Regulator v Nedbank* (GNP) *supra*.
206 *National Credit Regulator v Nedbank Ltd supra* 312, 320–321.
207 See also Van Heerden in Scholtz par 11 6.

regarding the financial situation of the applicant.[208]

Apart from prescribing in regulation 24 which information has to be submitted for purposes of initially applying for debt review in terms of section 86, the NCA contains no specific provisions or prescribed forms indicating which information has to be disclosed in an application for a court-ordered debt restructuring. Unfortunately, uncertainty in this regard has led to various fragmented approaches to this issue. This uncertainty is inherently problematic as it forces many applicants for a court-ordered debt restructuring to attach every document they regard as relevant to their applications, which inevitably has severe cost implications. It is submitted that it is imperative that a solution to this problem be found urgently and that it should most likely entail that a standard form be prescribed for such purposes.[209]

4 7 2 Procedure at Hearing

At the hearing of the application for administration the court must clearly first establish that proper notice has been given and that the application complies with the prescriptions laid down by the MCA. It is an implicit part of the hearing that the court must be convinced on a balance of probabilities that the debtor is indeed unable to forthwith pay the amount of any judgment obtained against him or her in court, or to meet his or her financial obligations, that he or she has no sufficient assets to satisfy such judgments or obligations and that the total amount of the debts does not exceed the amount determined by the Minister of Justice from time to time.[210]

The NCA does not contain any provision indicating the specific procedure to be followed in bringing the recommendation for debt restructuring before the court. Section 86 refers to a proposal to court that must be "recommended" by the debt counsellor and section 87 obliges the court to conduct a "hearing", but neither of these sections indicate what exactly is meant by "recommendation" or "hearing". A practice has developed and it has subsequently been confirmed by case

208 S74A MCA discussed in par 2 2 above.

209 Draft r 3 Debt Counselling Regulations published for comment in GN 503 in *GG* 32229 of 2009-03-15 endeavoured to address this issue by providing that the debt counsellor must lodge his or her proposal in Form B which must be filed as soon as it has been delivered to the consumer and credit providers. Such proposal must be substantiated by a written statement which must contain the information set out in sub-r 2. The credit providers affected must be informed that they may oppose the proposal by filing a notice in the form of Form C with the clerk of the court and delivering a copy thereof to the debt counsellor. Ito draft r 3(4) this notice must be filed and delivered within 15 days after the proposal was served on the credit provider, that it must be substantiated by a written statement containing the credit provider's objections to the proposal and that it must be accompanied by a certified copy of the relevant agreement and relevant documentation intended to be used as evidence to substantiate the objections. See also Roestoff *et al* 2009 *PER* 274.

210 S 74(1)(a) & (b) MCA.

law, to use the application procedure as set out in rule 55 of the Magistrates' Courts Rules for this purpose.[211] Currently these applications thus serve before the motion court and involve an exchange of affidavits. Given the fact that rule 55 is employed, it is submitted that it would also be possible for a court to refer an application for debt restructuring for oral evidence should a creditor oppose the matter and a dispute of facts be disclosed.[212] However, debt restructuring in accordance with the NCA, unlike the administration order process, does not explicitly provide for financial interrogation[213] of the consumer and the procedure is also not held in camera.[214]

The finding that the application procedure should be used is evidently to fill a *lacuna* in the NCA, but it is submitted that this procedure is clearly not the best way to deal with the debt counsellor's recommendation and the hearing relating thereto.[215] In *Wesbank v Schroder*[216] Van Zyl J made the following observation in this regard:

> It is regrettable that the legislature has not seen it fit to put into place a more simplistic and less formal procedure for dealing with the referral of the proposal of the debt counsellor to the magistrate's court and the manner in which the hearing is to be conducted as envisaged in section 87(1) of the Act. The unfortunate result of this is that, as in the instant case, once the proposal is referred to the magistrate's court, the matter then lands up in the hands of lawyers at which time the spirit of cooperation more often than not sadly disappears. The result is unnecessary delays in the finalisation of the debt review process and the resultant incurring of costs.

4 7 3 Powers of Court

In terms of section 87 of the NCA, the court has the power to either reject the debt counsellor's proposal, or to make an order declaring any credit agreement to be reckless and/or to make an order re-arranging the consumer's obligations. As pointed out above,[217] the magistrate's court granting an administration order does not have the power to make any order in respect of reckless credit granting. However, in other respects the court seems to have a wider discretion with regard to the granting of an administration order than is the case with regard to debt restructuring orders in terms of the NCA. In the case of administration, the court is empowered to grant an administration order providing for the administration of the debtor's estate and for the payment of his or her debts in instalments or otherwise, when the requirements in terms of

211 *National Credit Regulator v Nedbank* (GNP) *supra* 310.
212 R 55(1)(k)(ii) MCR.
213 S 74B(e) MCA.
214 It is unlikely that the high court would be approached for debt restructuring but in such event it is submitted that r 6 Uniform Rules of the High Court will have to be used.
215 See *Wesbank v Schroder*, *Stolz v Wesbank and Schroder* (unreported case numbers EL1450/2011; ECD2485/2011).
216 *Supra* par 16.
217 Par 4 1 1.

section 74(1) of the MCA are satisfied.[218] Furthermore, section 74(1) stipulates that the order may be made subject to such conditions as the court may deem fit with regard to security, preservation or disposal of assets, realisation of movables subject to hypothec, or otherwise.[219] In terms of section 74C(1)(b) an administration order may *inter alia* specify the assets of the estate which may be realised by the administrator for the purpose of distributing the proceeds among creditors. Although a court ordering debt-restructuring in terms of the NCA may not order that assets be realised,[220] it is submitted that the court may reject[221] the debt counsellor's recommendation for debt restructuring if it is of the opinion that certain assets are luxurious items and unnecessary for the maintenance of the consumer and his or her dependants and that the consumer's over-indebtedness could be reduced if such assets be realised.[222]

Section 74 clearly envisages that all debt of a debtor under administration should be repaid and the court may thus not order that the debtor be granted a discharge of any of his or her debts.[223] A court who orders debt re-structuring in terms of the NCA is likewise not empowered to reduce interest or to impose a discharge for debt relief purposes.[224] The court has limited restructuring powers and can basically only postpone and/or extend payment dates.[225] However, notwithstanding objections and opposition by creditors,[226] the court, in the case of both administration and debt-rearrangement orders in terms of the NCA, is in actual fact empowered to force or "cram-down" a re-scheduling of debt upon creditors. With regard to debt-rearrangement in terms of the NCA the court is also empowered to order such rescheduling with regard to secured debt as would *inter alia* include obligations with regard to home mortgages. Although foreign systems are not discussed at large for the purposes of this article, it should be noted that this is quite revolutionary when compared with the position regarding Chapter 13 repayment plans in terms of the American Bankruptcy Code.[227] In a Chapter 13 reorganisation bankruptcy a payment plan is created and administered over a period of three to five years. With regard to secured

218 S 74(1) MCA.
219 S 74(1)(b) MCA and see also s 74C(1)(b)(v) MCA.
220 It is submitted that the high court will be able to make such an order in terms of its inherent jurisdiction. Magistrates' Courts are creatures of statute and will not be able to do anything not specifically permitted by either the MCA or NCA.
221 S 87(1)(a) NCA.
222 Cf *Standard Bank v Panayiotts supra* par 77 and the discussion in par 3 2 above.
223 S 74U MCA.
224 Cf the position in the USA where the debtor, subject to certain exceptions, receives a discharge of all unsecured debt after completion of a Chapter 13 repayment plan – see s 1328(a) Bankruptcy Code.
225 S 86(7)(c)(ii) NCA.
226 See the discussion in par 4 5 above.
227 See in general iro Chapter 13, Ferriel & Janger *Understanding Bankruptcy* (2007) 641 *et seq.*

claims the court may only approve the plan if provision is made for payment of at least the amount equal to the value of the claim.[228] However, although secured claims in Chapter 13 are subject to modification, meaning that the debtor may change the amount and time of payments,[229] such modification is not allowed where the claim is secured only by "real property that is the debtor's principal residence".[230] Should the debtor therefore opt to retain the property and should he or she wish to deal with the debt in terms of a Chapter 13 plan, such plan must provide for payment of the regular mortgage instalments as originally agreed. The court is not empowered to reduce the instalments and extend the period of the agreement. However, any amount that is in arrears may be repaid over the duration of the plan.[231] With regard to administration orders, secured debt, insofar as it qualifies as *in futuro* debt, is excluded from the order and an order for the rescheduling of such debt is therefore not possible. However, the court may in its discretion, when calculating the amount to be paid to the administrator in terms of the order, make provision for the periodical payments which a debtor is obliged to make under a credit agreement in terms the NCA as well as for the periodical payments under a mortgage bond.[232]

4 8 Remedies for Non-compliance

The NCA contains no provisions in terms of which a credit provider may compel a consumer to comply with a section 138 consent order or with a court-induced restructuring order. Unlike the position with regard to administration,[233] the NCA also does not provide for an amendment or suspension of the order or for the lapsing or discharge thereof.[234] However, section 88(3) contains the sanction in this regard as the moratorium on enforcement is lifted allowing the credit provider to enforce his rights under the credit agreement in the event of such non-compliance.

4 9 Duration and Discharge

As pointed out, neither administration nor debt review provides the debtor with a discharge of any of his or her debt and in theory a debtor may remain under administration and debt review indefinitely. Although a maximum time period is not stipulated for a re-arrangement in case of debt review, it seems unlikely that a consumer will be allowed to extend

228 S 1325(a)(5) Bankruptcy Code.
229 S 1322(b)(2) Bankruptcy Code.
230 *Ibid*.
231 S 1322(c)(1) Bankruptcy Code.
232 See s 74C(2) MCA and the discussion in par 2 4 above.
233 See s 74Q MCA and the discussion in par 2 8 above.
234 An administration order may also not be granted if it is proved that any administration order was rescinded because of the debtor's non-compliance therewith, unless the debtor proves that his non-compliance was not wilful – s 74B(5) MCA.

the period of repayment for too long or indefinitely. Even though debt review and a subsequent debt rearrangement are aimed at eventual satisfaction of debts, case law indicates a reluctance by courts to reschedule debts over unfeasibly long periods.[235] It thus appears that debt review in terms of the NCA is best suited to those instances where a consumer needs a "financial breathing space" of a year or so to recover financially.[236]

4 10 Alternative Measures

Neither the administration nor the debt review process (before the debt counsellor or court) prohibits other debt relief measures such as a voluntary distribution based on a composition between a debtor and his or her creditor(s), or sequestration of the estate of a debtor.[237] In this regard it has been held that applications for administration constitute an act of insolvency for purposes of section 8 of the Insolvency Act[238] due to it evidencing an inability by the debtor to pay his debts.[239] The position relating to a request for debt review by a consumer seems unclear[240] but it is suggested that if a debt counsellor for instance informs a credit provider about such request it may amount to such an

235 In *Firstrand Bank v Olivier* 2009 3 SA 353 (SE) it was held that the purpose of the Act is, *inter alia,* to provide for the debt reorganisation of a person who is over-indebted, thereby affording that person the opportunity to survive the immediate consequences of his financial distress and achieve a manageable financial position.

236 See also iro administration *African Bank v Weiner* (C) *supra* 575 and the discussion in par 2 2 above.

237 See s 74R MCA with regard to administration. Debt review also does not, according to case law, create a bar to sequestration. In *Investec Bank Ltd v Mutemeri* 2010 1 SA 265 (GSJ) 274–277, Trengove AJ held that an application for compulsory sequestration did not amount to debt enforcement ito the NCA (see s 130(1) NCA) and therefore did not preclude the applicant creditor from proceeding with an application for sequestration. See also *Firstrand Bank Ltd v Evans* 2011 4 SA 597 (KZD*)* and *Naidoo v Absa Bank supra* confirming the decision in *Mutemeri* and the discussion of *Naidoo* by Maghembe "The appellate division has spoken – sequestration proceedings do not qualify as proceedings to enforce a credit agreement under the National Credit Act 34 of 2005: *Naidoo v Absa Bank* 2010 4 SA 597" 2011 *PER* 171. See also Boraine & Van Heerden "To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: A tale of two judgments" 2010 *PER* 84 for a detailed discussion of the *Mutemeri* case. When applying for voluntary surrender ito the Insolvency Act and where a large portion of a debtor's debt consists of credit agreements in terms of the NCA, it has also been held that such debtor should explain that he or she has considered debt review as a possible solution for his or her debt problems – see *Ex parte Ford* 2009 3 SA 376 (WCC). For a detailed discussion of *Ford* see Van Heerden & Boraine "The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of insolvency law" 2009 *PER* 161.

238 12 of 1976.

239 See *Volkskas Bank v Pietersen supra* 316; *Fortuin v Various Creditors supra* 573; *Ex Parte August supra* 271.

240 *Firstrand Bank Ltd v Evans supra* but cf *FirstRand Bank Ltd v Heinrich Janse van Rensburg; FirstRand Bank Ltd v Azelle Janse van Rensburg* (unreported case numbers 3846/2011; 3847/2011) (ECPP) where the court ruled that the

act of insolvency if the requirements of section 8(g) of the Insolvency Act are met.

In case of administration it is highly unlikely, if at all possible, that a voluntary distribution will run concurrently with an administration order since the debtor must in principle disclose and deal with all his debts in the application and debts not included at that stage may also be added later during the execution of the administration procedure. In the case of debt review, debt counsellors in practice often propose a comprehensive repayment plan to creditors that also includes non-credit agreement debt. In this way a voluntary distribution may be used in tandem with the formal debt review process in terms of the NCA.

The provisions pertaining to debt review do not exclude an application for an administration order but although it seems unlikely that a consumer will end up under both procedures, it apparently happens in practice occasionally. However, this situation, it is submitted, is undesirable not only due to the potential difficulty of administering both procedures simultaneously but also because of the duplication of costs that it would of necessity entail. In those instances where a debtor has debts that may be subject to debt review as well as other types of debt, he or she may thus rather have to consider a voluntary distribution to deal with such debt in conjunction with the debt review.

4 11 Moratorium on Enforcement

As indicated, being under debt review or complying with a voluntary debt rearrangement order as a section 138 consent order or with a court-ordered debt restructuring, creates a moratorium on enforcement of the credit provider's rights under the credit agreement. Non-compliance by the customer entitles the credit provider to proceed with enforcement subject to compliance with section 86(10) in respect of a pending debt review.[241]

Section 131 of the NCA provides for debt enforcement by repossession of goods by authorising the court to grant an attachment order with respect to property that is the subject of a credit agreement. However, while the debt review process before the debt counsellor is still pending and the credit agreement has not yet been terminated in terms of section 86(10), such attachment will in terms of section 88(3) not be allowed. Also, such repossession will not be allowed once a re-arrangement agreement has been reached or a re-arrangement order in terms of section 87 has been granted, unless the consumer defaulted on any obligation in terms of the re-arrangement agreement or order.[242]

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initiation of debt review by the debtor (per se) does not amount to such an act of insolvency. See also Van Heerden in Scholtz par 11 7.

241 S 88(3) NCA.

242 S 88(3)(b)(ii) NCA.

However, it should be noted that the moratorium provided for by the NCA only applies to the enforcement of a credit provider's rights under a credit agreement in terms of the NCA. With regard to administration all debts are covered as section 74P(1) provides that no creditor shall have any remedy against the debtor or his property for collecting money, except where the debt pertains to a mortgage bond, or where the debt has been rejected by the court in terms of section 74B(2) or where the court grants leave to institute enforcement proceedings. With regard to credit agreement debt in terms of the NCA, it should be noted that section 74C(2)(b) excludes such debt from the administration order. However, the court may in its discretion refuse to make allowance for the periodical payments which the debtor is obliged to make under a credit agreement for the purchase of goods. Should the court refuse to make allowance for such payments, the creditor would not be able to enforce such debt and repossess the goods which are the subject matter of the relevant agreement, unless the court lifts the moratorium in terms of section 74P(1). However, the court may also, if the credit provider advises the administrator that he elects to demand immediate payment of the outstanding purchase price, authorise the seller to repossess the goods which are the subject matter of a credit agreement in terms of the NCA, to sell them and, if the net proceeds are insufficient to pay his debt in full, to lodge a claim with the administrator in respect of the balance of the purchase price still owing to him. Where the credit agreement was concluded after granting of the administration order, the same procedure applies, but the creditor will not be entitled to a dividend in terms of the administration order until all creditors who were creditors on the date of the administration order have been paid in full.[243]

4 12 Position of Debtor

A debtor under administration or debt review does not undergo a diminution of his status as is the position with sequestration. However, being under administration or debt review will obviously affect such debtor's credit worthiness.[244]

5 Conclusion

It is a pity that the various state departments involved did not communicate properly about the reform of consumer debt relief measures. It is now about a decade after the first steps in the reform of the administration procedure were initiated and South Africa still does not have a proper alternative debt relief measure to sequestration. The legislature, when introducing the NCA in 2007, clearly also missed a golden opportunity for comprehensive reform of this area of our law. It

243 Ss74G(7)–(9) MCA read with s 74H(4) MCA and the discussion in par 2 5 above.

244 Ito s 86(4)(b)(ii) NCA read with r 24(2) CR, a debt counsellor is obliged to notify all registered credit bureaux of an application for debt review. Credit bureaux are regulated by the NCA – see ss 70–73.

is for instance not clear if and how administration and debt review could operate in the same case.[245] The question also arises as to what purpose is served by having two co-existing procedures serving the same purpose, namely, to provide for a debt re-organisation measure in cases of over-indebtedness.

Whilst the debt review procedure is an attempt to address some of the shortcomings of the administration order – in particular with regard to the appointment requirements and regulation of the person responsible to facilitate this procedure – a major flaw regarding debt review remains that it caters only for certain types of debt regulated by the NCA. It thus lacks general application in this regard and, as is the case with administration, it also does not provide for some kind of a discharge in worthy cases. Administration and debt review are also not subject to a maximum rescheduling time which may cause the repayment period to be extended indefinitely.

Although the administration order may provide some assistance in certain instances, for example where the debt is not credit agreement debt in terms of the NCA or where debt review is ruled out because the credit provider has initiated a debt enforcement procedure, the procedure in itself is dated and recent events have indicated a number of serious deficiencies in the system that give rise to abuse of the procedure.[246] The number of recent court cases on this procedure is also indicative of its relative importance as an alternative to sequestration.

Although the non-statutory voluntary re-arrangement is not that popular in practice and of course creditors cannot be compelled to accept its terms, the newly adopted formal debt review in terms of the NCA has now provided a statutory alternative to this kind of work-out with regard to credit agreements in terms of the NCA.[247] The statutory procedure did not rule out an informal re-arrangement outside the ambit of the NCA but the non-statutory voluntary re-arrangement may be the preferred option in those instances where the consumer has credit agreements as well as other debts not regulated by the NCA.[248]

We are thus still faced by the reality that those debtors who can prove an advantage to creditors may in principle obtain a sequestration order and thereafter qualify for a statutory discharge following rehabilitation whilst such a benefit is not available to those debtors who cannot obtain a sequestration order. It is submitted that South African law needs a complete overhaul as regards its current debt-reorganisation measures. It is suggested that lawmakers should devise one single measure providing for all debt reorganisation cases. When devising this new measure, the positive and negative aspects pertaining to administration and debt review should be taken into account and it is suggested that

245 Par 4 10 above.
246 Par 1 above and Boraine 2003 *De Jure* 217 230 *et seq*.
247 Par 3 3 2 2 above.
248 Par 4 10.

lawmakers should build on the existing and well-established system of debt counselling which, as opposed to administration, is currently strictly regulated by the NCR which was created by the NCA as regulatory body. The issue of distributions to creditors,[249] which is currently one of the major concerns with regard to administration, is also well regulated, as the NCR compels debt counsellors to use PDAs accredited by the NCR to effect the necessary distributions.

The above comparison[250] between administration and debt review, it is suggested, indicates that the main issues to be considered when devising the new debt re-organisation procedure are the following:

(a) *Limitations on relief*: There should be no monetary cap and all debt obligations, including judgment debts, should be covered. Furthermore, steps taken to enforce a debt should not bar a debtor from obtaining relief.[251] The new procedure should obviously provide for a discharge of debt and in this regard it is submitted that lawmakers should, in order to prevent abuse of the procedure, place a time limit on the frequency with which such discharge may be obtained.[252] Another issue that needs to be considered is the type of debtor who may qualify for relief. It is submitted that the legislature should consider extending the relief under the new measure to small juristic persons.[253]

(b) *Procedural issues*: The methods of access to relief and the procedure for the hearing in the case of administration are clearly described in the MCA and its rules.[254] The NCA on the other hand does not specifically prescribe the procedure to be followed or the information to be disclosed when bringing a debt review matter to court. Nor is the procedure for possible opposition of such application by creditors prescribed in any way. It is also not clear what exactly the procedure at the hearing in terms of section 87 entails.[255] As a whole the procedure may be regarded as cumbersome, costly and slow.[256] It is submitted that the procedural issues be addressed by first of all prescribing standard forms for the application and any possible opposition to such application.[257] Although many of the other uncertainties pertaining to the procedure before the court have been dealt with by the Supreme Court of Appeal in *National Credit Regulator v Nedbank*,[258] it is submitted that the legislator should also deal with these issues.[259] In accordance with the administration procedure it is submitted that the manner in which the hearing is to be conducted should be simplified and should *inter alia* provide

249 Par 4 4 above.
250 Par 4 above.
251 See s 86(2) NCA and the discussion in par 4 1 1 above.
252 Par 4 1 1 above.
253 Par 4 1 2 above.
254 Par 2 2 & 2 3 above.
255 Par 4 7 1 & 4 7 2.
256 See *Wesbank v Schroder* referred to in par 4 7 2 above.
257 See the discussion in par 4 7 1 above.
258 *Supra*.
259 These issues include the uncertainties pertaining to the person who has *locus standi* to approach the court for debt restructuring, jurisdiction and the manner of service of the application – see par 4 1 2, 4 1 3 & 4 6 2 above.

for the possibility to interrogate the debtor with regard to his or her financial situation.[260]

(c) *Obtaining further credit*: For obvious reasons a debtor should be prevented from incurring further credit once debt relief has been granted to him or her.[261] However, since such limitation may have the result that the debtor may be denied credit indefinitely, it is submitted that such limitation would only be justifiable when provision is made for a maximum repayment period.

(d) *Powers of court*: One of the positive aspects pertaining to debt review, as opposed to administration, is the fact that the court, apart from being empowered to grant a debt re-arranging order, may also make certain orders pertaining to reckless credit granting. However, in other respects the court's powers are limited[262] and it is submitted that the new procedure should afford the court a wider discretion. So, for instance, the court should also be empowered to make an order for assets to be realised if, for example, it is of the opinion that it is not necessary for the maintenance of the debtor and his or her dependants and that it would reduce the debtor's over-indebtedness.[263] The court should also be able to grant a debt re-arrangement order that would afford the debtor a discharge of all remaining unsecured debt after completion of the repayment plan. With regard to secured debt it is submitted that the American example should be followed in terms of which secured creditors should at least receive the value of their security. With regard to housing loans debtors should be able to repay their arrears in terms of the payment plan, but the normal mortgage instalments should be continued with as originally agreed. Where the debtor continues with both these payments, foreclosure should not be possible.[264]

(e) *Non-compliance with court order*: Although the NCA addresses the issue of non-compliance by allowing the credit provider to continue with enforcement actions, it does not deal with the situation where the debtor experiences a change in circumstances during the period in which the order is in force, for example an increase in income or a temporary disability to pay instalments due to the debtor losing his or her job. It is submitted that the new procedure, in accordance with the position regarding administration,[265] should provide for the possibility that the order, depending on the circumstances, could in such instances be amended or suspended.

(f) *Moratorium on enforcement*: In principle the new procedure should provide for a moratorium on enforcement with regard to all debt obligations. However, in accordance with the position pertaining to administration, it is submitted that the court should be empowered to lift the moratorium if in the opinion of the court it would be justifiable in the circumstances.[266]

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260 Par 2 2, 2 3 & 4 7 2 above.
261 See s 88(5) NCA and the discussion in par 4 3 above.
262 Par 4 7 3 above.
263 See with regard to administration s 74C(1)(b)(i), 74K(1) & (2) MCA and the discussion in par 2 4 & 4 7 3 above.
264 Par 4 7 3 above.
265 See s 74Q MCA and the discussion in par 2 8 & 4 8 above. See also *Fortuin v Various Creditors supra* 576.
266 See s 74P(1) MCA and the discussion in par 4 11 above.

The rule of law versus *decisionism* in the South African constitutional discourse

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OPSOMMING

Die heerskappy van die reg teenoor *desisionisme* in die Suid-Afrikaanse grondwetlike diskoers

Die heerskappy van die reg (rule of law) is een van die grondliggende waardes van die Suid-Afrikaanse grondwetlike orde. Saam met 'n aantal ander waardes wat in artikel 1 van die Grondwet van die Republiek van Suid-Afrika van 1996 vervat is, omskryf dit die eenstemmige waardekompleks waarop die huidige grondwetlike orde berus. Hierdie bydrae ontleed onlangse gebeure in die Suid-Afrikaanse grondwetlike diskoers, meer bepaald: (1) die omstredenheid rondom die Regterlike Dienskommissie se hantering van die klagtes van die regters van die Konstitusionele Hof teen regterpresident John Hlophe en (2) die president se verlenging van die ampstermyn van die vorige hoofregter kragtens 'n ongrondwetlike wetsbepaling. Daar word geargumenteer dat die omstredenheid te wyte is aan twee onversoenbare denkbeelde oor die heerskappy van die reg. Die een is die klassieke konsep van oppergesag van die reg, wat op die beginsel van legaliteit gegrond is, en die ander, hier *desisioinisme* genoem, is gegrond op 'n "norm" van die "beste" besluit in die omstandighede. Hierdie diepliggende verskil spruit voort uit twee uiteenlopende (regs)kulture. Die een het 'n skriftuurlike grondslag en is geanker in 'n soewereine *corpus* van reg teenoor die ander een wat mondeling en teenswoordig-gesentreerd is en wat nie met die idee van 'n soewereine *corpus* van reg soos dit eeue lank in veral die Westerse regskultuur bestaan, bekend is nie.

1 Introduction

The South African state is based on the foundational values, set out in section 1 of the Constitution of the Republic of South Africa of 1996. One of these values encapsulated in section 1(c) is the rule of law.

During the constitutional negotiations that led to the adoption of the Constitution in 1996 the rule of law was never an issue: It was generally agreed that it had to be one of the foundational constitutional values. There was also no trace of disagreement on what it signified. Or at least, that was the perception. In this way the rule of law provided one of the cornerstones of the new constitutional order and of a common South African nationhood built on the Constitution, more specifically built on the foundational values of the Constitution.[1]

1 This consensus was also reflected in a number of *dicta* of the Constitutional Court. Many of these may be referred to. Compare for example *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*

However, the South African legal discourse has lately been marked by controversies surrounding the meaning and implications of the rule of law and of the emergence of an arguably aberrant notion of the rule of law in South Africa that are now casting doubt on whether there is in fact consensus on this.

First, there is the controversy around two decisions of (the majority) of the Judicial Service Commission (JSC) regarding complaints against the Judge President of the Western Cape, Judge John Hlophe. The first decision related to the complaint against JP Hlophe in the *Oasis* matter (discussed in 4). The second decision was on the dispute between JP Hlophe and the justices of the Constitutional Court (the *CC/Hlophe* matter), discussed in 3, sparked the most controversy, causing a bitter public row that divided not only the country's lawyers but the public in general. The majority decision of the JSC in *CC/Hlophe* was eventually set aside by the Supreme Court of Appeal (SCA) in *Freedom Under Law v Acting Chairperson of the Judicial Service Commission*.[2] The most important interventions within this controversy are:

(a) the reasoning in the majority decision of the JSC and of those who support the majority decision;

(b) the judgment of the SCA in *Freedom Under Law* mentioned above on the *CC/Hlophe* matter;

(c) aspects of the argumentation in the heads of arguments submitted to the JSC on behalf of the Advocates for Transformation (AFT);[3]

(d) aspects of the arguments advanced in the heads of argument on behalf of the sixteenth respondent (JP Hlophe) in the mentioned judgment of the SCA.[4]

The second controversy revolved around the re-appointment of the former Chief Justice of South Africa, Mr Justice Sandile Ngcobo, by the President in accordance with an unconstitutional statute. This decision to re-appoint the former Chief Justice was set aside by the Constitutional Court in *Justice Alliance of SA v President of the RSA*.[5] The arguments by the second *amicus curiae* in this matter, the Black Lawyers Association (BLA),[6] are particularly pertinent for the present discussion.

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2 1998 (12) BCLR 1458 (CC) parr 56-59; *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) parr 48- 49, 108, 109.

2 2011 3 SA 549 (SCA).

3 These heads of argument were signed by Advv Semenya SC, Madima, Pillay and Maenetje dated 2008-08-29. The heads have been obtained from the JSC and is on file with the author.

4 The heads of argument were obtained from the Registrar of the Supreme Court of Appeal and are on file with the author.

5 2011 10 BCLR 1077 (CC).

6 The heads of argument were obtained from the Registrar of Supreme Court of Appeal and are on file with the author. There were also other decisions that caused considerable public outrage namely that by the National Director of Public Prosecutions not to institute a prosecution against the President of the ruling African National Congress (ANC) and now president

This discussion will now proceed first with a discussion of the rule of law in section 2 below. In doing so, the relevant aspects of the jurisprudence of the Constitutional Court on the rule of law will be referred to. This is followed by my own concise exposition of the content and consequences of the rule of law which is informed by the historical and philosophical tradition of the notion of the rule of law as it has emerged particularly in the Western legal tradition. This exposition of the rule of law serves as the normative framework and yardstick for judging the interventions made in the course of the two mentioned controversies. The majority decision of the JSC in the *CC/Hlophe* matter is discussed in section 3 and the JSC decision in the *Oasis* matter in section 4. In section 5 below the controversy surrounding the renewal of the term of office of the Chief Justice is dealt with. The discussion of these controversies reveals the existence of an aberrant view on the rule of law which is not reconcilable with the rule of law described as *decisionism* discussed in section 6. In 7 decisionism is critiqued and in section 8 it is argued in conclusion that these two approaches to the rule of law reveal the existence of two conflicting (legal) cultures that had been concealed by the common hegemonic Western legal terminology of the Constitution which, in the period after the constitutional transition in 1994, created the deceptive impression of constitutional consensus.

2 The Rule of Law

2 1 Introduction

The Constitutional Court has on numerous occasions dealt with various aspects of the rule of law, indicating that the rule of law requires rational decision-making,[7] that *stare decisis* is an incidence of the rule of

of the country, Jacob Zuma, on various corruption-related charges. The prosecution took great pains to collect evidence and to prepare for the trial. There was a *prima facie* case against Zuma. Shabir Shaik, Zuma's financial advisor, was convicted on counts that share a similar factual basis as the case against Zuma. However, while the prosecution prepared for the trial against Zuma – and notwithstanding the impending prosecution Zuma gathered increasing support from within the ANC and was eventually elected president of the organisation in December 2007. Zuma's rise in the ANC was accompanied by a tremendous pressure from within the ANC for prosecution to be dropped. This was precisely what the National Prosecuting Authority eventually did when it announced its decision on particularly flimsy grounds. This cleared the way for Zuma to become president of the Republic of South Africa. The legal soundness of the decision was doubted and the official opposition, the Democratic Alliance considered legal action to challenge the decision.

7 *Poverty Alleviation Network v President of the RSA* 2010 6 BCLR 520 (CC) parr 65-66; *Affordable Medicines Trust v Minister of Health of RSA* 2005 6 BCLR 529 (CC) parr 74-79; *Pharmaceutical Manufacturers Association of SA; In Re: Ex Parte Application of President of the RSA* 2000 3 BCLR 241 (CC) parr 85, 90; *Bel Porto School Governing Body v Premier of the Province, Western Cape* 20029 BCLR 891 (CC) par 45; *United Democratic Movement v President of the RSA 1* 2000 11 BCLR 1179 (CC) parr 55-76 (more in

law,[8] that the rule of law prohibits arbitrary decision-making and vague legislative provisions, et cetera. Possibly the most important aspect of the rule of law consistently highlighted by the Constitutional Court and very pertinent for the present discussion, is that the doctrine of legality lies at the very heart of the rule of law. In terms of this principle all spheres of governmental power are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law; Public power can therefore only be validly exercised if it is clearly sourced in law.[9] Hence, public governance must be conducted on a consistent basis in terms of predetermined, properly promulgated general legal rules (and principles). Arbitrary, unpredictable public conduct is the arch-enemy of the rule of law. It is against this public threat that the rule of law seeks to guard. The rule of law acknowledges the need for discretionary decision-making, yet strictly within the framework of clearly defined legal rules and principles. In terms of the rule of law the boundaries for conduct, more in particular the conduct of organs of the state are defined, thus ensuring certainty and affording the citizenry guaranteed legal protection without the fear of unpredictable, arbitrary decision-making beyond the bounds of predetermined law.

The rule of law is bolstered by general principles of the legal tradition alongside specific legal rules. These general principles assume particular relevance in situations that were not foreseen and therefore not accounted for by specific rules. These general principles co-assure conduct and decision-making on account of the law and in doing so reinforce the legally-based outcome of decisions where the rules are falling short. In so doing they strengthen the rule of law and guard against arbitrary decision-making and absolutism.[10]

Adding on to the above, I now proceed with an outline of what I would submit to be the core content of the (classical) rule of law as it has developed mainly in the Western legal tradition. Having done that, the contrasting content, implicitly held by the majority of the Judicial Service Commission and the more expressly argued by the BLA and the AFT and others (as discussed in 6 infra) will be clearer and more pronounced.

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particular parr 55, 68 & 70); *New National Party of South Africa v Government of the RSA* 1999 5 BCLR 489 (CC) parr 19, 24.

8 See the recent judgment of the Constitutional Court in *Gcaba v Minister of Safety and Security* 2010 1 BCLR 35 (CC) parr 59-62 and the case law cited there.

9 See for example *Fedsure Life assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) parr 56-58; *Pharmaceutical Manufacturers Association Of SA: In re ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC) par 17; *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) parr 49-50; *Minister of Justice and Constitutional Development v Chonco* 2010 4 SA 82 (CC) par 27.

10 The legal tradition abounds with general legal principles such as the principle~~s~~ of natural justice, which are an integral part of the legal order. One need not be a supporter of Dworkin to realise how important legal principles are. For Dworkin's discussion on principles see Dworkin *Taking Rights Seriously* (1977) more in particular chapters 4 and 7.

2 2 The Quintessential Characteristics of the Rule of Law

The rule of law has the following quintessential features that logically imply and mutually strengthen each other. It is marked by sovereign corpus of law; it has a literary, ie scriptural foundation; it is impersonal and abstract; it is characterised by and functions on account of the authority of the past and has forward-looking perspective at the same time; it is marked by the temporal distance between the legal norm and the (legal) decision.

Law is constituted by and legal decision-making is premised on a corpus of law. This corpus of law consists of legal rules, principles and precedents – the sources of the law – clearly distinguishable from and independent of non-law. The corpus has its own sovereign existence and grows independently in terms of its own rules. It is clearly distinguished from other considerations such as morality, religion, habitual behaviour, public policy, feasibility, et cetera. These other considerations might be very important. For legal decision-making they are irrelevant, however. Legal decision-making is determined independently by the corpus of law[11] on the basis of deductive reasoning applied to the facts of the subject-matter that calls for a decision. Other considerations have no part to play there. For such non-legal considerations to play any part in legal decision-making they must first be converted into law – legal rules. Such conversion takes place in terms of existing legal rules that set out the manner in which such conversion has to take place, whereafter they would form part of the corpus of law.[12] Only then, can such rules, now forming part of the corpus be taken into account in legal decision-making.

The corpus of law is recorded in the distinct sources of law (legislation, codes, case law, et cetera). Legal decision-makers must always go back to these sources that serve as the sole authoritative and decisive basis for legal decision-making. They must always remind themselves of the past – of the corpus of law that has already been in existence for a long time. Hence, memory of the law is the basis of the rule of law. They must consult the literature in which the law has been recorded over the ages and deductively apply it to the facts of a matter.[13] To arrive at a decision on a present issue the past is always the decisive factor. This perspective on the past is a salient feature of the rule of law. (This aspect of the rule

11 The emergence of an independent corpus of law as the basis of Western legal culture is explained very instructively by Berman *Law and Revolution: The Formation of the Western Legal Tradition* ((1983). For the truism that law is clearly distinguished and exists distinct from equity, expediency, morality, religion, custom, etc in Western (legal) culture see also Deutsch "On nationalism, world regions and the nature of the West" in *Mobilization, Center- Periphery Structures and Nation–building* (ed Torsvik)(1981) 74.

12 This argumentation is in line with Hart's exposition of the rules of recognition in widely read *Concept of Law.*

13 Through the art of *artificial reason* of the law as Edward Coke once reminded King James I. Quoted by Sabine *A History of Political Theory* (1971) 452 from *Coke's Reports* Pt XII 65.

of law is closely linked to its accompanying forward-looking characteristic explained below.)

In consequence there is, and there must necessarily be a temporal distance between the legal norm and the legal decision. In order to arrive at a decision the norm must necessarily precede the decision. They cannot be collapsed into one moment – ie the decision taken and the norm proclaimed simultaneously. If that was not so, the norm would not *pre*determine the decision simply because it did not predate it. The obvious manifestation of (and test for) temporal distance is the existence of legal precepts contained in the corpus of law, which obviously predate the decision and is for that reason capable of determining it.

Temporal distance is not only an essential feature and prerequisite of the rule of law. It is, also, a logical and principled prerequisite for separation of powers and on that score of constitutionalism and the armour against absolutism. This is so because temporal distance assures that the adoption of general legal norms executing decisions in terms of the norms and adjudication of disputes on the basis of the norms, are authored by different people and institutions, thus securing separation of powers, without which the very idea of constitutionalism is inconceivable. Conversely, if temporal distance between norm-making, execution and adjudication was removed and all these powers were collapsed into one (authored by the same person or body), the crucial difference between legislative, executive and judicial functions would be done away with, thus sacrificing the foundation of constitutionalism.

The rule of law is premised on the reliable recording of the corpus of law. Even though customary law, which is distinguished from custom (which does not qualify as legal rules) has in the pre- and early-modern era of the Western legal tradition occupied a prominent place as a legal source, comprehensive codes with roots in Roman law, have since an early stage played an important part in this tradition. In recent centuries the corpus of law originated and has been existing either in authoritative continental (Western European) legal codifications or in recorded (English) case law. These two bodies of law are important for distinguishing between the European civil-law tradition and the English common-law tradition.[14] However, the two traditions are more similar than dissimilar in that both are rooted in the notion of an independent corpus of law: The one on the codes and the other on the cases. On that score they are equally dependent on a literary culture: the corpus of law must be recoded in written form. Without that (the corpus of) law cannot be distinguished from non-law, more in particular from mores and precepts of morality and religion, from custom and from considerations of policy, feasibility and the like. Written recording further ensures preservation of the corpus of law for posterity. Hence it is clear that the

14 See for example the discussion by David & Brierley *Major Legal Systems in the World Today* (1985) on the Romano-Germanic and the common law legal traditions.

rule of law is based on a literary culture. In this respect the Western legal tradition is not exceptional as there are distinctive similarities between the Western (Christian) legal tradition and that of the Muslim world, which as Fukuyama points out in his captivating discussion of the rule of law, share the salient feature that both are, as he aptly pointed out *deeply scriptural*.[15] Although, as indicated above the rule of law presupposes a clear distinction between the legal corpus in contrast to religion (the religious canon) among other things, Western (Christian) and Muslim notions of the rule of law are in their origins both anchored in a similar scriptural religious tradition. Christianity, Islam (and Judaism), Fukuyama states, from a very early point on were based on authoritative Scriptures.[16] The Western tradition, however, went one step further, by systemising law at a very early stage in a single authoritative legal canon, distinct from non-law and distinct from legal discourse that did not qualify as authoritative and which therefore did not merit incorporation in the legal canon. As Fukuyama states:

> But only in Western Europe was the confusing welter of written texts, decrees, interpretations, and commentaries systemised with a view toward making them logically consistent. There was no equivalent for the Justinian Code or Gratian's *Decretals* in the Muslim, Hindu or Eastern Orthodox traditions.[17]

This crucial characteristic of the rule of law – its scriptural nature as manifested in the authoritative legal corpus – therefore has ancient roots, and although it might have been most advanced in the Western legal culture, it does not stand alone as its shares the indispensable scriptural basis with other (legal) cultures, more in particular the Muslim culture.

The scriptural foundation of the rule of law embodied in the corpus of law is the prerequisite for a legal order. It is the enabling instrument for living within a legal order and, at the same time the life-long burden of everyone living in such an order, more in particular for jurists, lawyers and public office-bearers who are responsible for administering the legal order. They are invariably bound by the corpus and must always justify everything they do – their decisions, judgments, opinions, submissions, et cetera – against the yardstick of the corpus of law. To that end they bear the burden of life-long reading and grasping the legal sources and of measuring and judging conduct in terms of the corpus. Never is there any escape from that burden of consulting – of reading and acting in accordance with – the corpus. The lawyer can, must and often do engage in rhetoric as part of her/his professional work, but always within the ambit of the authoritative script – the acknowledged sources – of the corpus. The lawyer might be a sage or philosopher speaking wisdom, but if that *wisdom* falls beyond the corpus of law, it is from the rule of law perspective (ie legally speaking) of no moment.

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15 Fukuyama *The Origins of Political Order: From Prehuman Times to the French Revolution* (2011) 278. Fukuyama discusses the rule of law in part 3 of this book.

16 Fukuyama 288.

17 *Idem*.

The law of the rule of law is inherently *im*personal, general and abstract, ie, not personal and specific.[18] The impersonality, generality and abstractness of law ensure that the law is applied regardless of any person (strikingly encapsulated in the Afrikaans: *sonder aansien des persoon*). If a legal rule is applied to a defined category of persons, it is applied without exception. The specific person *vis-a-vis* the rule will be applied in a specific case, does not determine the (legal) decision, ie the specific individual is not relevant to the legal decision about to be taken; the decision is determined by the operation of the relevant legal rules themselves.

So-called hard cases may occur where dire consequences of faithful and consistent application of a legal rule in a specific case may elicit the temptation to bend the law or not to be faithful to it. If the rule itself does not allow for discretion, or if there is no legal basis, in the form of a qualifying legal rule that allows an exception to the general rule, there is no way out. It must be applied. "*Hard cases make bad law*" the saying goes. This follows logically from the rule of law itself. So, do not allow a hard case to force a legally unwarranted exception, because that is destined to haunt future decision-making and to compromise the law in question. Before long others, claiming that their cases are also hard, are going to press for similar exceptions. Referring to the exception in the previous hard case, they might well have a foot to stand on and it is going to be difficult to justify why another exception is not once again to be made. If another exception is in fact made, the rule of law is further compromised in favour of arbitrary decision-making, which is another step towards inconsistent and unpredictable lawlessness. Hence, in order to avert this state of affairs and to protect the integrity of the law, always be consistent and never surrender to a hard case.

This forward-looking element of the rule of law reveals that no legal decision is restricted to have *inter partes* implications only. It always has implication for future decision-making and therefore always tends to be precedential as it were.

The fear that hard cases may force inconsistency in legal decision-making reveals the distinctive forward-looking characteristic of the rule of law, which is closely linked to the perspective on the past. Decision-makers who act in accordance with the rule of law are always alert to avoiding exceptions to the application of a rule in a particular case that may compromise the integrity of such rule in future. In order to protect the existing pre-determined rule, decision-makers are compelled to be forward-looking at the same time. Hence, in terms of the rule of law the

18 It may be argued that law is by definition abstract and impersonal and that the abstractness and impersonality of law distinguishes it from other forms of control of human behaviour. There is a long history, dating back to the Roman legal tradition that can be drawn upon as authority for this. See for example the references of Jolowicz *Historical Introduction to the Study of Roman Law* (1954) 25; Cicero *De Legibus* Part III 19 (English translation by Keyes (1966)); *D* 1 3 8 (translation by Watson (1985)).

future is always a factor that is prominently present in the decision in an instant case.

These then are the core features and consequences of the rule of law, without which the rule of law is hardly conceivable. If a Constitution, therefore avows the value of the rule of law in the way the South African Constitution does, these consequences are necessarily implied.

3 The Two Decisions of the Judicial Service Commission

3 1 The Role of the Judicial Service Commission

The JSC is one of the most important bodies created by the South African Constitution and its decisions are of great importance for the preservation of the country's constitutional order. The JSC is an independent body that plays a pivotal part in the appointment and impeachment of judges. According to section 177(1)(a) of the Constitution a judge may be removed from office only if the JSC has found that he or she suffers from an incapacity, is grossly incompetent, or is guilty of gross misconduct. If the Commission has made a finding based on one of these grounds, the National Assembly[19] may take further action towards the removal from the bench of the judge in question.

In order to discharge its responsibilities under section 177(1)(a), the JSC has the power to pronounce on whether a judge is guilty of gross misconduct. However, there is a *lacuna* in South African law in that the JSC cannot pronounce on misconduct that fell short of gross misbehaviour.[20] This *casus omissus* was an important factor in the reasoning of the JSC in relation to the two decisions under discussion.

3 2 The *CC/Hlophe* Matter

3 2 1 Background

In the *CC/Hlophe* dispute the judges of the Constitutional Court lodged a complaint against Hlophe with the JSC.[21] They alleged that the Judge President in two separate conversations with Judges Jafta and Nkabinde (of the Constitutional Court) in March and April 2008, had sought

19 S 177(1)(b) Constitution of the Republic of South Africa, 1996.

20 There have been various discussions to address this problem but no legislation has been passed to fill this lacuna.

21 The background of the matter is reflected in full in *Complaints of the Judges of the Constitutional Court against Hlophe and counter-complaint by Judge-President Hlophe against the judges of the Constitutional Court: Decisions and Reasons of the Judicial service Commission,* dated 2009-09-29 available at Judicial Service Commission. This will further be referred to JSC majority decision 2009.

improperly to persuade them to decide the *Zuma/Thint* case in a manner favourable to the president of the ruling African National Congress (ANC) (and now the president of the Republic), who was a party in that case. The case was on appeal before the Constitutional Court after the Supreme Court of Appeal had decided against Thint and Zuma.[22] When the judges of the Constitutional Court lodged their complaint, they also released a media statement in which their complaint against Hlophe was made public. The media release was the subject matter of a counter-complaint by Hlophe who alleged that the Constitutional Court judges had in doing so violated a number of his constitutional rights. Hlophe also instituted litigation against the judges of the Constitutional Court in the High Court. The majority judgment in the High Court was in his favour[23] but was later overturned by the Supreme Court of Appeal.[24]

It was common cause that Hlophe on his own initiative did have conversations with Constitutional Court Judges Nkabinde and Jafta. (Jafta was a former junior colleague of Hlophe at the University of the Transkei.) Hlophe visited the two judges in their offices at the Constitutional Court where the impugned conversations took place. It was also common cause that Hlophe raised the *Zuma/Thint* matter with the two judges. Judgment in the case was at that stage pending and the judges were preparing the judgment.

The judges of the Constitutional Court lodged a collective complaint against Hlophe since they regarded his actions an attempt to compromise the integrity of the court in general. Hlophe denied having improperly tried to influence the outcome of the case. Both parties filed statements with the JSC on the complaint and the counter-complaint. This was followed by oral hearings on 7 and 8 April 2009. Hlophe did not attend these hearings, reportedly due to his indisposition. Six judges of the Constitutional Court, including the then Chief Justice and Deputy Chief Justice, testified at the hearings. On July 30 a three-person subcommittee of the Commission took evidence from Hlophe, the then Chief Justice, the Deputy Chief Justice and Judges Nkabinde and Jafta. None of them was cross-examined.

3 2 2 The Majority Finding on the Main Complaint

The Commission was divided. As to the main complaint – the complaint of judges of the Constitutional Court against Hlophe – the majority found that Hlophe had in fact said to Nkabinde and Jafta that the *Zuma/Thint* case was very important and that it had to be decided properly. He also raised the question of privilege, which was a crucial aspect in the pending judgment. The majority found that Hlophe had used the word 'mandate' in his conversation with Nkabinde. Nkabinde alleged that Hlophe had intimated that he had a mandate to visit the Constitutional Court and to

22 *Zuma v National Director of Public Prosecutions* (2008) 1 All SA 234 (SCA).
23 *Hlophe v Constitutional Court of South Africa* (2009) 2 All SA72 (W).
24 *Langa v Hlophe* 2009 8 BCLR 823 (SCA).

raise the *Zuma/Thint* matter. However, Hlophe attached an exculpatory meaning to his use of the word "mandate". The majority also found that Hlophe had said that Zuma was persecuted (the *Zuma/Thint* case being part of the persecution) in the same way that he (Hlophe) was being persecuted. (Hlophe apparently alluded to the protracted disputes between himself and colleagues on the Cape bench and race rows with members of the Cape bar. There had *inter alia* been a public demand for his removal from ten senior counsel of the Cape bar.)[25] The majority accepted that Hlophe had said that there was no case against Zuma and that the last hope was now pinned on the Constitutional Court. Hlophe was also found to have said that the majority of the Supreme Court of Appeal who decided against Zuma, and whose judgement was now on appeal at the Constitutional Court, had made a mistake. He also said that the case was most probably one of the most demanding cases ever to be dealt with by the Court given its importance to the president of the ANC, Zuma, the ANC itself and the country.[26]

The majority attached considerable weight to the fact that the judges of the Constitutional Court never expressly said that Hlophe had asked them to decide the case in Zuma's favour. They merely inferred from the things that Hlophe had said – as summarised in the previous paragraph – that Hlophe had tried to improperly influence the court to decide in Zuma's favour.[27] It was also important to the majority that none of the judges was actually influenced as a result of what Hlophe had said.

3 2 3 The Majority Finding on the Counter-complaint

As to Hlophe's counter-complaint the majority noted that it might be argued that it was not collegial, unwise or imprudent of the judges of the Constitutional Court to release a media statement. However, in line with the finding of the Supreme Court of Appeal the majority could not find that it was unlawful to have done so.[28] Consequently there was no basis for finding them guilty of gross misconduct, which would warrant their removal from the bench. As noted before, the jurisdiction of the JSC to pronounce on judicial misconduct was limited to alleged gross misconduct and did not extend to misconduct in general. For that reason the majority did not regard it necessary to pronounce on whether the release of the statement constituted an act of (general) misconduct that fell short of gross misconduct.[29] The counter-complaint was therefore dismissed.

25 This was widely reported in the media, for example "Hlophe has no place on the Bench, say legal gurus" (2007-10-08) *Pretoria News*.
26 *JSC majority decision 2009* par 343.
27 *Ibid* par 337.
28 *Ibid* parr 327, 328.
29 *Ibid* par 332.

3 2 4 The Majority's Flouting of the (Classical) Rule of Law

3 2 4 1 Unwarranted Refusal to Clarify Unresolved Factual Disputes

The majority's decision was widely criticised by legal practitioners and legal academics. Former judge of the Constitutional Court, Johan Kriegler, is most probably the majority's most vocal critic. He described the decision as irrational and unreasonable. Most important for the present discussion is that Kriegler specifically accused the Commission for having flouted the rule of law. Kriegler stated: "The decision by the JSC is the biggest threat to rule of law the country has experienced since it emerged from darkness."

He added:

> The JSC was a magnificent instrument designed by the drafters of our Constitution to ensure that the judiciary was protected in its integrity and in its manifest independence. It has failed us in producing a decision that is legally indefensible and factually insupportable.[30]

In the following paragraphs various aspects of how the majority of the Commission flouted the rule of law will be discussed in some detail.

3 2 4 2 The Counter Complaint

Hlophe alleged in support of his counter-complaint that the judges of the Constitutional Court, and specifically the Chief Justice and the Deputy Chief Justice, had ulterior motives for the complaint against him and wanted to get rid of him at all costs. He alleged that the Chief Justice and the Deputy Chief Justice had brought undue pressure to bear on Judges Nkabinde and Jafta to act contrary to their conscience in proceeding with the complaint against him. (It should be noted that the two judges at one stage stated that they did not want to file a complaint against Hlophe.) Hlophe also alleged that the Chief Justice and the Deputy Chief Justice concealed the truth surrounding the background of the complaint; that they were driven by political motives; and that they masterminded leaks to the media as part of an orchestrated campaign against him (Hlophe).[31] Subsequently Hlophe indicated that he was not insisting that the counter complaint and the serious allegations that he had made be further dealt with in a formal hearing. He asked that the counter-complaint be dealt with on the basis of his initial complaint, ie the material already before the Commission.[32]

Hlophe's allegations against the Chief Justice and the Deputy Chief Justice were particularly serious. Had these allegations been proven true, a finding of gross misconduct on the part of the Chief Justice and the

30 http://www.sagoodnews.co.za/general/kriegler_to_challenge_jscs_hlophe_decision.html (accessed 2012-11-03); See also *The Sunday Independent* at http://www.iol.co.za/news/south-africa/kriegler-mulls-hlophe-challenge-1.457396 (accessed 2012-11-03).

31 Reflected in *JSC majority decision 2009* par 330.

32 *Ibid* par 331.

Deputy Chief Justice would undoubtedly have been justified. Had the said allegations found to be false and proven to have been made by Hlophe with malicious intent, it would have cast further doubt on Hlophe's suitability as a judge. Either way, these serious allegations called for scrutiny under cross-examination. The Commission's own *Rules Concerning Complaints of the Judicial Service Commission,* which regulated the procedure in the present matter provide for formal inquiries[33] accompanied by cross-examination. The serious factual issues that went to the bottom of the whole matter and the available procedural rules made it incumbent to order a formal inquiry. Strangely enough the majority nevertheless decided not to afford itself the opportunity to find the truth in this way. In doing so the Chief Justice and Deputy Chief Justice were also denied the opportunity to defend themselves and to challenge the allegations. Of utmost importance is the fact that the decision not to order a formal inquiry was clearly and unjustifiably in Hlophe's favour. He was spared the responsibility to account for his vilifying allegations and saved from the clear risk of embarrassment of cross-examination. Moreover, the decision against a formal hearing and accompanying cross-examination, was in accordance with Hlophe's own wish since he requested that the counter-complaint be dealt with on the basis of the material that was already before the Commission.[34] The bottom line is that the decision was not based on the applicable law and was therefore incongruent with the rule of law. Moreover, it was patently in Hlophe's favour.[35]

The obvious question is: Why did the majority make this legally unwarranted ruling?

3 2 4 3 The Main Complaint

Although the Commission made a number of findings, the statements and tendered evidence still left crucial factual disputes unresolved, more in particular regarding conflicting evidence of Hlophe and Nkabinde highlighted by the majority.[36] It is obvious that unless an *accused* (Hlophe and the judges of the Constitutional Court in the case of the present complaints) admitted all allegations against them, there would be factual disputes between them. These could be resolved in a formal inquiry, which is precisely what the *Rules Concerning Complaints of the Judicial Service Commission* referred to above, provide for. Such formal enquiry (accompanied by cross-examination) would have enabled the Commission to clarify the factual disputes and to make a comprehensive factual finding. The majority nevertheless once again refused to order a

33 Rule 5 of the Rules Concerning Complaints and Enquiries in terms of s 177(1)(a) Constitution of the Republic of South Africa, 1996.

34 *JSC majority decision 2009* par 331.

35 See Kriegler's comments on the majority's unjustifiable decision not to order a formal inquiry and cross-examination http://www.sagoodnews.co.za/general/kriegler_to_challenge_jscs_hlophe_decision.html (accessed 2012-11-03); See also *The Sunday Independent* at http://www.iol.co.za/news/south-africa/kriegler-mulls-hlophe-challenge-1.457396 (accessed 2012-11-03).

36 Amongst others in *JSC majority decision 2009* parr 336-337, 345.

formal enquiry.[37] Two reasons were advanced in support of this refusal: Firstly, it was regarded unlikely that new evidence would emerge from a formal enquiry. Cross-examination would not necessarily be material or relevant to the essential dispute, namely whether Hlophe had tried to improperly interfere with a decision of the Constitutional Court.

It is trite legal procedure that matters of this nature should be clarified in a formal hearing accompanied by cross-examination. As pointed out above, Rule 5 of the Commission's own rules provides accordingly. Had the Commission adhered to the rule of law, trite legal precepts, and its own rules, it had no choice but to order a formal hearing. The grounds on which the Commission based its decision not to do so were flimsy, to say the least, and had no basis in law. The speculation as to whether or not a formal inquiry and cross-examination would have taken the matter any further provides no legal ground for refusing an inquiry. Information which could be elicited during cross-examination is always clouded in uncertainty but that could never render the cross-examination dispensable, especially not when, as in the matter under discussion, the factual disputes clearly call for cross-examination. Once again the majority avoided the application of applicable law and denied itself the opportunity to make an informed factual finding. And once again the decision not to order a formal hearing protected Hlophe against the obvious risks that cross-examination might have entailed. Once again the question arises: Why did the Commission resort to such a legally untenable decision and why did it flout the rule of law?

3 2 4 4 Unwarranted Finding that Judge President Hlophe was not Guilty of Gross Misconduct

The majority's factual finding that Hlophe was not guilty of gross misconduct followed from its decision not to hold a formal hearing and was legally equally untenable. The majority's reasoning was to the effect that the Commission's jurisdiction in relation to judicial misconduct was confined to cases of gross misconduct; that the Commission could not pronounce on *ordinary* misconduct; that even if the evidence of the judges of the Constitutional Court (particularly that of Nkabinde) was fully accepted, a finding of gross misconduct on the part of Hlophe would not have been warranted; that at most a finding of *ordinary* misconduct might have been justified; but that since the Commission could not pronounce on *ordinary* misconduct, a formal hearing would not have served any purpose and was therefore not ordered.

The rule of law could once again serve as basis for the criticism against this decision. Within the framework of the rule of law there was no justification for the decision. The applicable law is perfectly clear; the evidence overwhelmingly shows that Hlophe improperly attempted to influence an impending decision of the Constitutional Court. Hlophe's conduct clearly constituted one of the gravest forms of serious

37 *Ibid* parr 340-363.

misconduct a judge can be guilty of. What is more is that a finding of gross misconduct did not depend on clarification of the questions that were in dispute. The following facts that were common cause were sufficient to support a finding of gross misconduct: Hlophe had approached Nkabinde and Jafta on his own initiative; Hlophe suggested to them that the Supreme Court of Appeal had erred in its judgment in the *Zuma/Thint* case which was at that stage pending before the Constitutional Court; Hlophe said that there was no case against Zuma in the *Zuma/Thint* case; Hlophe raised the question of privilege, which was a crucial aspect in the pending judgment; and Hlophe said that Zuma was persecuted in the same way that he (Hlophe) was being persecuted. All these facts which were accepted by the Commission were strangely enough still not enough to convince the majority of a *prima facie* case of gross misconduct.

In order to evade a finding of gross misconduct the Commission set a much higher threshold for a finding of improper influence, and thus for gross misconduct, than that which would ordinarily be required. The well-based inference of *attempted* influence drawn from the undisputed evidence of Judge Nkabinde was insufficient to convince the majority that Hlophe was guilty of gross misconduct. Apparently the majority required actual improper influence for a finding of gross misconduct; Hlophe's clear attempt to exert improper influence was not sufficient. The Commission's improper leniency in favour of Hlophe flew in the face of the applicable legal principles and the rule of law. Again the question arises: Why did the majority flout the rule of law?

This decision attracted sharp public criticism from law academics, lawyers and the media. However, it was not to the displeasure of everyone. On the contrary, there were many senior lawyers, including the chairman of the Justice and Constitutional Development Portfolio Committee of the National Assembly, Advocate Ngoako Ramathlodi, who hailed the decision as correct and he strongly dismissed the criticism against the majority.[38]

3 2 4 5 The Minority Ruling in the *CC/Hlophe* Matter[39]

The ruling of the minority, on the other hand, was strictly based on the clear legal rules applicable to the situation and was therefore true to the rule of law. The minority held that an attempt to improperly influence a

38 "Rule of Law deployed as a sword to decapitate the JSC" (2009-09-13) Sunday Times. See also Ngidi "It's time crusading Kriegler hung up his boots" (2009-09-20) Sunday Independent. The Black Lawyers Association (BLA) was also strongly supportive of the majority decision.

39 The minority decision of the JSC in the *CC/Hlophe* matter is recorded in *Complaints of the Judges of the Constitutional Court against Judge President Hlophe and counter-complaint by Judge President Hlophe against the judges of the Constitutional Court: Decisions and Reasons of the Judicial service Commission, dated 2009-08-29 available at Judicial Service Commission*, here referred to as JSC minority decision 2009. The decision was summarised in a press release of the same date by the JSC.

judgment in the manner that Hlophe tried to do amounted to gross misconduct that would warrant a formal hearing with a view to Hlophe's removal from the bench. They also held that the disputes of fact could only be resolved in a formal hearing. In this regard the minority specifically pointed out that the circumstantial evidence in this matter and the contexts in which the conversations had taken place could only be properly dealt with in a formal hearing where cross-examination was allowed. The minority also found the counter-complaint so closely linked to the main complaint that it also had to be dealt with in a formal inquiry.

3 2 4 6 The SCA Judgment in *Freedom Under Law v Acting Chairperson of the Judicial Service Commission*

The decision of the majority of the JSC was unsuccessfully challenged in the High Court. On appeal, however, the SCA made short shrift with the majority finding of the JSC. It held that the finding of the JSC that the contradictions in the evidence of Nkabinde and Hlophe was not material to the issue, not bearing on the central question namely whether Hlophe had attempted to improperly influence Nkabinde was irrational.[40]

Hlophe contradicted almost everything that Nkabinde said. It follows that the JSC considered virtually everything that Nkabinde said, ie virtually everything on the strength of which she drew the inference that Hlophe tried to influence her, to be immaterial in respect of the question whether he tried to influence her. It cannot conceivably, rationally be considered to be immaterial to the question whether Hlophe tried to influence Nkabinde, that Hlophe said, when making an appointment to see her, that he had a mandate, that, when he visited her, he said that the reason why he was there was that a concern had been raised that people in the Constitutional Court did not understand our history, that he said, when asked who those people were, that 'he has connection with some ministers', that he said that the question of privilege should be decided properly because the prosecution's case rested on it, that Nkabinde reprimanded him for speaking about a case he was not involved in, that he said that there was no case against Zuma and that Zuma was being persecuted, that he said that some of the people implicated in the arms deal whose names appeared on a list he had obtained from National Intelligence were going to lose their jobs when Zuma became President. These were the facts which the JSC had to consider together with Jafta's evidence, to determine whether Hlophe attempted to influence them. Once it had been determined that he did attempt to influence them, the JSC had to decide whether his attempt to do so constituted gross misconduct of such a nature that it may justify his removal from office.

40 *Freedom Under Law v Acting Chairperson of the Judicial Service Commission* 2011 3 SA 549 (SCA) parr 41-42.

The SCA also found the refusal of the JSC, in the face of a contradictions between the versions of Hlophe and Nkabinde, to order a formal hearing (including cross-examination) "surprising".[41]

Courts frequently have to decide where the truth lies between two conflicting versions. They often do so where there is only the word of one witness against another and neither of the witnesses concedes the version of the other. Civil cases are decided on a balance of probabilities but where there is a dispute of fact it is rarely possible to do so without subjecting the parties to cross-examination and without allowing them to test what are alleged to be probabilities in the other parties' favour. A court may of course after cross-examination still be unable to decide where the truth lies. That possibility does not entitle a court to decide the matter without allowing cross-examination and it does not entitle the JSC to do so.[42]

The SCA noted that the JSC had already, when it decided to conduct the interviews with the judges, decided that if Hlophe had indeed attempted to do so he would have made himself guilty of gross misconduct which, prima facie, may justify his removal from office and that this decision dismissing the complaint on an acceptance that Hlophe probably said what he is alleged to have said:

> In these circumstances the decision by the JSC to dismiss the complaint on the basis of a procedure inappropriate for the final determination of the complaint and on the basis that cross-examination would not take the matter any further constituted an abdication of its constitutional duty to investigate the complaint properly. The dismissal of the complaint was therefore unlawful.[43]

The SCA therefore concluded that the JSC flouted the rule of law. Against this backdrop the SCA among other things set aside the decision of the JSC that the evidence in respect of the complaint and counter-compliant against Hlophe and the judges of the Constitutional Court respectively are guilty of gross misconduct and that the matter be treated as finalised and ordered the JSC to hold a formal enquiry into the complaints in terms of rule 5 of its Rules Governing Complaints and Enquiries in terms of section 177(1)(a) of the Constitution.[44]

4 Judge President Hlophe and Oasis (The *Oasis* Matter)

In the midst of the clash between the judges of the Constitutional Court and Hlophe, the earlier complaint two years earlier against Hlophe in relation to the Oasis company was largely forgotten. However, it is

41 *Ibid* par 48.
42 *Ibid* par 48.
43 *Ibid* par 50.
44 *Ibid* par 58.

important to recall this matter as the JSC dealt with it in a way strikingly similar to the approach followed in the *CC/Hlophe* matter. In that matter the JSC was divided on lines remarkably similar to those followed in the *CC/Hlophe* matter. In that case a majority also decided against a formal inquiry while a minority regarded a formal enquiry necessary in the circumstances.[45]

The Oasis Asset Management Group is a company that conducted business *inter alia* in the Western Cape (the province where Hlophe is the Judge President). It emerged that Hlophe had for several years provided services to Oasis for remuneration. In total he received payments amounting to R467,500 from Oasis. While Hlophe was involved in this relationship with Oasis, the company was party to several cases in the Cape High Court. Oasis was amongst others also the plaintiff in a defamation case against Judge Desai, one of Hlophe's fellow judges on the Western Cape High Court bench. According to section 25 of the Supreme Court Act[46] no summons or subpoena may be issued against a judge of the High Court in any civil action except with the consent of that court. Hlophe, without disclosing his relationship with Oasis, granted permission for the institution of an action against Desai. When Hlophe's relationship with Oasis came to light a complaint against him was lodged with the JSC. Hlophe's defence was that the former minister of justice, Dullah Omar, had given him permission to do work for remuneration for Oasis. The permission was given orally and the only person that could confirm the permission, former minister Omar, had died several years before. The department of justice had no formal records of the alleged permission.

In this dispute, as in the *Hlophe/CC* one, there were matters that called for clarification under cross-examination: Could Hlophe's *ipse dixit* that he had been given permission be accepted without further ado? If so, what were the terms of that permission? Could Hlophe really have regarded such permission as legitimate seeing that it was obviously incongruent with the office of a judge, let alone that of a judge president, to be remunerated for private professional work performed alongside his public duties? Why did he not disclose his relationship with Oasis, particularly at the time when he had decided on Oasis' prospective litigation against Desai? These and other matters could only be clarified in cross-examination during a formal inquiry. This was also the argument of a minority within the JSC which they had advanced in support of the view that a formal inquiry was necessary in order to get to the bottom of the matter, thus enabling the Commission to make an informed finding.

However, the majority had another view, namely that although Hlophe's explanation was unsatisfactory, and his failure to disclose his

45 The facts and the decisions of the JSC in the *Oasis* matter are set out in two press releases issued by the Judicial Service Commission on 4 and 18 October 2007 respectively, available at the Constitutional Court in Johannesburg.

46 59 of 1959.

relationship with Oasis was inappropriate, no formal inquiry should be instituted. Instead, the Chief Justice, the President of the Supreme Court of Appeal and the Judge President of Gauteng (all members of the JSC) were delegated to meet with Hlophe and to convey to him the JSC's concerns about his conduct and its expectations regarding his future conduct.

As in the *CC/Hlophe* case a minority of the Commission, in strict adherence to the applicable law, and therefore also to the rule of law, was convinced that the evidence constituted a *prima facie* case of gross misconduct that warranted a formal inquiry. It is submitted that it undoubtedly constitutes impeachable gross misconduct if a judge receives remuneration for outside work and then gives permission to his remunerator to sue a fellow judge. This is certainly not the kind of conduct that should be swept under the carpet or be settled gently in a private discussion. It is a matter to be dealt with in the open, at a formal hearing and in accordance with the applicable law. Moreover, in this case, as in the *CC/Hlophe* matter, the only person who could cast light on the circumstances in which payments had been made to him; the alleged ministerial consent to do private work had been granted to him; and on the circumstances surrounding his permitting Oasis to sue Judge Desai while keeping his relationship with Oasis secret, was Hlophe himself. Cross-examination of Hlophe was obviously the only way in which this information could be obtained and a formal, public hearing for this purpose was therefore essential. However, the majority decided against bringing the matter into the open and in doing so denied itself the opportunity to get clarity on the relevant facts. And, very important, it also avoided the risk of any embarrassment to Hlophe. The question may once again be asked: Why did the Commission act in disregard of the rule of law?

5 Renewal of the Term of Office of the Chief Justice and the Judgment of *Justice Alliance of South Africa v President of the RSA*

Following the positive response of the Chief Justice to a written request of the President to serve in that capacity for another five years, the President on 3 June 2011 effected the extension of the term of office of the Chief Justice and communicated his decision to the JSC and to leaders of the political parties represented in the National Assembly before announcing the decision in an address to Parliament.

The constitutional provision pertinent to the present issue is section 176(1) which provides:

> Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.

It is clear from this provision that the term of office of the Chief Justice could only be renewed if an Act of Parliament so provides. The only legislative provision dealing with the question of the renewal of the term of office of Judges of the Constitutional Court (including the Chief Justice) is section 8(a) of the Judges' Remuneration and Conditions of Employment Act.[47] This provision, however, does not provide for the renewal of the office of these judges but purports to confer a discretionary executive power upon the President to prolong the term of office of the Chief Justice.

Section 8(a) reads:

> A Chief Justice who becomes eligible for discharge from active service in terms of section 3(1)(a) or 4(1) or (2), may, at the request of the President, from the date on which he or she becomes so eligible for discharge from active service, continue to perform active service as Chief Justice of South Africa for a period determined by the President, which shall not extend beyond the date on which such Chief Justice attains the age of 75 years.

When the renewal of the term of office of the Chief Justice by the President, acting on the basis of section 8(a) was challenged in the Constitutional Court, the Court stated that the determination of the case turning on the interpretation of section 176(1) of the Constitution and section 8(a) of the Act, involve crucial constitutional imperatives including the rule of law.[48] The court held that the provision as well as the act of the President, renewing the term of office of the Chief Justice, in terms of this provision, was incompatible with section 176(1) of the Constitution and for that reason invalid. It stated:

> In all the circumstances, we conclude that the Constitution determines that a Constitutional Court judge holds office for a non-renewable term, "except where an Act of Parliament extends the term of office of a Constitutional Court judge." It is only by an Act of Parliament that an extension may occur. The provisions of section 8(a) amount to an impermissible delegation and are invalid because they are inconsistent with the provisions of section 176(1) of the Constitution. Any steps taken or decision made pursuant to the provisions of section 8(a) of the Act is inconsistent with the Constitution and equally invalid.[49]

Very pertinent for the present discussion is that the Court was confronted with an argument on behalf of the second Amicus Curiae, the BLA, which as the Court stated "took a novel stance." The BLA mainly confined itself to the question and the appropriate remedy. It acknowledged that the act was unconstitutional. However, the adoption of the act and the reappointment of the Chief Justice were based on a *bona fide* mistake acknowledged by all parties concerned and should for that reason be excused in terms of certain notions of restorative justice in customary

47 47 of 2001
48 *Justice Alliance of South Africa v President of the RSA* 2011 5 SA 388 (CC) par 20.
49 *Ibid* par 69.

African jurisprudence. It contended that a mistake has been made in good faith by all concerned and should for that reason be "forgiven". It argued that the notion of "*tshwarelo*" or "*tshwarela*" in African jurisprudence, as applied in "*Lekgotla*" (African traditional courts), meaning "excusable" or "excuse" and translates to "erasing the wrong permanently",[50] ought to be applied in the instant case.

The court rejected the BLA's argumentation (which is dealt with in more detail in *6. Infra),* stating that it is difficult to envisage how the rule of law will be served in this instance by protecting future constitutionally invalid uncertainty.[51]

6 Another Rule of Law (Decisionism)

6 1 Outlining Decisionism

It was argued above that the minority decisions of the JSC in both Hlophe matters were strictly in line with the applicable law and therefore firmly rooted in the rule of law. On the other hand, the majority decisions (and the views of those who supported the majority, which are now under consideration) were incompatible with the rule of law. This is a serious indictment against a highly esteemed constitutional institution that carries hefty responsibilities for the South Africa's judiciary. As indicated in 5 *supra* the Constitutional Court in *Justice Alliance* also rejected the views of the BLA as incompatible with the rule of law. The question to be considered is whether there is an alternative explanation for the majority approach of the JSC, and for those who supported this approach as well as for the stance that the BLA took in the *Justice Alliance* case – one that could somehow be justified in pursuance of a deviating notion of the rule of law.

If we assume that there could be a conception of the rule of law deviating from the outline in *2 supra* and from the stances taken by the minority of the JSC in the Hlophe matters, the SCA in the *Freedom under Law* case and the Constitutional Court in *Justice Alliance* clearly subscribe to the classical conception of the rule of law, while those who differ subscribe to a deviating notion of the rule of law. As also indicated there, the bare minimum (core content) of this classical (Western) rule of law is strict adherence to the principle of legality.

The question could arise whether the majority decisions discussed above were not possibly the best in the circumstances. It might be argued that given the circumstances they were the most feasible and prudent regardless of the fact that the applicable law was not adhered to in the manner insisted on in the minority decisions of the JSC, by the critics of these decisions and as decided in *Justice Alliance* and in *Freedom Under Law*, in other words, that in the circumstances the decisions were the

50 *Ibid* par 108.
51 *Ibid* par 111.

best in spite of the fact that the rule of law (in the classical) sense was flouted.

This is where the alternative – "another rule of law" – could come into the picture. Unlike the (classical) rule of law the focus here is not on the integrity of legal rules contained in the corpus, and on their strict and consistent application. The protection of the impersonal and abstract character of the rule of law is also of lesser importance in terms of this *alternative rule of law*. In terms of this approach legal rules are but the first guidelines, yet not the decisive factor in legal decision-making. They might be points of departure but not decisive binding law. Considerations of fairness, feasibility, policy, politics, strategy, ideology, et cetera may justify deviation from the law. The crucial concern of this approach is the *best* (individual) decision, not the integrity of the legal rule in question. In every case the best possible decision should be taken. The *good* decision is the decisive criterion (to the extent that *criterion* is the suitable term). That means that if strict application of the applicable legal rule could ensure a good decision, the rule should be applied. But if adherence to the rule would produce a *bad* decision, be harsh to the person/s in question or would lead to unacceptable (short term) political or other consequences, it should be departed from so that the best possible decision, viewed from the perspective of the parties in the case or considerations of strategy, tactics, politics, et cetera can be reached. Since the individual decision stands at the centre of this approach, it is described as decisionism.

In terms of this deviating approach to the rule of law the classical notion of the rule of law may be criticised for its alleged static, abstract, decontextualised nature and for its alleged excessive preference of rules over processes. It may be said to be excessively rule-driven and scripturally-based; dealt with as a fixed system of detailed defined rules (or similar legal precepts) that are *enforced* as it were on factual situations, regardless of the specific contexts – the individual contingencies – of each factual situation. The rules are static – they do not assume a different meaning in accordance with different contexts – and they are deductively applied to all factual situations. The deviating "rule of law" is exactly the opposite. It is pragmatic and context-bound. It allows for decisions to be taken as required by each situation, more in particular with reference to the nature of the relationships (and to strategic, political and other considerations) in each case. Matters are approached and disputes are resolved not through deductive reasoning on the basis of strict and static legal rules, recorded in the corpus but rather by way of an open-ended communicative process that allows matters to be talked through and thus for solutions to be reached in a manner that allegedly accommodates everyone. The focus in this case is not on the deductive application of pre-determined rules but rather on an on-going discourse and rhetoric that could pave the way to reaching

creative solutions in concrete and changing contexts,[52] instead of demarcating rights in terms of the relevant predetermined legal rules contained in the sovereign corpus.

But is decisionism not mindful of the risks of the hard case that classical rule of law is so wary of? Isn't decisionism aware that hard cases must not be allowed to compromise the applicable legal rules? Is decisionism unaware that exceptions and inconsistencies create bad – haphazard, unstable and inconsistent – law that is destined to haunt future decision-makers? In terms of the premises of the (classical) rule of law all these objections are obviously valid. However, in terms of the premises of decisionism, these "objections" are of no moment. This is so because decisionism rejects the notion that hard cases make bad law. In terms of decisionism no cases, neither hard, nor easy ones, make law. This is so because for decisionism a decision pertains and has consequences only for the case at hand. It applies *inter partes* but never goes beyond that. It does not set a precedent, does not serve as authority and does not create law for future cases. Unlike the rule of law, in terms of which decisions are made on the basis of existing law that originated in the past and with due consideration of possible future consequences – all in order to guard over the integrity of existing (corpus of) law – decisionism is neither disciplined by existing rules nor scared by future consequences.

It is not dependent on the memory of a previously recorded corpus of law; on the contrary, if the need for the good decision so requires, it is rather based on forgetting. Decisionism is purely *present-centred*.

The charge might be levelled that decisionism paves the way to unbridled arbitrariness that sacrifices the very notion of law. If the parameters provided by the corpus of law are not present and not respected there can be no consistency, no predictability and finally no legal order at all. Decisionism dispenses with adherence to the predetermined corpus of law. It allows considerations that are irrelevant to the rule of law to co-determine (and to be decisive for) decisions. In some cases namely when the "good" decision so requires, applicable legal precepts that might otherwise be decisive for reaching a decision might – or must – be disregarded.

52 See in this regard amongst others Mazrui "Globalism and Some Linguistic Dimensions of Human Rights in Africa' in *Human Rights, the Rule of Law and development in Africa* (eds Zeleza & McConnaughay)(2004) 52 *et seq* (specifically 68); Weissbourd and Mertz "Rule-centrism versus legal creativity: the skewing of legal ideology through language" 1985 *L and Soc R* 623 623 *et seq*.

6 2 The JSC's Majority Decisions and Forgiveness/*Tshwarela* as Applied in African Jurisprudence According to the BLA in *Justice Alliance* in a Decisioninst Framework

I now proceed to place the decisions of the majority of the JSC and its supporters as well as the argumentation of the BLA in Justice Alliance in the decisionist perspective that was outlined in the previous section.

6 2 1 Oasis *Matter*

In the *Oasis* matter the majority of the JSC, instead of making a finding of gross misconduct, opted for a confidential discussion with Hlophe. In doing so Hlophe's subjection to cross-examination and the ensuing risks of embarrassment in a formal public inquiry and the possibility of eventual impeachment were avoided. In doing so the majority, instead of applying the applicable law, opted for a friendly settlement, which it regarded as the best decision in the circumstances.

6 2 2 CC/Hlophe *Matter*

In the *CC/Hlophe* matter the majority took a similar course. Here it also concluded that there was no case of gross misconduct on Hlophe's side. It also went out of its way to avert an open public inquiry and the accompanying risk of embarrassment that cross-examination could have caused both Hlophe and the Constitutional Court judges concerned. By ruling that there were no grounds for a finding of gross misconduct against either Hlophe or the said judges the majority once again brought the disputes to a quick and friendly settlement instead of following the process prescribed by the applicable law. Hence, in both cases the best decision in terms of decisionism was made in disregard of the (classical) rule of law.

The defenders of the two majority decisions were arguably more forthright and came closer to an express articulation of decisionism than the majority of the JSC itself. They mention additional considerations, more in particular political considerations, such as the transformation of the judiciary, for ensuring the best decision in the circumstances: the best decision that would avoid any disruption of the transformation of the judiciary by acting against black incumbents of the bench. In some cases these political considerations were mentioned fairly tactfully and in other cases forthright and rather blatant.

In its submission to the JSC concerning the *CC/Hlophe* on behalf of the Advocates for Transformation (AFT) of the Witwatersrand, (the AFT submission) the AFT is described as an association that among other things, are committed to "advocacy of the rule of law."[53]

53 *AFT submission* par 2 *AFT submission*. The submission was signed by Advv Semenya SC, Madima, Pillay and Maenetje.

The predominant aim of the AFT is to avoid any disciplinary action against any of the judges concerned as that would, according to the AFT, erode the public confidence, integrity and dignity of the judicial officers involved in the matter and of the judiciary as such, which must be avoided.[54] That would, the AFT says, undermine the gains that have been made with the transformation of the judiciary.[55] (De Lange, ANC MP, former Chairperson of the Justice Portfolio Committee, deputy minister of justice and a former member of the JSC explained in the national assembly that the transformation of the judiciary comprises: First, the realisation of the objective of equitable representation of blacks and women, described as *diversity, personnel or symbolism transformation*, and, second, transformation relating to the intellectual and ideological approach adopted by judicial officers, when implementing the letter and spirit of our Constitution – referred to by De Lange as *intellectual content or substantive transformation*.)[56]

In order to avoid disciplinary action the AFT argues that the complaints of the Constitutional Court judges and that of Judge Hlophe should be mediated in private, thus avoiding a public hearing accompanied by cross-examination and the ensuing public interest and media scrutiny in the matter. The fact that the most senior judges are implicated in the complaints made against each other, is the crucial reason for them calling for an extraordinary response in dealing with the complaints.[57]

A striking feature of the AFT 's moving for mediation is that it deals with this full-fledged public-law dispute, involving the responsibilities and duties of public office-bearing, namely the public office-bearing of judges, almost as if it is a pure private tussle between individuals with no public responsibilities in terms of the description of their positions of public office. It is precisely for that reason that the AFT can argue that complaints had to be dealt with privately and not as a hearing that revolved around the question whether the judges had acted in disregard of their responsibilities as public (judicial) office-bearers. This becomes even more apparent when the further argumentation and the accompanying vocabulary of the AFT submission are considered. Reference is made to the "resolution of both complaints"; "the impasse between Hlophe and the Justices of the Constitutional Court"; "the issue between the parties"; that mediation would enable the "parties" to

54 *Ibid* par 6, 8, 44, 45, 57.
55 *Ibid* par 60.
56 Hansard (2003-2-17) 128-134. The litmus test, according to De Lange, for intellectual transformation –
"… would be how individual judges and magistrates will pursue their legitimate and genuine constitutional obligations, without wittingly or unwittingly going out of their way to frustrate or undermine the legitimate and genuine choices and aspirations of the majority of South Africans to create a fully functioning democracy and a socio-economic and ideologically transformed country".
57 *AFT Submission* par 9.

"endeavour to settle the disputes in an environment that is not adversarial"; and "to engage in discussion without prejudice".[58] Obviously, this was not a matter that could merely be "settled" between the "parties" since the alleged wrongdoing complained of was not directed against another person; it revolved on the question whether or not the terms of the public office-bearing – judicial office-bearing in the present case – were transgressed.

The AFT basically argued that the mediation by the Heads of Court would be the best way to resolve the complaints. That would "stave off" a full hearing and cross-examination. Through mediation, the AFT argues towards the end of its submission:

> [t]he parties will be able to endeavour to settle the disputes in an environment that is not adversarial. The nature of the process ensures that all discussion are 'without prejudice', and that information divulged at mediation cannot be used against a party at another forum should mediation fail.[59]

The AFT is particularly concerned that the conversations that took place in judges' chambers should not become the subject of public scrutiny (which would have been the case in an open hearing). It states:

> We submit that both complaints result in the undesirable public scrutiny of a dialogue between judicial colleagues. Such dialogue ought to be protected from disclosure in view of the sanctity of judges' chambers which protects discussions between judges and enable them to freely and robustly voice their opinions.[60]

Bona fide conversations that take place in judges' chambers should certainly not become the subject of public scrutiny. However, this case differs as the conversations that took place were allegedly precisely not *bona fide*; they allegedly constituted a serious transgression of the terms of the judicial office-bearing; it was improper, illegal and unconstitutional. Hence it did not qualify for protection from public scrutiny, but precisely calls for such public scrutiny.

It is clear that political objectives and ideology were the most relevant and crucial considerations for the AFT moving for the resolution of the matter through mediation, thus preventing disciplinary action for (gross) misconduct. This clearly emerged from the AFT stating towards the end of its submission:

> The matter has begun to undermine the transformation imperatives of the Constitution. If not handled properly, the matter could reverse the gains of the transformation of the judiciary.[61]

The best decision in the circumstances, in terms of this decisionist approach, was one that best serve the political consideration of the need

58 *Ibid* parr 7, 8, 46, 50, 51, 61.
59 *Ibid* par 61.
60 *Ibid* par 43.
61 *Ibid* par 60.

for transformation of the judiciary, regardless of the fact that it would be ignoring the relevant (legal) factor in terms of the rule of law (and the JSC's own rules, namely whether the judges have acted in accordance with what their public office-bearing required.)

The heads of argument on behalf of the first respondent (the Acting Chairperson of the JSC) in the Freedom under Law case in the SCA bear traces of a similar argument. One of the reasons, it is argued, why the JSC's decision concerning the complaints should not be reversed, was because both the judges of the Constitutional Court and Judge Hlophe had accepted that the complaints had been finalised. Another was that considerations of pragmatism and practicality required that the Court should not exercise its discretion in favour of granting the review, even if the grounds of review may be well founded.[62]

The former chairman of the Justice and Constitutional Development Portfolio Committee (subsequently appointed deputy minister of correctional services) advocate Ngoako Ramatlhodi, also supported the majority of the JSC. He argued that the rule of law had been deployed as a sword to decapitate the JSC.[63] Ramatlhodi, like the AFT, therefore did not part with the rule of law but proffered his own interpretation of it. For Ramatlhodi, commenting on the majority decision in the *CC/Hlophe* matter, said there were considerations that clearly showed that the majority took the best decision in the circumstances. He also dealt with the need for the transformation of the judiciary but in terms much more outspoken than that of the AFT referred to above. Ramatlhodi highlighted the need for transformation of the judiciary and particularly for the judiciary to be racially representative of the South African population and refers to section 174(2) of the Constitution in support of his argument. This provision provides that the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed. It should be noted that this is neither the only, nor the overriding factor for judicial appointments.[64] However, in Ramatlhodi's view the need for transformation was the crucial factor for reaching the best decision in the circumstances. Hence, decisions that could somehow impede *transformation* and jeopardise the position of black incumbents on the bench,[65] should be avoided, regardless, it would seem, of the suitability of the individual judge in question. A public interrogation of all the judges involved in the *CC/Hlophe* matter

62 *Ibid* par 81.

63 Ramatlhodi "Rule of law deployed as sword to decapitate the JSC" (2009-09-13) *Sunday Times*.

64 S 174(2) Constitution of the Republic of South Africa 1996: "The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed".

65 In Ramatlhodi's logic the position would have been vastly different with white judges. They are not instrumental in judicial transformation. If they did what Hlophe had done a formal hearing, cross-examination and impeachment, all according to the book would have been perfectly fine – arguably another example of the best decision in the circumstances.

(including the outgoing chief justice) all of whom are black, should therefore as far as possible be avoided. If there were to be a formal hearing, Ramatlhodi warned, that would lead to "... public wrestling among the most senior black jurists in the country, as each side will seek to prove the other to be less forthcoming with the truth." This, Ramatlhodi clearly wanted to avoid almost at all cost even in spite of the evidence of gross misconduct against Hlophe.

Ramatlhodi found it frightening that those who criticised the majority for not ordering a formal inquiry could not "... comprehend the damage being visited upon our fragile democracy by a systematic assault upon our nascent institutions such as the JSC".[66]

In another defence of the majority decision in the *CC/Hlophe* matter another lawyer, Ngidi,[67] defended the majority's decision on account of the fact that it would not be in the interest of the justice system to have senior judges at each other's throat for a protracted period. He argued that "... the ugly spat in the judiciary, the continuation of which puts us all to shame, had to be brought to an end as soon as possible". It is significant that Ngidi admitted that the rule of law was not adhered to, but he downplayed that. He accepted that the JSC in the process of resolving the dispute committed "minor procedural transgressions". These transgressions were, according to him, not serious. From Ngidi's argumentation it is clear that the avoidance of conflict, the reaching of a friendly settlement and the mending of bad relations (between the senior judges involved in the dispute) were important ingredients of a good decision.

In the assessment of these views in support of the majority of the JSC the best decision necessitated that the broad political objective of transformation be protected; that the possibility of disciplinary action and impeachment be avoided; that a further quarrel between the judges involved in the matter, all of whom are black, be brought to an end and that the embarrassment that would follow for some or all of these (black) judges if a formal inquiry was to be held, be avoided. All these considerations fell outside the corpus of law that ought to govern the decisions of the JSC. Under the (classical) rule of law they are entirely irrelevant. Yet, to decisionism they were crucial in the circumstances: in order to reach the best decision in the circumstances it was imperative that they be carefully accounted for; and if strict application of applicable legal rules in terms of rule of law would stand in the way of a "good" decision, it is not only acceptable but imperative to depart from it.

66 Ramatlhodi "Rule of law deployed as sword to decapitate the JSC" (2009-09-13) *Sunday Times*.

67 Ngidi "It's time crusading Kriegler hang up his boots" (2009-09-20) *Sunday Independent*. Ngidi also said that the JSC is an institution established in terms of a democratically adopted constitution and suggested that questioning the majority's decisions was an assault on the legitimacy of the JSC.

6 2 3 Tshwarela

In 5 *supra* mention was briefly made of the submission made by the second Amicus, the Black Lawyers Association in the Justice Alliance case in which it argued that the mistaken renewal of the term of office of the Chief Justice was excusable in terms of the African notion of *tshwarela*. I now proceed by reflecting in more detail on what was argued, thus revealing how this argumentation reflected the decisionist mode of thinking: The BLA explained as follows:

> The term 'excusable' or 'excuse' is applied in African jurisprudence and as applied in Lekgotla (African Court) meaning 'tshwarela' (the literal English equivalent is "hold for me). Ttshwarela or tshwarelo means erasing the wrong permanently as you would hold that wrong permanently on behalf of the wrongdoer (it should be noted that 'forgive' or 'forgiveness' is not equivalent to 'tshwarela'). In African jurisprudence the wrongdoer who has been '*tshwareled' is deemed not to have committed any wrongdoing. The wrongful conduct is expunged by the victim and/or* Lekgotla by 'holding it' ('tshwarela') for the wrong doer. Tshwarela is preceded by an unequivocal acceptance of the wrong doing by the wrong doer.[68]

The BLA submitted that the submission of an amendment act by Parliament amounted to an unequivocal acceptance on the part first respondent (the president) of his wrong-doing: "The first respondent is therefore saying to the nation 'ntshwareleng' (hold this for me)".[69]

In the premises the BLA submitted that renewal of the term of office of the Chief Justice should be countenanced.[70] In spite of the legal position as set out in the applicable law governing this question, this was in the view of the BLA the best decision in the circumstances.

7 Does Decisionism Qualify as an Alternative Rule of Law?

Could there be any credibility in decisionism's claim discussed in 6 *supra* to be an alternative rule of law? The answer depends on whether the norm proffered by decisionism – the norm of the best decision in the circumstances – can stand the test of a genuine legal norm. Hence, is this alternative so-called norm of the best decision really a legal norm or is it but a disguise for uncontrolled arbitrariness? Precisely this would be the charge of the (classical) rule of law against decisionism.

In terms of the (classical) rule of law protection of rights in modern society is inconceivable without legal certainty and predictability. This is precisely what the rule of law should achieve. For that reason the law must be well-defined and pre-announced, demarcating in precise terms

68 *BLA submission* parr 15, 16.
69 *Ibid* par 17.
70 *Ibid* par 20.

what state organs, must and may do and what they are precluded from doing. In this way the prerequisites for limited government and constitutionalism are complied with. By the same token the citizenry are enabled to foresee with a fair degree of certainty when and how (coercive) authority will be enforced in given circumstances. The citizenry can therefore go about freely knowing what their legal position is and when their conduct will go beyond the limits of their rights.

If the legal norms are so vague that its nature and extent is unpredictable, the so-called norm is non-existent. If the factors relevant for decision-making are not settled before-hand, but only determined by the decision-maker on a case by case basis, genuine normative decision-making is out of the question. If the law which is supposed to determine the outcome of decisions changes from decision to decision and person to person depending on the judgment of the decision-maker, the decision-maker that applies the law is also the case by case law-maker of (unpredictable) law. For this very reason decisionism cannot constitute an alternative rule of law since any prediction based on the *norm* of the best decision is impossible. Moreover, the decision-maker, whose decisions are supposed to be regulated by law, becomes the law-maker. In this way the separate functions of law-making, execution and adjudication are combined in one act that occurs at the moment the decision is arrived at. And all this takes place under the guise of the norm of the best decision, a decision which is not law-based and amounts to nothing more than an arbitrary decree. The *norm* allows for unqualified casuistic and arbitrary decision-making which is precisely what the rule of law and constitutionalism seek to avoid.

The classical rule of law does not claim to secure absolute certainty and predictability as if decisions are taken in an almost mechanical-like fashion. Therefore there could be no grounds for presenting discretionary decision-making in administrative law as an example of decisionism. Administrative decision-making, like all (public) decision-making in the constitutional state must still carefully be accounted for in terms of the existing recorded law. In the case of administrative law decisions must amongst others be based on the applicable empowering legal provisions; not be affected by an error of law or made with an ulterior purpose; it must be taken in good faith and the decision must be reached on the basis of a fair procedure (which in itself is set out in detail in existing law); it must be rational, reasonable and based solely on carefully defined relevant considerations, et cetera. Decision-makers must explain their stance on previous decisions and set out the legally relevant grounds for differing from or agreeing with them. Hence, administrative decision-making is governed and/or disciplined by, and accounted for in terms of existing authoritative legal literature comprising all applicable law, including case law, contained in the

authoritative corpus of law.[71] This existing legal literature – the corpus of law – is the object of the rule of law's focus on the past as explained in 2 2 *supra*. This goes a long way towards assuring consistency, rationality, rights-protection and the predictability of future legal decision-making, thus contributing to a legally-based dispensation. This constitutes compliance with the rule of law. Decisionism, on the other hand, is devoid of all that. With its exclusive present-centeredness, devoid of the disciplining effect of existing binding legal literature, decisionism entails total lack of any consistency, predictability and certainty. It may well be that that decisionism may occasionally facilitate amiable settlements, restore bad relationships, avert politically awkward consequences and avoid personal embarrassment to esteemed public figures by resorting to so-called best *decisions,* but such results are purely arbitrary in nature and are in no way compatible with the basic tenets of the rule of law.

Decisionism parts with literary-based legal sources contained in a sovereign corpus of law. Decisionism cannot cite (written) sources. Moreover, it must avoid literary-based sources at all costs because if there is an authoritative scripturally recorded source of law, the very idea and purpose of decisionism, namely to take the best decision in the circumstances without being hamstrung by binding legal sources, fall by the wayside as it then gives way to the (classical) rule of law. Once there is an authoritative corpus of law – binding scriptural legal sources – decisions will no longer be present-determined as decisionism would want them to be. Then the past and the future will once again assume its importance for present decisions as the rule of law require them to be. Decisionism cannot be based on authoritative sources of law; on the contrary, it must avoid the authority of a scripturally-based corpus of law at all costs. Decisionism's "sources" must be kept in obscurity until the moment a specific decision is required to be made. Only then the "law" is suddenly announced. And that announcement must be oral and it must strictly avoid citation of a scriptural source because such written source could serve as the authoritative basis for future legal decision-making, thus dislodging decisionsm's present-centredness. The point is that decisionism's present-centredness implies oral-centredness and the accompanying aversion to and avoiding of an authoritative scriptural legal source in direct contrast with the Western (and Islam) legal cultures which are rooted in the authoritative scripts of the sovereign legal corpus.

The rule of law, regardless of how liberally defined, cannot accommodate decisionism. Decisionism lacks a normative basis and can never qualify as an alternative rule of law. The rule of law and

71 The same holds true for constitutional adjudication. Even though it might be argued, that *stare decisis* does not apply in the same measure to constitutional matters, constitutional adjudication still requires that the courts adjudicating such matters must account for their decisions in terms of their previous decisions and reasoning. This is quite clear among others from South African constitutional jurisprudence on the question of *stare decisis*, as evidenced in dicta of judgments of the Constitutional Court cited in footnote 8.

decisionism are simply irreconcilable. In the final analysis there is no choice between various forms of rule of law – more in particular between a classical as opposed to a decisionist rule of law. The choice lies between the rule of law and as opposed decisionism.

8 A Clash of (Legal) Cultures and Cleft Constitutionalism

The rule of law might appear to be universal but it is not. Deutsch states that Western civilisation, or what he describes as the Western regions (all regions in the world where Western civilisation has established itself), unlike other world regions, has long-standing inclinations towards the rule of law. The rule of law is possibly the main distinguishing characteristic of the West.[72] Deutsch possibly went too far in this regard, because the notion and consequences of the rule of law have in fact been known to some other cultures. (See the observations by Fukuyama referred to in 2 *supra*). The rule of law does, however, appear to be more refined, advanced and incorporated in Western systems of government. Allowing thus for some exceptions, there is hardly any rule of law-based tradition elsewhere in the world. In its strength, depth and existence over many centuries the Western tradition of the rule of law, despite its breaches and exceptions, is unique.[73] Yash Ghai states that the rule of law has become part of the political and cultural tradition of the Western state, deeply rooted in its organic growth. He emphasised that it is not a universal principle.[74] It has distinct traits. It places the emphasis, as the discussion in 2 *supra* shows, on written law or precedent and it is distinct from equity, religion, expediency, morality and custom. In this tradition as the discussion on the rule of law in 2 *supra* shows law is independent: it exists in an independent corpus of legal sources distinct from other means of controlling social behaviour.[75] In his widely discussed *The Clash of Civilizations and the Remaking of World Order*[76] Huntington also argues that the rule of law is one of the distinguishing features of Western civilisation,[77] which, together with a number of other characteristics, constitutes the essential continuing core of Western

72 Deutsch 73-74; Also see Watkins *The Political tradition of the West* (1957) 8-9 who describes what he calls *legalism* is a distinguishing feature of the West.

73 Deutsch 75.

74 Ghai "The rule of law, legitimacy and governance" 1986 *Int J of Soc of L* 184.

75 Berman (*op cit*) describes in detail the historical emergence of the particular legal tradition in the West since the latter part of the eleventh century.

76 Huntington *The Clash of Civilizations and the Remaking of World Order* (1998).

77 The others are the separation of spiritual and temporal authority, the rule of law, social pluralism, representative bodies, and individualism. Some of these characteristics were not always strictly adhered to and they have not consistently been absent in other cultures. However, the combination of these characteristics has been more prevalent in the West that in any other civilisation. See Huntington 70-72.

civilisation.[78] Huntington also suggests, without discussing it in detail, that there might be a distinctive sub-Saharan (legal) culture. Arguably South Africa more than any other place on the African continent, is the theatre where these two cultures meet and where they may be clashing. Could it possibly be that the conflict between the (classical) rule of law and decisionism suggests something of this clash?

But what about the South African constitution, one may ask. Have the foundational values, more in particular the value of the rule of law in section 1, not pre-emptively settled the *civilisational* question (in Huntington's phraseology) in favour of Western legal culture? After all, as indicated at the beginning of this article, there was no controversy about this and everyone seemed to have agreed that the rule of law was to be one of the foundational constitutional values and also on what it signified. The discussion of the rule of law, as opposed to decisionism, has shown that the question was in fact not settled at all. Elsewhere in Africa, as Yash noted, African states have been created in the image of the West, with national constitutions, bureaucracies, legal systems and Western ideologies of the law.[79] Mazrui specifically highlights the hegemonic and repressive impact of the European languages on African constitutional law. African constitutional law, he said, is almost entirely Eurocentric in the linguistic sense precisely because of the excessive centrality of the imperialist languages.[80] South Africa is not different. Not only is the South African state, like other African states, an inheritance of colonial policy, but the constitution itself is also construed in the image of the notions, structures, processes and parlance that originated and developed in the West. The rule of law is one of these notions. The whole constitutional discourse is conducted and articulated in this Western-based parlance. The constitutional discourse (if not constitutional practice) in South Africa has always been conducted in this parlance. The constitutional transition in 1994 did not bring an end to this.

The (overt) constitutional discourse has been conducted in Western-based constitutional parlance. This also holds true for the jurisprudence of the Constitutional Court. However, this does not imply that there are not (covert) notions alive which are at loggerheads with the principles underpinning the Western-based discourse; on the contrary, the Western-based discourse does have challengers. Decisionism appears to be a challenger and most probably has always been. It was a challenger in 1996 when the constitution was adopted and when the rule of law was accepted as one of its foundational values. However, it is a voiceless challenger and often not articulated in express terms as those set out in 5 *supra,* the reason being that challengers such as decisionism have found it hard to articulate itself under the stifling yolk of the hegemony of the Western-based legal and constitutional discourse. This linguistic hegemony is much more pervasive than visible legal structures and

78 Huntington 72.
79 Ghai 1986 *Int J of Soc of L* 184 196.
80 Mazrui 62.

procedures (which are also imported or imposed from the West). This hegemony provides the sole linguistic framework for participating in our legal and constitutional discourse.

Those who are not steeped in this tradition of the rule of law and who might experience discomfort or disagreement with it could find it difficult to express themselves because of the absence of an appropriate legal parlance of which they could avail themselves to articulate any alternative legal view that they may hold. This lies at the root of the problem experienced by supporters of decisionism. Lacking its own parlance, it is manipulated into an awkward position to remain silent and not even try to put across its own point of view. This silence may be interpreted as full agreement with the opposing view based on the (classical) rule of law.

Alternatively, when decisionism is articulated, it is articulated in the hegemonic parlance of the classical rule of law. As the discussion in 6 *supra* has shown, this is an impossible task because the legal parlance designed to serve the classical rule of law cannot also be employed to give expression to the unknown, variable, if not secret, content of some or other principle masquerading as a rule of law. This "principle", which is essentially different from the rule of law is never openly articulated. Its fundamental premises are never revealed, debated or defended. If they do exist, they are safely guarded in obscurity.

Based on the present discussion there appears to be severe clash on the constitutional value of the rule of law in South Africa. This conflict was in all likelihood already present when the Constitution was passed in 1996. However, it was covered underneath the seemingly common constitutional value system provided for in section 1 of the Constitution coached in the hegemonic terms of the Western-based constitutional parlance. This created the impression of universal consensus on values such as the rule of law. But now, a decade and a half later, the second generation factor (in Huntington's words) is starting to take effect. The fault line that has always been there is now emerging.

Colonialism, justice and the rule of law: a Southern African and Australian narrative

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OPSOMMING

Kolonialisme, geregtigheid en die oppergesag van die reg: 'n Suider-Afrikaanse en Australiese verhaal

Kolonialisme het 'n groot impak op die regstelsels van lande regoor die wêreld gehad. Die historiese impak van die Britse Ryk kan vandag nog steeds gevoel word in lande so uiteenlopend soos Australië en Suid-Afrika. Hierdie impak word in beide hierdie lande ondersoek, in sowel sy historiese vorm van rassediskriminasie, as die moderne gevolge van die koloniale verlede. Hierdie artikel ontleed hoe formele opvattings van die oppergesag van die reg en regsekerheid, pogings om geregtigheid vir gedane historiese onreg te bewrkstellig, kan ondermyn. Voorbeelde hiervan kan gevind word in die *Aboriginal* grondregte litigasie in Australië, sowel as litigasie in die Verenigde State van Amerika onder die *Alien Tort Act*.**

1 Introductory Remarks

Writing after the fall of the Berlin Wall, Fukuyama posited the "end of history", the universalisation of Western liberal democracy as the final form of human government.[1] Western liberal democracy has at its heart the ideas of equal treatment under the law, individual rights and the rule of law. Underpinning this is the idea of legal certainty – that the law must be certain in order to ascertain rights and duties that are applied equally to all.[2] However, the history of Western liberal democracy is inextricably linked to European colonialism. Indeed, the history and implications of the rise of liberal democracy in Europe, to be understood properly, must be read in conjunction with this colonial heritage.

Liberal democracy's development took place in this shadow; the legal systems of many countries around the world bear witness to this intertwined history. It is this intertwined relationship which gives rise to

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1 Fukuyama *The End of History and the Last Man* (1992).

2 Radbruch *Legal Philosophy* (1932) 112.

a dilemma: the imposition of a legal order defines empire and colonialism; the foundation of an independent legal order marks the birth of the newly independent nation. The law serves both these masters.[3] In a real sense, the ideal of the rule of law played a huge part both in the colonial imposition of a legal order, as well as the foundation of an independent legal order after independence.

This article explores this paradox. Two main arguments are put forward. Firstly, it is contended that *formal* interpretations of the rule of law and equality have historically served to perpetuate oppression and discrimination within a colonial context. This argument is supported through reference to examples of British colonialism in Southern Africa and Australia.

This second argument is connected to what is called here "historical justice litigation", litigation which has at its aim the rectifying of past oppression in colonial (now postcolonial) states. What is so interesting about this litigation is its attempt to reconcile belief in the rule of law and its qualities with an attempt to provide justice for the victims of oppression. In this way, the law is very much attempting to serve its two masters. It is in this Janus-faced existence that this litigation proceeds, heading to an uncertain future.

2 The Rule of Law

In a sense, this article is challenging the rule of law. The phrase "in a sense" is used here because historical justice litigation is marked by an adherence to the self-same doctrine, although it is a substantive, rather than a formal interpretation of the "rule of law" which is adhered to. As Paul Craig has maintained, the dichotomy between formal and substantive conceptions of the rule of law is crucially importance in determining the nature of the specific legal precepts which can be derived from it.[4]

The importance of this distinction can be seen through an example of a United Kingdom statute, the Constitutional Reform Act 2005 (CRA). Amongst other things, the CRA provided for the new United Kingdom Supreme Court, replacing the Judicial Committee of the House of Lords. In prefacing the subsequent constitutional changes (the exact content of which are not strictly relevant here), section 1 states:

> This act does not adversely affect –
> (a) the existing constitutional principle of the rule of law.[5]

3 Douzinas & Gearey *Critical Jurisprudence: The Political Philosophy of Justice* (2005) 283.
4 Craig "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" 1997 *Public Law* 467.
5 S 1 (c 4) Constitutional Reform Act 2005 (UK).

What the CRA shows is that the rule of law is central to the operation of the law in the UK. What the Act does not do is define the rule of law. The term appears so self-evident that it seems to need no definition. This appears plausible at first glance; there are a number of judgments in British courts where judges have invoked the rule of law as justification for their rulings.[6]

Nor is this lack of meaning restricted to the United Kingdom. Waldron, commenting upon *Bush v Gore*[7] in the United States Supreme Court, noted that the rule of law was invoked by both parties' legal teams to support their cases. Waldron's impression was that the use of this phrase meant little more than "Hooray for our side!"[8] Perhaps Tamanaha is right when he described the rule of law as "an exceedingly elusive notion" that gives rise to a "rampant divergence of understandings" and is in fact analogous to the notion of the "good" in the sense that "everyone is for it, but have contrasting convictions about what it is".[9]

However this lack of definition brings to the fore the importance of whether the rule of law is given substantive or formal meaning. Formal conceptions of the rule of law address the manner in which the law was promulgated, the clarity of the ensuing norm and whether the norm was promulgated prospectively or retrospectively.[10] Such conceptions do not seek to pass judgment upon the actual content of the law itself. This can be contrasted to substantive conceptions of the rule of law, which seek to develop certain substantive rights which are claimed to derive from, or be based upon, the rule of law. The rule of law founds these rights, which can be used to distinguish between "good" laws which comply with such rights, and "bad" laws which do not.[11]

The potential difficulties of establishing substantive conceptions of rights and duties can be illustrated with reference to the doctrines of substantive and procedural due process in US Constitutional Law. Substantive due process asks the question, under the due process clause of the Fourteenth Amendment, of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose. Procedural due process asks whether the government has followed the proper procedures when it takes away life, liberty or property.[12] However, Supreme Court opinions have never defined substantive due process, which looks to whether there is a sufficient substantive

6 *R v Horseferry Road Magistrates' Court, ex parte Bennett* 1994 1 AC 42 (HL) 62, 64 (Lord Griffiths), 67 (Lord Bridge), 75-77 (Lord Lowry); *A v Secretary of State for the Home Department* 2005 2 AC 68 (HL) par 42 (Lord Bingham), par 74 (Lord Nicholls).
7 *Bush v Gore* 531 US 98.
8 Waldron "Is the Rule of Law an Essentially Contested Concept (in Florida)?" in *The Rule of Law and the Separation of Powers* (ed Bellamy) (2005) 119.
9 Tamanaha *On the Rule of Law* (2004) 3.
10 Craig 467.
11 *Ibid* 467-468.
12 Chemerinsky "Substantive Due Process" 1999 *Touro LR* 1501.

justification or a good enough reason for such a deprivation to occur; it is a contextual standard.[13]

Chemerinsky provides an example to illustrate the divergence between both approaches. Under the Fourteenth Amendment, the word "liberty" has been held to provide to parents a fundamental right to the custody of their children.[14] In this context, procedural due process requires the government to give notice and a hearing before it can permanently terminate custody.[15] Contrarily, substantive due process requires the government to show a compelling reason that would demonstrate an adequate justification for terminating custody.[16] Procedural due process gives no wider guarantee for "fairness" beyond the requirement that the correct procedures are followed. Substantive due process appears much more intangible than procedural due process, and cannot be easily or succinctly described. The content of substantive due process is driven more by Rawlsian conceptions of "fairness" than by any exhaustive list of attributes.[17]

The tension between procedural and substantive viewpoints is exacerbated in respect of the rule of law. For instance, Raz has commented upon the tendency to use the rule of law as a shorthand description of the positive aspects of any given political system.[18] Finnis finds himself with a similar definition of the rule of law. Finnis describes the rule of law as "the name commonly given to the state of affairs in which a legal system is legally in good shape".[19]

Even here the content of this foundational legal concept will differ greatly depending upon whether a procedural or substantive viewpoint is adopted. This is the case as there are certain principles which can be posited as forming part of the rule of law. The most important can be said to be the principle that all persons are to be treated equally under the law. Paine perhaps explained it best:

> That in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries that law ought to be King; and there ought to be no other.[20]

The implications of this principle, equal treatment under the law, differ depending on whether formal or substantive definitions of equality are adopted. Formal equality is as old a principle as Western political philosophy: if two persons have equal status in at least one normatively

13 *Ibid* 1501.
14 *Santosky v Kramer* 455 US 745 753.
15 *Lassiter v Department of Social Services* 452 US 18 27.
16 *Santosky supra* 762.
17 Rawls *A Theory of Justice* (1999).
18 Raz *The Authority of Law: Essays on Law and Morality* (1979) 210 (Ch 11 "The Rule of Law and its Virtue").
19 Finnis *Natural Law and Natural Rights* (1980) 270.
20 Paine *Common Sense* (1994) 279.

relevant respect, they must be treated equally with regard to this respect. As Aristotle stated, we are to "treat like cases alike".[21]

However, it is an emphasis upon formal equality which is argued to characterise historical colonial discrimination in both Southern Africa and Australia. Successive colonial measures adopted a very narrow procedural, formal conception of the rule of law and equality; indigenous populations were not treated as having equal status in normatively relevant respects, which justified a discriminatory regime being applied favouring non-indigenous peoples.

The main objection to be drawn here is that the focus upon procedure meant that the original racist attitudes which underpinned discrimination did not get challenged. Historical justice litigation can be read in a way which seeks to disturb such thinking and assumptions.

3 The Savage Economy of Jurisprudence

Historical justice litigation is marked by an acute historical sense. This emphasis upon history requires us to engage with the intellectual premises of colonial law-making.[22] The notion that a colonial country is imbued with "primitive" law and it is the "gift" of the law of the coloniser becomes, for Douzinas and Gearey,[23] one of the central justifications for the colonial state.

Fitzpatrick[24] has shown that the distinction between the savage and the civilised has historically run through English jurisprudence. There is created a European identity, opposed to the figure of a pre-modern savage who inhabits a pre-modern world. The savage must be "civilised" through the imposition of civilised, European law. This mindset is illustrated in the Privy Council decision of *In re Southern Rhodesia*,[25] where Lord Sumner argued that:

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.

Such a mindset ran through British colonialism in Australia in the eighteenth and nineteenth centuries.

21 Aristotle *Nicomachean Ethics* (1984) Book 5 3 1131 a10-b15.
22 Douzinas & Gearey 286.
23 *Ibid*.
24 Fitzpatrick *The Mythology of Modern Law* (1992) 65.
25 1919 AC 211 (HL) 233-234.

As French and Lane explain,[26] the indigenous people of the Australian continent were long thought of as wandering tribes, who were "living without certain habitation and without laws".[27] The Australian colonies were almost universally seen as "settled" rather than "conquered"; the lands of modern day New South Wales were deemed "uninhabited" by civilised peoples and therefore in no way could be conquered. This was confirmed in the case of *Cooper v Stuart*[28] in 1889:

> The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to the circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.

McNeil[29] argued that the Privy Council reached its conclusion about the absence of any system of Aboriginal law without any evidence of the nature of Aboriginal society. *Cooper v Stuart*[30] fits the traditional narrative; namely that Australia was claimed by the British Crown under the legal doctrine of *terra nullius*, literally 'no man's land'.

The historian Reynolds has been very influential in disseminating this view.[31] For Reynolds, land rights for Aboriginals were recognised in the nineteenth century by the Imperial Colonial Office in London.[32] It was the settlers, governments and courts in the colonies that ignored land rights in defiance of the law.[33] For this traditional narrative, *terra nullius* was a misconception, masking the fact that Aboriginals were recognised as having rights. This can be supported – in 1836, the case of *R v Murrell*[34] extended to Aboriginal people the right to be subject to the laws of the colony. Essentially, Reynolds contended that Aboriginal dispossession was simply a mistake;[35] this way of thinking assumes that if Australia had not been classified as *terra nullius* in 1788 Aboriginals would have had legal rights.[36] Thus if *terra nullius* could be overruled, the legal system of Australia could be "healthy once more".[37]

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26 French & Lane "The Common Law of Native Title in Australia" 2002 *Oxford U Commonwealth LJ* 16.
27 *MacDonald v Levy* (1833) 1 Legge 39 45 (NSWSC).
28 *Cooper v Stuart* (1889) 14 App Cas 286 (PC) 291.
29 McNeil *Common Law Aboriginal Title* (1989) 122.
30 *Cooper v Stuart* (1889) 14 App Cas 286 (PC) 291.
31 Reynolds *The Law of the Land* (1987).
32 *Ibid* 97-103.
33 *Ibid* 140.
34 *R v Murrell* (1836) 1 Legge 72 (NSWSC).
35 Reynolds 230.
36 Ritter "The Rejection of Terra Nullius in *Mabo*: A Critical Analysis" 1996 *Sydney LR* 28-29.
37 *Ibid* 29.

Despite this narrative, no case ever stated that Australia was *terra nullius*.[38] The reason for this was simple: Aboriginal land rights were not denied on the basis of a legal doctrine, but rather upon the operation of power. *Terra nullius* is a title for the discourses of power which operated to legitimate the dispossession of Aboriginal peoples.[39] The founding ideals of the Enlightenment led to a colonial mindset which favoured "progress".[40] This sense of progress led to a desire to civilise the "savage". Colonial powers expressed their identity through the denigration of those who were perceived to be "unlike" themselves and could be subjected to that civilising process.[41]

Thus the Australian Aboriginals, regarded as "low in the scale of social organisation", and their occupancy of land were ignored in considering the title to land in a settled colony.[42] Nor did Aboriginals only lack legal rights to land. As the legal historian Neal has stated, "as a practical matter, the Aborigines stood outside the protection of the rule of law".[43] The absence of legal rights for Aboriginals was a self-evident truth. The internal ideological mechanisms of the law meant Aboriginal people were labelled as non-conformists, and denied the law's benefits.[44] "Like persons" were treated "alike"; however, Aboriginals were not "alike" to Europeans, and therefore not to be treated equally under the law. There are echoes of *Plessy v Ferguson*[45] and the "separate but equal" decision of the US Supreme Court.

An example of this can be found in 1842 in South Australia, where several Aboriginal men and women were hung extra-judicially after being suspected of murder. The Governor of South Australia, Governor Gawler, requested an opinion from Cooper CJ of the South Australian Supreme Court in response to public protests over the hangings "on the amenability of the Aborigines to European law".[46] Cooper CJ replied:

> It is impossible to try according to the forms of English law people of a wild and savage tribe whose country, although within the limits of the Province of South Australia, has never been occupied by Settlers, who have never submitted themselves to our dominion.[47]

Ultimately, it was the civilised, European conception of the rule of law which was imposed on all persons in Australia. The whole of native

38 *Ibid* 9.
39 *Ibid* 12.
40 Douzinas & Gearey 287.
41 Douzinas & Gearey 287; Fitzpatrick 70.
42 *Mabo* v *Queensland (No 2)* 1992 175 CLR 1 (HCA) par 39.
43 Neal *The Rule of Law in a Penal Colony: Law and Politics in Early New South Wales* (1991) 17.
44 Ritter 11.
45 *Plessy v Ferguson* 163 US 537.
46 Watson "Buried Alive" (2002) *Law and Critique* 262.
47 Castles *An Australian Legal History* (1982) 524-525; Smandych "Contemplating the Testimony of 'Others': James Stephen, the Colonial Office, and the Fate of Australian Aboriginal Evidence Acts, Circa 1839-1849" 2004 *Australian J of Legal History* 237.

society was seen as deviant, or potentially deviant.[48] The laws of Australian governments were made for the common good and for the benefit of the common man. However, historically the common man had been the non-Aboriginal man, and excluded the Aboriginal man.[49]

4 The Stolen Generations in Australia

After the British settlement of the Australian continent in 1788, until the mid-nineteenth century, European policy toward Aboriginals was fundamentally genocidal.[50] The policy of dispossession, contributing to the decline of the Aboriginal population, led to a view that Aboriginals were a "dying race", with extinction a certainty in the face of the robust and supreme European way of life.[51] However, by the end of the nineteenth century, it became clear that traditional Aborigines were not going extinct. In addition, a large amount of sexual contact between Aboriginal and non-Aboriginal populations had produced a growing mixed-race population, referred to as the problem of the "half-caste":

> There was a growing realisation that the descendants of a dying race might continue to haunt a White Australia for generations.[52]

This led to a State-wide program to eliminate Aboriginality, and in turn protect civilisation, represented by White Australia.[53] Robert van Krieken saw two elements to this civilising offensive: first, regulation of the case of the problem, the sexual intercourse between whites and blacks, through "protective" legislation.[54] As a result, Australian Aborigines were subject to a huge degree of regulation, governing their sexual relations, marriage, employment, income, property ownership, education and custody of their children.[55] The aim was to quarantine white and "mixed-bloods" from "full-blood" Aborigines, to allow the full-blood group to continue down the path of extinction.[56]

Secondly, Australia made use of the pre-existing social technology which had been in place in Europe since the sixteenth century for dealing

48 Fitzpatrick 111.
49 Department of the Parliamentary Library Information and Retrieval System, "Pat Dodson: Mabo, Reconciliation and National Leadership", National Press Club, 15 September 1993 (http://hdl.handle.net/10070/91167 (accessed on 2012-04-23)).
50 Van Krieken "The barbarism of civilisation: cultural genocide and the 'stolen generations'" 1999 *British J of Sociology* 303.
51 McGregor *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880-1939* (1997).
52 *Ibid* 134.
53 Blackton "The dawn of Australian national feeling, 1850-56" 1955 *Pacific Historical Rev* 121-138.
54 Van Krieken 305.
55 O'Malley "Gentle genocide: the government of Aboriginal peoples in Central Australia" 1994 *Social Justice* 48.
56 Moran "White Australia, Settler Nationalism and Aboriginal Assimilation" 2005 *Australian J of Politics and History* 168-193.

with the problems of social discipline of the working classes. The removal of Aboriginal children from their parents was based upon pre-existing practices concerning unacceptable "problem" groups in Western Europe – in this way, the rule of law was being maintained; Aboriginals were not considered "equal" to Europeans, and therefore could justifiably be treated differently. Legislation was passed which made the State, rather than the parents, the legal guardian of all Aboriginal children. By the 1930's, any child of Aboriginal descent could be removed from their family and placed in a government institution to be trained in ways of "civilisation".[57]

The Human Rights and Equal Opportunity Commission's *Bringing Them Home* Report in 1997 estimated that between 1910 and 1970 between one in three and one in ten Aboriginal children were removed from their parents.[58] The ultimate aim of White Australia was to "absorb" or "assimilate" Aboriginal Australia, an aim motivated by knowledge of the eventual destruction of Aboriginal culture and a humanitarian concern to civilise Aboriginals: "Europeanisation is inevitable".[59]

It was not until 1967 that Aboriginals were included in the Australian census for the first time, and it took until 1969 for all Australian States to repeal the legislation allowing for the removal of Aboriginal children under the policy of "protection". In short, the pervading discourse changed in Australia. When Aboriginals started to bring cases claiming rights to dispossessed lands the Courts were faced with a dilemma: why had the judiciary not protected Aboriginal land rights for the first 183 years of white settlement?[60] In answering this question, the Australian Courts utilised the very principle of the rule of law, but in a way which could further entrench this historical repression. Such a move could cast doubt upon the efficacy of future historical justice litigation within Australia.

5 A Short Overview of Britain's Impact on South Africa's Apartheid Policies

5 1 South Africa – a Triangle of British, Boer and Black Conflict and Concession

Just as in Australia, British colonialism also had a huge impact in defining forms of belonging in South Africa. South Africa's racial policies have to

57 Van Krieken 305; Haebich *For Their Own Good: Aborigines and Government in the Southwest of Western Australia, 1900-1940* (1988) 350.

58 Human Rights and Equal Opportunity Commission "Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families" (1997) http://www.austlii.edu.au/rsjlibrary/hreoc/stolen/index/html (accessed on 2012-04-23).

59 Berndt & Berndt *From Black to White in South Australia* (1952) 275.

60 Ritter 27.

be studied before the backdrop of its history of conflict among its many peoples, tribes or nations. This is first a struggle between white British and the "Boer", [61] as the new nation of "Afrikaners" was referred to, later a struggle between "white" South Africans and black South Africans. South Africa is marked by a triangle of ethnic, cultural and racial conflict and compromise.[62]

The arrival of Jan van Riebeek, a young Dutch employee of the Dutch East India Company at Table Bay in April 1652, marked the beginning of a permanent white presence and, up to 1994, dominance in a region which was to become South Africa. It also marked the beginning the Afrikaner or Boers, who developed into a distinct nation of white Afrikaans speaking people.

The history of the South African people is rich in symbolic events of ethnic collective suffering which shaped the identity of its people, influenced their actions and continues to exert its influence to this day. For the Afrikaners, the Boer War at the turn of the twentieth century constitutes one such event.[63] The British decision to establish "concentration camps" for interning non-combatant family members of the Afrikaner "Boer" commandos during the Boer War of 1899-1902 led to the death of more than 20,000 Boer women and children in some 66 camps.[64] This invention by the British military high command, together with the applied tactics of "scorched earth" as a punitive means of fighting an asymmetric campaign of guerrilla warfare shaped Afrikaner identity. It ultimately gave rise to *Afrikanerdom*, a new nationalistic and religious identity among South Africa's white Afrikaners,[65] and fuelled a conception of the British as a past and sometimes present enemy.[66]

The establishment and implementation of Apartheid as official state policy and the victimisation of the *African* majority after 1948 have, at least partly, their roots in this British–Boer conflict. Afrikaner identity

61 Giliomee 34–35, for a description of the Boer "race"; the term is not used derogatively in the context of the article.

62 Giliomee *The Afrikaners –Biography of a People* (2009) for an authoritative and uncompromising overview of the South African history from the perspective of the white Afrikaner minority; Leach *South Africa* (1986) for an contemporary account of South Africa's apartheid and its violent challenges during the last decade of its white minority rule; Welsh *The Rise and Fall of Apartheid* (2009) for an informative and comprehensive account of the rise and fall of Apartheid.

63 Van Jaarsveld *Lewende Verlede* (1961) 68–69; 73-74 for an analysis of Afrikaner history and ideology.

64 Leach 31 who numbers the total number of Boer concentration camp victims at 26,000. Africans who also fought on the side of the Boers and who were also subjected to internment suffered a similar fate with high mortality numbers in the British camps, see Pakenham *The Boer War* (2007) 510.

65 Van Jaarsveld 66-67 for a description of Afrikaner identity.

66 A sentiment which sometimes still resonates today and found its way into contemporary Pop culture as the success of the singer Bok van Blerk shows who landed a hit in 2006 with his rendition of "De La Rey", which commemorates the above British atrocities and calls for Boer unity.

transcended its own victimisation in the camps towards the justification for own human rights violations in the wake of Apartheid.[67]

African and other "Non-White"[68] suffering under post-1948 Apartheid and suppression can be best summarised in former President De Klerk's apology, which highlighted the daily plights, violations and humiliations, which non-white South African citizens had to endure:

> I apologise in my capacity as leader of the NP to the millions who suffered wrenching disruption of forced removals; who suffered the shame of being arrested for pass law offences; who over the decades suffered the indignities and humiliation of racial discrimination.[69]

Apart from such omnipresent discrimination and victimisation, two particular events in history exemplify the brutality of the Apartheid regime: the "Sharpeville shootings" of 1960,[70] when South African police opened fire on black demonstrators and killed 69 people, and the Soweto uprising of 16 June 1976.[71] South Africa's Apartheid policies of institutionalised discrimination and persecution of its non white people cannot be isolated from these forming historical events.

5 2 Apartheid

Apartheid,[72] the system of racial segregation in South Africa, would today qualify as not only a state delict/tort, a violation of a state's international obligation of a peremptory nature,[73] but also as one of the four core crimes of international criminal law, the international crime against humanity.[74] The South African system of Apartheid was not an invention by the Afrikaners, nor unique in 20th century's policies of

67 Giliomee xiv, recognises the Afrikaner as "both victims and proponents of European imperialism".

68 Such as the "Coloured" (mixed race) and Indian race groups.

69 "De Klerk Apologises Again For Apartheid" *South African Press Association* (1997-05-14) http://www.justice.gov.za/trc/media/1997/9705/s970514a.htm (accessed on 2012-04-23).

70 Welsh 72–73; *SAHO* at http://www.sahistory.org.za/topic/sharpeville-massacre-21-march-1960 (accessed on 2012-04-20) offers a wide variety of online sources. Sharpeville township was once more in the headlines in 1984 when civil unrest erupted.

71 Also known as the Soweto Youth Riot, which spread over the whole country and were only contained in October 1977. There was a repeat of these riots in Soweto and Sharpeville in 1984 – Leach 128*ff*. See Welsh 101-102 for an account of the divergent Afrikaner opinion on the Soweto 1976 shootings. Both events serve as manifestations of the will of the black majority to take active action against white minority rule, action which moved away from passive resistance to out and out protest and even armed struggle.

72 Coined on the Afrikaans "Apartness".

73 Part (4) of the Commentary to Article 40 of the ILC Draft Articles on State Responsibility, *Yearbook of the International Law Commission 2001 vol II Part Two*, where racial discrimination and apartheid are listed as potential peremptory norm violations of international law.

74 Article 7 Part 1 of the *Statute of the International Criminal Court*, where the crime of apartheid is listed as one of the elements of crimes against humanity, lit (j); See Article 5 of the *Statute of the International Tribunal for*

racial segregation: what made Apartheid different from other examples of racial segregation, discrimination and hate past and present was that it systematically institutionalised a legal framework for such treatment.

The Nationalist Party which came to power in 1948 established a legal framework of an institutionalised system of racial discrimination and exclusion, second only to the example of Nazi Germany's race legislation, highlighted by the *Nürnberger Gesetze,* or Nuremberg Laws of 1935.[75] Apartheid legislation governed the fields of racial segregation, jobs and employment, political rights and freedoms, citizenship, land and property rights, education and freedom of movement.[76] It fell to the courts of South Africa to enforce Apartheid law: the judiciary became a trusted pillar in enforcing Apartheid's law and policies.[77] This "top to bottom" enforcement was supplemented by a broad based implementation which allowed for "flexible" oppression – the white minorities were active stakeholders in such oppression.[78] Consequently, Apartheid did not require the availability of security and police assets in exceptional high numbers.[79]

The legal foundations of apartheid were British in origin and nature: while Britain can be credited with having ended slavery and slave trade in the Cape during the 1830's,[80] it also laid the legal foundations of social domination and racial segregation through legislation. In 1856, the first *Masters and Servants Act* came into force,[81] which was used to deny collective social rights to unskilled workers and was basically used to regulate African labour relations. Such social racial segregation was enhanced by further subsequent legislation, such as the *Franchise and Ballot Act of 1892*.[82]

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the Former Yugoslavia, 1993-05-25, UNSC Res 827 (1993) which criminalises racial discrimination as crimes against humanity.

75 The *Nuremberg Laws of 1935*. The "Law for the Protection of German Blood and German Honour" and the "Reich Citizenship Law" stripped German Jews of their national identity and restricted interracial social as well as professional interaction, establishing the first prerequisite for the later *Shoah*.

76 *Truth and Reconciliation Commission of South Africa Report Volume 1* ch 13 http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf (last accessed 2012-04-24) for a detailed overview of all major apartheid legislation within a topical context.

77 Welsh 74-75; reference is also made to the Treason Trial from 1956-1961 which resembled one of the last 'fair' trials where the rule of law was still upheld.

78 Referring to white Afrikaners as well as English speaking South Africans.

79 Giliomee 551-552.

80 With Emancipation Day on 1 December 1838 marking an early "freedom" day in South African history.

81 This Act forms part of a wider legislative effort in the UK (and its territories) to regulate relationships between employers and employees; the last of these Acts was passed in 1904.

82 Effectively limiting the African vote by tying it to financial and educational minimum requirements.

The creation of the Union of South Africa also saw the first legal enshrinement of racial segregation policies. The Natives Land Act[83] prohibited Africans from owning land outside designated reserves, laying the foundations for post 1948's Apartheid's Homeland or "Bantustan" policies.

South Africa's past serves as a case study of the changing role of perpetrator and victimhood: the legislative measures taken by the British authorities pre-1948, in concert with British colonial rule which saw its fair amount of ruthlessness in Southern Africa, meshed together with the widespread Afrikaner perception that own victimhood could be used to justify own wrongs.[84]

6 The Role of Historical Justice Claims in Remedying the Past

6 1 Introduction

> Human rights litigation contributes to an important long-term objective: working toward a world in which those who commit gross violations of human rights are brought to justice swiftly, in whatever country they try to hide.[85]

Historical justice litigation has lofty aims: namely the addressing of historical wrongs ranging from slavery, crimes against humanity and genocide. Such litigation encompasses a substantive vision of the rule of law: that equal treatment under the law includes redress for past wrongs, and that justice is as important a part of the rule of law as legal certainty. However, it is in running into formal conceptions of the rule of law that such litigation has stumbled in the courts.

Two approaches to such litigation are considered: the "extraterritorial" approach and the "territorial" approach. The extraterritorial approach involves the bringing of litigation in countries not connected to the original human rights violation; the focus here will be upon cases brought in the United States under the Alien Tort Statute (ATS). The territorial approach focuses upon litigation brought within the same territory as the original human rights violation. The Australian land rights litigation provides an example of this.

It is the way in which the rule of law has been interpreted by courts that potentially calls into question whether historical justice claims can provide justice to the victims of human rights abuses. Only by addressing this challenge can such litigation fulfil its potential to supplement the other existing forms of human rights protection available in International Law and to protect human rights.

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83 27 of 1913.
84 Van Jaarsveld 64.
85 Stephens *International Human Rights Litigation in US Courts* (2008).

6 2 ATS Litigation

The rise in extraterritorial historical justice litigation cases in the courts of the US was well documented since the 1990's.[86] This modern litigation began in 1980, when the US Court of Appeal for the Second Circuit decided in the seminal case of *Filártiga v Pena-Irala* that acts of torture committed among non-US citizens outside of the USA could establish jurisdiction of US federal courts.[87]

The Second Circuit based its decision on the ATS, also referred to as the Alien Tort Claims Act, or ACTA. The ATS was part of the federal Judiciary Act 1789. Today, its original meaning and purpose are uncertain.[88] Indeed, even the ATS itself is short:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.[89]

The ATS remained almost unutilised for human rights protection until *Filártiga*. This is not to state that the ATS was redundant; it was used as the basis for a child custody suit between aliens,[90] as well as determining title to slaves on board an enemy vessel taken on the high seas.[91]

The plaintiffs in *Filártiga*, in using the ATS to bring the alleged torturer in question to justice, opened up the possibility of using the ATS to pursue human rights violations across the world. Since 1980, the ATS has been used by plaintiffs to initiate legal actions against other individuals and in some instances, even states,[92] as perpetrators of human rights violations. Thus the ATS opens up the possibility of pursuing a substantive conception of the rule of law, where all violators of human rights can be brought to justice, and impunity does not reign.

ATS litigation in the US provides one of the few extraterritorial opportunities for natural persons to seek redress for human rights violations. Since 2000, ATS litigation has been brought against Multi-

86 *Ibid* 541–548; Anderson "Redressing Colonial Genocide: The Hereros' Cause of Action Against Germany" 2005 *California LR* 1155; Sarkin & Fowler "Reparations for Historical Human Rights Violations: The International and Historical Dimensions of the Alien Torts Claims Act Genocide Case of the Herero in Namibia" 2008 *Human Rights Rev* 331.

87 *Filartiga v Pena-Irala* 630 F 2d 876. The ATCA/ATS was only used on a few occasions prior to *Filartiga*; Symposium "Corporate liability for violations of international human rights law" 2001 *Harvard LR* 2033.

88 D'Amore "Note, *Sosa v Alvarez-Machain* and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?" 2006 *Akron LR* 596.

89 28 USC § 1350.

90 *Adra v Clift* 195 F Supp 857.

91 *Bolchos v Darrel* 3 Fed Cas 810.

92 Such as terrorism, *Smith v Socialist Peoples Libyan Arab Jamahiriya* 101 F 3d 239 for the terrorist Lockerbie bombing of 1988.

National Companies (MNC's).[93] This development should not surprise. The laws of the US hold that:

> In determining the meaning of any Act of Congress ... the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.[94]

Corporations have also been given rights under the First Amendment, relating to political speech,[95] and the Fourteenth Amendment, guaranteeing equal treatment under the law.[96] Thus such ATS cases against corporations seem to be making a broader point: namely that the ATS does apply to corporations and that if the Supreme Court extends constitutional protections to corporations, then corporations should also have duties, and can be held liable for breaching these. There have been ATS cases brought against corporations for their alleged collusion in crimes against humanity, war crimes and torture.[97]

What has been forwarded by plaintiffs is a substantive conception of the rule of law, incorporating the adherence of basic human rights norms. ATS plaintiffs appear to view the rule of law as protecting against human rights violations. However, this vision has not been uncritically accepted by US courts.

Indeed, the scope and limitation of ATS litigation can be illustrated through its successes and failures. The successful Holocaust litigation cases consisted of the *Swiss Gold Bank* case and the *Nazi Slave Labour* case. In the case of *In re Holocaust Victim Assets Litigation*,[98] a class action was brought against the three large Swiss banks, alleging that they had violated international law by knowingly retaining and concealing the assets of Holocaust victims, accepting and laundering illegally obtained

93 Bachmann "Where do we stand with human rights litigation against corporations?" 2007 *TSAR* 292; Herz "The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement" 2008 *Harvard Human Rights J* 208.

94 I USC §1.

95 *Citizens United v Federal Election Commission* 558 US 310.

96 *Santa Clara County v Southern Pacific Railroad* 118 US 394.

97 Strydom & Bachmann "Civil liability of gross human rights violations" 2005 *TSAR* 448 454-457; "Shell on trial - Oil giant in the dock over 1995 murder of activist who opposed environmental degradation of Niger Delta" *The Independent* (2009-15-26) available at http://www.independent.co.uk/news/world/americas/shell-on-trial-1690616.html (accessed on 2012-04-24); *John Doe I v Unocal Corp* 403 F 3d 708 concerned allegations of corporate complicity in forced labour and torture (the case was settled out of court in 2006); "Historic advance for universal human rights: Unocal to compensate Burmese villagers" http://www.earthrights.org/news/press_unocal_settle.shtml (accessed on 2012-04-23); *Wiwa v Royal Dutch Petroleum Co* 226 F 3d 88 (the case was based on the alleged involvement of the Royal Dutch/Shell oil group in human rights abuses in Nigeria, leading to the 1995 torture and murder of the environmental and community activist Ken Saro-Wiwa and was settled out of court in 2009); *Sarei v. Rio Tinto PLC* 487 F 3d 1193 (regarding alleged complicity of corporations in the commission of war crimes committed by Papua New Guinean Security Forces).

98 105 F Supp 2d 139.

Nazi loot and transacting in the profits of slave labour. The case was never decided in court but led to a $1.25 billion settlement in 1998.[99] This perhaps shows the main impact of the ATS: corporate defendants were driven to settle out of court, instead of risking an adverse judgment at trial. A settlement, whilst not apportioning blame, does at least provide monetary reparations, which of course would be what is awarded in a successful tort claim.

The second case, *In re Nazi Era Cases Against German Defendants Litigation*,[100] was a class action against German corporations for their alleged complicity in the Holocaust by using slave labour in their production lines during World War II. Again showing the potential of the ATS to lead to reparations for those wronged parties, this highly politicised case ended with a settlement in 1999 when the defendant corporations and the German government agreed to establish a jointly funded $5 billion foundation for compensating the surviving victims of Nazi slave labour.

These successes led many more extraterritorial claims to be filed. These have included the Herero Reparation cases and the still ongoing Apartheid lawsuits.[101] It is these lawsuits which reveal the uncertain future the ATS litigation faces.

Acts of genocide, crimes against humanity as well as slavery were committed by the German Empire against the nations of the Herero,[102] the Great Namaqua, Boschmans and Hill Damaras in its former colony German South West Africa in the late nineteenth and the early twentieth century.[103] These acts were the subject of reparation lawsuits brought before US Federal Courts in 2004. The Hereros sued Deutsche Bank and the Deutsche Afrika-Linien Gmbh & Co shipping line (as the legal successor to the former Woermann Line), for alleged participation in crimes against humanity, genocide, slavery and forced labour.[104]

The plaintiffs failed to convince the Court to recognise US jurisdiction for a private cause of action for violations of customary international law.[105] In short, the ATS was found to be inapplicable. We can see in this judgment a key *formal* virtue of the rule of law: namely legal certainty.

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99 Stephens 543.

100 198 FRD 429 (DNJ) MDL No 1337 DNJ Lead Civ No 98-4104 (WGB) (2000).

101 Stephens 543*ff* for an overview of related lawsuits within their topical context; *In re South African Apartheid Litigation* 02 MDL 1499 (SDNY) 2009 continues the original unsuccessful 2004 lawsuit; *In re South African Apartheid Litigation* 346 F Supp 2d 538.

102 See Anderson for a summary of the political and legal questions surrounding the Herero's cause of action against Germany.

103 Krüger "Coming to Terms with the Past" (2005) 45-49; Erichsen & Olusoga *The Kaiser's Holocaust: Germany's Forgotten Genocide and the Colonial Roots of Nazism* (2010).

104 BBC News "German bank accused of genocide" (2001-09-25) http://news.bbc.co.uk/1/hi/business/1561463.stm (accessed on 2012-04-20).

105 *Herero People's Reparations Corp v Deutsche Bank AG* 370 F 3d 1192; Stephens 1194-1195.

Such a position assumes that to open up US Courts to all potential extraterritorial claims would render the law uncertain and completely indeterminate. There would be no real limiting principle with which to determine claims. Despite this failure, the topic of restitution and rehabilitation for Germany's colonial crimes remain important to the peoples of Namibia.[106]

The consequences of South African Apartheid are a clear example in showing exactly why the ATS litigation has been favoured by non-US citizens who wish to claim reparations for past wrongs. South Africa established in 1995 the Truth and Reconciliation Commission (TRC) to investigate and record the human rights abuses which occurred under Apartheid. Under certain circumstances, the TRC could grant immunity from prosecutions in the form of individual amnesty.[107] Chaired by former Archbishop Desmond Tutu, the TRC's main purpose was to contribute to South Africa's transitional peace building by emphasising reconciliation and rehabilitation over criminal prosecution.[108] One of its declared objectives was to use reparation as a form of moral and legal rehabilitation.[109] This was to be achieved by securing payment of reparations directly to individual victims and/or their relatives through a state-run reparation scheme for the compensation of as many as 22,000 victims.[110] The TRC recommended the establishment of a fund worth R2.8 billion for the payment of final reparations to the victims of apartheid.

Whether the TRC managed to exceed in respect to all expectations set in it will remain open to debate.[111] What remains beyond doubt is the fact that the failure of two consecutive South African governments to implement the TRC's recommendations regarding individual monetary compensation has undermined the original objective of the TRC to

106 Hoffmann "German Acknowledgments A Milestone in Our Struggle" *The Namibian* (2012-04-12) http://www.namibian.com.na/columns/full-story/archive/2012/february/article/german-acknowledgments-a-milestone-in-our-struggle. (accessed on 2012-04-20).

107 Promotion of National Unity and Reconciliation Act 34 of 1995.

108 *Justice in Transition booklet explaining the role of the TRC* http://www.justice.gov.za/trc/legal/justice.htm, (accessed on 2012-04-23).

109 TRC *A Summary of Reparation and Rehabilitation Policy, Including Proposals to be Considered by the President* http://www.justice.gov.za/trc/reparations/summary.htm (accessed on 2012-04-20); *Truth and Reconciliation Commission of South Africa Report Volume 5* (2003) ch 5, 173–195 http://www.justice.gov.za/trc/report/finalreport/Volume%205.pdf (accessed on 2012-04-20) and Preamble Promotion of National Unity and Reconciliation Act 34 of 1995.

110 Bachmann *Civil Responsibility For Gross Human Rights Violations – The Need For A Global Instrument* (2007) 40-43.

111 *Truth and Reconciliation Commission of South Africa Report Volume 1* ch 1, where the chairperson sums up some of the criticisms and challenges directed at the TRC during the duration of its work http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf (accessed on 2012-04-20). For a current summary, see South African Coalition for Transitional Justice (SACTJ) "Background: Facing Apartheid's Legacy" http://ictj.org/our-work/regions-and-countries/south-africa (accessed on 2012-04-20).

rehabilitate the victims of the days of the Apartheid struggle.[112] The 2011 plan of the government to make provision for the payment of educational assistance and health benefits for the victims of apartheid and their children was regarded by many activist groups as being too superficial and not in the spirit of the TRC's original aims.[113] Consequently, *The Khulumani Support Group of Apartheid Victims* called upon President Jacob Zuma to honour the obligation to implement all of TRC's recommendations.[114]

This failure to implement a proper reparation disbursement policy in a timely fashion failed to close an accountability gap which prepared the way for the later Apartheid litigation cases. *In re Apartheid Litigation* refers to an ongoing litigation arising from the alleged collaboration of US and international MNC's with the former South African Apartheid government in committing international human rights violations by aiding and abetting its military and security apparatus.

Originally brought as a class action in 2002, the original lawsuits targeted twenty corporate defendants.[115] Dismissed in 2004 by the US District Court for the Southern District of New York on grounds of lack of subject matter jurisdiction under the ATS, the cases were allowed to proceed on appeal in 2009, albeit against a reduced number of defendants, namely Daimler, Ford, General Motors, IBM and Rheinmetall Group.[116]

The Apartheid cases illustrate the complexity of addressing historical claims and the wider repercussions for states affected. South Africa is the perpetrator state as well as the country of the victims, and also the host state to many corporate defendants and therefore depending on such Foreign Direct Investment. The South African government under former President Mbeki opposed the litigation and filed *amicus curiae* papers

112 Neither former president Thabo Mbeki nor President Jacob Zuma showed much interest in implementing the TRC's recommendations. The only exception was the initial disbursements of R48.37 million by Nelson Mandela's President's Fund, which paid out grants of R3,000 each to the 17,100 applicants in November 2001. The median annual household income in SA at that time was around R21,700; Strydom & Bachmann 2005 *TSAR* 448 466-467.

113 South African History Archive *Draft Regulations released for payment of reparations to apartheid victims* (2011) http://www.saha.org.za/news/2011/May/draft_regulations_released_for_payment_of_reparations_to_apartheid_victims.htm (accessed on 2012-04-23). The South African Coalition for Transitional Justice criticised these regulations in its *Comments On The Draft Regulations Published By The Department Of Justice Dealing With Reparations For Apartheid Era Victims* (2011) http://ictj.org/sites/default/files/SACTJ-South-Africa-Reparations-Submission-2011-English.pdf (accessed on 2012-04-23).

114 "Khulumani Memorandum to the President" (2012) http://www.khulumani.net/reparations/corporate.html (accessed on 2012-04-23).

115 *In re South African Apartheid Litigation; Ntsebeza v Citigroup* 346 F Supp 2d 538; Bachmann 34–36.

116 *In re South African Apartheid Litigation* 02 MDL 1499 (SDNY) 2009.

accordingly.[117] This opposition was withdrawn under President Zuma in 2009, when support for hearing such a case before a US court was made public.[118] Again showing the effect of the ATS, General Motors settled the case in 2012 by compensating 25 plaintiffs.[119]

The South African Apartheid litigation under the ATS has the potential, together with the failed Herero litigation, to serve as an indicator to how successful a future lawsuit against the UK for their concentration camp policy in South Africa could be. However, the ATS litigation which has reached the Supreme Court points to a less optimistic outlook for such extraterritorial claims, based in part upon a formal construction of the rule of law.

Sosa[120] involved a claim by a Mexican citizen against another Mexican citizen for a kidnapping that occurred in Mexico. While accepting that federal courts did have jurisdiction over torts in violation of the "law of nations",[121] the Court strictly limited the category of offences which were defined by their universal acceptance, their obligatory nature and high degree of specificity.[122] Thus the Court had the rule of law in mind in ensuring certainty of the common law. Indeed this view is reinforced by the fact that the Court contended that a cause of action which satisfies the first three heads can still be non-justiciable if prudential considerations such as public policy weigh in favour of non-justiciability.[123]

This limitation upon ATS litigation could be in the process of being extended. In *Kiobel*,[124] the question posed was whether corporate civil tort liability under the ATS was justiciable, or whether corporations were immune for tort liability. During oral argument, Justice Alito expressed concern at the very extraterritorial nature of the ATS:

> The first sentence in your brief in the statement of the case is really striking: 'This case was filed ... by twelve Nigerian plaintiffs who alleged ... that respondents aided and abetted the human rights violations committed against them by the Abacha dictatorship ... in Nigeria between 1992 and

117 This decision was taken in order to prevent any damage to present and future foreign investment in South Africa and must be seen before the background that the original amount of remedies sought, totalled US $400 billion. "It's state v apartheid victims" *Mail & Guardian* (2005-10-21) 5 for a brief overview of the controversy in South Africa.

118 "State supports apartheid-era victims" *IOL – News for South Africa* (2009-09-03) http://www.iol.co.za/news/politics/state-supports-apartheid-era-victims-457265?ot=inmsa.ArticlePrintPageLayout.ot (accessed on 2012-04-23).

119 Ephraim "US General Motors settles apartheid reparations claim" *Mail & Guardian Online* (2012-02-29) http://mg.co.za/article/2012-02-29-us-general-motors-settles-apartheid-reparations-claim (accessed on 2012-04-24).

120 *Sosa v Alvarez-Machain* 542 US 692.

121 *Ibid* 714.

122 *Ibid* 732.

123 *Ibid*.

124 *Kiobel v Royal Dutch Petroleum* 2012 (SCOTUS).

> 1995'. What does a case like that – what business does a case like that have in the courts of the United States?[125]

Justice Alito thus clarifies the Court's concern in *Sosa* – why should offences committed abroad be justiciable in American courts? Do prudential considerations (ensuring certainty in the law) disqualify such extraterritorial actions? This concern for key principles of the rule of law led the Supreme Court to order *Kiobel* to be expanded and reargued. The new question the Court will answer is:

> Whether and under what circumstances the Alien Tort Statute, 28 USC § 1350, allows courts to recognise a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.[126]

Thus the potential of extraterritorial historical justice litigation may be curtailed through a concern to secure legal certainty and the rule of law. The future of historical justice litigation may have to focus upon territorial challenges.

6 3 Australia: Native Title, *Mabo* and Beyond

The Australian response is one which Justice Alito may deem as most suitable for such historical justice litigation: through the State in question allowing such claims, the rule of law, and the legal certainty which forms a part of the rule of law, are maintained.

In *Mabo*,[127] the High Court of Australia had to decide whether "native title" existed in Australian law, 100 years after *Cooper v Stuart*[128] denied that such title existed. The High Court faced head on the traditional narrative of Australia: the doctrine of *terra nullius*. Most interestingly, *terra nullius* was not mentioned in the first 183 years of Australian jurisprudence, nor mentioned before the Court in oral argument.[129] The first description of Australia as *terra nullius* occurred in a 1979 case, *Coe v Commonwealth*.[130] There, the High Court held that Australian sovereignty, founded upon *terra nullius*, was not justiciable in Australian courts. The High Court in *Mabo* thus declared that they were faced with a choice. Either they could apply the existing authorities and deny that Aboriginals had rights to land, or overrule those cases.[131]

For Brennan J, delivering the leading judgment, overruling the cases was necessary as otherwise their authority would destroy the equality of

125 *Kiobel* oral transcript 11 http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf (accessed on 2012-04-23).
126 See http://sblog.s3.amazonaws.com/wp-content/uploads/2012/03/10-1491-order-rearg-3-5-12.pdf (accessed on 2012-04-23).
127 *Mabo* v *Queensland (No 2)* 1992 175 CLR 1 (HCA).
128 *Supra*.
129 Ritter 22.
130 *Coe v Commonwealth* 1979 53 AJLR 403 (HCA).
131 *Mabo* par 39.

all Australian citizens before the law.[132] Brennan J argues passionately for equality and justice under the law, values buttressing the rule of law. Crucially, Brennan J contended that *Mabo* presented the Court with a fundamental clash of principles. First was the fact that the dispossession of the Aborigines underwrote the development of the Australian nation.[133] Second, the Court argued that it could not adopt rules if those rules would fracture the skeleton of principle that gives the law its shape and internal consistency – the rule of law.[134]

What is most important here is that *terra nullius* was treated by the Court as a foundational legal principle, when the reality of Australian colonialism was that it was no such thing. The denial of Aboriginal land rights was not based on a legal doctrine, as Reynolds would have it, but upon the brute assumption that Aboriginals were savages without civilisation. Aboriginals were "physically present, but legally irrelevant".[135]

Thus the High Court *created* a conflict in relation to the rule of law. By treating *terra nullius* as the founding legal doctrine of the Australian legal system which dispossessed Aborigines, they ensured that the rejection of *terra nullius* would be seen as evidence of the progress of the law.[136] Thus the Court couched its judgment in the language of reconciling the (fictional) foundational act of dispossession with the (fictional) fact that this act was the condition of the ongoing existence of Australia.

The Court distinguished between the *acquisition* of sovereignty and the *consequences* of the acquisition of sovereignty. The former, held the Court, is not subject to review by the Court as it is that sovereignty that gives the Court power to rule on the matter at hand. The latter issue was justiciable. From this the Court held that the Crown gained title to Australia through the act of *terra nullius*; in other words, the Crown gained the right to create property rights but where none had been created it was possible for native title to continue to exist.[137] This right was entrenched in the Native Title Act 1993.[138] In this way, Aboriginal communities could gain land rights if they could show that they had "continual association" with the land from the time of colonisation.

This adherence to the certainty of the legal system, part of the rule of law, was in fact a "symbolic legitimation ritual".[139] The right to native title is curtailed by the rule of law in a manner different to the legislation in the United States. The formal adherence to the rule of law here involves the application of general principles ("native title") and treating

132 *Ibid* par 63.
133 *Ibid* par 82.
134 *Ibid* parr 28-29.
135 Simpson "Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence" 1993 *Melbourne U LR* 200.
136 Ritter 30.
137 *Mabo* par 55.
138 Native Title Act 1993 (Cth) (NTA).
139 Simpson 207.

like cases alike.[140] However, this formal legal equality is tied to the concept of the legal person.[141] Kerruish and Purdy[142] have stated that this means that people are free (stripped) of *all* their characteristics. Equality at law has this dual freedom: all those who come before the law are *equally* stripped of their actual characteristics and *equally* presumed to be responsible for their actions. In the case of *Mabo*, by assuming that Aboriginals are free actors, the law misdescribes the historical reality of racism and discrimination, but does so in a way that legitimises the overlooking of this fact – namely formal equality under the rule of law. The gains of *Mabo* were achieved within the supremacy of the liberal, Anglo-American rule of law framework.[143]

What is more concerning for the question of redress for past wrongs, the High Court ruled that the original act of sovereignty was not justifiable in the court system. By refusing to engage with *terra nullius*, itself a fiction, the court not only legitimises its jurisdiction, but actually legitimises the very act of dispossession that was based upon a colonial racism. As Coe[144] stated, the High Court, in rejecting *terra nullius*, "threw away a name but retained the substance". *Terra nullius* still provides the foundation of the Australian state, meaning that Aboriginal dispossession is now legally set in stone, but is perversely legitimated by the claim that the law is acting in a non-discriminatory manner. Things were changed in order for things to remain the same.[145]

7 Conclusion

This article has explored the potential and pitfalls of historical justice litigation with reference to two instances of British colonialism: Australia and South Africa. Formal constructions of the rule of law, with their emphasis upon legal certainty, have curtailed the search for justice on the part of victims of human rights litigation. In Australia Aboriginals have to defer to the supremacy of the European common law, and ignore past injustices in order to have their rights to land legitimated by the same system of law which legitimated their very dispossession. In South Africa, the failure of the government to provide adequate reparations to victims of Apartheid has led to individuals starting extraterritorial litigation under the ATS. However, even here formal conceptions of the rule of law have led the US Supreme Court to seemingly narrow, and possibly even foreclose the options for aliens to bring claims. In order to bring about the very historical justice that marks both these forms of litigation, courts will have to construct a *substantive* conception of the rule of law, which

140 S 225 NTA; MacCormick *Legal Reasoning and Legal Theory* (1978).
141 Weyraucht "Law as Mask – Legal Ritual and Relevance" 1978 *California LR* 699.
142 Kerruish & Purdy "He 'Look' Honest, Big White Thief" 1998 *Law, Text, Culture* 150.
143 Ritter 32.
144 Coe & Lewis "100% Mabo" 1992 *Polemic* 143.
145 Ritter 33.

values the rectification of human rights abuses above legal certainty. It is with this uncertain conclusion that this article ends.

An overview of certain aspects regarding the regulation of sovereign insolvency law*

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OPSOMMING

'n Oorsig van sekere aspekte ten opsigte van die regulering van staatsinsolvensiereg

Daar is tans geen internasionale erkende of geldige insolvensiestelsel wat toegepas kan word in die geval van die insolvensie van 'n staat nie. Regeringsamptenare en owerhede regoor die wêreld poog tans om die impak van die huidige internasionale ekonomiese krisis te versag deur gebruik te maak van verskeie kunsmatige ondersteuningsmeganismes en ekonomiese beleidsreaksies. Akademici sowel as beleidmakers pleit reeds geruime tyd vir die ontwikkeling van internasionale maatreëls ten einde so 'n internasionale ekonomiese krisis te hanteer en sodoende die herhaling en erns daarvan te beperk. 'n Doeltreffende en effektiewe insolvensiestelsel is 'n kritiese komponent van elke goed-funksionerende mark-ekonomie en die huidige debat oor ekonomiese globalisering kan ook nie geïgnoreer word nie. Die onlangse ekonomiese ondergang van Griekeland en ander Europese lande het die behoefte beklemtoon om ekonomiese aangeleenthede ten opsigte van staatsinsolvensies op 'n tydige, ordelike en voorspelbare wyse aan te spreek. Die doel van hierdie bespreking is nie om die moontlike oorsake, implikasies en oplossings vir die huidige internasionale ekonomies krisis te bespreek nie, maar om 'n oorsig van sekere aspekte met betrekking tot staatsinsolvensie te gee en die behoefte aan 'n internasionale insolvensie-raamwerk te beklemtoon. So 'n stelsel het die potensiaal om toekomstige finansiële krisisse te voorkom of minstens die impak daarvan te verlig.

1 Introduction

When it becomes necessary for a state to declare itself bankrupt, in the same manner as when it becomes necessary for an individual to do so, a fair, open and avowed bankruptcy is always the measure which is both least dishonorable to the debtor, and least hurtful to the creditor.[1]

During the past few years the heightened interest and focus on sovereign insolvency law by international institutions such as the International Monetary Fund (IMF) and the World Bank has been mirrored not only in the international media but worldwide sovereign insolvency law has increasingly become the subject of scholarly articles,

* Part of this research was presented at the INSOL Europe Annual Congress' Academic meeting 2011, Venice as well as a paper delivered at the INSOL Academics' Group Meeting 2011, Singapore.

1 Smith *Of the Revenue of Sovereign or Commonwealth* Book V Ch II of Public Debts (1776).

reflection and debate.[2] Stories about debt downgrades, a double dip recession and sovereign-debt defaults are dominating the headlines and new proposals to strengthen the global financial safety net are being put to the test on a daily basis. Recently governments and authorities across the globe have also been using a wide array of policy responses to mitigate the impact of the global crisis and in some instances sovereign default.[3] These measures range from emergency bailouts to aggressive monetary easing and massive stimulus packages.

When discussing sovereign insolvency law it should be highlighted that to refer to a government as being bankrupt is to use a metaphor.[4] There is currently no internationally recognised and legitimate system of law or procedure relating to insolvency law that can be applied to assist the creditors of a sovereign debtor.[5] In recent months it has become apparent that many players in the global financial system have dug a debt hole far larger than they can reasonably expect to escape from and the case of Greece has ushered in the second phase of the financial crisis, namely that of potential sovereign default.[6] Efforts to improve the framework for the resolution of the international economic crises have been on the international policy agenda for a number of years, but the recent financial crisis has brought new urgency to the matter.

The purpose of this article is not to envisage the possible causes, implications and solutions to the current sovereign debt crisis but to give an overview of certain aspects pertaining to sovereign insolvency law and to stir the debate on the need for an international sovereign insolvency framework or mechanism for sovereign debt crisis resolution. Such a mechanism would have the potential to avert future financial crises or at least alleviate their destructiveness by bringing to situations of state insolvency a similar structure and discipline that at present applies within countries with efficient and effective bankruptcy laws.[7]

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2 See *inter alia*: Kolb *Sovereign Debt: From Safety to Default* (2011); Lynn *Bust: Greece, the Euro and the Sovereign Debt Crisis* (2011); Tomz *Reputation and International Cooperation: Sovereign Debt across Three Centuries* (2007) for a detailed discussion of the concept of "sovereign debt".

3 See Arieff "Global Economic Crisis: Impact on Sub-Saharan Africa and Global Policy Responses" in *CRS Report for Congress* (2010); Jara *et al* "The Global Crisis and Latin America: Financial Impact and Policy Responses" 2009 *BIS QR* at: SSRN: http://ssrn.com/abstract=1513216 (accessed on 2012-07-01); International Monetary Fund (IMF) "Greece: Stand-By Arrangement – Review under the Emergency Financing Mechanism" in *IMF Country Report, No. 10/217* (2010) at: http://www.imf.org/external/pubs/ft/scr/2010/cr10217.pdf (accessed on 2012-07-01).

4 Herman *et al Overcoming Developing Country Debt Crises* (2010) 3.

5 *Ibid*.

6 In 2010, the public debt of Greece had reached €290 billion and public debt to GDP ratio had reached 12.7 percent. See Akram *et al* "The Greek Sovereign Debt Crisis: Antecedents, Consequences and Reforms Capacity" 2011 *J of Eco and Behavioral St* 306. See also Gros "Towards a Euro(Pean) Monetary Fund" 2010 *CEPS Policy Brief No. 202* at: SSRN: http://ssrn.com/abstract=1604446 (accessed 2012-07-01); Buckley "The Bankruptcy of Nations: An Idea Whose Time Has Come" 2009 *Int Lawyer* 1189.

2 Brief Historical Overview

The first important reference in modern economic history goes back to *Adam Smith* who called for an orderly state insolvency in his famous book *The Wealth of Nations* in 1776.[8] From its earliest days lenders put their fate into the hands of princes and the medieval history of state insolvencies and sovereign debt was one of wars, kings, and every so often the tragic figure of a ruined Italian banker.[9] For example "France defaulted on its Sovereign debt eight times between 1500 and 1800 while Spain defaulted thirteen times between 1500 and 1900"[10] which in turn makes it a world record.[11] The defaults of Philip II, who ruled Spain between 1556 and 1598 and who failed to honour his debts four times during his reign have attained mythical status as the origin of the sovereign debt crises.[12] Over the decades it has been shown that sovereign default has not been a unique phenomenon as among the member states of the Eurozone, Austria, Greece, Germany, Italy, Portugal and Spain have each experienced at least one case of sovereign default since 1824.[13]

After World War I the Great Depression resulted in a major debt crisis and subsequent sovereign defaults in the 1930s as the defaulted states considered the needs of the nation more important than those legal obligations to creditors.[14] Then came the era of the emerging economies' dramatic economic demise and by the 1980s most emerging economies

7 Bhargava *Global issues for global citizens: an introduction to key development challenges* (2006) 66.

8 Kaiser "Resolving Sovereign Debt Crises: Towards a Fair and Transparent International Insolvency Framework" 2010 *Friedrich Ebert Stiftung Study* 23. On file with the author.

9 Wood "State Insolvency: Bankruptcy without a Bankruptcy Law" 2009 *Allen & Overy's Special Global Counsel* at: http://www.allenovery.com/publications/en-gb/Pages/State-insolvency--bankruptcy-without-a-bankruptcy-law.aspx (accessed on 2012-07-01).

10 De Paoli *et al* "Cost of Sovereign Default" *Financial Stability Paper (*Bank of England 2006*)* at: http://www.bankofengland.co.uk/publications/fsr/fs_paper01.pdf (accessed on 2012-07-01).

11 Grigien? & Mockien? "Can a Sovereign State Declare Bankruptcy?" 2010 *Baltic J of L & Politics* 128. See also Sturzenegger & Zettelmeyer *Debt defaults and lessons from a decade of crises* (2006) ch 1 for a detailed discussion on the history of sovereign defaults and restructurings.

12 Conklin "The Theory of Sovereign Debt and Spain under Philip II" 1998 *The J of Political Economy* 483.

13 Gianviti *et al* "A European Mechanism for Sovereign Debt Crisis Resolution: A Proposal" paper prepared on behalf of the Brugel Organization (2010) at: http://www.europolitique.info/pdf/gratuit_fr/282201-fr.pdf (accessed on 2012-07-01).

14 Sturzenegger & Zettelmeyer 3.

defaulted.[15] This was followed closely by the Asian market collapsed in 1998 which eventually spread to Russia. But it was eventually Argentina's spectacular collapse in the beginning of the 21st century that finally lead to numerous debates and proposals for an international bankruptcy regime.[16] Until a few years ago Asian and African financial crises were far less researched than those of Europe and Latin America. Indeed, the widespread belief that modern sovereign default was a phenomenon confined to Latin America and a few poorer European countries was heavily influenced by the scarceness of research on other regions.[17]

The financial crisis which arose in July 2007, when investors lost their confidence in the mortgage- and asset-based securities in the United States, has since deepened, affecting a wide range of financial and economic activities and institutions in both developed and developing countries around the world. As the crisis deepened, the governments of major developed and developing countries as well as international financial regulators attempted to take some mitigating actions and coordinate efforts to contain the crisis.[18] What makes the current financial crisis so much more far- reaching is the mere scale thereof and as several European states[19] recently declared their inability to pay their debts and warned the rest of Europe and the world of their potential bankruptcy, a Pandora's box of uncertainties regarding the restructuring process itself – the macroeconomic scenario as well as the behavioural response of European institutions – has been opened.[20] Unquestionably the cost of intrusion was increased due to the delay in response to the crisis. Not only does the current global economic crisis represent a critical juncture for the reform of the European Union institutions to introduce provisions to help avoid a similar fate in the future, but the prevailing economic and financial scenario of countries such as Greece has also exposed major flaws in the governance framework of the Economic and Monetary Union (EMU).[21]

15 For a detailed discussion of the financial turmoil in Emerging Economies (EE) see Loser "Global Financial Turmoil and Emerging Market Economies: Major Contagion and a Shocking Loss of Wealth?" 2009 *Global J of Emerging Market Economies* 137.

16 Grigiené & Mockiené 2010 *Baltic J of L & Politics* 129.

17 Reinhart *The Time is Different: Eight Centuries of Financial Folly* (2009) xxxiii.

18 Statistical Economic and Social Research and Training Centre for Islamic Countries (SESRIC) *Reports on Global Financial Crisis a Second Wave of the Global Crisis? The Eurozone Debt Crisis* January-June 2011 at: http://www.sesric.org/files/article/443.pdf 2 (accessed on 2012-07-01).

19 Eg Greece, Latvia, Iceland, Portugal, Spain, Ireland.

20 Akram 2011 *J of Economics and Behavioural St* 316.

21 Grigiené & Mockiené 2010 *Baltic J of L & Politics* 128.

3 Some Thoughts on Sovereign Insolvency Law in General

3 1 General Remarks

Virtually every country has adopted some formal legal process for dealing with the insolvency of individual debtors and sub-sovereign public entities.[22] Legislatures outline the insolvency regimes, courts interpret the laws and apply them to individual cases, and the executive power regulates and enforces the judgments.[23] In turn another embedded legal principle is that once insolvent corporations are not wound up, they are expected to come out of bankruptcy as self-sustaining entities; in a nutshell, the main objective of modern bankruptcy law is to afford them a "fresh start".[24]

The principles relevant to sovereign insolvency law is different and with good reason. There is no global legislature or international institution, no global bankruptcy court to evaluate the claims of creditors or to protect the debtor from abusive practices, and no global government to enforce judgments against sovereigns.[25] As signs of convergence begin to materialise with regard to private-sector insolvency procedures the reality of global financial integration has significantly complicated the resolution of sovereign financial distress.[26]

Another significant observation is the evolving nature of the sovereign debt landscape. During 2004 the international financial community was faced with new challenges in sovereign debt restructuring during the financial crises in Argentina and Iraq.[27] Although there were important differences between these two countries' debts, with Argentina struggling with the concept of holdout creditors and Iraq's default

22 Herman "Towards a Sovereign Insolvency Mechanism: Why it matters to Small Vulnerable Economies, what it might be like, and how to get it" *Consultative Workshop on Policy Options to address the Looming Debt Problems of Commonwealth Small Vulnerable Economies* Kingston, Jamaica, 2010. On file with the author.

23 Stiglitz "Sovereign Debt: Notes on Theoretical frameworks and Policy Analysis" in *Overcoming Developing Country Debt Crises* (ed Herman) (2010) 35. See also UNCITRAL *Legislative Guide on Insolvency Law* (2005) 2 at: http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (accessed on 2012-07-01).

24 Herman *op cit* 1. Also note that a fundamental goal of the American federal bankruptcy laws enacted by Congress is to give debtors a financial "fresh start" from burdensome debts. The US Supreme Court made this statement about the purpose of the bankruptcy law in the decision of *Local Loan Co v Hunt* 292 US 234 244: "[I]t gives to the honest but unfortunate debtor … a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt".

25 Herman *op cit* 1.

26 Lubben "Out of the Past: Railroads & Sovereign Debt Restructuring" 2004 *Georgetown J of Int L* 14.

27 Olivares-Caminal *Legal Aspects of Sovereign Debt Restructuring* (2009) 103.

reflecting features of an "odious debt"[28] scenario, what was more significant was that both incidents were laying down the foundation for future sovereign debt crises.[29]

Debt has been a large source of capital flow to developing countries during the past few decades and previous periodic debt cycles were characterised by their own unique character *vis-a-vis* the financial instruments that were used.[30] During the late 1980s syndicated loans were replaced by international bonds as one of the most important mechanisms for raising long term finance in the international capital markets.[31] One of the challenges experienced during the restructuring of Argentina's debt had indeed been that the credit base had been enlarged from a limited number of banks involved in a syndicated loan to thousands of creditors holding Argentine bonds. This has essentially been the trend worldwide with private creditors increasingly becoming numerous, anonymous and difficult to coordinate.[32]

It should however also be noted that there is a definite link between sovereign risk and corporate access to foreign capital.[33] Private corporations has lately gained unequaled access to external finance and especially in emerging markets business have become more reliant on foreign sources of capital and funding, resulting in increased exposure to international economic forces.[34] In the wake of the current financial crisis, corporations will thus be struggling to raise capital in international markets with grave consequences for domestic investment and economic growth.[35]

The proposal to emulate features of domestic insolvency in order to solve the problem of sovereign debts, which dates back to Adam Smith, is no longer as controversial as it once was.[36] The key difference is evidently the difference in status between that of a state and private sector parties as a result of a state's sovereignty as states jealously guard their sovereignty under international law and resist interference by other states or international institutions.

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28 Howse "The Concept of Odious Debt in Public International Law" 2007 UNCTAD discussion papers paper no 185 at http://unctad.org/en/docs/osgdp20074_en.pdf. (accessed on 2012-07-01).
29 Olivares-Caminal 104.
30 *Idem*.
31 *Ibid* 105.
32 *Ibid* 106.
33 Das *et al* "Sovereign Default Risk and Private Sector Access to Capital in Emerging Markets" in *Debt Relief and Beyond: Lessons Learned and Challenges Ahead* (ed Braga) (2009) ch 7.
34 *Idem*.
35 Das "Spill overs of Sovereign Default Risk: How much is the private sector affected" in *Sovereign Debt: From Safety to Default* (ed Kolb) (2011) 33.
36 Raffer "Considerations for Designing Sovereign Insolvency Procedures" 2005 *Law, Social Justice & Global Development J* at: http://www.go.warwick.ac.uk/elj/lgd/2005_1/raffer (accessed on 2012-07-01).

3 2 Comparisons Between Sovereign and Corporate Insolvency

At national level the principle benefits and purposes of a personal bankruptcy system are generally stated as being to divide the assets of an insolvent debtor fairly and equitably among the creditors, and to allow an insolvent debtor the opportunity to make a fresh start free of the burden of accumulated debt.[37] What could also be mentioned is that an effective bankruptcy system will always improve the allocation of credit within an economy and thus make the economy more stable.[38]

The question could be asked whether lessons may be drawn for the development of a sovereign insolvency framework from the principles underlying national policies for corporate and personal insolvency law. A state is presumed to be insolvent when it is unable to meet its foreign currency liabilities as they fall due.[39] According to Wood[40] the alternative test of insufficiency of assets to cover liabilities is not applicable as most of a state's assets are not realisable. The famous banker Walter Wriston was legally quite correct when he once declared that "countries never go bankrupt", as indeed countries cannot legally become bankrupt without a body of rules under which they may be declared to be so.[41] However throughout history countries have become substantively bankrupt, typically with horrendous consequences for the living standards and human rights of their more vulnerable citizens.[42]

For insolvency law purposes states differ from corporations as corporate insolvency laws can be extremely complex with highly prescriptive bodies of rules and rigid procedures.[43] By contrast as mentioned there are virtually no statutory rules or procedures governing the insolvency of states and the matter is left to negotiations between interested parties and the century old debate surrounding the enforcement of *pacta sunt servanda*.[44]

37 Buckley "The Bankruptcy of Nations: Let the Law Reflect Reality" 2010 *Banking and Financial Services Policy Report* 1.

38 See also Buckley *The International Financial System: Policy and Regulation* (2009) 145; Buckley "Sovereign Bankruptcy" 2003 *Bond LR* 100.

39 Thomas "Bankruptcy Proceedings for Sovereign State Insolvency and their Effect on Capital Flows Paper" paper presented by *World Institute for Development Economic Research* (UNU-WIDER) 2002 at: http://www.wider.unu.edu/stc/repec/pdfs/rp2002/dp2002-109.pdf (accessed on 2012-07-01).

40 Wood *Principles of International Insolvency* (2007) 756.

41 Buckley 2010 *Banking and Financial Services Policy Report* 1; Buckley 2009 *Int Lawyer* 1189; Buckley 2003 *Bond LR* 97.

42 Buckley 2003 *Bond LR* 95.

43 Portes "Resolution of Sovereign Debt Crises: The New Old Framework" in *Economic Integration and Social Responsibility* (ed Bourguignon) (2007) 176.

44 Schlemmer "The Enforcement of Sovereign Debt" in *International Monetary and Financial Law: The Global Crisis* (ed Giovanoli) (2010); Schlemmer "Die staat is na sy swernoot ... en *pacta sunt servanda*?" 2001 *TSAR* 203.

Substantial differences however do exist between the insolvency of a state and that of a corporate entity. Wood[45] mentions the following differences:

> (a) The economic affairs of a state cannot be taken over and managed by a receiver, trustee or administrator and we thus deal with a debtor that stays in possession. The IMF vaguely simulates the role of a company "doctor" albeit with much less power as the administrator in a corporate insolvency.
>
> (b) Creditor suits or attachments in external courts cannot be frozen by a bankruptcy order of judicial moratorium as domestic government assets are usually exempted from creditor execution.
>
> (c) In contrast to municipal laws allowing judicially approved creditor plans, debt reorganisations of state debt cannot be imposed on dissenting creditor minorities by majority creditor vote as consensus is needed.
>
> (d) There are also no international enforced disclosure obligations at the same level of detail as corporate financial statements crawled over by auditors. There are also no statutory rules for the recovery of preferential payments or transfers although in practice insolvent debtors are advised not to prefer certain creditors as this could sour restructuring negotiations.
>
> (e) Most state debts are unsecured and the priority or equality of payment must be settled by the difficult process of agreement.

Lending to governments is also distinct as such loans are usually made without collateral and there is no legal mechanism to impose settlements comparable to the legal enforcement of a court finding on a private loan contract.[46] There is instead the confidence that governments will fully service their debts to ensure a positive credit rating which may be regarded as a very uncertain incentive.[47] In turn a firm that goes bankrupt keeps an intrinsic value, which can be sold by creditors. This is not the case for a state as aggregate gross domestic product (GDP) cannot be shipped home by creditors.[48] Some kind of inclination to pay on the part of the state is always required. Moreover, because creditors have no collateral and as a result of the absence of any legal recourse; the value of a creditor's claim is proportionate to the harm that they can inflict on a defaulting state.[49] As the historian Max Winkler observed in 1933:

> In the case of a private default the lender can follow up the defaulter to his very fount and origin, and discover for himself his prospect of repayment. When a government defaults, the creditor must seek his way through myriad miles of tape of all colours, must track and backtrack across a road obscured by the prints of a thousand red herrings, before he can even come to the surface of the facts.[50]

45 Wood 756.
46 Herman 7.
47 *Ibid* 7-8.
48 Portes in *Economic Integration* 176.
49 Serra *The Washington Consensus Reconsidered Towards a new Global Governance* (2008) ch 9.
50 Winkler *Foreign Bonds: An Autopsy* (1933) (reprinted 1999) 18.

4 Recent Proposals

4 1 General Remarks

In 2009 the US Committee on Capital Markets Regulation issued a report on the regulation of the financial system post crisis and admitted the following:

> The US financial system is best viewed as an integral part of the overall global financial system. No longer can the United States regulate in a vacuum. Coordination with other national regulators and cooperation with regional and international authorities is required.[51]

As Keiser mentions:

> On Monday the 12th of July 2010, German Finance Minister Wolfgang Schäuble proposed to his fellow members of the EU Task Force on the Strengthening of the European Monetary Union the creation of an international sovereign insolvency framework. Such an initiative by Europe's most powerful economy would have been unimaginable just half a year earlier. The de-facto insolvency of the Greek state had not only shattered the old continent's financial and banking system. It had also brought about important changes in some of the key orientations of policymakers. Strong discontent among the populace about the big bailouts of states as well as private investors pushed the conservative/liberal government in Germany towards the search for alternatives. While at first controversial among European governments, the proposal thus met with more positive responses from key academics and also some fellow European governments.[52]

At present there are several proposals or alternative approaches for dealing with sovereign insolvency and debt restructuring on the table. As far back as the early eighties authors have debated the reform of the international financial architecture in the aftermath of recent economic crises.[53] Academics and policy-makers alike have advocated a number of measures to deal such a crisis in an attempt to limit the frequency and severity thereof.[54]

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51 Committee on Capital Markets Regulation "The Global Financial Crisis – A Plan for Regulatory Reform" 2009. On file with the author.

52 Keiser 23.

53 Oechsli published a detailed proposal of how to adapt Chapter 11 of the US Code, (11 USC §§ 1101–74 (2000)) well before Aug 1982, the date considered by many as the official beginning of the debt crisis. See Oechsli "Procedural Guidelines for Renegotiating LDC Debt: An Analogy to Chapter 11 of the US Bankruptcy Reform Act" 1980–81 *Virginia J of Int L* 305; See also regarding Internationalising US Municipal Insolvency: Raffer "A Fair, Equitable, and Efficient Way to Overcome a Debt Overhang" 2005 *Chicago J of Int L* 263.

54 Gai *et al* "Crisis Costs and Debtor Discipline: The Efficacy of Public Policy in Sovereign Debt Crises" (May 2001) Bank of England Working Paper No. 136 at SSRN: http://ssrn.com/abstract=274288 or http://dx.doi.org/10.2139/ssrn.274288 (accessed on 2012-07-01).

4 2 Sovereign Debt Restructuring Mechanism

In 2001 the IMF proposed its own solution to the problem of sovereign insolvency in the form of the "Sovereign Debt Restructuring Mechanism" (SDRM) first proposed in a signal speech by Anne Kreuger, First Deputy Managing Director of the IMF, in November 2001.[55] This is probably the most well-known proposal and was introduced when the IMF proposed its own solution to the problem of sovereign insolvency. In the words of the IMF: "[w]e are not proposing a bankruptcy mechanism for countries, but simply a mechanism to facilitate debt workout negotiations between a debtor and its creditors".[56]

Limited as it was, the IMF's proposed scheme drew strong criticism from creditors and the US Treasury, and considering these criticisms, the IMF consequently revised its program considerably.[57] Nonetheless, at a 2003 meeting of the Board of Governors of the IMF, the SDRM initiative was suspended.[58] One of the interesting elements of the IMF's proposal was the introduction of a Sovereign Debt Dispute Resolution Forum (SDDRF) which was designed to adjudicate certain disputes stemming from the restructuring process.[59]

4 3 International Club and Institutional Approach

Another approach is the so called club approach where at international level, certain classes of lenders are coordinated through "clubs" – the *Paris Club* comprising rich-country government lenders, and the *London Club*, which brings together commercial-bank lenders.[60] The *Paris Club*

55 Buckley 2010 *Banking and Financial Services Policy Report* 1 1–17. See also Buckley *The International Financial System: Policy and Regulation* (2009) 145; Krueger "International Financial Architecture for 2002: A New Approach to Sovereign Debt Restructuring" a speech delivered at the National Economists' Club Annual Members' Dinner, Washington DC 2001 at: http://www.imf.org/external/np/speeches/2001/112601.htm (accessed on 2012-07-01). The proposal was substantially modified in a later speech, Krueger "A New Approach to Sovereign Debt Restructuring" at http://www.imf.org/external/pubs/ft/exrp/sdrm/eng/index.htm (accessed on 2012-07-01). See generally White "Sovereigns in Distress: Do They Need Bankruptcy?" 2002 *Brookings Paper on Economic Activity* 20.

56 Buckley *The International Financial System: Policy and Regulation* (2009) 145; Buckley 2003 *Bond LR* 100 and Buckley 2010 *Banking and Financial Services Policy Report* 31; see also Setser "The Political Economy of the SDRM" in *Overcoming Developing Country Debt Crises* (ed Herman) (2010) 317.

57 Raffer "The IMF's SDRM – Another Form of Simply Disastrous Rescheduling Management?" in *Sovereign Debt at the Crossroads* (ed Jochnick) (2005) 246.

58 Buckley 2010 *Banking and Financial Services Policy Report* 32.

59 Kargman & Paulus "Reforming the Process of Sovereign Debt Restructuring: A Proposal for a Sovereign debt Tribunal" paper presented at the 8th Annual International Insolvency Conference (IIC), Humboldt University, Berlin, Germany, 2008; Paulus "Some Thoughts on an Insolvency Procedure for Countries." 2002 *Am J of Comp L* 531–39.

60 Kaiser 5.

was founded in 1956, when Argentina had repayment difficulties and the French Treasury hosted a meeting of official creditors.[61] The Club is an *ad-hoc* negotiation forum with no legal status, nor rules of procedure. Although negotiations at, for example the *Paris Club* result in a multilateral agreement on debt rescheduling, it is still not meant to be applied as a permanent mechanism.[62] Kaiser mentions that the Club's informal character has been useful for flexible solutions to individual debtor cases.[63] However, this flexibility has also meant that countries were not treated consistently, rather political considerations have often influenced the outcome of negotiations – thus undermining the Club's basic rationale: that creditors and interested parties should be treated equally.[64]

There are also a number of well-established and well-respected international arbitration institutions, such as the International Chamber of Commerce in Paris and the International Centre for Settlement of Investment Disputes (ICSID).[65] Although the ICSID offers tremendous benefits to investors and host states willing to settle their disputes by arbitration it is not the specialised and dedicated institution that may be needed to deal with claims arising out of sovereign debt in a systematic manner and to effectively resolve future sovereign debt crises.[66]

4 4 The Contractual Approach

A contractual approach is also reflected in the so called collective action clauses (CAC) which have also in recent times been viewed as an effective mechanism for handling debt restructurings.[67] Such clauses exert discipline on creditors by preventing the strategic "hold out" scenario that is likely when unanimity is required. Some of the criticism voiced against collective action clauses by authors such as Paulus is that they are applicable only to bond holders and not to more traditional lenders, such as foreign states or banks. If traditional claims form the bulk of a sovereign's debts, the collective action clause approach is likely to have little effect.[68] Although a statutory approach may have a

61 *Idem*.
62 For a detailed discussion on the creation, development and framework of the *Paris Club* see UNCTAD Discussion Papers: Cosio-Pascal "The Emerging of a Multilateral Forum for Debt Restructuring: the Paris Club" Nov 2008 at: http://www.unctad.org/en/docs/osgdp20087_en.pdf (accessed on 2012-07-01).
63 As late as 2003, the *Paris Club* started to communicate with the broader public through their website at: http://www.clubdeparis.org (accessed on 2012-07-01).
64 Kaiser 5.
65 Weibel *Sovereign Defaults before International Courts and Tribunals* (2011) 209.
66 Couillault *et al* "Toward a Voluntary Code of Good Conduct for Sovereign Debt Restructuring." 2003 *Financial Stability Review* 154.
67 Paulus "A Standing Arbitral Tribunal as a Procedural Solution for Sovereign Debt Restructurings" in *Sovereign Debt and the Financial Crisis – Will This Time be Different?* (ed Braga) (2010) 318.
68 *Idem*.

significant role to play as it could act as a comprehensive instrument designed to coordinate different creditor groups prior to and during a debt crisis, it still falls short of an inclusive and effective framework needed for the restructuring of sovereign debt.

4 5 Elements of an International Chapter 9

A number of proposals[69] also put forward the US bankruptcy law as model and in particular Chapter 9 of the US Bankruptcy Code,[70] which concerns the procedure to deal with municipality debts. Commentators such as Raffer[71] agree that there is a strong and convincing case for one specific type of insolvency procedure appropriate for sovereign debtors, but links this procedure to an arbitration process based on the principles of the US Chapter 9. There are two particular reasons why Raffer chooses Chapter 9, which is conceived for sovereign public municipalities: It protects the sovereignty of a public debtor, and it establishes the right to a hearing as a means of involving the affected population in proceedings leading to a restructuring agreement.[72]

Chapter 9 was created during the Great Depression, when a number of local governments were unable to service their debts, and was in fact introduced specifically to avoid prolonged and ineffective negotiations and rescheduling, to allow speedy, fair, and economically efficient resolutions for over indebted US municipalities.[73] Some commentators are also of the opinion a Chapter 9-procedure could solve the sovereignty matter as it represents a legal institution which takes account of all creditors and in which the sovereign debtor still has full capacity to act.[74]

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69 Berensmann "An insolvency procedure for sovereign states: a viable instrument for preventing and resolving debt crisis?" in *Sovereign Debt: From Safety to Default* (ed Kolb) (2011) 383; Raffer "Applying Chapter 9 Insolvency to International Debts: An Economically Efficient Solution with a Human Face" 1990 *World Development* 301; Raffer "What's Good for the United States Must Be Good for the World: Advocating an International Chapter 9 Insolvency" in Kreisky Forum for International Dialogue (ed) *From Cancún to Vienna, International Development in a New World* (1993) 64*ff*; Buckley 143.

70 Also referred to as the Bankruptcy Code, Code, 1978 Act or Bankruptcy Reform Act of 1978. (Pub l no 95-598, 92 Stat 2549 (1978) 11 USC par 101 *et seq* which was signed into law on 1978-11-06 and became effective on 1979-10-01.

71 Raffer *World Development* 301. See also Herman 468; Raffer "Sovereign Debt Workout Arrangements" in *After Neoliberalism – Economic Policies That Work for the Poor* (eds Weaver *et al*) a collection of papers presented at a conference on "Alternatives to Neoliberalism", 2002-05-23/24 in Washington, DC, *The New Rules for Global Finance Coalition* 88-102.

72 Berensmann & Herzberg "International Sovereign Insolvency Procedure: A Comparative Look at Selected Proposals" 2007 Discussion Paper/ Deutsches Institut für Entwicklungspolitik 3.

73 Herman 468.

74 Chun "'Post-Modern' Sovereign Debt Crisis: Did Mexico Need an International Bankruptcy Forum?" 1996 *Fordham LR* 2647.

4 6 Individual Proposals

Lastly, there have also been number of individual proposals for the establishment of a standing arbitral tribunal modelled after, for example, the Iran-US claims tribunal.[75] Most recently, Paulus and Kargman[76] outlined their proposals for a Sovereign Debt Tribunal. The proposal entails that such tribunal would address disputes specified by such interested parties and would range from basic issues such as the confirmation of creditor claims to the more elaborate and complex matters relating to debt restructuring.[77] It is submitted that the most significant advantage of this proposal is that the tribunal would elevate disputes and sovereign debt restructuring obstacles to a neutral forum empowered to make binding decisions.[78] Paulus further suggests that the tribunal should be established under the auspices of a highly reputed institution that does not lend to sovereigns.

5 Challenges to an International Bankruptcy Regime

When observing the abortive history of the precursor to the United Nations (UN), the League of Nations and the International Trade Organisation history, it clearly teaches us to never underestimate the difficulty of establishing an international institution.[79] The scale of accomplishment in establishing the IMF and World Bank should also itself not be undervalued, as it took a global cataclysm, preceded by the Great Depression, to summon the political will to realise these ideals.[80] Indeed, fifty years was also roughly the gestation time for the International Criminal Court that relatively recently came into being in The Hague.[81]

A significant challenge to the proposed sovereign debt model is the concept of sovereignty. Although much criticised, the concept of "sovereignty" is still central to most thinking about international relations

75 Paulus in *Sovereign Debt and the Financial Crisis* 317.
76 Proposal for a sovereign debt tribunal is a project of the International Insolvency Institute (III) and has been approved by the International Insolvency Institute at: www.iiiglobal.org (accessed on 2012-07-01); see *Kargman & Paulus IIC paper* 318.
77 *Kargman & Paulus IIC paper* 318. Schwarcz "Facing the Debt Challenge of Countries that are Too Big to Fail" 2010 *Duke Law Working Papers,* paper 30 at: http://scholarship.law.duke.edu/working_papers/30 (accessed on 2012-07-01); Paulus in *Sovereign Debt and the Financial Crisis* 317.
78 "A fair and transparent debt work-out procedure: 10 core civil society principles" a report from the European Network on Debt and Development (Eurodad) (2009) 7 at: http://www.eurodad.org/uploadedFiles/Whats_ New/Reports/Eurodad%20debt%20workout%20principles_FINAL.pdf?n = 13 (accessed on 2012-07-01).
79 Buckley *International Financial System: Policy and Regulation* 140.
80 Buckley 2003 *Bond LR* 97.
81 Buckley *International Financial System: Policy and Regulation* 141.

and particularly international law.[82] Although globalisation is reshaping the fixed and firm boundary between domestic and international spheres and challenging our perceptions of international politics and law, the old "Westphalian" concept is still prized and harboured by most states who wish to prevent foreign or international powers and authorities from interfering in a national government's decisions and activities.[83] Yet the development of humanitarian intervention and extended integration of sovereign debt into international and regional monetary institutions marks a key development in the traditional meaning of sovereignty.[84]

It is also clear that the crisis in the Eurozone poses a further threat to state sovereignty. One significant cause has been the absence of a coordinated fiscal policy across member states. As a long term solution to the current European debt crisis, a recent proposal has been to further dilute national sovereignty in fiscal and economic policies, for instance in respect of budget deficits and the creation of a single strong bank regulator.[85]

It is also important to review the difficulties facing any version of an international bankruptcy court without teeth. Without a legal framework such as a treaty or international agreement, such a body could not enforce seizure of any collateral, if such existed. It would also not have the power to introduce a similar procedure to that of the debtor-in-possession (DIP) financing under the US Chapter 11 by awarding a preference to so called new money.[86] More to the point, national bankruptcy codes differ widely, specifically on the role of the bankruptcy courts. The highly activist involvement of the bankruptcy judge in Chapter 11 proceedings, for example, contrasts with UK, where "the receiver is king". It is therefore unrealistic to expect a simple agreement on a uniform international bankruptcy code, with legislative backup in the near future.[87]

6 The Benefits of an International Sovereign Debt Procedure

If we consider the current state of affairs there have been numerous calls for a new international debt framework as well as the establishment of a

82 Jackson "Sovereignty – Modern: A New Approach to an Outdated Concept" 2003 *The Am J of Int L* 784.

83 *Ibid* 786. The general perception is that the concept of sovereignty as it is thought of today, particularly as to its "core" of a monopoly of power for the highest authority of what evolved as the "nation-state," began with the 1648 Treaty of Westphalia.

84 "Financial crisis reshapes sovereignty" 2010 *OxResearch Daily Brief Service*, Oxford: 2010-08-05.

85 *Ibid* 24. See also Kalmo *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (2010) 102 for a discussion on the concept of sovereignty within the European Union (EU).

86 Portes in *Economic Integration* 181.

87 *Ibid*.

regulatory and institutional framework for sovereign insolvency.[88] The globalisation of finance has resulted in the creation of many new frontiers as well as actors involved in debt restructurings and negotiations, especially on the creditor side. The thread of contagion has also become more challenging as financial crises can spread far more rapidly around the globe affecting multiple sovereigns at the same time.[89] The current European debt crisis has forced European and international government and financial leaders to implement various short term solutions in an attempt to stem the crisis and prevent spillovers from the European financial crisis to the global economy.[90] Globally it is almost unthinkable that an economy as a system would offer no relief from an unsustainable debt burden. When nations have unsustainable debts, they typically must service these debts, as there is no viable alternative, save a highly destabilising default which will deny the nation access to commercial capital for extensive periods of time.[91] These debts are usually serviced through higher taxes and lower social services in countries that are already facing the inconvenience of intense austerity measures.

One of the responses by the European Union has been the creation of the European Financial Stability Facility (EFSF) created by the Eurozone Member States following the decisions taken on 9 May 2010 to safeguard financial stability in Europe by providing financial assistance to the Member States.[92] Eurobonds[93] have been floated as a possible solution to the debt crisis and several European leaders have also called for the European Central Bank (ECB) to play a more active role in extinguishing

88 Hagan "Designing a Legal Framework to Restructure Sovereign Debt" 2004-2005 *Georgetown J of Int L* 299; Paulus *in Sovereign Debt and the Financial Crisis*; Bolton & Skeel "Inside the Black Box: How Should a Sovereign Bankruptcy Regime be Structured?" 2004 *Emory Law Journal* 763; see also Kargman & Paulus "Reforming the Process of Sovereign Debt Restructuring: A Proposal for a Sovereign Debt Tribunal" paper presented at the 8th Annual International Insolvency Conference, Humboldt University, Berlin, Germany, June, 2008, unpublished draft.

89 Kargman & Paulus IIC paper 6; see also Sussman & Yafeh "Institutional Reforms, Financial Development and Sovereign Debt: Britain 1690-1790" 2006 *The J of Econ Hist* 906-935 for an interesting discussion of the financial development in Britain.

90 Panetta "Life in the Eurozone with or without Sovereign Default" in *Life in the Eurozone with or without Sovereign Default* (ed Allen) (2011) 9.

91 Buckley 2003 *Bond LR* 101.

92 Since then a further decision was taken by the European Heads of State which resulted in a second rescue package for Greece, the maximisation of the resources of the EFSF, the recapitalisation of the European banking sector and the strengthening of economic and fiscal coordination and surveillance. See official website of the EFSF available at: http://www.efsf.europa.eu/about/index.htm (accessed on 2012-07-01) for further information on the mandate and instruments used by the Fund.

93 A Eurobond is a debt capital market instrument issued in a Euro currency through a syndicate of issuing banks and securities houses, and distributed internationally when issued; see also Choudhry *An Introduction to Bond Markets* (2010) ch 6.

Europe's spiralling debt crisis.[94] These responses were however developed in an *ad-hoc* manner and on a temporary basis only and do not provide a permanent mechanism or framework for dealing with any possible future global debt crises. [95]

The need to address sovereign debt issues in a timely, orderly and predictable manner has become more evident as the recent examples of Greece and other European countries suggest. Without providing a detailed exposition or comprehensive overview of European Union law or international economic law it should be mentioned that the current European economic crisis has exposed some of the institutional flaws of the Eurozone, which was established more than a decade ago. Even though the earlier detection of the Greek crisis would not have changed the fact that the Greek economy suffers from structural deficits and the lack of competitiveness, the question should be asked whether an effective global mechanisms for crisis prevention and management could not have averted the current crisis or at least could have curbed the size thereof and the potential domino effect.[96] It has been widely agreed by international financial commentators such as Stiglitz[97] that if Europe had developed a better solidarity and stabilisation framework, the deficits in the periphery of Europe might have been smaller and more manageable.

Although there are substantial differences between the insolvency of a state and a corporate entity or individual it is submitted that the current global crisis has shown that within the concept of sovereign insolvency there is no formal mechanism to ensure that sacrifice is equivalent or appropriate across the groupings of creditors or that overall relief is sufficient for realising the presumed general goal, being that the remaining debts not prevent economic growth and rehabilitation.[98] The regulation of a national insolvency system is essential to assure the efficiency and effectiveness of the system, and to maintain the integrity of, and public confidence in, the system. It is submitted that within the concept of sovereign debt and state insolvency the underlying theme should also be the need to instill trust and confidence in the system, in

94 "Eurozone crisis: David Cameron says ECB must act now" *The Guardian* 2011-11-10.

95 Gianviti *et al* 3.

96 See "Greece's Debt Crisis: Overview, Policy Responses, and Implications" prepared by Nelson *et al* as CRS Report for Congress (Prepared for Members and Committees of Congress) (2011) for a complete discussion of the Greek debt crisis.

97 Stiglitz "A principled Europe would not leave Greece to bleed" *The Guardian* 2010-01-25.

98 Herman "Unfinished business in the international dialogue on debt" 2003 *Cepal Review* 81; see also Stiglitz "Participation and Development: Perspectives from the Comprehensive Development Paradigm" 2002 *Review of Development Economics* 164.

order for any proposed system to act as a pillar for both fiscal and social policy considerations.[99]

Raffer[100] made the following apt remark regarding the need for an international sovereign debt framework:

> With good reason, any decent legal system demands an impartial and uninterested entity to be vested with the authority to make certain decisions. It is the courts, rather than creditors or debtors, which must have this power. The very foundation of the Rule of Law demands that one must not be judge in one's own cause. So far, international public creditors have been judge, jury, experts, bailiff, and occasionally even the debtor's lawyer all in one, mocking the very foundation of any legal system.

7 Conclusion and Recommendations

An efficient and effective insolvency system is a critical component of every well-functioning market economy and in the wake of the current financial crisis designing effective and efficient, formal and informal insolvency mechanisms, and building institutions capable of implementing them thus became a high priority for the crisis-hit countries.[101] At the time of writing this article, there has been great effort amongst European politicians to resolve the increasingly worsening sovereign debt crisis and there is mounting pressure on the European Central Bank to become the Eurozone's lender of last resort. Obviously, the rules-based framework for fiscal policy created by the Excessive Deficit Procedure and the Stability and Growth Pact was insufficient to prevent the debt crisis despite its emphasis on promoting the implementation of radical austerity measures.[102]

The principle of Kant[103] that "the master is himself an animal, and needs a master" is surely also relevant to the current situation. Moving the field of sovereign debt reform away from diplomacy and official intervention will remain incomplete until an international tribunal or judicial mechanism is established and charged with adjudicating sovereign defaults and provide countries in genuine financial distress with the machinery to carry out an orderly and rapid restructuring of their debt.[104]

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99 "Insolvency Law Reform: Promoting Trust and Confidence" New Zealand Law Commission Study (2001) Paper 11 Wellington at: http://www.lawcom.govt.nz/sites/default/files/publications/2001/05/Publication_101_256_SP11.pdf (accessed on 2012-07-01).

100 Raffer 2005 *Chicago J of Int L* 364.

101 "Insolvency Systems in Asia: An Efficiency Perspective" OECD report 2001 at: www.oecd.org/dataoecd/60/7/45747128.pdf (accessed on 2012-07-01).

102 Gianviti *et al* 20.

103 "Idea for a Universal History from a Cosmopolitan Point of View" translation by Beck of *Kant* "*On History*" (1963).

104 Weibel 327.

It is also clear that the current financial crisis is not only a calculation of debit and credits but has in turn led to a deep division and instability in the Eurozone. In turn the global crisis has also taken away not only the pride of individuals but that of an entire nation as the previous Greek Prime Minister admitted that his country had accepted "a partial surrender of sovereignty ... our struggle will be to recover our autonomy and liberate Greece from the surveillance imposed by the forces of conservatism".[105]

This article has merely presented an overview of certain ideas regarding sovereign insolvency law. The challenge will lie in creating a balance between, on the one hand designing a model which will optimise the regulatory outcome, while on the other hand bearing in mind that this should take place within an achievable and sustainable approach. Further research is inevitable as globalisation is increasing the complexity and the number of relevant actors in the world of sovereign debt. It is submitted that although we are observing an exceedingly politicised debate in international financial diplomacy on the issue of sovereign debts I am hopeful that the overwhelming scale of the current global crises would highlight the need to develop a predictable and reliable procedure for resolving the problems of sovereigns in financial distress and working towards a collective goal of building and maintaining global financial stability.

It is also submitted that the reworking of any area of our law and more specifically the regulation of sovereign insolvency law, should be done against the background of a well-managed policy process, generally accepted social and economic goals, and not a combination of political ideology and private advantage. It is also important to capitalise on the enormous investment that the international community has already made in thinking through the problems that arise in a sovereign debt restructuring.[106] It would be a shame if the numerous proposals and research already done did not ultimately result in the implementation of a series of tangible improvements and developments in the sovereign debt and insolvency regime.

While the concept of European unity has been held hostage by countries such as Greece hovering on the edge of default, the potential impact on both the citizens of the defaulting sovereign states and the global economy are currently forcing global economic leaders to come up with a sustainable solution. All these ideas or reactions to the current global crisis basically underline the central theme of this article that a

105 "Backlash grows over Greek rescue plan" *Financial Times* 2010-04-25.

106 Roubini & Setser "Improving the Sovereign Debt Restructuring Process: Problems in Restructuring, Proposed Solutions and a Roadmap for Reform" paper presented at conference on "Improving the Sovereign Debt Restructuring Process" co-hosted by the Institute for International Economics and *Institut Francais des Relations Internationales*, Paris, March 2003.

global crisis demands a global solution. As stated by Kofi Annan[107] in 2000:

> I would go a step further and propose that, in the future, we consider an entirely new approach to handling the debt problem. The main components of such an approach would include ... establishing a debt arbitration process to balance the interests of creditors and sovereign debtors and introduce greater discipline into their relations.

107 Annan "Freedom from Want" in: *We, the People, The Role of the United Nations in the 21st Century* (publ UN 2000).

Can an employer still raise the retrenchment flag in interest negotiations? The *Fry's Metals* case under the Labour Relations Amendment Bill 2012

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OPSOMMING

Kan 'n werkgewer nog die operationele-vereiste-ontslag-roete volg in onderhandelinge oor belangsdispute? Die *Fry's Metals*-saak onder die Wetsontwerp op Arbeidsverhoudinge 2012

Artikel 187(1)(c) van die Wet op Arbeidsverhoudinge 55 van 1996 ("WAV") maak die sogenaamde uitsluitings-ontslag, in die loop van kollektiewe onderhandelinge, outomaties onbillik. Werknemers word egter alleenlik deur die huidige artikel 187(1)(c) beskerm, as die afdanking ten doel het om die werknemers te dwing om hul werkgewer se eis ten aansien van 'n aangeleentheid van gemeenskaplike belang te aanvaar, en as die afdanking bloot tydelik is.

Dit is dus huidig moontlik om finale diensbeëindigings teweeg te bring, vir operasionele redes (ingevolge artikel 189 of 189A van die WAV) as werknemers nie bereid is om toe te stem tot wysigings aan hulle diensvoorwaardes nie, mits die werkgewer substantiewe billikheid in die ontslag kan bewys, en solank die ontslag nie tydelike werking het nie.

Op 22 Maart 2012 het die Suid-Afrikaanse Kabinet sekere voorgestelde wysigings aan die WAV goedgekeur. Artikel 187(1)(c) sal, as die wetsontwerp in sy huidige vorm aanvaar word, die uitwerking hê dat enige ontslagte wat intree as gevolg van werknemers se weiering om toe te stem tot eise van hul werkgewers, ten aansien van aangeleenthede van gemeenskaplike belang, outomaties onbillik sal wees. Dit laat die vraag ontstaan hoe werkgewers artikel 189- en 189A-prosesse, waar moontlike veranderinge aan diensvoorwaardes voorgestel word as alternatief tot ontslag, moet benader, en of sodanige situasies noodwendig tot gevolg sal hê dat die werkgewer nie werknemers wat weier om die alternatief te aanvaar, mag ontslaan nie.

Die skrywers kom tot die slotsom dat artikel 187(1)(c) nie voorrang behoort te geniet bo artikels 189 en 189A nie, en dat dit eerder 'n feitevraag moet wees, wat in elke geval beantwoord moet word, gebaseer op die normale kousaliteitsbeginsels, of die oorwegende rede vir die afdankings gevind kan word in 'n poging deur die werkgewer om werknemers te dwing om 'n aanbod op 'n gemeenskaplike-belang-aangeleentheid te aanvaar, teenoor die vraag of die rede vir die afdanking as gevolg van *bona fide* operasionele-vereistes ontslag is.

1 Introduction

The sanctity of collective bargaining is well established in a South African context, particularly since the advent of the Constitutional era. Section 23(5) of the Constitution of the Republic of South Africa, 1996 guarantees to every trade union, employer's association and employer the "... *right to engage in collective bargaining.*"[1] The national legislation enacted to give effect to these constitutional rights, the Labour Relations Act[2] (LRA) eventually struck a much debated wage-work bargain which functions on the basis that parties to the employment relationship do not have a duty to bargain with each other, although each has a right to engage in collective bargaining.[3]

Issues of interest (such as wage negotiations) are largely left to be resolved by and between the parties, if necessary by means of industrial action. The state does not get involved in compelling resolution of such interest issues by compelling bargaining, or any specific outcome of bargaining. Instead, in the LRA it created the structures within which parties must engage with each other, and potentially use industrial action to compel agreement with another bargaining party. In common parlance, the term "mutual interest" is often mistakenly used to refer to interest issues, however, strictly speaking, the term "mutual interest" includes both interest and rights issues[4].

Despite the central role of collective bargaining in South African industrial relations, it was not left completely unregulated in the LRA. Certain conduct within the context of collective bargaining was seen as being too disruptive to constructive labour relations to leave to the parties' discretion. So for instance was employees' criminal behaviour such as violence and intimidation while engaged in a protected strike (or indeed misconduct, whether or not such amounts to criminal behaviour), not considered excusable conduct. Various adverse consequences, including dismissal, could follow for the perpetrators.[5] Employer behaviour also did not escape scrutiny. It was, for instance, considered that strategic and temporary dismissals by employers in circumstances where the parties were engaging with each other in collective bargaining, in order to compel acceptance of the employer demand, was conduct that placed the negotiating parties in an unfairly uneven bargaining

1 Other employment related rights guaranteed in s 23 Constitution include the right to fair labour practices, the right to form or join trade unions and employer organisations, to participate in the activities of such organisations, and for "workers" the right to strike.
2 66 of 1995.
3 Grogan *Workplace Law* (2009) 346-348; Van Niekerk *et al Law @ Work* (2008) 40-44.
4 Grogan 345. For purposes of this article we do not express a view regarding the appropriate demarcation between the terms "interest dispute", "rights dispute" and "mutual interest issue" for purposes of evaluating s 187(1)(c)'s effect.
5 Van Niekerk *et al* 388.

position, and as such, outlawed.[6] It is with this type of employer conduct that we concern ourselves in this article.

2 The Labour Relations Amendment Bill

After some 17 years of living with the LRA, it has become apparent that industrial action in South Africa remains susceptible to violence and intimidation. The legislator has therefore now attempted to introduce measures to promote a more constructive use of industrial action. On 22 March 2012, the South African Cabinet approved certain proposed amendments to the LRA. The Labour Relations Amendment Bill (LRA Bill) must still be submitted to, and approved by, parliament before it will become law.

The LRA Bill introduces many far-reaching amendments. Some of these provisions impact heavily on employees and their trade unions (for example, limiting the right to strike to circumstances where the strike is, from the start, supported by the majority of affected employees), but it has not left employer behaviour unaffected either.

Amongst other changes, the LRA Bill introduced a change to section 187(1)(c) of the LRA. This section currently provides that a dismissal is automatically unfair if the reason for the dismissal is to: "... compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee". If the LRA Bill is adopted, dismissals will be automatically unfair if the reason for the dismissal is: "... a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer". In what follows, we evaluate the effect of this amendment.

3 The Effect of the Proposed Amendment to Section 187(1)(c) on Retrenchments

3 1 Current Interpretation of Section 187(1)(c): The *Fry's Metals* Case

The current section 187(1)(c) of the LRA renders the so-called lock-out dismissal by an employer, in the course of collective bargaining, automatically unfair. Lock-out dismissals are dismissals with a temporary effect, until acceptance of an employer offer by the employee bargaining

6 Not only would these types of dismissals be unfair, but it would amount to automatically unfair dismissals. Various authors have expressed doubt as to whether or not the so-called "lock-out dismissal" was really such pernicious conduct as to justify being made an automatically unfair dismissal. See Thompson "Bargaining over Business Imperatives: the Music of the Spheres after Fry's Metals" 27 *ILJ* 2006 704 727; Todd & Damant "Unfair Dismissal – Operational Requirements" 2004 *ILJ* 896 918-919; Grogan "Chicken or Egg: Dismissals to Enforce Demands" 2003 19(2) Employment Law 4 8.

parties. It is effectively a form of industrial action used by employers in a type of final brinksmanship.

With the promulgation of the LRA, section 187(1)(c) appeared as one of the forms of automatically unfair dismissals, carrying the additional penalties associated with this form of dismissal.[7] It was not immediately apparent to writers or the courts, what had been intended with this section.

Initially, writers and judges alike followed the approach that the section deserved a wide reading, so that employees would be protected from both threats of dismissals, and actual dismissals (whether temporary or final), if the employer's intention with the dismissal was to secure agreement to changes to terms and conditions of employment. That sentiment was informed by the view that, whilst it could be said that it was "... 'manifestly unfair' to dismiss employees for refusing to accept changes to their terms and conditions of employment ..."[8] when employers could resort to lock-outs to achieve the desired outcome:

> [a] contingent dismissal is not a particularly pernicious form of employer conduct in the context of employer-employee relations. It is no more and no worse than a sometimes useful expedient for management in the context of industrial power-play. It is not particularly odious precisely because of its transient intent and effect ...[9]

The general view was therefore that it could not have been the legislator's intention to only prohibit the relatively harmless lock-out dismissals, while leaving open the much more serious option of bringing about final dismissals should employees refuse to accept an employer demand on a matter of mutual interest.

However, in *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA*[10] and *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd*,[11] the Labour Appeal Court and Supreme Court of Appeal together devised a reading of the section which construed it narrowly. It interpreted section 187(1)(c) to indeed only protect employees from being dismissed if the purpose of the dismissal was to compel them to accept a demand on a matter of mutual interest, and the dismissal was of a temporary nature. If the employer effected a permanent dismissal, because employees would not accept its demands, section 187(1)(c) could not come to the employees' protection. That of course did not mean that the

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7 In terms of s 194(3) LRA the compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal. In all other instances where an employee was unfairly dismissed, the maximum compensation that may be awarded is 12 months' compensation (s 194(1) LRA).

8 *Grogan 2003 19(2) Employment Law* 4 7, 11.

9 Thompson 727.

10 2003 *ILJ* 133 (LAC).

11 2005 *ILJ* 689 (SCA).

employees were without remedy – any operational requirement dismissal must meet the substantive fairness requirements of section 189 of the LRA, and if the employer could not satisfy the Labour Court that a fair operational reason existed for the dismissals, it could still result in a finding for the employees. However, successful employees would then not be entitled to the greater automatically unfair compensation, but only the standard unfair dismissal compensation.[12]

In the *Fry's Metals* case,[13] the employees unfortunately did not attack the substantive fairness of the dismissals, and limited their case to the alleged automatic unfairness of their dismissal (on urgent application), and hence we do not know whether the courts would have found that the employer's operational needs in any event justified the dismissals.

Subsequent cases have followed the *Fry's Metals* judgments, and only in circumstances where the employer's dismissals were for some reason not final, would section 187(1)(c) be of application. In *Chemical Workers Industrial Union v Algorax (Pty) Ltd*[14] for instance, the facts were very similar to the *Fry's Metals* case. In both instances the employers sought to introduce new shift systems. When each of these sets of employees would not agree to the amendments to terms and conditions of employment represented by the new shift systems, they were then dismissed for operational reasons. In the *Algorax* case (different from the *Fry's Metals* case) the employer offered to reinstate the employees if they would accept the offered changes to terms and conditions, and this offer (which remained open until the matter came to the Labour Court) resulted in a finding that the employer did in fact use a non-permanent form of dismissal, and hence fell afoul of section 187(1)(c). The employer in the *Fry's Metals* case made it very clear in written communications to employees, that the employees were being threatened with dismissal if they refused to accept the new shift system, however, once the dismissals took effect, they were final and the employees were not given the opportunity to change their minds and accept the new shift system. The *Fry's Metals* dismissals therefore did not constitute automatically unfair dismissals in terms of section 187(1)(c).

It therefore transpired that, notwithstanding the general views held previously regarding section 187(1)(c)'s supposed purpose and effect:

> ... after Fry's Metals we have a situation where a temporary dismissal to compel acceptance with a mutual interest demand must be branded as automatically unfair and countered with the strongest remedies available at law while a permanent dismissal for the same reason but without justification (in other words, not a dismissal defensible under ss 188/189) is treated as a lesser industrial offence with lesser penalties.[15]

12 Reinstatement or re-employment is available as the primary remedy in the event of any substantively unfair dismissal, irrespective of whether the dismissal qualifies as automatically unfair (s 193(1) LRA).
13 *Supra*.
14 2003 *ILJ* 1917 (LC).
15 Thompson 728.

The aforestated anomalous position has been law since the Supreme Court of Appeal pronounced on the *Fry's Metals* case. Very good questions remained as to whether the courts have correctly interpreted the legislator's intent.[16] As a result, some speculation has seen the light, about what potential changes to the LRA could be brought about, to correct the position, and whether such anticipated changes would be an improvement or not.

Thompson[17] raised the possibility of an amendment to section 187(1)(c) to outlaw all dismissals in the context of economic disputes (ie both temporary lock-out and final dismissals). He considers this prospect with some dread. In his words:

> It is suggested that such 'remedial' steps would not serve industrial society well. On reflection, if the intention was that s[ection] 187(1)(c) should outlaw all dismissals in the context of economic disputes, it was being asked to do too much heavy lifting. And in any event, to locate that kind of control measure in the 'automatically unfair' basket was simply too drastic. The contest between claims for business flexibility on the one hand and protection against labour exploitation on the other is too complex and too important to be addressed by blunt-nosed legislative injunctions. A wide interpretation of s[ection] 187(1)(c) had the potential to hamstring the adaptive capacity of business mightily, and so inflict a great harm on the economy. The court could have tempered this again by a generous and overriding interpretation of the sweep of the operational dismissal provision (the 'employer's leeway'), s[ection] 188(1)(a)(ii), but the exercise would have been a tricky and uneasy one.[18]

Lo and behold, the LRA Bill now indeed seeks to bring about in this "blunt-nosed" fashion, the very effect foreseen to have the potential to hamstring "the adaptive capacity of business mightily".

3 2 The Difficulties Presented by Section 187(1)(c) of the LRA Bill in a Retrenchment Context

On a literal reading of the proposed amendment to section 187(1)(c) in the LRA Bill, if the reason for a dismissal is one that constitutes a refusal to accept an amendment to terms and conditions of service, this would be automatically unfair, even if the refusal took place in the course of a retrenchment exercise, where the potential changes to terms and conditions of employment were raised as alternatives to retrenchment.[19]

16 Grogan 2003 *Employment Law* 411: "It seems somewhat strange that the legislature should have categorised conditional dismissals in the context of collective bargaining as automatically unfair, but excluded final dismissals occurring in the same context. It is also debatable whether the legislature intended to allow employers to terminate collective bargaining over employer-initiated proposals by finally and irrevocably dismissing the employees". See also Thompson 729.

17 Thompson 729-730.

18 Thompson 729-730.

19 Please note that this difficulty is by no means the only difficulty foreseen with clothing the proposed s 187(1)(c) LRA Bill with meaning, given that

The question to be answered then, is whether the amended section 187(1)(c) was intended to outlaw the potential overlap between mutual interest demands and operational requirement dismissals and if so, the extent to which it does so.

The difficulty foreseen is not in respect of the straightforward operational requirement dismissal for some neatly contained reason that has no impact on the collective bargaining arena, but rather all those gray areas where mutual interest issues seep over into the operational requirement arena, and it becomes difficult to distinguish clearly between the two.[20] The difficulty in understanding where the line should be drawn is further exacerbated by the fact that operational requirements within the context of sections 189 and 189A dismissals, can encompass "survival" reasons for the proposed dismissals, but also "for efficiency" or even "for increased profit" reasons.

It is difficult to see how dismissals effected to ensure a business's survival can be considered unfair (especially automatically unfair), even if the introduction of changes to terms and conditions of employment was offered as a viable alternative to the dismissals. However, not so if the employer's purpose is to increase profit or efficiency, and to achieve this purpose, seeks to introduce changes to terms and conditions of employment, alternatively dismiss such employees as will not agree to the changes. But is this differentiator even one that is contemplated in the proposed amendment to section 187(1)(c)?

To illustrate, if a business is faced with new technology becoming available to its competitors, which involves a different way of carrying out operations, and which the business must either adopt, or risk losing its competitive advantage completely (and hence disappear), such new technology may lead the employer to demand that its employees agree to work on new terms and conditions of employment (for example working new shift systems, or acquiring new skills). This demand will constitute a mutual interest demand, falling under the proposed section 187(1)(c). Say the employees refuse to agree to the employer's demand. Is the employer now precluded from embarking upon a section 189 or 189A process, where the different terms and conditions of employment are offered as an alternative to retrenchment? What about the position where the employer does not first seek to achieve the desired outcome in the collective bargaining arena, but instead immediately embarks upon a retrenchment exercise, again offering the different terms and conditions of employment as an alternative to retrenchment? Is one or both of these scenarios putting the employer at risk of transgressing the proposed section 187(1)(c) if dismissals follow a failure to reach agreement? What if the changes are only meant to bring about an

"mutual interest" issues go beyond matters properly falling within the collective bargaining arena, and it may therefore have unintended consequences within other disputes. Such other potential difficulties however do not fall within the purview of this article.

20 See Thompson 717-722 for examples of gray areas.

increase of profit, and even if they are not introduced, the business will continue, albeit not as profitably as its shareholders may like?

To summarise the questions raised in the example above, it remains to be seen whether the proposed section 187(1)(c) will allow for the following:

(a) Can the employer fairly retrench employees who refuse to agree to proposed changes to terms and conditions of employment, where the employer can demonstrate that a failure to implement such changes will probably result in catastrophic consequences for the business, or is the employer limited to trying to compel agreement through a lock-out after failed collective bargaining?

(b) If the employer has recourse to retrenchment in question (a), will the employer also be able to justify the retrenchment if the consequences of not implementing the proposed changes to terms and condition of employment is only that the business does not operate at optimum efficiency or profitability, or is lock-out the only option in this situation?

(c) If the employer initially follows a collective bargaining approach, and only later, when agreement proves illusive, embark upon a retrenchment exercise where a materially similar alternative is offered, will that result in an adverse inference being drawn against the employer, rendering dismissals automatically unfair under the proposed section 187(1)(c)?

Whereas, under the Labour Appeal Court and Supreme Court of Appeal's reading of the existing section 187(1)(c), there may not have been a conflict between sections 189 or 189A and section 187(1)(c),[21] there is now clearly a potential conflict under the LRA Bill. This conflict will create uncertainty regarding the appropriate manner of classifying operational changes, and the appropriate process to follow to achieve necessary adaptation to market changes.

The difficulty is of course primarily that of the employer. It bears the onus of proving the reason for its dismissals, and the fairness thereof. It now also carries the risk that a mistake could be doubly costly.

3 3 Suggested Interpretation of Section 187(1)(c) Under the LRA Bill

At one extreme, it is possible to interpret the proposed section 187(1)(c) to have the effect that, in the event of an attempt to restructure an organisation by amending terms and conditions of employment, no operational requirement dismissal ought to be possible in the face of an inability to reach agreement with the appropriate bargaining parties, and that lock out should be the only weapon in the employer's arsenal.

A potentially less intrusive impact may be achieved if an operational requirement dismissal (for failure to agree to changes in terms and conditions of service) will only be prohibited in the event that the reason

21 Grogan 2003 *Employment Law* 46.

for the restructure is purely to increase profitability in an already profitably business. Thompson[22] opined in 1999 (before the *Fry's Metals* case settled the question of what the current section 187(1)(c) sought to achieve), that:

> [w]hen the contest between management and labour is 'purely' over the wage-work bargain – in other words, the substantive terms of the next collective agreement – dismissal will never be permissible. The 'for-profit' termination offends against section 187(1)(c). An employer may argue, however, that not a quest for profit but sheer operational requirements oblige a particular economic outcome, even to the point of sanctioning the discharge of those who hold out. But the Labour Court should lean against a result that allows a dispute on a wage-work deal to escape the protected zone of collective bargaining. When in exceptional circumstances the case for migration is made, the employer must still overcome a formidable fairness hurdle in the judicial process. When labour and management go into dispute over business restructuring (at the end of whatever kind of process), on the other hand, dismissal may unfold from the very logic of the exercise.

Such a reading would however require a limiting and strained interpretation being given to the term "mutual interest", so as to limit the proposed section 187(1)(c)'s effect to only some retrenchments, differentiated based on the employer's intended result (survival as opposed to increase in profits or efficiency). Such a differentiation would be a novel one.

We find both of these possible interpretations unpalatable. Zondo JP expressly pointed out (in the *Fry's Metals* case) that nothing in the LRA precluded employers from retrenching in order to increase profits. This view has been expressed often before and since.[23] It seems illogical to read the proposed section 187(1)(c) to restrict employers' possible use of alternatives to retrenchment, when the whole structure and logic behind sections 189 and 189A is geared towards finding viable alternatives to retrenchment that would keep employees in employment.

We instead suggest that sections 189 and 189A ought not to be made subservient to the proposed section 187(1)(c), nor indeed should a rigid distinction be drawn between the subject matter of a mutual interest collective bargaining process protected by section 187(1)(c), and that of an operational requirement process. The two are too often inextricably linked to each other, and an attempt to create a strained division will only hamstring effective collective bargaining and indeed efficient business management.

Instead, insofar as the LRA Bill may become law, the enquiry as to how the proposed section 187(1)(c) ought to be interpreted, should largely be

22 Thompson: "*Bargaining, Business Restructuring and the Operational Requirements Dismissal*" (1999) 20 *ILJ* 755 755-756.

23 See for instance *General Food Industries Ltd v FAWU* 2004 *ILJ* 1260 (LAC); *Mazista Tiles (Pty) Ltd v NUM* 2004 *ILJ* 2156 (LAC); *Van Rooyen v Blue Financial Services (SA) (Pty) Ltd* 2010 *ILJ* 2735 (LC).

a factual one, where the primary reason for employer action should be determined with reference to the test suggested in *SA Chemical Workers Union v Afrox*.[24] In establishing the reason for a dismissal (*in casu* for participation in a protected strike), the Labour Appeal Court held that:

> ... one first has to ascertain whether such participation or conduct [in a protected strike] was a factual cause for the decision to dismiss. To do this one must ask whether the dismissal would have taken place had there been no participation in the strike (or had there been no strike) ... Once it is accepted that participation in the strike was ... a factual cause for the dismissal of the employees, the next question is whether participation in the strike was, as a matter of probable inference from the facts, the only real or proximate cause of the dismissal (in other words, whether such participation was the legal cause of the dismissals).

It is further, in our view, preferable to apply the following dictum from *ECCAWUSA & Others v Shoprite/Checkers t/a OK Bazaars Krugersdorp*[25] (which predated the Fry's Metals case):

> In my view, care should be taken not to equate a bona fide retrenchment exercise which is aimed at avoiding job losses to a negotiating exercise which is aimed, not at avoiding job losses, but is primarily aimed at unilaterally amending terms and conditions of employment to suit the operational requirements of an employer. In other words, where the amendment to terms and conditions of employment is proffered by an employer as an alternative to dismissal upon a bona fide retrenchment exercise and it is a reasonable alternative based upon the employer's operational requirements, the employer will be justified in dismissing employees who refuse to accept the alternative on offer.

True enough, in this case, the employer was faced with financial ruin. However we would submit that there is no justifiable basis to rewrite the interpretation currently given to what constitutes a substantively fair operational requirement dismissal, simply because of the proposed amendment to section 187(1)(c). The mere fact that a restructure has as its purpose the increase of profitability or efficiency, and involves amendments to terms and conditions of employment, should not exclude the potential use of sections 189 or 189A if agreement proves illusive.

4 Conclusion

Had the *Fry's Metals* case been determined under the LRA Bill, the union's urgent application to prevent the employer from implementing its threat of dismissal would have succeeded, and the dismissals would have constituted automatically unfair dismissals.

Even if the proposed interpretation of the proposed section 187(1)(c) is accepted, it may well be that the process which an employer elects to

24 1999 *ILJ* 1718 (LAC) 1729F-1730A.
25 2000 *ILJ* 1347 (LC) 1351G-H.

follow, when trying to bring about changes to terms and conditions of employment, will result in an inference being drawn that the true nature of the intended action is one that lies closer to section 187(1)(c), as opposed to sections 189 and 189A of the LRA. The motive of the employer will be carefully scrutinised, and the initial process followed (and content of communications exchanged at this stage) may well be the factor that sways the factual enquiry towards an inference that section 187(1)(c) is applicable.

It appears therefore that, should the LRA Bill become law in its current form, employers will have to step very carefully in future, when indicating what the consequences may be if agreement cannot be achieved in collective bargaining and of course when following through on any such threat. Threats of dismissal would in most instances be a very poor choice of bargaining technique and could very well lead to a conclusion that a refusal to accept a mutual interest demand was the real reason for the later dismissal.

The authors foresee that the proposed section 187(1)(c) may (at least until such time as the courts have pronounced on its true effect), have a stifling effect on collective bargaining, as in borderline cases employers would be safer to approach the matter as a retrenchment exercise from the start, rather than first engaging in collective bargaining. Where the matter was initially broached around the collective bargaining table, but no agreement is achieved, employers should consider whether the lock-out mechanism ought not to be used in preference to a retrenchment exercise.

Houston, we have a problem! Gaps, glitches and gremlins in recent amendments to the law of civil procedure pertaining to the magistrates' courts

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OPSOMMING

Houston, ons het 'n probleem! Gapings, glipsies en goggas in onlangse wysigings aan die siviele prosesreg in landdroshowe

Die tempo van verandering op die gebied van siviele prosesreg het onlangs toegeneem. Grootskaalse verandering gaan egter dikwels gepaard met verwarring en ontwrigting. Merkwaardige veranderinge aan die struktuur en funksionering van die land se landdroshowe het onlangs 'n reeks "gapings, glipsies en goggas" tot gevolg gehad. Die aard en omvang van hierdie "gapings, glipsies en goggas" dui op 'n kommerwekkende ontwikkeling, naamlik dat onvoldoende sorg en aandag geskenk blyk te word gedurende die proses van wetsontwerp en opstel van regulasies. Indien dit nie aangespreek word nie, mag die verskeie probleme waarop hierdie artikel dui, selfs die toekomstige vlot transformasie van die Suid-Afrikaanse regstelsel verhinder.

1 Introduction

For a decade and a half following the demise of Apartheid, with a few significant exceptions, the law relating to civil procedure seemed relatively unaffected by the momentous developments in South African society.[1] Recent years, however, have seen accelerating changes within

1 Significant changes in this area of the law during the early years following the demise of apartheid included: the revamping of the s 65 debt collection procedure in the wake of the decision of the Constitutional Court in *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 4 SA 631 (CC); the scrapping and reconfiguration of notice and prescription periods required for taking legal proceedings against certain state bodies, following cases such as *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) and *Moise v Greater Germiston Transitional Local Council* 2001 4 SA 491 (CC), as well as the enactment of The Institution of Legal Proceedings Against Certain Organs of the State Act 40 of 2002; the broader approach of the courts to *locus standi* when

the field of civil procedure, sometimes accompanied by a degree of turmoil and confusion. These changes include the renaming of the high courts in order to dispense with the names of the provinces which existed during the Apartheid era,[2] the proposed major reconfiguration of the superior court system in terms of the Superior Courts Bill,[3] as read with the Constitution Seventeenth Amendment Bill,[4] both tabled in parliament on 2 June 2011,[5] the establishment of an entirely new tier of civil magistrates' courts with greatly increased civil jurisdiction, including the power to grant divorces and deal with matters related thereto;[6] and major changes to the Magistrates' Courts Rules brought about by the Rules Board.[7]

Significant change, however, often brings with it a degree of dislocation, resulting in some difficulties (what we have termed "gaps, glitches and gremlins"), which can lead to problems in the smooth functioning of the legal system. Due to the nature of their work, lawyers are averse to any lack of clarity and precision within their field of operation. When this lack of clarity and precision affects civil procedure, the engine of legal practice, it touches on an area of particular sensitivity to the broader legal profession. The purpose of this short article is to point to certain difficulties which have become apparent in the field of civil procedure in recent years. The article will focus specifically on the difficulties that pertain to the functioning of the magistrates' courts, since many of the proposed changes to the superior court system have yet to be effected. It is hoped that the focus of this article will assist in the process of eliminating some of the more serious difficulties, in order that

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enforcing the Bill of Rights (and as set out in s 38 of the Constitution) in cases such as *Coetzee v Comitis* 2001 1 SA 1254 (C) and *Independent Electoral Commission v Langeberg Municipality* 2001 3 SA 925 (CC) par 15.

2 The changes were brought about in terms of the Renaming of High Courts Act 30 of 2008, and took effect from 2009-03-01.

3 B 7-2011: An explanatory summary of the Bill was published in *GG* 33216, 2010-05-21.

4 B 6-2011: Particulars of the proposed amendments were published in *GG* 33216, 2012-05-21.

5 Ss 3, 4 Constitution Seventeenth Amendment Bill, which is currently before parliament, propose amending the Constitution in such a way as to make the Constitutional Court the final court of appeal in constitutional and in other matters in respect of which the Constitutional Court has granted leave to appeal on the grounds that the interests of justice require that the matter be decided by it. See *GG* 33216, 2012-05-21, not 414 of 2010.

6 These significant changes were brought about by the Regional Courts Amendment Act 31 of 2008, which was brought into operation on 2010-08-09 in terms of Proc R41 *GG* 33448, 2010-08-06.

7 The Rules Board was established by s 2 Rules Board for Courts of Law Act 107 of 1985. The Board was acting in compliance with a direction set out in section 9(6)(a) Jurisdiction of Regional Courts Amendment Act 31 of 2008, which required the Board to review and amend the existing rules of magistrates' courts, so as to ensure that the new courts of regional divisions could exercise jurisdiction effectively and efficiently. The Rules Board used this opportunity to bring the Magistrates' Courts Rules closer to the high court rules (ie to the Uniform Rules of Court).

the continued transformation of the South African legal system proceeds as efficiently as possible.

2 Establishment of the Magistrates' Courts for Regional Divisions

As noted in the introduction, one of the major recent changes in the field of civil procedure has been the introduction of an entirely new tier of civil magistrates' courts – in addition to civil magistrates' courts for districts which have always existed, a number of civil magistrates' courts for regional divisions have been established.[8] This is a significant development and it is useful to focus briefly on the process in terms of which this new tier of magistrates' courts was established, in order to identify potential problems.

Government Notice 670 of 29 July 2010 purports to establish the following magistrates' courts for regional divisions: Eastern Cape Regional Division, Free State Regional Division, Gauteng Regional Division, KwaZulu-Natal Regional Division, Limpopo Regional Division, Mpumalanga Regional Division, Northern Cape Regional Division, North West Regional Division and Western Cape Regional Division. In the notice, the minister of justice purports to act in terms of sections 2(1)(d), 2(1)(g)(ii), 2(1)(iA) and 29(1A) of the Magistrates' Courts Act,[9] as substituted by sections 2 and 7 of the Jurisdiction of Regional Courts Amendment Act.[10] Apart from section 2(1)(d), all the other sections mentioned by the minister were introduced into the Magistrates' Courts Act[11] by sections 2 and 7 of the Jurisdiction of Regional Courts Amendment Act.[12]

The potential problem which arises from the above, is that the Jurisdiction of Regional Courts Amendment Act[13] only came into operation on 9 August 2010.[14] In other words, almost all of the sections in terms of which the minister of justice and constitutional development purported to act when establishing the magistrates' courts for regional divisions in his notice of 29 July 2010, were not yet in operation when he so acted. Although he stated in his notice that the establishment of the said courts were to be with effect from 9 August 2010, the fact remains that when he acted, the sections in terms of which he was acting had not yet come into operation. Taken at face value, these facts might seem to

8 See the definition of "court" in s 1 Magistrates' Courts Act 32 of 1944 (MCA) as amended by the Jurisdiction of Regional Courts Amendment Act 31 of 2008, which came into operation on 2010-08-09, read with *GN* 670 *GG* 33418, 2010-07-29.
9 32 of 1944.
10 31 of 2008.
11 32 of 1944.
12 31 of 2008.
13 *Idem*.
14 See Proc R41 *GG* 33448, 2010-08-06.

bring into question the legal validity of the process in terms of which the new tier of magistrates' courts referred to above was established.

Fortunately, this problem appears more apparent than real when considered in light of the provisions of section 14 the Interpretation Act.[15] The said section deals with the exercise of conferred powers during the period between the passing and the commencement of a law. Of particular interest is section 14(e), which reads*, inter alia,* as follows:

> Where a law confers a power to do any ... act or thing for the purpose of the law, that power may, unless the contrary intention appears, be exercised at any time after the passing of the law so far as may be necessary for the purpose of bringing the law into operation at the commencement thereof …[16]

What emerges from the above, is that the central issue to be addressed in the matter under consideration is whether or not the actions of the minister in establishing the Magistrates' Courts for Regional Divisions (as set out in Government Notice 670 of 29 July 2010)[17] were necessary for bringing the Jurisdiction of Regional Courts Amendment Act[18] "into operation" at the time of the commencement of the law.

Our courts have attached a broad meaning to the important phrase "necessary for bringing the law into operation at the commencement thereof" contained in section 14 of the Interpretation Act.[19] For example in *R v Magana*[20] Trollip J states as follows:

> … I do not think that 'bringing the law into operation' means only 'effecting its commencement'; it also includes 'rendering it operative' from and after the time it commences. In other words the whole object of s 14 is to enable the authorised official to take such of the enumerated steps before the enactment commences as are necessary to render it operative immediately it commences.[21]

When considered in this light, it would seem clear that the actions of the minister in establishing the magistrates' courts for regional divisions in

15 Act 33 of 1957.
16 Section 14(e) Interpretation Act 33 of 1957.
17 See *GG* 33418 2010-07-29.
18 Act 31 of 2008
19 Act 33 of 1957.
20 1961 2 SA 654 (T) 656.
21 Further, note the following analysis of Rumpff JA in *Cresto Machines (Edms) Bpk v Die Afdeling Speur-Offisier SA Polisie Noord-Transvaal* 1972 1 SA 376 (A) 391: "Die bedoeling skyn duidelik te wees dat *Kennisgewings* uitgereik kan word en ander handelinge verrig kan word ná aanname van die Wet vir sover dit nodig is om die Wet by sy inwerkingtreding te laat funksioneer. Dit gebeur gereeld dat artikels van 'n Wet voorsiening maak vir die aanstelling van persone in sekere ampte, vir die uitvaardiging van regulasies en reëls en die doen van ander handelinge. Indien so 'n Wet in werking gestel sou word sonder voorafgaande aanstellings, uitvaardiging van regulasies of kennisgewings sou die Wet of sekere artikels daarvan wesenlik nie funksioneer nie totdat die nodige aanstellings gedoen is en die regulasies en kennisgewings uitgevaardig is. Klaarblyklik sou dit 'n ondoeltreffende proses

terms of Government Notice 670 of 29 July 2010 (with effect from 9 August 2010), were indeed necessary in order to render the Jurisdiction of Regional Courts Amendment Act[22] "fully operational" from the time the Act was put into effect on 9 August 2010. The establishment of the magistrates' courts for regional divisions would therefore appear to be legally valid. Unfortunately, as one examines the said Act, further legal problems arise which appear more difficult to resolve.

3 Uncertainty Surrounding the Jurisdiction of the Magistrates' Courts for Regional Divisions

There are a range of potential problems relating to the jurisdiction of the new magistrates' courts for regional divisions.

The first potential problem arises from the fact that in *Government Notice* 670 of 29 July 2010, the minister of justice and constitutional development purported to act, *inter alia*, in terms of section 29(1A) of the Magistrates' Courts Act when he determined certain monetary jurisdictional limits for the new magistrates' courts for regional divisions, in respect of various causes of action.[23] Section 29(1A) must be read with section 29(1C), which states as follows:

> Jurisdiction conferred on a court for a regional division in terms of this section shall be subject to a notice having been issued under section 2(1)*(i*A*)* in respect of the place for the holding, and the extent of the civil adjudication, of such court.[24]

The problem is that section 2(1)(iA) – which is referred to in section 29(1C) quoted above – only empowers the minister to "appoint one or more places ... for the holding of a court" and to "prescribe the local limits within which such courts shall have jurisdiction ..."[25] The words "the local limits within which such courts shall have jurisdiction" in section 2(1)(iA), seem much narrower than the words "the extent of the civil adjudication, of such court" in section 29(1C). The words in section 2(1)(iA) seem to refer to the designation of a particular geographical area within which a court shall exercise jurisdiction, whereas the words in section 29(1C) seem to refer to the much wider concept of civil

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wees om die Wet in werking te stel terwyl die geheel of dele daarvan nie funksioneer nie en daar gewag moet word op toekomstige administratiewe handelinge. Dit is dus te verstaan dat die Interpretasiewet voorsiening maak om 'n Wet behoorlik te laat funksioneer wanneer dit in werking tree." See also *S v Manelis* 1965 1 SA 748 (A); *S v Van der Horst* 1991 1 SA 552 (C); *Cats Entertainment CC v Minister of Justice, Van der Merwe v Minister of Justice, Lucksters CC v Minister of Justice* 1995 1 SA 869 (T); and *Harksen v Director of Public Prosecutions, Cape* 1999 4 SA 1201 (C).

22 Act 31 of 2008

23 The various causes of action were set out in ss 29(1)(a)-(g) MCA. The monetary jurisdictional limits were set out in Sch 2 *GN* 670 *GG* 33418, 2010-07-29.

24 S 29(1C) MCA.

25 See s 2(1)(iA) MCA.

jurisdiction itself. Were a court to find section 29(1C) to be incompatible with section 2(1)(iA) in this respect, it is difficult to predict the result. In order to make sense of the apparent conflict in meaning, the court might interpret the words "the extent of the civil adjudication, of such court" in section 29(1C) to mean the same as the words "the local limits within which such courts shall have jurisdiction" in section 2(1)(iA). Van Loggerenberg,[26] however, seems to believe that the above-mentioned conflict in meaning makes it impossible for section 29(1C), in its present form, to be complied with. This, in turn, makes it impossible for the Minister to confer jurisdiction on the new magistrates' courts for regional divisions. Van Loggerenberg states as follows:

> The words 'the extent of the civil adjudication' [in section 29(1C)] are nonsensical and in conflict with the wording of this subsection [subsection 2(1)(iA)]. It is submitted that s[ection] 29(1C) should be amended by the substitution of the words 'the extent of the local limits' for the words 'the extent of the civil adjudication' before a valid notice, conferring jurisdiction on courts for regional divisions, can be issued by the Minister.

The second potential problem relating to the jurisdiction of the new magistrates' courts for regional divisions arises from the specific wording of subsections 29(1)(a), (b), (d), (f) and (g) of the Magistrates' Courts Act.[27] These subsections give the Minister of Justice and Constitutional Development the power, *inter alia*, to set monetary limits in respect of the jurisdiction of the new magistrates' courts for regional divisions, for various causes of action. Indeed, in *Government Notice* 670 of 29 July 2010, the minister purported to act in terms of these subsections when setting monetary limits for the new courts, in respect of each of the causes of action referred to in each of the said subsections. In each case, the monetary limit set by the minister was worded as follows: "Above R100 000 to R300 000".[28] The problem with this wording is that the minister purports to set both a lower and an upper monetary limit for civil claims to be brought in the new courts. If one examines the wording of subsections 29(1)(a), (b), (d), (f) and (g) of the Magistrates' Courts Act,[29] however, it would seem that they only empower the minister to set an upper monetary limit for such claims, and not a lower limit. Each of the subsections refers to a single "amount" to be determined by the minister, which shall not be exceeded.[30] This implies that the minister was acting *ultra vires* when he purported to set a lower monetary limit (R100 000 in each case) for claims to be brought in the new magistrates' courts for regional divisions in terms of subsections 29(1)(a), (b), (d), (f) and (g) of the Magistrates' Courts Act. Clearly, this creates much

26 Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa: Volume 1 – The Act* (2011) 11.
27 32 of 1944.
28 See Col B Sch 2 GN 670 *GG* 33418, 2010-07-29.
29 32 of 1944.
30 S 29(1)(a) MCA employs the words "not exceeding in value the amount determined by the Minister" whereas s 29(1)(b), (d), (f), (g) MCA employ the words "not exceed the amount determined by the Minister".

uncertainty in relation to the jurisdiction of the new courts. Van Loggerenberg sums up as follows:

> [T]he Minister created the impression that courts for regional divisions have jurisdiction *only* in respect of amounts above R100 000 and up to R300 000, which clearly cannot be the case - if the maximum amount in respect of such courts is properly and *intra vires* fixed at R300 000, these courts will have jurisdiction *up to* R300 000 (i.e. also, for example, in respect of a claim for R50 000).[31]

Unfortunately, confusion in relation to the jurisdiction of the new magistrates' courts for regional divisions does not end there. A third potential problem arises in relation to subsection 29(1)(e) of the Magistrates' Courts Act.[32] The said subsection does not mention an "amount" which shall not be exceeded, as do the other subsections of section 29(1) discussed in the previous paragraph. In the first place, this seems to make a nonsense of the wording of section 29(1A), which purports to empower the Minister to "determine different amounts contemplated in subsection (1)(a), (b), (d), (e), (f) and (g) ..." Since subsection 29(1)(e) does not "contemplate" an "amount" or "amounts", it is submitted that it should not have been included in the list of subsections set out in section 29(1A). But further problems arise in relation to subsection 29(1)(e). When read with section 172(2) of the National Credit Act,[33] subsection 29(1)(e) gives the magistrates' courts unlimited monetary jurisdiction in relation to matters falling under the National Credit Act.[34] However, in terms of Schedule 2 of *Government Notice* 670 of 29 July 2010,[35] the Minister of Justice and Constitutional Development purported to limit the jurisdiction of the regional magistrates' courts under subsection 29(1)(e), as follows: "Above R100 000 to R300 000".[36] It would seem, therefore, that the minister was acting *ultra vires* when he purported to set these limits. To cap it all, if one looks at Column A of Schedule 2 to *Government Notice* 670 of 29 July 2010, one cannot help noticing that the National Credit Act is cited as "Act No 35 of 2005" whereas the said Act is, in fact, Act No 34 of 2005. All this creates uncertainty in relation to the jurisdiction of the new magistrates' courts for regional divisions, and leaves an impression of legislation and regulation being drafted and passed without due care and attention.[37]

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31 Van Loggerenberg *Jones and Buckle 1* 119.
32 32 of 1944.
33 34 of 2005.
34 See *Nedbank Ltd v Mateman; Nedbank Ltd v Stringer* 2008 4 SA 276 (T) 284B-C.
35 See *GG* 33418, 2010-07-29.
36 See Col B Sch 2 GN 670 *GG* 33418, 2010-07-29.
37 It is not possible to discuss in detail all the anomalies which now exist in relation to the jurisdiction of the magistrates' courts. The following anomaly, however, deserves brief mention. In terms of s 46(2)(c) MCA, the magistrates' courts shall have no jurisdiction in matters in which is sought specific performance without an alternative of payment of damages, except in: (i) the rendering of an account in respect of which the claim does not

4 Amendments to the Magistrates' Courts Rules

One of the most profound areas of change in the field of civil procedure has been the large-scale amendment of the Magistrates' Courts Rules, which came into effect on 15 October 2010.[38] The amendments are clearly intended to make the high and Magistrates' Courts Rules more uniform and have employed high courts' usage wherever amendments have occurred.[39] This has resulted in the near substitution of the relevant high courts' "Uniform Rules of court" rule for the former magistrates' courts rule in nearly every case.[40] The new features include the demise of further particulars for the purpose of pleading; a new set of summonses replicating the high courts' types, including simple and combined summonses; the introduction of a general rule for pleadings modelled on but not identical to rule 18 of the Uniform Rules; the introduction of further particulars for the purpose of trial and irregular proceedings; and the adoption of high courts' discovery rules.[41] Other minor changes include the elimination of the small differences that formerly existed between the magistrates' courts and high courts' rules relating to summary judgment.[42]

In addition, the new Magistrates' Courts Rules have introduced some innovations such as provision for service by electronic means of communication, and an extension of the distance from the court house

exceed R100 000; (ii) the delivery or transfer of property, movable or immovable, not exceeding R100 000 in value; (iii) the delivery or transfer of property, movable or immovable, exceeding R100 000 in value, where the consent of the parties has been obtained in terms of s 45 MCA (see s 46(2)(c) MCA read with GN R1411, 1998-10-30). All this seems simple enough. It is anomalous, however, that the monetary limits referred to above remain fixed at R100 000 for both district and regional magistrates' courts. Since the general monetary jurisdiction for the new regional magistrates' courts is only capped at R300 000, it is odd that the monetary limits referred to above were not set at this level for these courts, when they were brought into existence.

38 In terms of GN 888, 2010-10-08

39 One possible reason is to make provision for the wider and higher jurisdiction that the regional magistrates' courts now enjoy, including jurisdiction over divorce matters and an extension of the monetary value of claims that can be dealt with by these courts. Another reason is apparently the notion that eventually there will be more frequent promotion from the magistracy to the judiciary as suggested in the preamble to the Jurisdiction of Regional Courts Amendment Act 31 of 2008, and that the courts should therefore align more closely in their practices. An interesting feature on this particular head is the introduction for the first time, if in somewhat in limited form, of inherent jurisdiction to the magistracy.

40 The correct title for the high court rules is the 'Uniform Rules of Court' – of course, reflecting this particular set of rules' history as a replacement for the individual sets of rules for the former provincial divisions, which still exist and may be used in the case of a *lacuna*. We shall refer to the "Uniform Rules" where the context involves the name of the rule set and the "high court rules" where a description of the type of rule is involved.

41 See rr 5, 6, 16, 60A, 23 Magistrates' Courts Rules.

42 Compare r 32 Uniform Rules and r 14 Magistrates' Courts Rules.

of the address one may appoint for service of pleadings and notices.[43] Furthermore, the rules have been modified to conform with the Constitution and current jurisprudence, so as to eliminate reference to gender in citations.[44] Finally, the rules have been updated with minor amendments to the odd word or phrase, to bring the language in line with current English usage.[45] It is likely that any innovations and modifications that have created slight differences between the new Magistrates' Courts Rules and the high courts' rules on which they were styled, will be incorporated into the Uniform Rules of court in due course.[46] However, the introduction of the recent innovations to the civil courts, including nomenclature, jurisdiction and procedure, has been somewhat haphazard, and it is difficult to know when any such amendments may occur.

Furthermore, the substitution of high court rules has not been wholesale. Certain Magistrates' Courts Rules that have historically been different from the corresponding high courts' rule remain distinct, including for instance, the respective procedures for drafting and taxing bills of costs.[47] In some cases, however, the procedure has been amended and improved, notwithstanding the fact that it remains distinct from the high courts' rule and practice. An example of this is the pre-trial conference which still remains optional in the magistrates' courts and is not really the equivalent of rule 37 of the Uniform Rules, but has been

43 See r 5(3)(a)(i), 5(3)(b), 5(3)(c) Magistrates' Courts Rules.

44 For instance, compare the provision for citation in r 17(4)(a) Uniform Rules with that contained in the otherwise similar r 5(4)(a) Magistrates' Courts Rules.

45 Thus, for instance, "seems meet" has been amended to "seems fit" where it appears in r 60A Magistrates' Courts Rules. Another example is r 24(7)(b) Magistrates' Courts Rules, which provides that either party may bring an application to the court and the court may make such order as it may deem "fit", replacing the word "just", which is employed in the otherwise similarly worded r 36(7) Uniform Rules.

46 This may include, for instance, the departure from high court practice in the amended r 5(2)(b) Magistrates' Courts Rules, which provides for simple summonses, but unlike the corresponding r 17(2)(a) Uniform Rules, permits the choice of using a combined summons in the case of a debt or liquidated demand. A guide to the new rules issued by the Department of Justice suggested that the reason for the discrepancy was the preference of many attorneys for having the choice to use a combined summons in these circumstances. Indeed, there are situations in which the use of a combined summons in the case of a debt or liquidated demand is justified, and provision for choice in the Magistrates' Courts Rules would suggest that the Uniform Rules will be amended to provide for the same choice in due course.

47 Common law rules apply to the granting of costs in the high courts, with r 70 Uniform Rules providing for taxation, whilst r 33 Magistrates' Courts Rules provides both substantive regulation for costs' orders and the procedure for taxation in the magistrates' courts. Whilst previously similar in operation, recent amendments to r 70 have made the procedures for taxation in each court quite different. Given that no attempt was made to bring r 33 Magistrates' Courts Rules into alignment with the Uniform Rules during the 2010 amendments, it would seem that the intention is for taxation procedures in each court to remain dissimilar.

improved by providing magistrates with a procedural opportunity to use the discretionary powers to call such a conference, a serious *lacuna* in the old rules.[48]

Whilst our general impression of the rule amendments is positive, questions and concerns remain. Among the broad questions arising is the extent to which it is still possible for the traditionally more lenient approach to pleadings in the magistrates' courts, to continue to exist in the context of the new rules.[49] Another question is the significance of the imbuing of inherent jurisdiction to the magistracy for the first time, albeit in a limited form, and whether it is possible to achieve this with a set of rules rather than legislation.[50] Furthermore, the specific limits of this power needs to be considered.

None of the broad questions just discussed fall within the scope of this article. Rather, the concerns under consideration on this occasion are specific *lacunae* and other potential problems created by the mechanics of some of the new rules. The first category of problems under this head relate to those caused by the replacement of specific provisions in the Magistrates' Courts Rules with the nearest corresponding high courts rules' provisions – without a wholesale amendment of the rules. In some instances the amendments have failed to take into account the differing overall structure which has always existed between the two sets of rules. The Magistrates' Courts Rules have tended to make provision for the enforcement of a particular procedure or exceptions relating to it, within the ambit of the rule that deals with the procedure in question. By contrast, the Uniform Rules tend to feature general rules that make provision for enforcement or exceptions. Therefore, the replacement of particular Magistrates' Courts Rules with their nearest high courts' counterpart, without similarly replicating the generic enforcement rule, has led to *lacunae*, the first of which relates to special pleas.

5 Separate Hearings for Special Pleas

Rule 17 of the Magistrates' Courts Rules, which now deals with pleas, has been amended to conform to rule 22 of the Uniform Rules.[51] This has led

48 S 54 MCA; r 25 Magistrates' Courts Rules.

49 *Liquidators Wapejo Shipping Co Ltd v Lurie Bros* 1924 AD 69 76. Nevertheless, there is authority to the effect that the rules of pleading ought to be observed within the magistrates' courts also; see *Matambanadzo Bus Service (Pty) Ltd v Magner* 1972 1 SA 198 (RA) 199H–200A.

50 See r 1(3) which empowers the courts at a pre-trial conference held in terms of s 54(1) MCA, to "dispense with any provision of these rules and give directions as to the procedure to be followed by the parties so as to dispose of the action in the most expeditious and least costly manner."

51 R 17 previously dealt with exceptions and applications to strike out, whilst rather confusingly, r 19, which now deals with exceptions and applications to strike out, previously dealt with pleas.

to a uniformity of practice which has eliminated some of the anomalies that previously existed between the practice of the two types of court.[52]

Less positively, however, the virtual replacement of the former Magistrates' Courts Rule 19 with its high court counterpart, has failed to take into account the systemic difference between the rules referred to above, resulting in a lacuna in respect of the hearing of special pleas. The previous rule 19(12) provided that:

> any defence which can be adjudicated upon without the necessity of going into the main case may be set down by either party for a separate hearing upon 10 days' notice at any time after such defence has been raised.

This sub-rule was of particular importance for special pleas, which are raised not on the merits of a matter, but on a legal point, and if successful can be decisive in the resolution of a case. It is clearly in the interests of all the parties that any matter should be dealt with as speedily and cost effectively as possible. Therefore, in circumstances where such a special plea is raised, the potential should exist for the special plea to be heard and adjudicated upon, so as to resolve the case at an early stage, without the need to proceed to trial. However, this option has been removed as a result of the elimination of rule 19(12).

Although rule 22 of the Uniform Rules is virtually identical to the new rule 17 and similarly makes no provision for a separate hearing in these circumstances, this does not present a problem in high court practice, as rule 33 of the Uniform Rules makes general provision for this kind of situation. Rule 33(4) provides that:

> If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may be decided conveniently either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.

A request for such a hearing should be made by application on notice at any time prior to the trial, but may also be made orally at the commencement of a trial or at any time thereafter before judgment.[53] The rule allows for a broad range of issues to be heard, both of fact and

52 For instance, r 19(10) of the former Magistrates' Courts Rules, provided that every allegation of fact made by the plaintiff that was inconsistent with the defendant's plea, would be presumed to be denied and all allegations consistent with the plea were presumed to be admitted. The new r 17(3) conforms to high court practice and r 22(3) Uniform Rules, however, by providing that all allegations not specifically denied or admitted will be taken to be admitted.

53 *Sibeka v Minister of Police* 1984 1 SA 792 (W) 795G-H; *McLelland v Hulett* 1992 (1) SA 456 (D) 463B-H; *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 1 SA 316 (T) 329D; *Sibeka v Minister of Police* 1984 1 SA 792 (W) 794H.

law, although a court will only agree to deal with issues under this rule, if their resolution would be likely to save costs or finally determine the matter.[54] Nevertheless, a special plea is an issue of law which fits these requisites and may be heard separately in terms of this provision.[55]

Unfortunately, it seems that no real equivalent to rule 33 of the Uniform Rules exists in the Magistrates' Courts Rules. This may seem to be an odd assertion to make in the light of the fact that rule 29(4) of the Magistrates' Courts Rules is identically worded to rule 33(4) of the Uniform Rules. Both sub-rules were substituted and brought into conformity in 1992.[56] Furthermore, from a substantive if not procedural point of view, any case law relevant to rule 33(4) is relevant to rule 29(4) also. The difficulty, however, is created by the context of their location within each rule set. In submission, this difference in "geography" so to speak, alters the meaning of each sub-rule in relation to the stage of proceedings at which each sub-rule may be invoked.

Rule 33(4) of the Uniform Rules is situated within a general rule, which is not located in or associated with any particular procedural stage of a matter. That is to say it is not set within the context of pleadings, preparation for trial, or trial. Furthermore, in contrast to the corresponding situation in the Magistrates' Courts Rules, rule 39 of the Uniform Rules provides for the conduct of the trial separately, without any reference to rule 33.

A "pending action" in the context of rule 33(4) is "one in which the issues between the parties have not yet been finally decided or disposed of."[57] This means in the context of a "stand alone" rule such as rule 33, that the rule applies at any time prior to judgment. The court *mero motu* or one of the parties on application, can therefore invoke this provision at any stage of the proceedings, which may include the period before close of pleadings, or after *litis contestatio* but prior to trial, or during the trial itself but prior to judgment.

The identically worded rule 29(4) of the Magistrates' Courts Rules is quite differently situated, however. Rule 29 deals with trial proceedings and in submission, sub-rule (4) needs to be read in that context. This would seem to indicate that whether by the court *mero motu* or on application by one of the parties, rule 29(4) is intended to be invoked at trial, from trial commencement, and any time thereafter until judgment.

Supporting this proposition is the fact that from 1992 until 2010, rule 29(4) coexisted with the former rule 19(12) – the implication being that

54 *Groenewald v Minister van Justisie* 1972 4 SA 223 (O) 225E.
55 *Imprefed (Pty) Ltd v National Transport Commission* 1990 3 SA 324 (T) 325F-G.
56 In terms of GN R1882 and GN R1883 respectively.
57 See Van Loggerenberg *et al Erasmus Superior Court Practice* [Revision Service 37] Rule 33 and the authorities cited there; *King v King* 1971 2 SA 630 (O) 634G; *Groenewald v Minister van Justisie* 1972 4 SA 223 (O) 225B; *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 1 SA 316 (T) 329D.

rule 29(4) was not intended to replace it, and that rule 29(4) was intended for use in a trial situation only. It would seem that the drafters did not take any of this into account when replacing the former rule 19 and its internal provision for a special plea hearing, with its high court equivalent.

Other possibilities for arranging the pre-trial hearing of a special plea do exist. For instance, the parties may make use of a section 54 conference in order to raise the possibility of such a hearing with a magistrate. The magistrate may use the powers afforded by section 54(1)(e) or alternatively by the new rule 1(3) – to order such a hearing. This is a somewhat more cumbersome procedure to use than was hitherto the case, however, given that the former rule 19(12) merely required one of the parties to set the matter down for hearing on 10 days' notice. Furthermore, a hearing which successfully disposes of a matter on the basis of a special plea, would obviate the need and added cost of a section 54 conference.

6 Barring a Plea in Reconvention in the Magistrates' Courts

A similar *lacuna* relating to the barring of pleas in reconvention has been created by the manner in which the new rule 20 of the Magistrates' Courts Rules has been amended. This amendment also fails to take into account the systemic differences in Uniform Rules and Magistrates' Courts Rules structures. Rule 20 continues to deal with counter-claims in the magistrates' courts as it always has, but has been amended to harmonise it with rule 24 of the Uniform Rules and is identical in almost every respect, apart from special provision for a counter-claim which exceeds the jurisdiction of the magistrates' courts.

Before proceeding any further, it is worth discussing "barring" as a concept, starting with its use in high court practice where it is found in its most developed form. "Barring" is a procedure designed to deal with dilatory pleadings. All pleadings have to be delivered within time limits prescribed by each set of rules, in order to keep the action process in motion, and to resolve matters as quickly as possible. Barring serves to enforce these time limits.

The average action is unlikely to employ more than the "main" pleadings, which include the plaintiff's declaration, the defendant's plea and the plaintiff's plea in reconvention to any counter-claim. Given the potential complexity of high court matters, however, the rules also provide for exchanges of pleadings which extend beyond the norm, commencing with replication, rejoinder, surrejoinder, rebutter and surrebutter.[58] It is highly unusual for any of the above pleadings to be

58 Other than the replication, these additional pleadings are referred to only in abstract fashion in r 25 Uniform Rules. R 25(5) provides: "Further pleadings

used, however, as replication will only be necessary where the defendant has raised fresh averments in his plea, which the plaintiff cannot leave unchallenged.[59]

Rule 26 of the Uniform Rules of Court provides a general rule for barring dilatory pleadings. There are two methods of barring, namely "automatic" barring and barring on notice, which of the two, is the method with the more serious consequences. Barring on notice is used in respect of the main pleadings including the plaintiff's declaration, the defendant's plea and the plaintiff's plea in reconvention to any counter-claim. "Automatic" barring occurs in respect of replication and any pleadings that may occur thereafter.

Barring on notice simply requires the delivery of a "notice of bar" (or "notice to plead") to the dilatory party, warning them that their pleading is late and should they fail to deliver the pleading within five court days after receipt of the notice, they will be *ipso facto* barred from doing so thereafter, and default judgment may be applied for against them. The inability to serve one of the main pleadings is destructive to the dilatory party's case, of course, and in our experience, notices of bar most commonly relate to the defendant's plea, although they may also be used in default of declaration in the case of a simple summons. The fact that default judgment can be taken, makes a notice of bar a serious threat to one's case and is a potent tool for preventing a party from using action proceedings to play for time.

The harmonisation of rule 20 of the Magistrates' Courts Rules with rule 24 of the Uniform Rules, has had the effect of removing any provision for barring a dilatory plea in reconvention. The Magistrates' Courts Rules have never included a general rule dealing with barring, such as rule 26 of the Uniform Rules of Court, and neither has one been provided with the new amendments. Previously, however, this was not problematic, as provision was made by the former rule 19, which previously dealt with pleas, when read with rule 12, which deals with default judgment and the former rule 20, which dealt with claims in reconvention, albeit in somewhat different terms from the current rules. Although the

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may, subject to the provisions *mutatis mutandis* of sub-rule (2) be delivered by the respective parties within ten days after the previous pleading delivered by the opposite party. Such pleadings shall be designated by the names by which they are customarily known".

59 The pleadings that follow a plea are relatively rare, as replication cannot be used for introducing a fresh cause of action or adding averments that ought to have been included in the plaintiff's declaration, and to do so is known as a "departure" (see *Broad v Bloom* 1903 TH 427; *Butler v Swain* 1960 1 SA 527 (N)). Usually, a replication followed by any of the subsequent pleadings will be prompted by the defendant pleading "confession and avoidance", by admitting the truth of the plaintiff's averments but adding further information which shows the plaintiff's averments in a different light. A slightly different kind of example would be a special plea of prescription, which would require the plaintiff to resist the special plea by averring in a replication that prescription had been interrupted in some fashion.

interaction between these three rules sounds complicated, it is not that difficult to unscramble.

Rule 12 is unchanged and rule 12(1)(b) continues to provide for the barring of the defendant's plea specifically. The rule allows for barring on notice in a manner which is identical to barring on notice in high court practice. It is the only provision dealing with barring in the Magistrates' Courts Rules, however, and makes no mention of pleas in reconvention or any other pleading, for that matter. This did not pose a problem before, however, because rule 20(1) provided that "the provisions of these rules shall *mutatis mutandis* apply to all claims in reconvention".[60] The effect was that any provision that rule 12(1)(b) made in respect of barring for pleas in convention and the time limits set out in rule 19, also applied to pleas in reconvention.

In the absence of a general rule for barring such as rule 26 of the Uniform Rules of Court, and with the amendment of rule 20 having eliminated any provision for rule 12(1)(b) to apply to pleas in reconvention, there is no longer any method for barring pleas in reconvention in the magistrates' courts. This potentially leaves a matter in limbo until and if ever the plea in reconvention is received.

7 Barring a Declaration in the Magistrates' Courts

As indicated above, the 2010 amendments to the Magistrates' Courts Rules introduced the high courts' type of simple summonses for debts and liquidated demands and combined summonses for the first time.[61] Although they must disclose a cause of action, it is in the nature of simple summonses that they do not fully comply with the requirements for pleadings set out in rule 6 – the new magistrates' courts equivalent of rule 18 of the Uniform Rules. More particularly, simple summonses do not comply with rule 6(4) which requires "sufficient particularity to enable the opposite party to reply thereto" by way of a plea or subsequent pleading.[62] This deficit is corrected in the same manner as is done in the high courts – by way of a "declaration" delivered by the plaintiff after receipt of an appearance to defend.[63] The declaration repeats the cause

60 The sub-rule also dispensed with the need for an appearance to defend, and provided that the time limits would run from the date of the delivery of the claim in reconvention. R 20(2) provided for the time in which a claim in reconvention should be served, which it indicated should be within the time limited by the former r 19 for the delivery of the defendant's plea, read with r 12(1)(b).

61 R 5(2)(b), (a).

62 R 18(4) Uniform Rules, the counterpart of the new r 6(4) Magistrates' Courts Rules, became necessary with the elimination of requests for further particulars to pleadings in high court practice during the 1980s, a process which has been repeated in the magistrates' courts as a result of the 2010 amendments.

63 R 15 Magistrates' Courts Rules.

of action originally set out in the simple summons, but insufficient particularity to comply with rule 6. As indicated above, the only provision dealing with barring in the Magistrates' Courts Rules is rule 12(1)(b), which refers exclusively to pleas. Needless to say, in the absence of a deeming provision such as the former rule 20(1) in respect of claims in reconvention, declarations also lack any means of being barred for dilatory delivery. Given that it is usually the plaintiff who has the motivation to pursue a matter with despatch rather than the defendant, this omission will not be endured that often. An omission it remains, however, and a defendant seeking finality or a tactical advantage, perhaps, will miss the ability to place the plaintiff under pressure of bar, particularly in the case of a plaintiff who has "knocked out" an ill-conceived simple summons without expecting it to be defended.

8 "Automatic" Barring for Pleadings Subsequent to the Plea

As was indicated above, "automatic" barring is provided for in rule 26 of the Uniform Rules, which provides that "any party who fails to deliver a replication or subsequent pleading within the time limit stated in rule 25 shall be *ipso facto* barred". This means that in the absence of the receipt of a timeous replication, the pleadings are deemed to be closed and the matter may be set down for trial.[64] "Automatic" barring also applies to all the pleadings that follow the replication. For example, if the plaintiff delivers his replication within the time limit, but the defendant fails to deliver his rejoinder within the time limit, the defendant will automatically be barred from further pleading. Unless there is a specific need to file a further pleading, failure on the part of either the plaintiff or defendant to file such further pleading, merely serves to close the pleadings and does not constitute an admission of the facts in the previous pleading.[65]

A *lacuna* has been created, however, by the 2010 amendment of rule 21 of the Magistrates' Courts Rules, which deals with replications and subsequent pleadings. Previously, rule 21 provided only for a solitary pleading known as a "reply", which served as an equivalent to replication in the high courts. There was no provision for a defendant to respond to the reply, perhaps because it was not expected that magistrates' courts matters would be sufficiently complicated to warrant the extra pleadings. However, the amendment has resulted in rule 21 becoming an almost exact duplicate of rule 25 of the Uniform Rules, with the result that the entire repertoire of extra pleadings from replication to surrebutter are now available in magistrates' courts practice.

Nonetheless, as indicated above, the sole Magistrates' Courts Rule dealing with barring remains rule 12(1)(b), which relates specifically to

64 See *Moghambaram v Travagaimmal* 1963 3 SA 61 (D).
65 R 25(2) Uniform Rules, read with r 29(b).

the defendant's plea, and requires notice for enforcement. In the absence of any general rule for barring equivalent to rule 26 of the Uniform Rules, there is no method of automatic barring available, should the extra pleadings become necessary, but are not served on time.[66] This creates uncertainty, as it is unclear whether a replication or other pleading received out of time can be safely ignored, the pleadings considered to be closed and the matter set down for trial.

The absence of provision for automatic barring in these circumstances may exist because the drafters of the rules felt that replications, rejoinders and subsequent pleadings are so seldom used. However, having made available the use of these pleadings, some provision for their enforcement might have been expected, other than an application in terms of rule 60(2). Furthermore, the provisions of rule 60(2),[67] apart from being more onerous as they require positive action in the form of an application, do not really lend themselves to this situation. It may be possible to use the newly-introduced irregular proceedings under rule 60A to have a late replication set aside, but this also requires positive action of the part of the party receiving the dilatory pleading. In any event, it is unlikely that these methods were intended for use in this situation, as the same or similar remedies feature in high court practice,[68] coexisting with a specialised form of enforcement in rule 26 of the Uniform Rules. The simple fact is that one might have expected the inclusion of additional high court pleadings to be accompanied by the requisite high courts' supporting provisions, and it would seem that the absence of a counterpart to rule 26 of the Uniform Rules is an unintended *lacuna* in the amended Magistrates' Courts Rules.

9 Provision for Jurisdictional Averments

Some difficulties are not caused by lacunas as much as the drafters' seeming obliviousness to the consequences of crafting the rules in a particular fashion. An example of this is found among the far-reaching amendments to rules 5 and 6 of the Magistrates' Courts Rules. These rules have been completely overhauled and apart from certain differences – that will not be discussed here – now more closely resemble rules 17 and 18 of the Uniform Rules of Court. The result is that

66 Before the 2010 amendment, r 21(4) provided that "where no reply to the plea is delivered, upon the expiration of the period limited for reply to the plea, the pleadings shall be deemed to be closed". The practical effect was therefore identical to high court practice, as there was only provision for the solitary reply, and if that was not timeously delivered, pleadings would be deemed to be closed, whether or not the reply was necessary. R 21(2) together with r 21A(b), have a similar effect, except that the deeming provision in r 21(2) appears to be dependent on the further pleading not being necessary. This appears to clash with r 21A(b), which makes no such distinction.

67 R 60 Magistrates' Courts Rules is a general rule, in respect of non-compliance with rules, including time limits and errors.

68 Rr 30, 30A Uniform Rules.

rule 5 deals with the details which need to be included in the various types of summonses, while rule 6 has become a general rule setting out certain principles to be followed in all pleadings, together with certain averments that must be incorporated with specific causes of action in particulars of claim.

Rule 6(5)(f) of the previous rules required a certain averment to be made in the particulars of claim when the plaintiff was relying on jurisdiction based on the cause of action, conferred on the court in terms of section 28(1)(d) of the Magistrates' Courts Act.[69] This averment was to the effect that the whole cause of action arose within the district, although no further particulars were necessary to support the averment. Under the former Magistrates' Courts Rules, of course, further particulars if necessary could be obtained in due course.[70] Having adopted the high court summons and pleadings structure, further particulars are no longer an option and the rules have been amended to provide for this. Unfortunately, jurisdiction in terms of section 28(1)(d) of the Magistrates' Courts Act[71] is not an issue in the high courts and the drafters could not find guidance for how it should be dealt with in the Uniform Rules. In the event, it appears that they have failed to take the difference between simple and combined summonses into account, and the result has been "overkill".

In similar fashion to the former rule 6(5)(f), the new rule 5(6)(a) provides that where the defendant is cited under the jurisdiction conferred upon the court by section 28(1)(d) of the Magistrates' Courts Act,[72] the summons must contain the averment that the whole cause of action arose within the district or region (in the case of a regional court). The new rule also requires, however, that the summons should set out particulars in support of this averment. This means that the usual statement to the effect that "the cause of action arose wholly within the jurisdiction of the above honourable court" is no longer valid for the purpose of a magistrate's court summons.

The purpose of the additional requirement is clearly to deal with the fact that further particulars to pleadings may no longer be requested. It would have made more sense, however, had the additional requirement appeared in rule 6, as it would then have applied only to a combined summons or a declaration, where the particulars of claim require the full particularity envisioned in rule 6(4). Nonetheless, the requirement appears in rule 5, which means it applies to all summonses, including simple summonses, which are not required to comply with rule 6. In submission, requiring a simple summons to contain this kind of particularity misses the point of a simple summons, and there is no reason why this kind of particularity should be required here, particularly

69 32 of 1944.
70 R 16 of the Magistrates' Courts Rules prior to amendment.
71 32 of 1944.
72 *Idem*.

as any deficit can be made up by a declaration should the matter be defended.

10 Electronic Addresses

Some potential difficulties with the amendments do not relate to *lacunae*, omissions or possible mistakes – but to innovation which can increase the scope of misuse. This is the case with the 2010 amendments' provision for the use of electronic addresses by parties in magistrates' courts proceedings for the first time. In terms of rule 5(3)(a)(i), the plaintiff's attorney must – where available – include his electronic and facsimile address as well his postal address in the summons. Furthermore, in terms of rule 5(3)(b), the plaintiff may indicate in the summons whether he is prepared to accept service of all subsequent documents and notices in the suit through any manner other than the physical address or postal address and, if so, which manner of service would be preferred. There is also provision in rule 5(3)(c) for the defendant in response to the written request of the plaintiff, to deliver a consent in writing to the exchange or service by both parties of subsequent documents and notices in the suit by way of facsimile or electronic mail. Should the defendant refuse or fail to deliver the consent, the court may, on application by the plaintiff, grant such consent, on such terms as to costs and otherwise as may be just and appropriate in the circumstances. This provision would seem to go further than to merely allow the use of using electronic addresses, and actively encourages the use of electronic means for the exchange of documents.

There is nothing wrong with this intent; indeed it is progressive and in keeping with the manner in which the world currently communicates. Delivery by electronic means does carry potential hazards, however. The first hazard is a relatively simple organisational one for attorneys and their staff. Already in regard to correspondence as opposed to pleadings, many messages are being exchanged via e-mail, instead of traditional letters. There are dangers in the drafting and dispatch of messages in this fashion, including informality and more seriously, the immediacy of drafting and dispatch leading to drafting without proper consideration. From a file maintenance point of view, two methods of dispatch and storage are being used in every matter, and it becomes difficult to keep track of all the communications. Therefore, hard copies of all electronic documents need to be made with religious consistency, as soon as they are written or received. In an age of laptops and coffee-shop work spaces, this habit is not always as simple to follow, as is necessary.

The second difficulty associated with delivery by electronic means relates to the problem of proving the despatch or receipt of pleadings when performed electronically. In theory, proof of "fax" or facsimile transmissions should be reasonably easy to show, as a date is indicated on both the received document and despatching note. Covering e-mails may be printed out, and these may show the required details also.

However, the use of electronic means of communication is not completely reliable. Unserviceable machines do not always indicate that they are out of order to the sender of a document. Furthermore, merely running out of paper at a busy time can cause a fax machine to lose its memory of some of the received documents which are queued whilst waiting to be processed, notwithstanding the fact the paperless machine has electronically acknowledged receipt.

The truth is that digital communication devices are a mystery to almost all but the professionals who service them. The result is that a wide range of new excuses are now available to a dishonest and dilatory attorney, who can now allege that the computer or some other device "ate" his notice or pleading. Nothing is quite as certain as having a receptionist compare a copy of a document with its original, and then stamp the proof of service together with the date.

11 Conclusion

As stated in the introduction to this article, a period of significant change often brings with it a degree of dislocation. In an area of law as complex and exacting as civil procedure, this can result in what we have termed "gaps, glitches and gremlins". What is of concern is the following: Firstly, certain of the gaps, glitches and gremlins which we have identified may be attributed to insufficient attention to detail and careless drafting – in short, lack of proper care and attention. It is submitted that the old adage "more haste less speed" should be applied to the process of transforming South Africa's civil court system. Rushing through legislation meant to transform the system, without due care and attention and without a proper understanding of the full ramifications of the measures passed, will only serve to delay the process of transformation. Secondly, it is of concern that certain of the gaps, glitches and gremlins identified in this article are not trivial, but may negatively impact upon the rights of litigants. Certain issues – for example, uncertainty surrounding the very establishment of the new magistrates' courts for regional divisions – lie at the heart of the system itself. Should the problems identified in this article not be rectified, it may lead to serious negative consequences for litigants making use of the system.

Although this short article cannot claim to have isolated each and every gap, glitch or gremlin, we hope to have at least pointed to most of the main problem areas as they relate to practice in the magistrates' courts. It is submitted that due attention needs to be paid by both the executive and the legislature to the problems identified, in order that the ongoing transformation of South Africa's legal system be accomplished without undue frustration on the part of those required to operate within that system.

Aantekeninge/Notes

Handtekening as vereiste vir die geldigheid van 'n kontrak

1 Inleiding

Die aanbring van 'n handtekening op 'n skriftelike stuk het 'n belangrike ritueel in die moderne handelsomgang geword. Dit dui daarop dat, na kort of uitgebreide onderhandelinge, die partye tot 'n wedersydse verstandhouding rakende een of ander saak van gemeenskaplike belang gekom het, waarin hulle belowe om saam te werk tot wedersydse voordeel. Kontrakte word dikwels op skrif gestel en deur of namens die partye onderteken, en getuies word versoek om die handtekeninge te bevestig deur hulle eie handtekeninge daarop aan te bring.

Wanneer 'n party sy of haar handtekening op 'n regsstuk aanbring, dui daardie party daarmee aan dat hy of sy bewus is van die inhoud van die stuk en bereid is om met daardie inhoud vereenselwig te word (*Meter Motors (Pty) Ltd v Cohen* 1966 2 SA 735 (T); *Handulay v Smith NO* 1984 3 SA 308 (C)). Maar tot watter mate is ondertekening 'n vereiste vir die geldigheid van 'n kontrak en wat is die gevolge indien 'n kontrak nie onderteken is nie?

2 Historiese Ontwikkeling

Oorspronklik is kontrakte ingevolge die Romeinse reg gesluit deur die uitruil van streng formalistiese mondelinge verklarings in die teenwoordigheid van transaksiegetuies. 'n Party wat later die kontrak sou ontken was onder die *Twaalf Tafels* (*Tab* 6 1) aanspreeklik om dubbel die waarde van die betrokke eindom te betaal. Mettertyd het hierdie streng formalistiese verwisselings plek gemaak vir kontrakte gegrond op wilsooreenstemming tussen die partye (*I* 3 15 1). Uiteindelik het Paulus (*Sententiae* 1 1 1, 2 2 1) aangedui dat kontraktuele verpligtinge ontstaan het uit wilsooreenstemming alleen, en Ulpianus (*D* 16 3 1 6), sowel as Modestinus (*D* 10 7 52 9), het saamgestem dat kontrakte hulle regskrag verkry deur blote wilsooreenstemming.

Die Romeinse reg het vier breë kategorieë van kontrakte erken (Gaius 3 89). *Contractus verbis* was 'n oorblyfsel van vroeër tye en die kontrak was gesluit deur die uitruil van formele mondelinge verklarings (Gaius 3 92; *I* 3 15) of, in die geval van sekere kontrakte betreffende eensydige prestasie, by wyse van eedsverklaring. Hierdie formele woorde (of eed) was nie soseer formaliteite waaraan voldoen moes word om 'n kontrak geldig te maak nie, maar eerder 'n manier om die bestaan van 'n kontrak te bevestig (Gaius 3 105). *Contractus re,* of saaklike kontrakte, het die oordrag van saaklike regte behels, en het 'n ritueel vereis waar die saak

wat verkoop is en die koopprys fisies of simbolies gelewer moes word (Gaius 3 90; *I* 3 14). Weereens was die doel van hierdie rituele heelwaarskynlik meer gerig op die bevestiging van 'n ooreenkoms, eerder as die daarstelling van streng formaliteite vir die geldigheid van sodanige kontrak. *Contractus litteris* was 'n vroëe vorm van 'n skriftelike kontrak, en het 'n inskrywing in die joernaal van die *paterfamilias* behels (Gaius 3 128; *I* 3 21). Hierdie inskrywing het gedien as bewys dat die partye wel op al die verpligtinge ooreengekom het (Gaius 3 131, 134). *Contractus consensu* was gebaseer op blote ooreenkoms tussen die partye (Gaius 3 135; *I* 3 22) en kon, volgens Modestinus (*D* 10 7 52 10) selfs stilswyend gesluit word as daar aanduidings van instemming was. Dit blyk dat geeneen van hierdie kontrakte enige verdere formaliteite vereis het om geldig te wees nie (*Tab* 6 1; Gaius 3 92 ev).

Mettertyd het partye op 'n meer gereelde basis begin om die bedinge van hulle kontrakte op skrif te stel (Du Plessis "The Roman Concept of lex contractus" 2006 *Roman Legal Tradition* 79 79 ev). Teen die derde eeu was dit algemene praktyk en partye het hulle instemming aangedui deur die skriftelike dokument met 'n seëlring te veseël (*Lex Acilia* 41; *I* 2 10 5; *C* 4 51 2).

Soos die Christendom posgevat en deur die Romeinse Ryk versprei het, het 'n nuwe ritueel tot stand gekom: in plaas daarvan om bloot hulle wilsooreenstemming teenoor mekaar op die gepaste wyse te bevestig, het partye begin om ook wedersydse verpligtinge met 'n eed te bevestig, en so hulleself voor God te verbind om hulle verpligtinge na te kom soos ooreengekom. Waar 'n kontrak beide deur skrif en deur eed bevestig is, het die partye met hulle eie hande die kontrak gemerk met 'n "X", wat die teken van die Heilige Kruis verteenwoordig het (*Novellae Leonis* 72). Met ander woorde, die partye het die skriftelike stuk "geteken" om hulle instemming om aan die kontrak gebind te word te bevestig.

Teen die vyfde eeu het Keiser Leo I verorden dat stukke wat privaat gesluit is, sowel as enige ander kontrakte, geldig sou wees ongeag of hulle in die handskrif van die betrokke partye geskryf is of nie, of hulle onderteken is deur die partye of nie, en of hulle deur getuies bevestig is of nie (*C* 8 18 11).

Dit blyk dat opskrifstelling en ondertekening in Romeinse Reg hoofsaaklik gedien het om instemming te bevestig, eerder as 'n formaliteit wat vereis was vir die geldigheid van 'n kontrak, en instemming kon gegee word sonder om 'n dokument te onderteken (*D* 20 6 8 15; *C* 6 42 22; *C* 8 54 31). Justinianus het verorden (*C* 4 21 16) dat:

> [n]iks van waarde is voordat hulle soos volg optree nie, óf by wyse van 'n skriftelike stuk wat die aantekening van een of albei partye bevat, óf deur hulleself in die openbaar ... inderdaad, selfs al is 'n koop nie op hierdie manier geldiglik aangedui nie, in soverre die koopprys vasgestel is, kan die verkoper verplig word om sy verpligtinge ingevolge die kontrak na te kom, indien óf die kontrak *perfecta* is, óf die koper die balans aan hom betaal het. (Eie vertaling. Die oorspronklike teks lees soos volg: "*ut nulli liceat prius, quam haec ita processerint, vel a scheda conscripta, licet litteras unius partis vel ambarum habeat, vel ab ipso mundo ... ut nec illud in huiusmodi*

venditionibus liceat dicere, quod pretio statuto necessitas venditori imponitur vel contractum venditionis perficere vel id quod emptoris interest ei persolvere".)

Kontrakte kon dus gesluit word óf op skrif óf sonder formaliteite in die teenwoordigheid van getuies. In soverre dit betrekking het op skriftelike kontrakte, is dit van belang dat hierdie paragraaf verwys na 'n dokument wat die aantekening (*litteras*) (of letterlik, die "letters") van een of albei partye bevat, eerder as hulle handtekeninge (*subscriptiones*). Hierdie was waarskynlik 'n verwysing na aantekening in die sin van die *contractus litteris* en dit dui daarop dat blote skrif voldoende was en dat ondertekening nie 'n vereiste was vir die geldigheid van sulke kontrakte nie. Dit is ook beduidend dat 'n kontrak in die lig van hierdie bepaling steeds in sekere omstandighede geldig kon wees al het die partye nie voldoen aan enige formaliteite nie. Skrifstelling en handtekening het meestal net gedien as 'n bewys van die bestaan van 'n kontrak (*C* 4 2 14; *N* 73 1). Selfs met formele kontrakte, as daar 'n duidelike aanduiding was dat instemming teenwoordig was, het dit dus geen verskil gemaak as die kontrak nie onderteken was nie (*D* 26 8 20; *C* 5 4 2).

Justinianus het egter verorden dat sekere kontrakte aan voorgeskrewe formaliteite moes voldoen ten einde geldig te wees. Byvoorbeeld, waar 'n vrou ingestem het om as borg op te tree was dit uitdruklik bepaal dat die kontrak nietig sou wees indien dit nie vervat was in 'n stuk wat in die openbaar gedoen en deur drie getuies onderteken was nie (*C* 4 29 23 2). Net so was dit 'n vereiste dat enige lening met 'n waarde van meer as veertig mates goud, vervat moes wees in 'n stuk wat geteken was deur drie betroubare getuies (*C* 4 2 17). Dit is opvallend dat hierdie paragrawe uitdruklik ondertekening deur getuies vereis, maar swyg oor ondertekening deur die partye self. Een verduideliking kan wees dat hierdie klousules bloot impliseer dat die partye ook die betrokke kontrakte moes onderteken. Dit is egter meer waarskynlik dat die partye dikwels ongeletterd was en dus nie 'n kontrak met hulle eie hand kon onderteken nie (*N* 23 44; *N* 73 8). Die bedinge van die kontrak sou dan aan die partye in die teenwoordigheid van die getuies voorgelees word en die getuies sou die instemming van die partye bevestig deur die stuk te onderteken.

Die Romeins-Hollandse reg het die beginsel aangeneem dat kontrakte gegrond is op wilsooreenstemming (Van Leeuwen *Het Rooms Hollandsch Recht* 4 1 7; Van der Keessel *Thesis Selectae* 3 45 11; Van der Linden *Regtsgeleerd, Practicaal en Koopmans Handboek* 1 15 5 4, 4 6 7) en dat, in die algemeen, geen formaliteite vereis was om 'n kontrak geldiglik te sluit nie (Van Leuwen 4 16; Van der Keessel 3 18 3). Voet (*Commentarius ad Pandectas* 2 14 15) het beaam dat kontrakte in die algemeen óf uitdruklik óf stilswyend gesluit kon word.

In sekere gevalle het die reg vereis dat kontrakte aan sekere formaliteite moes voldoen. Van Leeuwen (4 21 8) verduidelik dat kontrakte vir die huur van 'n erf of die hernuwing van so 'n kontrak slegs geldig was indien dit gesluit was by wyse van 'n openbare geskrif wat deur die eienaar onderteken is. Op dieselfde basis sou 'n geskenk met 'n

waarde van meer as vyfhonderd mates goud, nie geldig wees nie tensy dit by wyse van 'n openbare dokument uitgevoer is (Van Leeuwen 4 30 3). 'n Openbare dokument is bevestig en verly voor 'n notaris en twee getuies (Van Leeuwen 4 30 3). Weereens is dit interessant dat in een geval die teks nie die ondertekening deur die verhuurder noem nie, en in die ander geval word die ondertekening deur die partye self nie genoem nie. Dit word veronderstel dat onderttekening in hierdie gevalle nie vereis was nie om dieselfde rede dat hulle handtekeninge nie 'n vereiste in die Romeinse reg was nie, en die geldigheid van 'n kontrak kon ook in die algemeen bewerkstellig word deur die getuies se bevestiging (Voet 12 1 27). Verder verduidelik Van der Keessel (3 19 3) dat waar 'n kontrak vir die huur van grond nie skriftelik hernu is nie, die huurder die perseel moes ontruim, maar hy kon dan steeds aan 'n hof bewys dat die huurkontrak mondelings hernu is sonder skrifstelling.

Kontrakte is meestal op skrif gestel en onderteken om bewys daarvan te vergemaklik, en nie omdat opskrifstelling of ondertekening formaliteite was waarsonder sulke kontrake nietig sou wees nie (Voet 12 1 26; Van Leeuwen 4 15 1). Partye kon wel ooreenkom dat 'n kontrak slegs geldig sou wees nadat dit op skrif gestel en onderteken was, en die reg het so 'n ooreenkoms erken (Van Leeuwen 4 15 1).

Pothier (*Traité des Obligations* 2 6 4 3) het ook gemeld dat kontrakte in die openbaar voor notarisse gesluit kon word, onder private handtekening of mondeling, en Domat (*Lois Civiles dans leur Ordre Naturel* 1 1 2 1 3 (par 260)) het bygevoeg dat dit oor die algemeen nie 'n verskil gemaak het of 'n kontrak voor getuies of in hulle afwesigheid gesluit was, of dit op skrif of mondeling gesluit was, of dit onderteken of nie onderteken was, en of dit voor 'n notaris of privaat gesluit was nie (Domat 1 1 1 11, 12 (parr 154, 155)). Skriftelike bewys kon gelewer word deur 'n openbare of private handeling wat onderteken is, of ten minste deur die partye geskryf is (Pothier 4 1 1 2).

Die reg het vereis dat sekere kontrakte, soos 'n lening vir 'n bedrag van meer as 100 *livres,* op skrif moes wees, maar die tekste noem nie of ondertekening vereis is nie. Selfs dan was die skrifstelling bewysmatig eerder as substantief, en die kontrak was geldig al was dit nie op skrif gestel nie (Pothier 1 1 1 2). Een rede daarvoor kan wees dat baie mense steeds ongeletterd was en nie veel meer as hulle eie name kon skryf nie (Pothier 4 1 2 1).

Ondertekening het meestal net gedien as bewys van die voorneme om gebonde te wees (Domat 1 3 6 2 (par 2016)) en in die afwesigheid van ondertekening kon 'n kontrak steeds bestaan indien 'n party uitdruklik verklaar of andersins te kenne gee dat die kontrak aanvaar word (Pothier 4 1 2 5; Domat 1 1 1 10 (par 153)). Nietemin kon partye ooreenkom dat hulle kontrak slegs geldig sou wees indien daar aan sekere formaliteite, soos verlyding voor 'n notaris, voldoen is en die reg het aan die partye se wense uitvoering gegee (Domat 1 3 6 2 6 (par 2024)).

Dit is dus duidelik dat die gemenereg nooit 'n algemene reël ontwikkel het dat voldoening aan vereistes, soos opskrifstelling en ondertekening,

noodsaaklik was vir die geldigheid van 'n kontrak nie. Die ou geskrifte stem ooreen dat enige formaliteite wat wel deur die reg voorgeskryf was, bewysmatig en nie substantief van aard was nie, en dus dat nienakoming aan die formaliteite nie noodwendig tot nietigheid van die kontrak gely het nie.

Die posisie in die gemereg kan daarom soos volg opgesom word:

(1) As 'n algemene reël is geen formaliteite voorgeskryf vir die geldige sluiting van 'n kontrak nie, en 'n kontrak kon uitdruklik of stilswyend gesluit word.
(2) Waar partye besluit het om hulle kontrak op skrif te stel, ongeag of die geskrewe stuk deur die partye onderteken is, aldan nie, is dit meestal gedoen om bewys van die ooreenkoms te vergemaklik.
(3) Indien die partye duidelik vooraf ooreengekom het dat hulle kontrak slegs geldig sou wees indien dit op skrif gestel is, sou die kontrak nie geldig wees tensy dit op skrif gestel is nie. Die partye kon ook ander formaliteite soos ondertekening voorskryf en dit sou insgelyks 'n vereiste wees vir die geldigheid van die kontrak.
(4) Waar 'n regsreël aangedui het dat 'n kontrak op skrif gestel moes word was die handtekeninge van die partye nie noodwendig nodig nie, en die opskrifstelling het meestal gedien om die bewys van die transaksie te vergemaklik. As daar nie aan die formaliteite voldoen is nie kon die kontrak steeds geldig wees, mits 'n party op 'n ander manier wilsooreenstemming kon bewys, byvoorbeeld deur middel van getuies.
(5) Waar 'n regsreël spesifiek voorgeskryf het dat 'n kontrak *slegs geldig sou wees* indien dit aan formaliteite soos opskrifstelling en ondertekening voldoen het, of dat 'n kontrak *nietig* sou wees indien dit nie aan die formaliteite voldoen nie, dan kon 'n kontrak nie bestaan tensy aan daardie formaliteite voldoen is nie.

3 Huidige Posisie

Dit word algemeen aanvaar dat kontrakte vandag gegrond is op werklike of oënskynlike wilsooreenstemming (*Cecil Nurse (Pty) Ltd v Nkola* 2008 2 SA 441 (SCA)). As die partye ooreenkoms bereik met die ernstige en bewuste bedoeling om verpligtiginge daar te stel en om daaraan gebonde te wees, dan verskaf dit 'n voldoende basis vir kontraktuele aanspreeklikheid (*Conradie v Rossouw* 1919 AD 279) en dit is oor die algemeen nie nodig om die kontrak op skrif te stel of om aan enige ander formaliteite (*Goldblatt v Freemantle* 1920 AD 123 128), soos ondertekening, te voldoen nie (*Roberts v Martin* 2005 4 SA 163 (C)).

3 1 Vorm Bepaal Deur die Partye

Partye stel dikwels hulle kontrakte op skrif en onderteken die skriftelike stuk, maar die vermoede bestaan dat dit bloot gedoen word om bewys te vergemaklik (*Woods v Walters* 1921 AD 303) en dit het geen impak op die bestaan of geldigheid van die kontrak nie. Wanneer 'n party 'n skriftelike kontrak onderteken word aanvaar dat die betrokke party bekend is met die bepalings van die kontrak (*Meter Motors (Pty) Ltd v Cohen* 1966 2 SA 735 (T); *Handulay v Smith NO* 1984 3 SA 308 (C)) en die ondertekening dui aan dat die party die bedinge van die kontrak aanvaar, ooreenkomstig die *caveat subscriptor*-reël (*Cecil Nurse (Pty) Ltd*

v Nkola 2008 2 SA 441 (SCA); *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 2 SA 599 (SCA)).

Waar die partye duidelik ooreenkom dat hulle kontrak nie bindend sal wees nie tensy dit op skrif gestel en deur die partye onderteken is, sal 'n hof uitvoering gee aan sodanige uitdruklike bedoeling van die partye (*Goldblatt v Freemantle* 1920 AD 123 129; *Cecil Nurse (Pty) Ltd v Nkola* 2008 2 SA 441 (SCA); *Blake v Cassim* 2008 5 SA 393 (SCA)). Selfs in so 'n geval kan die partye steeds hulle vorige ooreenkoms dat hulle kontrak nie bindend sal wees tensy dit aan sekere formaliteite voldoen nie, ongedaan maak, en die kontrak mondelings of stilswyend sluit (*Clemans v Russon Bros (Pty) Ltd* 1970 3 SA 686 (E)).

In *First National Bank v Avtjoglou* 2000 1 SA 748 (C) het regter Maya beslis dat 'n vorige ooreenkoms tussen die partye dat hulle kontrak slegs geldig sou wees indien dit (op skrif gestel en) deur albei partye onderteken is, neerkom op 'n voorwaardelike verbintenis en dat, indien enige party sou weier om die skriftelike kontrak te onderteken, die leerstuk van fiktiewe vervulling ingespan sou word om daardie party aanspreeklik te hou ingevolge die kontrak asof dit wel onderteken was. Op appèl is hierdie gevolgtrekking tereg bevraagteken (maar nie omvergewerp nie) deur die volbank van die Wes-Kaapse Hooggeregshof (*Avtjoglou v First National Bank* [2002] 2 All SA 1 (C)). 'n Voorwaardelike verbintenis, per definisie, stel die aanvang van 'n kontrak uit totdat 'n onsekere toekomstige gebeurtenis plaasvind of nie plaasvind nie (*Southern Era Resources Ltd v Farndell* 2010 4 SA 200 (SCA) 206), en voldoening aan die voorwaarde kan nie in geheel afhang van die wil van enige van die partye nie (*Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd* [2009] 2 All SA 65 (SCA) 68). Die besluit om die geskrewe kontrak te onderteken of dit nie te onderteken nie, lê uitsluitlik binne die wil van elke party en die belangrikste element van 'n voorwaardelike verbintenis is dus afwesig. 'n Beter konstruksie is dat 'n voorafgaande ooreenkoms tussen die partye (dat hulle kontrak slegs geldig sal wees as dit op skrif gestel en deur beide partye onderteken is) daarop dui dat daar, hangende voldoening aan die ooreengekome formaliteite, nog geen ernstige en bewuste voorneme is om verpligtinge te skep nie. Op die meeste kan so 'n voorafgaande ooreenkoms 'n *pactum de contrahendo* daarstel, wat nie enige verpligtinge skep (*Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 1 SA 768 (A) 773I) totdat die skriftelike stuk voortgebring en onderteken is nie.

3 2 Formaliteite van Regsweë Voorgeskryf

Somtyds word formaliteite ook by wet voorgeskryf. Die aard en omvang van sulke formaliteite, en die gevolge van die nie-nakoming daarvan, hang af van die uitleg van die bepaalde wet. Eerstens moet enige wetsbepaling uitgelê word ooreenkomstig die gemenereg (*Fish Hoek Primary School v GW* 2010 2 SA 141 (SCA) 147A) eerder as strydig daarmee, tensy dit duidelik is dat die wetgewer die gemeneregtelike posisie wou verander (*Kleynhans v Wessels* 1998 4 SA 1060 (SCA)). Dit is 'n gevestige beginsel van wetsuitleg dat 'n wet nie die gemenereg meer

wysig as wat nodig is nie, en dan ook net soos uitdruklik aangedui in die betrokke bepaling (*Menqa v Markom* 2008 2 SA 120 (SCA) 132I-133A).

Gevolglik, wat die nakoming van statutêre formaliteite betref, geld die gemeenregtelike reëls, soos hierbo uiteengesit, steeds tensy 'n wetsbepaling duidelik anders bepaal. Eerstens beteken dit, as 'n algemene reël, dat 'n kontrak nie aan enige formaliteite hoef te voldoen nie, behalwe waar die betrokke wetsbepaling duidelik anders aandui.

Dus, waar artikel 15(3) van die Wet op Huweliksgoedere 88 van 1984 bepaal dat 'n eggenoot wat binne gemeenskap van goedere getroud is, nie sekere kontrake mag sluit sonder die toestemming van die ander eggenoot nie, kan daardie instemming informeel of stilswyend gegee word aangesien artikel 15(3) geen formaliteite voorskryf nie (*Bopape v Moloto* 2000 1 SA 383 (T) 386G).

Net so, waar 'n wetsbepaling voorskryf dat 'n kontrak op skrif moet wees, beteken dit nie noodwendig dat die skriftelike stuk ook onderteken moet word nie. Byvoorbeeld, artikel 2(1) van die Wet op Vervreemding van Grond 68 van 1981 vereis dat enige verteenwoordiger wat 'n vervreemdingsakte namens die koper of verkoper onderteken, moet handel op die skriftelike volmag van daardie party. In *Hugo v Gross* 1989 1 SA 154 (C) het regter Friedman beslis (162F–163A):

> [t]hat the principal is not required to sign the agent's authority and that any form of writing would be sufficient, [and] it is possible for such writing to take various forms, subject, of course, to authentication. Clearly, if the principal himself writes the authority, that would be sufficient. If he were to call in his secretary, dictate an authorisation to her and request her to type it, that would also constitute the principa's written authority. There would, likewise, be no difference between the last example and a situation in which the principal conveys his instructions telephonically to his secretary who, in turn, types the authority on the basis of such instructions. Taking it a stage further, if the principal happened to be overseas and he were to telephone his secretary in Cape Town and dictate to her an authorisation, such authorisation, when typed, would, in my view, constitute the principal's written authority.
>
> *In the instant case the evidence is that, ... respondent telephoned the post office and instructed the post office to convey to the addressee, ... the message which she dictated to the postal official. The message was transmitted to the Pinelands Post Office by telex, i.e. it arrived in a typed form and was delivered in that form ... Accordingly, what Mr. Voogt had when he signed the deed of sale, was a written authority which emanated from his principal, the respondent.*

In *Van der Merwe v DSSM Boerdery BK* 1991 2 SA 320 (T) (328 ev) het die verteenwoordiger, in die teenwoordigheid van die verkoper, op die vervreemdingsakte geskryf dat hy namens die verkoper optree in die verkoop van die eiendom. Regte Schabort het beslis dat hierdie 'n geldige skriftelike volmag was om die vervreemdingsakte namens die verkoper te onderteken, soos vereis deur artikel 2(1), al was dit nie deur die verkoper onderteken nie.

'n Soortgelyke bepaling word gevind in artikel 5 van die Algemene Regswysigingswet (50 van 1956). 'n Uitvoerbare skenking is slegs geldig

indien die bedinge van die skenking op skrif gestel en onderteken is deur die skenker of 'n persoon wat optree ingevolge die skriftelike volmag van die skenker, wat gegee is in die teenwoordigheid van twee getuies. Waar aan iemand 'n skriftelike volmag gegee is om die kontrak namens die skenker te onderteken, is nóg die handtekening van die skenker, nóg die van die twee getuies, 'n voorvereistes vir die geldigheid van die volmag (Owens "Donations" in *LawSA 8 (1)* (red Joubert) (2005) par 309).

Op dieselfde wyse, waar artikel 15(2) van die die Wet op Huweliksgoedere 88 van 1984 bepaal dat 'n eggenoot wat binne gemeenskap van goedere getroud is, nie sonder die skriftelike toestemming van haar eggenoot sekere kontrakte mag sluit nie, is die handtekening van die eggenoot nie noodwendig vereis nie, en die skriftelike toestemming mag op enige ander gepaste manier bevestig word (Joubert "Marriage" in *LawSA 16* (red Joubert) (2006) par 73).

Verder bepaal die gemenereg dat waar opskrifstelling (met of sonder ondertekening) vereis word, is die vemoede dat die opskrifstelling (en ondertekening) hoofsaaklik dien om die bewys van 'n transaksie te vergemaklik en 'n kontrak wat nie aan die voorgeskrewe formalitieite voldoen nie sal slegs nietig wees waar die betrokke wet duidelik bepaal dat dit die geval sal wees indien die kontrak nie aan die formaliteite voldoen nie. Byvoorbeeld, artikel 2(1) van die Wet op Vervreemding van Grond (68 van 1981) bepaal dat:

> [g]een vervreemding van grond ... sal ... van krag wees nie tensy dit vervat is in 'n vervreemdingsakte wat deur die partye daartoe of deur hulle agente, handelende op hulle skriftelike gesag, onderteken is nie.

Hierdie bepaling maak dit baie duidelik dat 'n gewaande vervreemding van grond geen regskrag of gevolg sal hê nie, of nietig sal wees, tensy dit aan die formaliteite van opskrifstelling en ondertekening voldoen. Gevolglik het die formaliteite van opskrifstelling en ondertekening nie net bewyswaarde nie, maar is ook substantiewe vereistes vir die geldigheid van 'n kontrak vir die vervreemding van grond.

Waar die handtekeninge van beide partye substantiewe vereistes vir die geldigheid van 'n kontrak is, beteken dit nie dat die bepalings van die kontrak en die handtekeninge van die partye noodwendig in een dokument vervat moet wees nie. 'n Aanbod, geskryf en onderteken deur een party in een dokument, en 'n aanname van daardie aanbod, geskryf en onderteken deur die ander party in 'n ander dokument, sal voldoen aan die formaliteite vereis deur artikel 2(1) van die Wet op Vervreemding van Grond (68 van 1981) (*Johnston v Leal* 1980 3 SA 927 (A) 937G-H; *Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd* 1982 1 SA 7 (A) 18C-E; *Hirschowitz v Moolman* 1985 3 SA 739 (A) 758). Daar is geen vereiste dat die partye in mekaar se teenwordigheid moet teken, of dat hulle tegelykertyd teenwoordig moet wees nie, en selfs as hulle op verskillende dae die kontrak teken sal dit steeds voldoen aan die formaliteite (*In re Schaffer* 1920 NPD 240).

3 3 Getuies

Net soos die ondertekening van skriftelike kontrakte in die moderne handelsomgang 'n belangrike ritueel geword het, so ook het die attestering deur getuies 'n belangrike element van die ritueel geword. Maar die algemene reël dat dit nie nodig is om 'n kontrak op skrif te stel (of te onderteken) nie, geld ook in hierdie verband (*Goldblatt v Freemantle* 1920 AD 123 128). Die beginsels hierbo uiteengesit met betrekking tot ondertekening deur die partye is eweneens toepaslik op bevestiging deur getuies. Dit beteken dat dit in die algemeen nie nodig is vir partye om hulle kontrak te sluit in die teenwoordigheid van getuies nie, tensy daar 'n wetlike bepaling is wat uitdruklik getuies vereis. Selfs al word getuies vereis, beteken dit nie noodwendig dat die getuies die kontrak moet onderteken om dit te bevestig nie (Owens *LawSA* par 309; Joubert *LawSA* par 73), tensy die wetsbepaling duidelik stel dat bevestiging 'n substantiewe vereiste vir die geldigeid van die kontrak is.

4 Gevolgtrekking

Terwyl ondertekening deur die partye en getuies 'n ritueel is wat partye gereeld eerbiedig wanneer hulle 'n kontrak sluit, is dit ook 'n ritueel wat meestal verkeerd verstaan word en selde nodig is om die kontrak geldig te maak. Kontrakte hoef in die algemeen nie aan enige formaliteite te voldoen nie, en kan uitdruklik of stilswyend gesluit word. As die partye sou besluit om hulle kontrak op skrif te stel, of 'n wetsbepaling sou na 'n skriftelike kontrak verwys, is die vermoede dat die doel van die opskrifstelling bewysmatig eerder as substantief is. Net so, waar die skriftelike kontrak deur die partye onderteken is, dien die handtekeninge as bewys dat die skriftelike stuk díe van die partye is en om aanname van die bedinge wat in die stuk vervat is, aan te dui in lyn met die *caveat subscriptor*-reël. Die afwesigheid van handtekeninge alleen sal nie veroorsaak dat die kontrak tussen die partye nietig is nie.

Dit is slegs waar die partye uitdruklik vooraf ooreenkom dat hulle kontrak net geldig sal wees indien dit op skrif gestel en onderteken is, of waar 'n wetsbepaling duidelik stel dat 'n kontrak slegs geldig sal wees indien dit op skrif gestel en onderteken is, dat ondertekening 'n substantiewe vereiste vir die geldigheid van daardie kontrak word. En dit is slegs in daardie geval dat die afwesigheid van handtekeninge op sigself die kontrak nietig maak.

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Mogale Alloys (Pty) Ltd v Nuco Chrome Boputhatswana (Pty) Ltd
2011 (6) SA 96 (GSJ)

Alienation or disposal of a "controlling interest" in a prospecting company

1 Introduction

Section 11(1) of the Minerals and Petroleum Resources Development Act 28 of 2002 (hereafter "MPRDA") contains a restraint against the alienation or transfer of prospecting rights, an undivided share in such rights or a controlling interest in a company or close corporation holding such rights, unless the approval of the Minister of Mineral Resources is obtained. The restraint also applies to mining rights to minerals, exploration and production rights to petroleum (ss 11(1) and 69(2) MPRDA). As the *Mogal*e decision dealt with prospecting rights, our discussion shall focus on prospecting rights but the principles are of course also applicable to the other rights. The *Mogale* decision is significant because it gives some indication of what is meant by a "controlling interest" in terms of section 11(1) of the MPRDA. It also illustrates how important it is to meticulously execute conditions in contracts, and to understand the consequences of the non-fulfilment of suspensive conditions if these consequences are harsh and unfair but stipulated in the agreement. In effect, the plaintiff in this case paid R3 million for shares, but was unsuccessful in enforcing the agreement through an order for specific performance because two suspensive conditions were not fulfilled, and the contract contained a clause preventing the plaintiff reclaiming the R3 million. In short, the plaintiff paid R3 million but never became a shareholder of the company and could not recover the payment contractually.

At the outset, an exposition of the facts, the relief claimed, the arguments of the court and what was decided by the court will be covered. In our commentary the requirements for the granting of prospecting rights will be given as background information, followed by our analysis of section 11(1) and (2) of the MPRDA. We intend to show that a clear distinction ought to be made between the alienation of a prospecting right (or share thereof) and the alienation of a "controlling interest" in a company or close corporation holding a prospecting right. The meaning of a "controlling interest" in a company or close corporation for purposes of section 11(1) will be examined, as well as the complexities of determining such meaning. It will be argued that requirements in terms of section 11(2) apply to the prospecting company or close corporation that intends to alienate, transfer or

dispose of a prospecting right (or undivided share therein). However, the requirements of section 11(2) do not apply to the shareholder or member of a close corporation (whether a juristic person or a natural person) that intends to alienate, transfer or dispose of the person's "controlling interest" in a prospecting company. Section 11(2) also does not apply to the person (whether a juristic person or a natural person) that obtains such a "controlling interest". We argue that there is confusion in the *Mogale* case between the juristic person holding the prospecting right and the shareholders or members of the close corporation holding a "controlling interest" in a company or close corporation wanting to alienate, transfer or dispose of such "controlling interest".

2 The Facts

Nuco Chrome Boputhatswana (Pty) Ltd (hereafter "Nuco") is a private company, which held a prospecting right for precious metals on certain farms in the North West province (par 7). The shareholding of Nuco was as follows: Butler held 52%; Van Zyl 12%; Uthango (Pty) Ltd 26%; and the Royal Bafokeng Nation 10% (pars 2 and 8). Butler sold 33% of his shares to Mogale Alloys (Pty) Ltd (hereafter "Mogale") for R3 million. For current purposes, four clauses in the agreement between Butler and Mogale (Pty) Ltd are of particular importance.

There were two suspensive conditions in the agreement. The first (clause 5.1.2) required "the approval of the Department of Mineral Resources of the sale [of] equity to the purchaser, to the extent such approval is required by law" (par 14). The parties were *ad idem* that this clause was a reference to section 11(1) of the MPRDA (par 15). In terms of section 11(1) of the MPRDA, such approval was required, *inter alia*, for the transfer, alienation or disposal of a "controlling interest" in a private company (or close corporation) holding a prospecting right (Nuco held such right).

The second suspensive condition (clause 5.1.3) related to the pre-emptive rights of other shareholders in Nuco (Pty) Ltd, as contemplated in article 64.1 of Nuco's Articles of Association – article 64.1 was very similar to the standard pre-emptive right provision contained in private companies' Articles of Association, requiring shareholders in private companies to first offer their shares to the other shareholders in such a private company before the shares could be sold to third parties (see par 48). The question arose as to whether the Royal Bafokeng Nation, as one of the shareholders, had such a right of pre-emption (par 4).

The third important clause in the contract between Butler and Mogale was clause 5.3, which stipulated that if any of the suspensive conditions were not fulfilled within a period of 180 days from the date of the signature of the agreement, then the agreement was to lapse and be of no force and effect (par 6).

The fourth important clause, clause 5.4, is quite a remarkable clause as it stipulated that if the agreement failed because the Minister's approval was not obtained (the clause 5.1.2 suspensive condition),

Mogale Ltd would have no right to recover the R3 million paid for the 33% of Butler's shares, but shall have the right(s) envisaged in clause 5.4 (par 41). Unfortunately, it is not revealed what these rights were.

Butler passed away (par 9). Neither the Minister nor the Department of Mineral Resources had consented to the sale of shares by Butler to Mogale (par 16). When the Royal Bafokeng Nation was informed about the intended sale to Mogale they indicated that they did not consent to the sale either (see par 52).

3 Relief Claimed and Arguments Raised

In a claim for specific performance, Mogale claimed delivery of the shares purchased (par 1). In the alternative, Mogale claimed repayment of the R3 million which it had paid for the shares in terms of the agreement (par 1).

Nuco and the executors of Butler ("the defendants") denied that the suspensive conditions in clauses 5.1.2 and 5.1.3 of the agreement had been fulfilled (par 4). They argued that the Minister's consent was required for the disposal of the shares to Mogale (par 22). According to the defendants, section 11(1) of the MPRDA was directed at the acquirer and not the disposer of the interest (par 21). They submitted that "controlling interest" in section 11(1) of the MPRDA referred to the majority shareholding in a company which held prospecting rights (par 22). At the date of sale, Butler owned the majority of the shares and by selling 33% to Mogale, Butler would no longer hold the majority shares in Nuco (par 22). It was argued that the Minister's written consent was required because the sale was going to have the effect of moving the controlling interest from Butler (par 22) as he would then only hold 19% of the shares (52% minus 33%).

Mogale contended that ministerial approval was not required because the agreement did not change the "controlling interest" in Nuco (par 5) or transfer a controlling interest from Butler to Mogale (par 17). It was submitted that "controlling interest" meant something other than a shareholding of more than 50%. "Controlling interests" in section 11(1) of the MPRDA "could imply different things, depending on the circumstances" (par 17). It was argued that the fact that Butler held 52% of the shares did not necessarily make it a controlling interest (par 17). Reliance was placed on the meaning of "control" and "controlling interests" in section 12(2) of the Competition Act 98 of 1998, and section 1 of the Diamonds Act 56 of 1986 (see par 7). Mogale also contended that the Royal Bafokeng Nation did not have a right of preemption (par 5). In the alternative, it was contended that, "if RBN had such a right, the conditions should be held to have been fictionally fulfilled, because Butler (and his agents) deliberately prevented the condition from being fulfilled" (par 5).

4 Decision

At issue was whether the abovementioned suspensive conditions had been fulfilled (see par 4). The court held that the first suspensive

condition was not fulfilled because the Minister's consent was required but not obtained (par 40). Despite the court's conclusion being decisive of Mogale claim and alternative claim, the court "nevertheless, briefly traversed the question of fulfilment of the second condition…"(par 41). The court also found that the second condition was not fulfilled (par 52). The outcome was that Mogale could not claim the R3 million because the contract prevented it from doing so (par 41). The decision of the court will now be examined in more detail.

4 1 Alienation of a "Controlling Interest"

According to the court, section 11 of the MPRDA has as its purpose the regulation of the transfer and encumbrance of prospecting rights that were granted by the Minister (parr 27, 37). According to the court, section 11(1) of the MPRDA places a prospecting right, an interest in a prospecting right and a controlling interest in a company or close corporation on the same footing (par 27). It applies to companies and close corporations which have prospecting rights (par 30) and regulates the disposal of the controlling interest (parr 28, 38). Section 11(1) of the MPRDA only refers to "controlling interest" in companies and close corporations (par 32).

"Controlling interest" is not defined in the MPRDA. An "interest" is described as something that is capable of being disposed of by any of the means envisaged in section 11(1) of the MPRDA and includes a proprietary interest (see parr 33, 36). An interest includes shares or rights (par 36; see also Dale, Bekker, Bashall *et al South African Mineral and Petroleum Law* (2005) 168 par 118.4). According to the court, the words "controlling interest" ought to be interpreted as a one composite phrase (par 31). A "controlling interest" has to be the interest that controls the company (or close corporation) (par 37). According to the court, the "term 'controlling interest' cannot be confined to a single characteristic, or criterion" (par 37). The list of criteria is not exhaustive but, in the case of a company, it may, mean any of the following:

(a) more than 50% of the issued share capital of the company;
(b) more than half of the voting rights in respect of the issued shares of the company;
(c) the power to either directly or indirectly appoint, remove or veto the appointment of the majority of the directors of the company without the concurrence of another; or
(d) the right of a shareholder (even if notionally) to more than half of the company's profits or assets (par 37).

According to the court, section 11(2) of the MPRDA indirectly indicates the purpose of section 11(1), namely, the acquirer must be capable of complying with the requirements, terms, conditions and obligations of a prospecting right before the Minister can consent (see par 28). Section 11(2) makes it clear that "one of the main purposes is for vetting of the intended acquirer of that right" (par 37). The court concluded that the "acquirer, or intended acquirer, of such a controlling interest in the company would have to be vetted for regulatory purposes" (par 37).

The court held that "what has to be determined is whether the interest was a 'controlling interest' at least at the time of the proposed disposal" (par 38). Coppin J provided the following scenarios:

> If a majority shareholder intends to dispose of his entire shareholding to another, or others, the Minister's consent would clearly be required. If the majority shareholder, with the controlling interest, intends to dispose only of a portion of his interest and the disposal will not result in a change of control, i.e. the shareholder will retain the controlling interest, then the disposal would, in my view, not require the Minister's consent. If, however, the effect of the disposal would be that the holder of the controlling interest would lose such control, then the disposal would require the Minister's consent, even if no one else acquires that controlling interest (par 38).

Applied to the facts, Coppin J held as follows:

> Butler was the holder of at least 52% of the shares in Nuco at the time of the agreement. This shareholding would, in my view, constitute a '*controlling interest*' in Nuco in the sense I held above. The fact that he did not sell the entire 52% to Mogale but only 33%, which would have had the effect of reducing his interest to less than a '*controlling interest*', does not mean that the Minister's consent for the disposal to Mogale, in terms of the agreement, was not required. In my view the Minister's consent was indeed required (par 39).

Coppin J reasoned that the Minister has a discretion in terms of section 11 of the MPRDA to consent to the disposal or refuse it (par 38). The fact that the disposal would have the effect that the controlling interest no longer vests in the disposer, is a matter for the Minister's consideration (par 38). It was held that a change in control may hold implications for the company's capabilities to comply with its obligations relating to prospecting, and its capacity to sustain compliance with the requirements of a prospecting right in section 17 of the MPRDA (par 38).

The court found that because "the Minister's consent was not obtained to date, or within the 180 days allowed for in the agreement, the suspensive condition contained in clause 5.1.2 of the agreement was not fulfilled" (par 40). Due to non-fulfilment of this condition, the court held that the agreement had lapsed. Therefore, in terms of clause 5.4 of agreement, the R3 million paid could not be recovered by Mogale (par 41). Despite its finding the court deemed it necessary to briefly consider the fulfilment of the second suspensive condition in clause 5.1.3 of the agreement as well (par 41).

4 2 Right of Pre-emption

The court found that the Royal Bafokeng Nation had retained a right of pre-emption in terms of article 64.1 of the Articles of Association (par 52). Proof of the actual notification of the proposed sale of shares to Mogale (Pty) Ltd was not produced. In the Royal Bafokeng Nation's response (which was produced as evidence) it indicated that they did not consent to the proposed sale of shares (see par 52). The court found that the second condition (stipulated in clause 5.1.3 of the agreement of sale)

was also not fulfilled (par 52). (By implication, the agreement had lapsed as contemplated in clause 5.3 of the agreement (see par 40)).

As to Mogale's alternative claim of fictional fulfilment of the condition because of Butler's alleged prevention of fulfilment, the court required (par 54) that Mogale:

> [m]ust prove that the condition was not fulfilled and that Butler had a duty regarding the fulfilment of the condition, and that he breached that duty with the intention of frustrating or preventing the fulfilment of the condition.

The intention required is *dolus*: the "debtor should have acted with the direct intention of preventing the obligation from becoming enforceable" (see par 56). The court concluded on the evidence that Butler had not "acted intentionally with regard to the non-fulfilment of the condition under consideration, particularly insofar as it pertains to RBN" (par 62). Thus, the plaintiff was also unsuccessful in proving "fictional fulfilment" of clause 5.1.3.

As we are of the view that the court's finding about the second condition was not really necessary, but correct, it will not be discussed further.

5 Commentary: The Alienation of Prospecting Rights (or Undivided Share Thereof) or a Controlling Interest in a Company Holding Prospecting Rights

5 1 General Requirements

The acquisition and exercise of prospecting rights, and the alienation of prospecting rights or a controlling interest in a company holding prospecting rights, are governed by the MPRDA. A prospecting right to minerals is granted to an applicant by the Minister of Mineral Resources (s 17(1) of the MPRDA). This power of the Minister has been delegated to the Deputy Director-General: Mineral Development (s 103 of the MPRDA; item 5 of the *Delegation of powers by the Minister of Minerals and Energy to officers in the Department of Minerals and Energy* 2004-05-12 (further references would, however, still be to the "Minister")).

In terms of section 17(1), for a prospecting right to be granted to an applicant, it is required that the applicant must have: (a) the financial resources and the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme; and (b) the ability to comply with the relevant provisions of the Mine Health and Safety Act 29 of 1996. The applicant must also not have contravened any relevant provision of the MPRDA (see s 17(1)(e) MPRDA). It is further required that the estimated prospecting expenditure is compatible with the proposed prospecting operation and duration of the prospecting work programme, and prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment (see s 17(1)(b), (c) MPRDA). In addition, the grant of a prospecting right may not result in an exclusionary act, prevent fair competition, or result in the concentration of the particular mineral

resource under the control of the applicant (see s 17(2) MPRDA). It may be required of an applicant to expand the opportunities for historically disadvantaged persons in terms of section 2(1)(d) of the MPRDA (see s 17(4)). These are the requirements for the acquisition of a prospecting right in terms of section 17 of the MPRDA.

A prospecting right is granted for five years (s 17(6) MPRDA). Such prospecting right is subject to the stipulated terms and conditions of the right, the MPRDA and any other relevant law (s 17(6) MPRDA). In *Maccsand v City of Cape Town* ((709/10) [2011] ZASCA 141 par 33) and *Louw NO v Swartland Municipality* ((650/10) [2011] ZASCA 142 parr 11, 12) the Supreme Court of Appeal held that "relevant laws" includes provincial legislation, such as the Land Use Planning Ordinance 15 of 1985 of the Western Cape ("LUPO"), which regulates land use planning and zoning by municipalities. The Constitutional court confirmed that the exercise of a mining right granted in terms of the MPRDA is subject to LUPO ((*Maccsand (Pty) Ltd v City of Cape Town* ((CCT 103/11) [2012] ZACC 7) par 51). The court reasoned that there is nothing in the MPRDA suggesting that LUPO will cease to apply to land upon the granting of a mining right or mining permit (44). The holder of a prospecting right is entitled to apply for a retention permit (s 31) to suspend the prospecting right (s 32(2)), whilst retaining the exclusive right to apply for a mining right (s 35(1)). The prospector has the exclusive right to apply for -

(a) the renewal of a prospecting right (s 19(1)(a)), and
(b) a mining right in respect of the mineral and prospecting area (s 19(1)(b)).

Linkage of a prospecting right with a future mining right is thus ensured, making a prospecting right, depending on the results of prospecting, a very valuable right. Various duties relating to prospecting are imposed upon a prospector (see further s 17(2)). Environmental provisions in chapter 4 of the MPRDA impose several environmental duties and responsibilities on prospectors and miners. For instance, a prospector or miner is responsible for any environmental damage, pollution or ecological degradation caused by his prospecting operations (s 38(1)(e)) and the management thereof until the Minister has issued a closure certificate to the holder of the prospecting right (s 43(1)). Directors of a company may even become jointly and severally liable "for any unacceptable negative impact on the environment, including damage, degradation or pollution advertently or inadvertently caused by the company or close corporation which they represent or represented" (see s 38(2)).

Section 11(1) provides that a prospecting right, an interest in a prospecting right or controlling interest in a company or close corporation, may only "be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of" with the written consent of the Minister (s 11(1)). The consent required in section 11(1) does not apply to a change of the controlling interest of a listed company (s 11(1); as to the meaning of a "listed company", see further Dale, Bekker, Bashall *et al* 174 par 118.8). An interest in a prospecting right refers to an undivided

(*aliquot*) share for purposes of coholdership of prospecting rights, whereas, an interest in a company refers to shares in the company. At common law, two or more holders could have held mineral rights and a co-holder was entitled to mine his proportionate share of the mineral deposits, provided such exercise takes place without prejudice to the rights of the other holder(s) (*Erasmus v Afrikander Proprietary Mines Ltd* (1976 1 SA 950 (W) 950, 962H). In terms of the common law, prospecting (or mining) rights granted in terms of the MPRDA are capable of being jointly held by two or more holders (see Badenhorst and Olivier "Conversion of 'old order mining right': "Sleeping at the MPRDA's wheel of (mis)fortune? *Sishen Iron Ore Company (Pty) Ltd v Minister of Mineral Resources"* (unreported decision) Case no 28980/10 (NGD) 2012**).

The Minister has to provide proper reasons for her decision. For instance, the Minister's refusal of an application for the transfer of a prospecting right in terms of section 11(1) of the MPRDA was set aside in *Rhino Plat (Pty) Ltd v Minister of Minerals and Energy* (2009 JDR 0399 (GNP) 17) and the only reason given by the Minister for her decision was the statement that the grant would defeat the objectives of the MPRDA (par 11). The court found on the papers that the applicant met the requirements of sections 17(1) and 2(d) of the MPRDA (par 16). In addition, the court found that there were no reasons why the application should not be granted by the Minister (par 16). An order was made by the court that the Minister should forthwith consent to the Applicant's application! (par 17) The decision of Seriti J is clearly incorrect because it was not an instance where the court could substitute the decision by the Minister with a decision by the court (see par 15) and order the Minister to consent thereto. Because the decision has been set aside, the Minister would have to consider the application anew, exercise her discretion and give proper reasons for her decision.

Restraints against the transfer, alienation or disposal of prospecting or mining rights also occur in other mineral law systems. For instance, similar prohibitions against assignment, sub-letting or transfer of mining rights or interests in mining rights without ministerial permission or approval, occur in the mining laws of some Australian states (see s 300 Mineral Resources Act 1989 (Qld); s 83(1) of the Mining Act 1971 (SA); s 33 Mineral Resources Development Act 1990 (Vic); and s 83(1)(d) of the Mining Act 1978 (WA)). Before approval is granted in the state of Victoria, the Minister must be satisfied that: the applicant is a fit and proper person to hold the mining licence, intends to comply with the Act, genuinely intends to do the work, has an appropriate work programme, and is likely to be able to finance the proposed work and rehabilitation of the land (s 15(6)).

5 2 Disposal of "[a] Prospecting Right or an Interest in Such a Right"

The first part of section 11(1) clearly deals with the prospecting right or an undivided share therein. As was explained under paragraph 5.1

above, this is the prospecting right granted for a period of five years by the Minister, and takes into consideration the requirements mentioned under paragraph 5.1 above. As there are requirements pertaining to "financial resources" and "prospecting expenditure", it will normally require some capital investment and most probably more than one person involved in the project or undertaking. In this regard a private company or a close corporation as holder of the prospecting right is an ideal business vehicle for such undertakings, unless large amounts of capital are required, in which case a public company will be the obvious business form. Several individuals can take up shares in the private company or a member's interest in a close corporation. In the case of Nuco (Pty) Ltd, the company had an authorised share capital of R50 000, divided into 50 000 ordinary shares (par value) of R1,00 (par 8), and the shareholders would have taken up those shares proportionally to determine their percentage of shareholding. Although we do not have the details in Nuco', there will normally be additional forms of financing for such undertakings, for example, bank loans or overdraft facilities for the company or the close corporation.

In the exercise of a ministerial discretion to grant a prospecting right to a company or close corporation, the Minister will doubtlessly take into consideration who the shareholders of the company or the members of the close corporation are, otherwise the general aim of fairness and community considerations could be defeated. As was seen above in the case of Nuco, there were two individuals involved (Butler, 52% and Van Zyl, 12%), but also a company (Uthango Pty Ltd, 26%) and the Royal Bafokeng Nation (10%). It should, however, be appreciated that the prospecting right will be granted to the company or the close corporation as separate legal entities, not to the individual shareholders or members. Section 11(1) clearly provides for ministerial approval if a company or close corporation would in any way attempt to cede, transfer, let, sublet, assign, alienate or otherwise dispose of the "prospecting … right or an interest in any such right" (first part of 11s (1)). Section 11(2) then contains an interesting provision:

> 11(2) The consent referred to in subsection (1) must be granted if the cessionary, transferee, lessee, sublessee, assignee or the person to whom the right will be alienated or disposed of-
> (a) is capable of carrying out and complying with the obligations and the terms and conditions of the right in question; and
> (b) satisfies the requirements contemplated in section 17 …

It should be noted that there are two different sets of requirements here. The one contained in 11(2)(a) deals with the "obligation and the terms and conditions of the right in question". In other words, here the focus will be on whether the new holder of the prospecting right can still carry out and comply with the obligations, terms and conditions initially attached to the prospecting right when it was granted. Section 11(2)(b), as far as a prospecting right is concerned, simply refers to the requirements of section 17 (see further discussion below).

It is apparent that there is no discretion for the Minister if the requirements are met – "[t]he consent referred to in subsection (1) *must be granted* … " (emphasis added). In other words, a company or close corporation that holds prospecting rights and that passes a resolution to dispose of the prospecting right, say to another company or close corporation, must obtain the approval of the Minister, but the Minister cannot refuse it if the requirements of section 11(2) are met. We appreciate that whether or not the requirements in section 11(2) are actually met or not could lead to complex disputes, but that is not the focus of this case note. That is particularly so because of the two sets of different requirements contained in section 11(2)(a) and section 11(2)(b), respectively.

Suppose some of the minority shareholders or members holding a minority interest in a close corporation are opposed to the disposal of the prospecting right, is there anything they can do? There will be at least two forms of protection for the minority shareholder or members of a close corporation if they are not happy with the disposal, and all the requirements expected in section 11(2) are met. First, a special resolution (75%) will be required if a company or close corporation disposes of the whole, or substantially the whole, of the company or close corporation, or disposes of all or the greater part of the assets of the corporation (see s 228(1) Companies Act 61 of 1973 (hereafter the "1973 Companies Act"); s 112(2)(a) Companies Act 71 of 2008 (hereafter the "2008 Companies Act"); s 46(b) Close Corporations Act 69 of 1984 (hereafter the "CC Act")). The disposal of the prospecting right of a company or close corporation formed for prospecting or mining purposes will surely be considered to be such a disposal. Secondly, there are remedies available for minority shareholders and members of close corporations in the case of oppressive and unfairly prejudicial conduct (see s 252 1973 Companies Act; s 163 2008 Companies; s 49 CC Act).

5 3 Disposal of a "Controlling Interest"

One of the difficulties experienced by Coppin J in the *Mogale* decision was that neither "control", nor "interest" nor "controlling interest" are defined. It is, therefore, of interest to make a few general comments about these concepts that may throw some light on the intention of the Legislator, and may assist if the term "controlling interest" needs to be interpreted in future cases.

Traditionally, the concept of "control" in company law is used to determine whether there exists a relationship of a holding company and subsidiary between companies (groups of companies) and to establish whether there were abuses of "control". Also linked to this is "control" of companies by managers and directors to determine under which circumstances loans made by companies to directors or managers were prohibited. Under the 1973 Companies Act these aspects were governed by sections 1(3), 37 and 226. There are, of course, now comparable provisions in the 2008 Companies Act, but as the case was decided under legislation drafted when the 1973 Companies Act was still in the

governing piece of legislation, we will not refer to the new provisions, but realise that they will be of considerable importance for future purposes. The interrelationship between sections 1(3), 37 and 226 of the 1973 Companies Act has been renowned for its complexities and technicalities, not least because of the different meanings of "control" in, for instance, section 1(3) and section 226(1A)(B) of the 1973 Companies Act. It is beyond the scope of this case note to analyse these complexities, but it may be of some interest to note the similarities of "controlling interest" in section 1 of the Diamonds Act 56 of 1986 as quoted by Coppin J (par 18) with the way in which the holding company-subsidiary relationship was determined under section 1(3) of the 1973 Companies Act. It will be noted that for purposes of that subsection, a company shall be deemed to be a subsidiary of another company if that other company is a member of it and:

(a) holds a majority of the voting rights in it; or
(b) has the right to appoint or remove directors holding a majority of the voting rights at meetings of the board; or
(c) has the sole control of a majority of the voting rights in it, whether pursuant to an agreement with other members or otherwise.

It is also important to take note of the requirements for "control" for purposes of section 226 of the 1973 Companies Act. Section 226 dealt, *inter alia*, with the prohibition of loans to directors and managers. It provided that these loans could not be made directly to a director or manager of the company, its holding company or any other company which is a subsidiary of its holding company (s 226(1)(a) 1973 Companies Act). Furthermore, and this is of particular importance for our current discussion, such loans or securities could also not be made to any other company or other body corporate *controlled* by one or more directors or managers of the company, or of its holding company or of any company which is a subsidiary of its holding company (s 226(1)(b) 1973 Companies Act).

It was, thus, vital for purposes of section 226 that "control" was defined and that was done in section 226(1A) of the 1973 Companies Act. The circumstances when it would have been deemed that there was such control by one or more directors or managers ("controlling" director or manager) of a company can be summarised as follows:

(a) When the "controlling" director or manager can appoint or remove the majority of the directors in another company. The power to appoint directors will then be deemed to exist if the directors in the other company can only be appointed as directors of that other company if the "controlling" director's or manager's consent or concurrence is required for such an appointment;
(b) When the "controlling" director or manager holds more than one-half of the equity share capital of that other company or body corporate or, if that other body corporate is a corporation as defined in section 1 of the Close Corporations Act, 1984 (Act 69 of 1984), more than 50 per cent of the interest in such corporation.

It would be surprising if, when the phrase "controlling interest" was included in section 11(1) of the MPRDA (the 1973 Companies Act was then still the governing piece of company law legislation), the Legislator did not have in mind some of these forms of "control". Thus, we agree with Coppin J that "[t]he 'interest' must be one that controls the company (or close corporation)" (par 37). In terms of general company law principles, it is the power of control over the company's two primary organs, namely, the board of directors and the general meeting (shareholders) that would give control over company matters. The simple reality is that if you control the board of directors or you have control over the general meeting, you control the company. We note that Dale *et al* (172 par 118.5) submit that the term "controlling interest" will include "both a direct or indirect controlling interest" and we agree with that. However, it will probably provide particular challenges to determine exactly what such "indirect controlling interests" are and when and how they are disposed of or alienated. For example, if a holding company has two subsidiaries and one subsidiary holds 25% of the shares (each share representing one vote) in a prospecting company and the other subsidiary holds 26% of the shares (each share representing one vote) in such a prospecting company, then the holding company has "indirect" control over the prospecting company – the holding company's two subsidiaries hold more than 50% of the shares and can exercise more than 50% of the voting rights at the prospecting company's general meeting. Does this mean that if the "controlling interest" of the holding company is affected that it "indirectly" affects the "controlling interest" in the prospecting company and that ministerial approval for the shift of the "controlling interest" in the holding company will also be required?

Also, suppose one of the two subsidiaries sell, say, 2% of their shares, then the holding company loses its indirect control over the prospecting company, because it can no longer, indirectly, control the prospecting company through its subsidiaries – the two subsidiaries jointly now only hold 49% of the shares and voting rights in the prospecting company. Will such a disposal of shares in one of the subsidiaries then also trigger the application of section 11(1), requiring ministerial consent? Furthermore, if the holding company no longer controls any one of the two subsidiaries in our example (in other words, one or both of them are no longer considered subsidiaries), will such a change in the group composition trigger the application of section 11(1), requiring ministerial consent? It is submitted that it will indeed be the case in all the examples given above, illustrating how complex matters can get, but there are even more complexities involved here.

Aspects like shareholder agreements, weighted voting rights and agreements between companies and third parties (for instance, an agreement between a prospecting company and a third party that the third party can appoint the majority of the directors of the prospecting company or can remove the majority of the directors of the prospecting company) can all be determining factors of who controls prospecting companies. That means, to cede, transfer, assign, alienate or otherwise

dispose of any such "controlling interest" ("direct or indirect controlling interests") may require the consent of the Minister. This obviously adds to the complexity of this area of law and could lead to considerable uncertainty. We are of the opinion that reliance on principles enshrined in paragraph 2.1.3.2 of the Codes of Good Practice for the Minerals Industry (GN 446 *GG* 32167 2009-04-29 (as suggested by Dale *et al* 171 par 118.6)) or other provisions of the Code will not resolve these uncertainties.

5 4 Distinguishing Between "The Right" and "Controlling Interest" in Section 11(2) of the MPRDA

In our view it is of particular importance to note that section 11(2) of the MPRDA only refers to "the right" and not to the "controlling interest". In fact, it would be an absurdity from a company law point of view if the Minister is required to consider whether the acquirer of the "controlling interest", that is, the new shareholder who holds the "controlling interest", meets the requirements of section 11(2) of the MPRDA. It is, therefore, submitted that the following statement of Coppin J is incorrect: "Thus, the acquirer, or intended acquirer, of such controlling interest in the company would have to be vetted for regulatory purposes" (par 37).

The prospecting right vests in the company (Nuco) and the rights and liabilities are the company's (Nuco). Shareholders are protected against liability by the corporate veil or, to put it differently, can rely on one of the most fundamental concepts of modern company law, namely, the concept of "limited liability of shareholders". That means it is totally irrelevant to consider whether the shareholders, or a new shareholder now holding the "controlling interest", have: (a) the financial resources and the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme; and (b) the ability to comply with the relevant provisions of the Mine Health and Safety Act 29 of 1996. The requirements mentioned in section 17 (see reference to it in section 11(2)(b)) of the MPRDA are also totally irrelevant as far as the shareholder having a "controlling interest" in a company or a close corporation is concerned. It is the company (in this case Nuco) that will have to meet those requirements.

Thus, in our view, the following statement of Coppin J is also incorrect:

> If there is a disposal of the controlling interest and an acquirer thereof, the Minister must consent to the disposal if the acquirer of the interest meets the requirements set out in s 11(2) (par 38).

This statement ignores the distinction in section 11(1) of the MPRDA between "the prospecting right" (or undivided share therein) and the "controlling interest" and who owns the right, that is, the company (Nuco). The statement would have been correct if Nuco, as a company with a separate existence from its shareholders, intended to dispose of the prospecting right. Then the Minister needs to consider the requirements mentioned in section 11(2) of the MPRDA. Coppin J clearly realises the dilemma. He points out that "[r]eference to 'the right' in ss

(2) must include 'the controlling interest' referred to in subsection (1)". He then explains that:

> ... otherwise there will be no apparent purpose, or guideline for the Minister, when dealing, not with the disposal of what is described as a right in ss (1), but with the disposal of the 'controlling interest in a company or close corporation' (par 29).

Coppin J makes no finding in this regard (see last sentence of par 29), but points out that "in dealing with the latter, the enquiry may of necessity be slightly different because the right would vest in the company or close corporation and not in those who control the company or close corporation" (par 29). With respect, as was already mentioned above, the enquiry will not be "slightly different", it will be completely different. None of the requirements mentioned in section 11(2) of the MPRDA, including the reference to section 17 of the MPRDA, is relevant for purposes of who holds the "controlling interest" in a company or close corporation. In fact, whether a person holding a "controlling interest" in a company or close corporation disposes of such "controlling interest" in part or completely and, whether a new person holds such a "controlling interest" after such a disposal, cannot have any bearing on whether or not the company or close corporation will continue to have the capability to comply with the statutory requirements set out in section 11(2) of the MPRDA. The only thing which happens when there is a disposal of a "controlling interest" is that the shareholding or holding of a member's interest will change hands. Thus, we fail to understand the logic behind the following statement of Coppin J (last sentence of par 38):

> A change in control may hold implications for the company's capabilities to comply with its obligations relating to its prospecting, or mining right, (or interest in such a right), and its capacity to sustain compliance with the requirement of s 17 of the MPRDA, in the case where the relevant right is a prospecting right.

There are indeed no specific guidelines or rules to assist the Minister in determining whether to give consent, or to refuse consent, for the disposal of a "controlling interest" in a company or close corporation as required by section 11(1) of the MPRDA and the amendment of section 11. Promulgating regulations to provide rules and guidelines to assist the Minister in this regard is something that the Department of Mineral Resources should consider seriously. We would like to emphasise that we are firmly of the opinion that the approval required under section 11(1) as far as a "controlling interest" is concerned should not be linked to the requirements referred to in section 11(2) – section 11(2) only applies to the Minister's consent under section 11(1) in so far as such consent is required in relation to "[a] prospecting *right* or mining *right* or an interest in any *such right*" (emphasis added). In other words, we disagree with Coppin J's statement that "[r]eference to 'the right' in ss (2) must include 'the controlling interest' referred to in ss (1)" (par 29). We appreciate that it might be of considerable importance that the Minister should have a discretion in consenting or not consenting to the transfer of a "controlling interest" in a company or close corporation holding prospecting or

mining rights and will, in what follows, make a few comments on this aspect.

5 5 Ministerial Discretion to Consent to the Disposal of a "Controlling Interest"

Let us first speculate about instances where there could be no doubt that the written consent of the Minister is required for disposal of a "controlling interest" in the context of the *Mogale* decision. Coppin J is clearly correct if he states that if a majority shareholder disposes of all his shares, the Minister's consent will clearly be required. He is also right that no ministerial consent is required if the majority shareholder maintains the majority shareholding after the disposal (par 38). As examples, if Butler sold all his shares (53%) to Mogale, the approval must be obtained but, if he only sold 1% of his shares to Mogale, no ministerial consent is required. However, it should be understood that if Butler sold 25% of his shares to Uthango, Uthango Ltd would then hold 51% of the shares in Nuco (its existing 26% plus another 25%) and that would have required ministerial consent to the disposal of the "controlling interest". The "controlling interest" would then move away from Butler to Uthango and that should be seen as a disposal falling under section 11(1) of the MPRDA.

The controversial part of the *Mogale* decision is that Coppin J held that by giving up his "controlling interest" without enabling anybody else to acquire the "controlling interest", the ministerial approval under section 11(1) was still required. This is significant as it implies that, in effect, *ministerial approval is required in all cases where*, for instance, a holder of more than 50% of the shares in a company (or member's interest in a close corporation) with prospecting rights sells shares (member's interest in a close corporation) that would reduce the person's shareholding (member's interest in a close corporation) in that company (or close corporation) to below 50%. That will be the case irrespective of the fact that after such disposal nobody would hold a "controlling interest" in that company or close corporation.

In order to illustrate the significance of ministerial discretion when there is a disposal of a "controlling interest", we can use an example related to the case under discussion. Suppose there were good reasons for the Minister originally to vest the prospecting rights in the company (Nuco), because the Minister was of the opinion that the Royal Bafokeng Nation must hold 51% of the shares in Nuco. It is then understandable that if the Royal Bafokeng Nation plans to dispose of the whole or part of that "controlling interest", in line with the spirit of the legislation (see again discussion under 5 1 above), the Minister should have a discretion whether or not to consent to the "controlling interest" shifting away from the Royal Bafokeng Nation. The discretion will then probably be based on the best interests of the Nation, the communities or, in particular, the best interests of the Royal Bafokeng Nation in our example.

It will be clear from this conclusion that we agree with Coppin J's conclusion that ministerial consent is required under circumstances

where the "controlling interest" moves to a different person, as well as in circumstances where the person holding the "controlling interest" no longer holds the "controlling interest", even though nobody else obtains such "controlling interest". That was what happened in the case under discussion: Butler sold off 33% of his 52% shareholding to Mogale (Pty) Ltd, resulting in nobody holding any "controlling interest" any longer, as the shareholding in Nuco would then have looked like this: Butler held 19%, Van Zyl 12%, Uthango (Pty) Ltd 26%; the Royal Bafokeng Nation 10%; and Mogale 33%. This is, of course, based on the assumption that the agreement was valid and the Minister's approval was sought, as well as that the pre-emptive rights provided no obstacle to the validity of the agreement (as was pointed out above, that was not what Coppin J decided).

It is appropriate to make a final important point relating to "controlling interests". As far as shareholding or holding a member's interest is concerned, a very interesting practical consequence follows if nobody holds a "controlling interest" any longer. It means that the shareholders in our example above can dispose of any of their interests without any ministerial approval required, up to a point where somebody else acquires such a "controlling interest" again. If this consequence is correct, then prospecting companies or close corporations would be well-advised not to structure their companies or close corporations when applying for a prospecting right with anybody holding more than 50% of the shares or members' interest. In this way, no ministerial approval will be required for any disposal of shares or members' interests up to the point where one person acquires a "controlling interest" in such companies or close corporations. One wonders whether this was the intention of the Legislature. This provides another reason why it is probably quite important for the Department of Mineral Resources to clarify section 11 by amendment thereof or promulgation of regulations to provide rules and guidelines pertaining to the disposal of "controlling interests".

6 Conclusion

Section 11(1) of the MPRDA prohibits the alienation, transfer or disposal of -

(a) a prospecting right or an undivided share in a prospecting right; or
(b) a controlling interest in a company or close corporation holding such interest.

In situation (a), the alienee or transferee of the prospecting right or undivided share therein must meet the requirements of section 17 of the MPRDA, and be capable of carrying out the duties imposed by the prospecting right and the terms and conditions thereof. We have argued that there are several uncertainties as far as situation (b) is concerned, and we have dealt with them in the context of general and specific company law principles and provisions.

In situation (b), the company or close corporation (as a juristic person) holding a prospecting right must still meet the requirements of section

17, and must still be capable of carrying out the duties imposed by the prospecting right and the terms and conditions thereof, when the "controlling interest" in such company or close corporation moves away from one person or when another person acquires such "controlling interest". A controlling interest "must be one that controls the company" and that can be a direct or indirect "controlling interest". In terms of general company law principles, it is the power of control over the company's two primary organs, namely, the board of directors and the general meeting (shareholders) that would give control over company matters. We have, however, argued that the mentioned requirements do not need to be met by the person who disposes of the "controlling interest" or the person acquiring the "controlling interest". In this regard we criticised statements in the *Mogale* decision in so far as they leave the impression that these requirements also apply to the person who disposes of the "controlling interest" or the person acquiring the "controlling interest".

Even though the outcome for the plaintiff was harsh, the *Mogale* decision is good law as far as it was held that ministerial consent is required if the "controlling interest" in a company or close corporation moves away from one person without anybody else acquiring a "controlling interest". However, as pointed out, there are a few statements in the case that should be treated with circumspection.

The complexities and possible uncertainties regarding the notion of a "controlling interest" make it quite important for the Department of Mineral Resources to clarify section 11 by amendment thereof or promulgation of regulations, in order to provide rules and guidelines pertaining to the disposal of "controlling interests" in prospecting (as well as mining) companies and close corporations.

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MM v MN
2010 (4) SA 286 (GNP)

Requirements for a valid customary marriage. Contracting a further customary marriage in terms of the Recognition of Customary Marriages Act of 1998. Failure to comply with section 7(6) of the Act leads to the invalidity of the ensuing marriage.

1 Introduction

The Recognition of Customary Marriages Act (120 of 1998) (the "RCMA") brought about fundamental changes to the legal position of a customary marriage in South African law. The RCMA ensured that a customary marriage is, for all purposes of South African law, recognised as a valid marriage.

The RCMA further recognises customary marriages which were contracted before it came into operation on 15 November 2000. Such customary marriages are afforded recognition provided that they were in existence and valid at the time when the Act came into operation. Therefore all customary marriages that were invalid at the time when this Act came into operation, remained invalid. There are several examples of these invalid customary marriages. They include, among others, those that did not comply with the various statutory measures that regulated their requirements. Examples of these enactments are the KwaZulu Act on the Code of Zulu Law (16 of 1985), the Transkei Marriage Act (21 of 1978), the various provisions of the repealed Black Administration Act (38 of 1927) which regulated the relationship between civil and customary marriages and the Marriage and Matrimonial Property Law Amendment Act (3 of 1988). Similarly, a customary marriage which was contracted prior to the date of commencement of the RCMA which did not comply with the rules of customary law or contracted contrary to such rules was not rendered valid by this Act. In accordance with these enactments, a spouse of a civil marriage was prohibited from concluding another marriage during the existence of his or her marriage. On the other hand, when a spouse of a customary marriage had contracted a civil marriage with another person during the subsistence of such marriage, this had the effect of dissolving it (Bekker *Seymour's Customary Law in Southern Africa* (1989) 249-253) This remained the position until 2 December 1988 when the Marriage and Matrimonial Property Law Amendment Act (3 of 1988) came into operation. Polygamy was allowed only in respect of customary marriages except in the then Transkei where the Marriage Act (21 of 1978) provided for the exercise of polygamy when the existing civil marriage was out of community of property and of profit and loss (see Koyana *Customary Law in a Changing Society* (1980) 161-180; Van Loggerenberg "The Transkei Marriage Act of 1978: A new blend of family law" 1980 *Obiter*

1; Maithufi "*Thembisile v Thembisile* 2002 2 SA 209 (T)" 2003 *De Jure* 195).

Besides recognising a customary marriage as a valid marriage, the RCMA lays down certain requirements for the validity of customary marriage contracted after 15 November 2000. These are contained in section 3 which provides that:

> (1) for a customary marriage entered into after the commencement of this Act to be valid-
> (a) the prospective spouses-
> (i) must both be above the age of 18 years; and
> (ii) must both consent to be married to each other under customary law; and
> (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

The RCMA further provides (s 2(4) RCMA) that:

> If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages.

It is further expected of a husband who wishes to contract another customary marriage with another woman to "make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages" (s 7(6) RCMA).

It is necessary to keep the legal position outlined above in mind in dealing with the dispute that the court was faced with in *MM v MN* 2010 (4) SA 286 (GNP). This dispute concerned the validity of a customary marriage which was contracted by a husband who was, at the time when the said marriage was contracted, a spouse to another subsisting customary marriage. The husband was supposed to have complied with the requirements of section 7(6) of the RCMA in order to render his second customary marriage valid. The requirements for a section 7(6) application will also be addressed to explain the reasons for declaring this second customary marriage invalid.

2 The Facts

On 1 January 1984, the deceased husband married the applicant by customary rites at Nkovani Village. The deceased passed away on 28 February 2009. On 6 January 2008 before he passed away, he married another woman, the first respondent, according to customary law. The applicant was not aware or was not made aware that her husband, the deceased, had contracted another customary marriage with the first respondent until after his death. The applicant's customary marriage to the deceased was not registered nor was his marriage to the first respondent.

3 Dispute

The second customary marriage with the first respondent was contracted after 15 November 2000, that is, after the coming into operation of the

RCMA. According to the RCMA, a customary marriage contracted after this date is recognised for all purpose if it "complies with the requirements of this Act" (s 2(2) RCMA). The most important requirement (s 7(6) RCMA) is that:

> [a] husband … who wishes to enter into a further customary marriage after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.

The other requirements are that the prospective spouses must be above the age of eighteen years and must have consented to be married to each other by custom. Furthermore, the marriage must be negotiated and entered into or celebrated in accordance with customary law (s 3 RCMA).

The applicant contended that the second marriage with the first respondent was null and void as a result of failure to obtain the section 7(6) order. The first respondent, on the other hand, contended that as "her marriage to the deceased was properly and publicly performed, in accordance with customary law, [this] was sufficient to establish an unassailable second marriage by the deceased" (par 14). As a result of the dispute relating to the validity of this customary marriage, the second respondent (the Minister of Home Affairs) refused to register the applicant's marriage to the deceased.

The RCMA makes provision for the registration of customary marriages contracted before and after its date of coming into operation (s 4 RCMA). A duty is imposed on the spouses of a customary marriage to ensure that their marriage is registered in terms of the RCMA (s 4(1), (2) RCMA). If satisfied that a valid customary marriage was concluded, "the registering officer must record the identity of the spouses, the date of the marriage, any lobolo agreed to and any other particulars prescribed" (s 4(4) RCMA). A registration certificate is issued in the case where the registering officer is satisfied about the existence of a valid marriage (s 4(5)(b) RCMA). A registering officer may refuse to register a customary marriage if not satisfied that a valid customary marriage was entered into by the spouses (s 4(6) RCMA).

The refusal by the registering officer to register a customary marriage does not leave the parties without recourse. They may apply to court to obtain an order for the registration of their customary marriage (s 4(7) RCMA). The certificate of registration constitutes *prima facie* proof of the existence of a customary marriage and of the particulars contained therein (s 4(8) RCMA). The Act, however, provides that "[f]ailure to register a customary marriage does not affect the validity of that marriage" (s 4(9) RCMA).

The customary marriage contracted by the applicant and the deceased was not registered in terms of any law that regulated registration at the time when it was contracted, that is, on 1 January 1984, nor was it subsequently registered in terms of the RCMA after had come into operation. At the time when it was contracted, the registration of customary marriages was regulated in terms of the regulations contained

in Government Notice R1979 of 25 October 1968 which was promulgated in terms of the repealed section 22 *bis* of the Black Administration Act 38 of 1927 (see Bekker 393-404). Even at that time, failure to register a customary marriage did not affect its validity and the certificate of registration was deemed to be *prima facie* proof of its contents in any court of law or in any administrative proceedings in which it was produced.

Realising that her customary marriage was valid although not registered, which is not a requirement for its validity in terms of the RCMA, the applicant requested the court to declare the second marriage of the deceased with the first respondent null and void for failure to comply with section 7 of the RCMA. The second respondent had also refused to register the applicant's marriage as a result of "the competing claims by the applicant and the first respondent" (par 15).

4 Argument by First Respondent

The first respondent argued that her marriage with the deceased was valid as it was contracted or entered into in accordance with customary law. What she in fact argued was that as all the requirements for a valid customary marriage were complied with, her marriage with the deceased was valid (see s 3 RCMA). The court phrased this argument as follows: … the fact her marriage was properly and publicly performed, in accordance with customary law, was sufficient to establish an unassailable second marriage entered into by the deceased" (par 14).

This could have been the position if her marriage was contracted before the coming into operation of the RCMA, that is, 15 November 2000 (s 2(3) RCMA). Customary marriages contracted after this date must comply with all the requirements laid down by the RCMA. Besides the requirements provided for by section 3 of the RCMA, the provisions of section 7(6) also have to be complied with in the case where a husband wishes to enter into a further customary marriage with another woman. This was not the position in this case. In fact this marriage would have been valid if it had been contracted before 15 November 2000. At that time no court order was required where a husband of a customary marriage wished to contract a further customary marriage. The position at that time and since 15 November 2000 may be summarised as follows (Maithufi & Moloi "The need for the protection of rights of parties to invalid marital relationships: A revisit of the 'discarded spouse' debate" 2005 *De Jure* 144):

> Previously the state played no role in authorising spouses of existing customary marriages to contract further marriages. It was therefore very easy for a husband of a customary marriage to marry as many women as he wished provided that he complied with the requirements laid down by customary law. Since the coming into operation of the Recognition of Customary Marriages Act of 1998, a court has to be approached by a husband of a customary marriage to approve a written contact which will regulate the future matrimonial property system of his marriages".

5 Decision

Various opinions have been expressed, even before this case, as to the validity of a further customary marriage contracted in terms of the RCMA (see, *inter alia,* Maithufi & Moloi 2005 *De Jure* 144 145). The legal position of polygamous customary marriages contracted before 15 November 2000 is straightforward. Their validity is regulated by section 2 of the RCMA. If such marriages complied with the provisions of the law as at 15 November 2000, that is, were in existence and valid, they were regarded as valid (s 2(1), (3) RCMA).

A further customary marriage contracted after 15 November 2000 must, however, be preceded by the application envisaged by section 7(6) of the RCMA to be valid. This is evident from the peremptory language employed in this provision, namely, the use of the word "must". In this respect, the court concluded (par 23) that:

> The failure to comply with the mandatory provisions of this subsection cannot but lead to the invalidity of a subsequent customary marriage, even though the Act does not contain an express provision to that effect.

Besides the peremptory provisions of section 7(6) of the RCMA, to hold that a further customary marriage contracted contrary to these provisions is valid would be against the rights or interests of the spouses and others who may have a "sufficient interest in the matter" (see s 7(7)(b)(iii) RCMA).

6 Section 7(6) Application

Although no application was lodged by the deceased husband when he purported to contract a further customary marriage with the first respondent, it is necessary to note the requirements for the application to be launched in terms of section 7(6) of the RCMA to render the intended customary marriage valid. This will explain the reasons that persuaded the court to declare the customary marriage with the first respondent invalid.

According to the RCMA, a husband of a customary marriage who wishes to contract a further customary marriage with another woman has to apply to court for an order which will regulate the future matrimonial property system of his marriages (s 7(6) RCMA). The RCMA does not expressly provide the consent of the existing spouse to the customary marriage as a requirement for the validity of the intended customary marriage or in determining whether or not to approve the proposed written contract.

The application to approve a written contract aimed at regulating the future matrimonial property system of the intended polygamous marriages is to be lodged by the husband. The order sought has to, among others, include:

(a) the approval of the proposed written contract to govern the future matrimonial property system of the marriages, which has to be made an annexure to the application;

(b) that the court may allow amendments to the proposed written contract; and
(c) that the court may grant the order subject to any condition it may deem just.

It is of importance that the applicant ensures that "all persons having a sufficient interest in the matter" are joined in the proceedings (s 7(8) RCMA). The most important persons to be joined in these proceedings are the applicant's existing spouse or spouses and his prospective spouse. This indicates that this application must be accompanied by at least three affidavits, that is, of the applicant husband, his current wife or wives as well as that of his prospective spouse.

It is also important to note the averments that the affidavits mentioned above must contain. The affidavit of the husband applicant must state:

(a) his full personal particulars;
(b) the full personal particulars of his existing spouse or spouses;
(c) the full personal particulars of his prospective spouse;
(d) the full particulars relating to his current customary marriage or marriages, that is, the date and place where it or each was contracted, the proprietary consequences of such marriage or marriages, the number of children born of the marriage or marriages; and
(e) the terms of the proposed written contract.

The existing wife (or wives) of the applicant also has (have) to depose to an affidavit (affidavits) stating the following:

(a) her full personal particulars;
(b) that she is also an applicant;
(c) confirming the existence of a valid customary marriage with the applicant husband; and
(d) confirming that she is or was made aware of the contents of the proposed written contract relating to the future matrimonial property system.

If there is more than one existing wife, all of them must depose to affidavits stating what is mentioned above.

The applicant, his current wife or wives and prospective wife may not be the only persons who have a sufficient interest in this application. Other persons may also have such interest, for example, the applicants' creditors. The husband's in-laws, current and prospective, may also be interested parties. It is therefore advisable that all persons who may have a sufficient interest in the matter be joined in these proceedings to afford them an opportunity to object, if they so wish, to the terms of the proposed written contract in the case where their interests may be adversely affected or would not be sufficiently protected.

After considering the application brought in terms of section 7(6) of the RCMA, the court must make an order:

(a) terminating the matrimonial property system applicable to a marriage in community of property or subject to the accrual system; or
(b) regarding the division of property in respect of a marriage in community of property or subject to the accrual system, or

(c) relating to the distribution of property in the case of a marriage out of community of property and of profit and loss without any accrual sharing (s 7(7)(a)(i), (ii) RCMA); and
(d) requiring the registrar or clerk of the court to furnish each spouse with the order of the court including a certified copy of the contract and to cause such order and certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated (s 7(9) RCMA); and
(e) relating to the registration of the marriage, if this was prayed for.

In its determination of the distribution of the property of the marriage, the court has to "take into account all the relevant circumstances of the family groups which would be affected if the application is granted" (s 7(7)(a)(iii) RCMA).

The applicant (husband) therefore has to specifically pray for the order relating to the termination of the property system applicable to his existing marriage. The existing marriage would normally be in community of property, whether entered into before or after the coming into operation of the RCMA (s 7(1), (2) RCMA; *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC)). This will be the position in respect of a customary marriage contracted after the commencement of the Act where such consequences were not specifically excluded by means of an antenuptial contract (s 7(2) RCMA). The spouses of a customary marriage contracted before the commencement of this Act may also have jointly applied for leave to change the property system applicable to their marriage. The main purpose of terminating the previous matrimonial property system is to ensure that the proprietary rights of the spouses of such marriages and their children, if any, are protected. The order regarding the termination of the matrimonial property system has to be accompanied by an order relating to the division of property or the distribution of such property. If a further customary marriage were to be regarded as valid despite failure to comply with the provisions of section 7(6) of the RCMA the effect would be that (par 33):

> … the additional wife might, as a result of a favourable marriage contract with the husband, receive considerable financial and other benefits to the detriment, possibly even to the total impoverishment, of the first spouse and her children. This would surely fly in the face of the legislature's intention.

And (par 35):

> [t]he intending spouse of a further marriage is obviously at risk if her marriage is not sanctioned by entering into the required contract, as she will find herself not to have been married at all or if her husband passes away or becomes embroiled in a divorce.

If the court is satisfied that the interests of all those affected would be sufficiently protected, including the relevant circumstances of the family groups involved, the order mentioned above would be granted and the proposed written contract would also be approved. The husband will therefore be in a position to legally marry another woman by customary rites. This marriage will be valid in accordance with the RCMA.

Furthermore, when considering the application lodged in terms of section 7(6) of the RCMA, the court may allow further amendments to the terms of the proposed contract or grant such order subject to any condition it may deem just (s 7(7)(b)(i), (ii) RCMA). The court may also "refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract" (s 7(7)(b)(iii) RCMA). Where the application is refused, the husband cannot contract a further valid customary marriage. A further customary marriage contracted without compliance with these provisions is null and void *ab initio*.

7 Conclusion

The judgment in *MM v MN* is a wake-up call to all husbands married by customary rites who wish to contract more than one marriage. It also serves as an eye-opener to all would-be second, third, etcetera, prospective wives. Such prospective wives should ensure that they are aware or made aware of the marital status of their prospective husbands. The prospective husbands should also be aware that although they may have the capacity to contract further customary marriages, their capacity is limited. Something more than the normal requirements for the validity of a customary marriage has to be complied with, namely, the lodging of an application and granting of the order in terms of section 7(6) of the RCMA. Without this, the resultant customary marriage is null and void irrespective of the fact that the parties thereto might have lived together as "husband and wife" for a number of years.

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Longfellow v BOE Trust Ltd NO (13591/2008) [2010] ZAWCHC 117 *Mabika v Mabika* [2011] ZAGPJHC 109 *Taylor v Taylor* [2011] ZAECPEHC 48

Requirements in terms of section 2(3) of the Wills Act 7 of 1953: Some comments on judgments in recent case law

1 Introduction

Every year, section 2(3) of the Wills Act produces its eagerly anticipated share of applications for condonation of non-compliance with the formalities for a valid will. Section 2(3) reads as follows:

> If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act No 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).

For the court to condone a will that is formally defective, three requirements must be satisfied: (a) There must be a document; (b) that has been drafted or executed by a person who has died since the drafting or execution thereof; (c) with the intention that the document must be that person's will. Despite valuable guidelines presented by the Supreme Court of Appeal (*Bekker v Naude* 2003 5 SA 173 (SCA); *Van Wetten v Bosch* 2004 1 SA 348 (SCA); *De Reszke v Maras* 2006 2 SA 277 (SCA); *Smith v Parsons* [2010] 4 All SA 74 (SCA); *Van der Merwe v Meester van die Hooggeregshof* [2010] ZASCA 99), recent case law indicates that there is uncertainty in the application of section 2(3), especially with regard to the "intention" requirement. In three recent cases, the courts addressed the question whether (three) different kinds of documents were intended by the respective deceased to be their last wills. The case of *Longfellow,* involved a so-called "CNA precedent" (completed by someone other than the deceased); *Mabika,* pertained to an "Application (form)" for the drafting of a will, while *Taylor,* dealt with a document referred to as a "wish list". This contribution discusses these and other aspects pertaining to section 2(3).

2 *Longfellow v BOE Trust Ltd*

2 1 Facts

The applicant (second husband) married the deceased (wife) in 1995. No children were born from the marriage. However, prior to her marriage to the applicant, the deceased was married to the second respondent (first husband). They had two children (parr 1-5). In 1989, while married to her first husband, the deceased executed a will in which she left her entire estate to him. The deceased was diagnosed with brain cancer in April 2007. She underwent surgery, during which surgeons removed most of the tumour, but in August 2007, the deceased suffered a stroke and was again diagnosed with cancer of the brain. The testatrix was discharged and sent home, since there was nothing that could be done for her. The applicant realised she was dying and set in motion the circumstances that led to the drafting of the CNA precedent. He started to enquire what to do to have a will drawn up. Attempts to get help from Standard Bank failed. In his affidavit the applicant stated (par 10):

> I then decided to buy a will from CNA. The same day I bought one. I said to the Testator that I had a will. At the time, it was blank. I said that I was going to fill it in to reflect that I would inherit the state, that I would be the executor, that the Old Mutual policy would be shared equally by the Third and Fourth Respondents and that she would revoke all previous wills. The Testator agreed to this. The testator could not write ... She stated that I should read it [the will] to her. I did so and she confirmed it was fine ...

The applicant had arranged for employees of Standard Bank to witness the draft document. On 7 September 2007, two employees of Standard Bank arrived at the couple's home in order to witness the draft document as arranged with the applicant. These employees informed the applicant that he would not be able to inherit in terms of a will that he had drafted and left without formalising the draft document. The deceased died on 21 September 2007 without signing the draft document. The applicant discovered the 1989 will, referred to above, amongst the deceased's belongings. As mentioned, the second respondent was the sole heir in terms of the 1989 will (parr 6-9).

Two persons, namely the deceased's nurse (Wilks) and the deceased's colleague (Nel), were present when the applicant completed the draft document. Their version(s) of the conversation(s) between applicant and respondent differ slightly from each other and that of the applicant (For a discussion of these differences see parr 11-18). Furthermore, the applicant mentioned that it was the deceased's wish for him to give a 25% share to each of her children, should the house be sold upon the death of applicant (par 19). This was not reflected in the draft document. The deceased also requested the applicant to look after her daughter (the 3rd respondent). He refused outright, because of severe tension and an apparent bad relationship between them. He was also only willing to look after her grandson, provided he was not accompanied by his mother. The applicant sought an order in terms of section 2(3), as well as section 4A(1), of the Wills Act (that he be declared competent to receive benefits despite the fact that he drafted the document).

2 2 Judgment

The court was not, on a balance of probabilities, satisfied that the deceased intended the document to be her last will. This was so in view of the circumstances that led the applicant to start his enquiries, in order to ascertain how he could have the deceased's will drawn up. He never stated that the deceased requested him to make any enquiry (par 24). Due to his poor relationship with third respondent (deceased's daughter), the court could not accept that the deceased would expect the applicant, after he had inherited her half share of immovable property, to leave a 25% share thereof to the third respondent. The court concluded as follows (parr 28-29):

> The draft document reflects, in my view, the applicant's will and not the deceased's. He says as much in his founding papers.
>
> '*I* then realised that the Testator was dying, … *I* started to enquire … *I* … decided to buy a will from CNA… *I* said *I* was going to fill it in to reflect that *I* would inherit the estate, …' (Own emphasis)

2 3 Discussion

2 3 1 "Drafted or executed by a person who has died since the drafting or execution thereof" (Second Requirement in Terms of Section 2(3))

The second requirement in section 2(3), besides there having to be a "document", is that the document should have been "drafted or executed by a person who has died since the drafting or execution thereof". Strangely enough, nothing is said in the judgment by the court about this requirement and whether it was met. The court only addressed the third requirement, namely, the intention for the document to be a will. In casu, the document was not drafted by the deceased. The CNA precedent of a will was filled in and completed by the applicant. In *Bekker v Naude* 2003 5 SA 173 (SCA), the Supreme Court of Appeal drew a distinction between a document that the testator "drafted" himself and one that he "had caused to be drafted" by someone else (in view of s 2A Wills Act). According to the court, there must have been a "personal" relationship between the testator (deceased) and the document, in the sense that he/she had drafted it personally (par 20). This interpretation, according to the court (par 16) provides and guarantees a degree of reliability, because it requires personal conduct by the deceased. It also reduces the chances of fraud and false statements, which the testator could not contest after his death. It was, however, *obiter* found that if a person *dictates* a document, it is as good as if a person has drafted the document personally (par 8). In *Longfellow*, the deceased did not personally write, type or dictate the content herself. The applicant completed the blank spaces. He told her he was going to fill it in to reflect that he would inherit the estate, that he would be the executor, that an Old Mutual Policy would be shared by the daughters and that she (testatrix) would revoke all previous wills. The document was read back to her and she agreed to its contents. This action can not be construed in a way to indicate that the deceased dictated her will to the drafter. The case could have been decided on this point alone, without debating the third "intention" requirement. Furthermore, reconciling oneself with a document and approving of its content, is not sufficient to comply with the requirement of "personal drafting" (*Bekker v Naude* 2003 5 SA 173 (SCA); contra earlier *Back v The Master* [1996] 2 ALL SA 161 (C)).

2 3 2 "Intended to be his/her will": Interaction Between the Intention to Make a Will (section 2(3)) , Mental Capacity to Make a Will (s 4) and Free Testamentary Expression

As mentioned above, the third requirement should have been addressed only once the first two requirements had been met. Let's, however, assume for a moment that personal drafting was not required by the courts. Courts (see *Harlow v Becker* 1998 4 SA 639 (D)) and authors (see Jamneck "Artikel 2(3) van die Wet op Testamente: 'n Praktiese probleem by litigasie 2008 *PER* 90) have indicated the importance of differentiating between the intention to make a will, to which section 2(3) refers (*Harlow* 645J) and the mental capacity to make a will in terms of section 4.

Section 2(3) requires that the person who has executed or drafted the document, must have intended it to be his/her will. However, in terms of both common law and the Wills Act, the mental capacity to make a valid will embraces more than a mere intention on the part of the testator for the document to be a will (*Harlow* 643F-G, 644A-C, 647B-C).

The onus rests on the party who seeks an order in terms of section 2(3), to satisfy the court that the person who drafted or executed the document intended it to be his will (*Harlow* 647C-D). On discharge of that duty, the party who contests the validity of a will, on the ground of the person who made it not having the requisite testamentary capacity, then bears the onus of proving the absence of such testamentary capacity. The same situation (sequence) applies, if it is alleged that the testator lacked the necessary free testamentary expression required (*Jamneck* 2008 *PER* 90). Any impairment of the testators' freedom of expression at the time of making a will may (also) result in the will being invalid. (In *Thirion v Die Meester* 2001 4 SA 1078 (T) the court had to devote attention to the interaction between an application in terms of section 2(3) and an application of the annulment of the will on the ground of undue influence.)

In *Longfellow,* one finds the interesting outcome that the court decided that the document reflected the applicant's (husband's) will and not that of the deceased and that she therefore did not intend it to be her will. Such a statement is normally associated with "undue influence", resulting in the impairment of the free testamentary expression of the testator. In the well-known case of *Spies v Smith* 1957 (1) SA 539 (A), undue influence (in testamentary context) was defined as:

> … it thus appears that a last will may in fact be declared invalid if the testator has been moved by artifices of such a nature that they may be equated by reason of their effect to the exercise of coercion or fraud to make a bequest which he would not otherwise have made and which therefore expresses another person's will rather than his own, in such a case one is not dealing with the authentic wishes of the testator but with a displacement of volition ["wilsonderskuiwing"] and the will is thus not upheld.

With regard to *Longfellow* under discussion, one must guard against the possible impression that "undue influence", or a "displacement of intention", can form the basis for a finding that the intention requirement in section 2(3) was not met. The court could have decided that it was not satisfied, on a balance of probabilities, that she intended the document to be her will, due to the fact that the applicant refused to take care of the 3rd respondent and her son. Under those circumstances she would perhaps have changed her mind and left her share to her children. By doing that she would have ensured that the children were taken care of. In addition, she only passed away two weeks later. If she was adamant that the document should be her will, she could have obtained legal advice on how to have the document signed on her behalf. She had an earlier will (1989) and certainly realised that certain requirements needed to be complied with, including her signing the document. She never again discussed the "unsatisfactory position" that

she would probably die without a will, with either her husband, nurse, colleague or children. She probably realised that her first will of 1989 would be her last will and testament and that her first husband, who was the sole beneficiary, would see to it that her daughter and grandson were taken care of.

The difficulties that faced the court in *Longfellow* in deciding on the intention requirement (even though it was not even necessary) (ironically) illustrate precisely why the Supreme Court of Appeal in *Bekker,* stated that the requirement of "personal drafting" reduces the chances of fraud, false statements, the possibility that the document does not reflect the intention of the testator, or, for that matter, undue influence. This, to a large extent, indicates that, despite criticism, the Court in *Bekker*, was correct in insisting on personal drafting as a requirement for an order in terms of section 2(3).

2 3 3 "Undue influence"

The court, *ex abundanti cautela*, stated (par 29): "*Even if I am wrong*, in the circumstances of this matter, the applicant *unduly influenced* the deceased" (own emphasis).

The court, however, did not even refer to *Spies,* neither for the definition of undue influence, nor for the factors the courts generally consider in determining whether there was undue influence or not. For its statement above, the court gave the following reasons (par 29):

> (1) Wilks had administered morphine to the deceased because she was in so much pain; (2) the deceased knew she was terminally ill; (3) the applicant had already refused the request to look after the third respondent/grandson; and (4) the applicant indicated to the deceased that he 'was going to fill it in to reflect that [he] would inherit the estate'.

It is debatable whether these factors constitute a finding of undue influence. The couple were (seemingly) happily married for twelve years. The deceased acknowledged that the applicant had put "so much into their house". There were two witnesses present. Two weeks lapsed between the completion of the CNA precedent and the death of the deceased. The applicant did not insist on her signing the CNA precedent. He refused at the outset to take care of her daughter. He didn't make inheriting her share a precondition for taking care of the third respondent or her child. She (deceased) had ample opportunity to change her mind and to discuss it with the nurse/colleague, which she did not do. The mere fact that there was a special relationship (husband/wife) is not sufficient indication of undue influence. The applicant called in independent help in the form of Standard Bank. Only when they did not respond, did he buy a CNA precedent. To now suggest "undue influence" on the applicant's part, seems somewhat harsh, unfair (towards a seemingly loving husband) and inconsistent with what is normally regarded as constituting undue influence.

3 *Mabika v Mabika*

3 1 Facts

In *Mabika,* the applicants, *inter alia,* sought an order for certain documents *executed (s*ee discussion below) by the deceased to be declared her will for purposes of the Administration of Estates Act 66 of 1965. Secondly, they sought an order for the first respondent to forfeit his share of the house (the deceased and first respondent were married in community of property). For purposes of this discussion, one needs to provide a detailed exposition of the surrounding circumstances (background) and other facts in order to understand and analyse the judgment. (The court, inter alia, stated in par 15: "Under these circumstances it will be greatly unjust not to accept Annexure 'SM2' as the deceased's final will").

The deceased and the first respondent (the respondent) married in community of property on 15 October 1997. At the time, the first and the second applicants had already been born. The respondent is not their biological father, although he adopted them as his children, and allowed them to use his surname (par 1). During 1998, the deceased, through her employer, Metrorail, purchased immovable property over which a mortgage bond was registered in favour of ABSA Bank. The immovable property was registered in the names of the deceased and the respondent by virtue of their marriage in community of property. The deceased was liable for the monthly bond repayments which were deducted from her salary (par 2). The respondent was unemployed from 2006, which apparently led to the breakdown of his marriage relationship with the deceased. The respondent left the common home, pursuant to an assault perpetrated on the deceased and never returned. During December 2006, the deceased obtained an interim protection order in terms of section 5(2) of the Domestic Violence Act 116 of 1998 against the respondent. The respondent was interdicted from assaulting the deceased. The deceased was intent on dissolving the marriage, but was threatened with death by the respondent (par 3). During 2007, the deceased was hospitalised (for approximately one year), as a result of continuous assaults on her by the first respondent. She suffered from a brain tumour and bipolar depression. After the nursing staff had summoned the respondent and told him of the deceased's condition, he enquired from the hospital staff whether the deceased was not dead yet (par 4). The deceased was again hospitalised during November 2010. At all times of her hospitalisation, the respondent showed no interest in her health and well-being or that of the applicants. He did not visit the deceased in hospital and instead wished for her demise (par 5). He violated a maintenance order obtained by the deceased against him for her family and he stayed elsewhere with various girlfriends. In December 2010, he telephoned his son, the third applicant, and informed him that he had a new lover, to whom he was getting married. This was at a time when the deceased was terminally ill. The deceased, after the admission to hospital on 16 December 2010, remained hospitalised until her death on 24 January 2011.

Prior to her death, during September 2010, whilst not in hospital, the deceased approached her bankers, First National Bank (FNB), where she "executed" Annexure "SM2", an instruction to draft her will. The document, on an FNB logo, consists of some five pages. It is entitled, "Application for the Drafting of a Will". The deceased supplied all her personal details, financial position and marital status. Under the heading "Children" the deceased inserted the names of all four applicants. Under the column "Special Needs", the deceased wrote, "Miss Sindisiwe Mabika ID Number 850918 0837 08 2 will be the children's guardian if I pass away". Again under the heading, "Guardians", the deceased inserted the name of Miss Sindisiwe Mabika and her identity number. The deceased proceeded to appoint FNB Trust Services as trustees. On page 4 of Annexure "SM2", and under the heading "Terms and Conditions", the following printed words appear:

> First National Bank Trust Services and Firstrand Bank Holding Ltd (the 'Company') will endeavour to prepare the 'Last Will and Testament' compatible with the client's instructions as indicated on this application form.

Paragraph 1 under the "Terms and Conditions", stated that the application was completed, based on information provided by the client. Paragraph 5 thereof provided that: "The Will is only valid once the completed document has been signed in terms of s (2)(a)(i) of the Wills Act of 1953, as amended." The deceased inserted her full names and identity number and also signed the "Terms and Conditions" on page 4. On the last page, page 5, the deceased completed and signed a debit order in favour of FNB, in respect of the fee payable for the drafting of the will. The debit order, the amount, the bank and branch, the account holder and the date (1/9/2010), were completed by the deceased in her own handwriting. On a document entitled "Client Information", Annexure "SM4", the deceased completed the information therein required. At the end of the document, and in the handwriting of the deceased, appears the following note:

> If I pass away my child Miss Sindisiwe Mabika will arrange for my burial, I want the children to own the property and not to be sold as a family property. The other policies and investments to be shared equally 24 percent each.

The deceased was interviewed by FNB Financial Planner, Mr Mkatshwa, who attached his confirmatory affidavits to the founding papers. He confirmed that at the time of the interview, the deceased fully comprehended the nature and effect of her actions, was capable of understanding the nature and extent of her properties and liabilities, and was capable of forming the requisite intention of bequeathing each of the shares granted to the individual beneficiaries. After the interview, the arrangement with Mkatshwa was that the deceased would return to the bank to sign the will. However, in the meantime the deceased became sick, underwent chemotherapy, and was hospitalised (par 11). She apparently died before any draft "will" was drawn up by FNB in accordance with the instructions.

The legal question the court had to answer, was whether it was satisfied that Annexure "SM2" (strangely enough nothing is said about Annexure "SM4") executed by the deceased was intended to be her will (par 14). The court, *inter alia,* referred to the cases of *Ex parte Maurice* 1995 (2) SA 713 (C) and *Van Wetten v Bosch* 2004 (1) SA 348 (SCA). Both dealt with "instructions to draft a will", but under different surrounding circumstances. The court, especially, referred to *Van Wetten* (par 16) where the court (in *Van Wetten*) concluded as follows:

> In my view, however, the real question to be addressed at this stage is not what the document means, but whether the deceased intended it to be his will at all. That enquiry of necessity entails an examination of the document itself and also of the document in the context of the surrounding circumstances.

3 2 Judgment

The court (*in casu*) decided as follows (par 15):

(a) The deceased clearly intended the document to be her final will, but did not survive to sign it. This is so despite the fact that the document is styled 'Application for the Drafting of a Will'. It contained full personal details, which the deceased intended to appear in her will.

(b) The deceased and the respondent, due to his cruelty towards her, were estranged. They were on the verge of a divorce, but for her illness and eventual death. They had not lived together since 2006. The deceased clearly intended to disinherit the irresponsible and unemployed respondent from her estate. She took him to the maintenance court in order to compel him to comply with his fatherly responsibilities. She even obtained an interim protection order to put an end to the persistent assaults on her. She was also very afraid of the respondent. That is why she never ventured to mention the word 'divorce' to him. Under these circumstances, it will be greatly unjust not to accept Annexure 'SM2' as the deceased's final will, and the first respondent will unfairly benefit from her estate when it is clear that such was not her intention (par 15).

(c) The decision that the respondent should forfeit his share of the immovable property, although drastic in nature, was justified in the circumstances of this matter.

3 3 Discussion

3 3 1 "Intended to be his will"

One immediately wonders why the bank did not prepare a draft will in the period 1 September 2010, to the date of death on 24 January 2011 and arrange for formal execution by the deceased. There is also no indication whether the deceased made any enquiries in this regard during this period. The cases of *Maurice* and *Van Wetten,* involved letters by the testators containing instructions with regard to the devolution of their estates. In *Maurice,* the court found that the testator must have intended the (specific) disputed document itself to be his will. The court can thus not condone a document "which simply expressed the testator's wishes, for the distribution of his estate" as a will (par 15). (See also *Letsekga v The Master* 1995 4 SA 731 (W); *Anderson and Wagner v The*

Master 1996 3 SA 779 (C); *Smith v Parsons* [2010] ZASCA 39). In *Van Wetten,* the court accepted this principle laid down in *Maurice,* but found that the disputed document (also a letter) was indeed intended to be the testator's final will, based on the facts and surrounding circumstances (parr 16, 19). The mere fact that the document was in the form of a letter, did not mean that it could not be a will.

However, in the case of *Mabika*, the court, had to decide for the first time whether an "Application For the Drafting of a Will", (in accordance with which FNB would have prepared a "Last Will and Testament" compatible with the client's instructions) was intended to be a will (p 14 of Annexure "SM2"). Can this document, "SM2", be said to have been intended by the testator as her *final will*, or did she only intend it to be the *instructions* for drafting a final will? What is to be made of the earlier statement in *Ramlal v Ramdhani's Estate* 2002 (2) SA 643 (N), to the effect that testators are notoriously fickle and that the possibility always exists that their wishes may change in the interval between the giving of instructions and the final approval of what has been drafted? (646D-647F). Does the fact that it can be said to be "greatly unjust" – if Annexure "SM2" was not condoned – have any role to play? The question in terms of section 2(3) to be answered though, was whether the "instructions" were intended to be her *final will*.

In the ongoing debate whether "constitutional values enshrined in the Constitution and notions such as "fairness, justice and reasonableness" (imported in the notion of "public policy"), can be applied to contract law and possible other spheres of private law, the Supreme Court of Appeal recently in *Potgieter v Potgieter* [2011] ZASCA 181, confirmed the view of the court in *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA). Although abstract values such as reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relations (see also *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Barkhuizen v Napier* 2007 5 SA 323 (CC)). In *Potgieter* the court also emphatically stated (par 34): "It follows, in my view, that the supposed principle of contract law perceived by the court a quo *cannot be extended to other parts of the [private] law*" (own emphasis).

The court in *Potgieter* (par 34) submitted that the reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as "reasonable" and "fair", is essentially that it will give rise to intolerable legal uncertainty. Reasonable people, including judges, may often differ on what is "equitable" and "fair". The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge. The criterion will thus no longer be the law, but the judge (*Preller v Jordaan* 1956 1 SA 483 (A) 500). Furthermore, with reference to Harms DP, in *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 486 (SCA), the court in *Potgieter*, agreed that a constitutional principle that tends to be overlooked, when generalised resort to constitutional values is made, is the principle of legality. Making rules of law discretionary, or subject to value judgments, may be

destructive of the rule of law (par 36). Based on the discussion above, it is doubtful whether the court in *Mabika* could, based on the circumstances, find it to be "greatly unjust" not to accept the document as her last will, as well as the fact that her husband will now "unfairly" benefit, when it is clear that such was not her intention. It is not clear from the judgment where these notions come from. In *Maurice* the court emphasised that the court will not condone a document which simply expressed the testator's wishes for the distribution of his estate (716J). This is, unfortunately, not dealt with by the court in *Mabika*.

3 3 2 "Document drafted or executed by a person who has since died": Difference Between "drafted" and "executed"

Another question that can be asked was whether Annexure "SM2" was indeed "executed" by the testatrix as was indicated by the court (par 14). With reference to *Van der Merwe v Master of the High Court* [2011] All SA 298 (SCA) par 16, the court remarked that the lack of a signature has never been held to be a complete bar to a document being declared to be a will in terms of s 2(3) (par 13). Under such circumstances, however, one would then be working with a document "drafted" by a person who has since died. It seems the court, *in casu,* regarded the document as a (partially) executed document, because it was completed in her own handwriting (par 13). A ("partial") execution in terms of s 2(3) (for the purposes of distinguishing it from "drafting"), should mean that the process of compliance with the formal requirements in section 2(1)(a) has been embarked upon. Should the document *in casu* not have been described as a document "drafted" by the testatrix, rather than one "executed" by her? (De Waal & Schoeman-Malan *Law of Succession* (2008) 73).

3 3 3 Forfeiture of Respondent's Share

With regard to the issue of the forfeiture of the respondent's share, the court only said that "although drastic in nature, [it] will be justified in the circumstances of this matter." No authority, however, is provided for this statement (par 15). In *Leeb v Leeb* [1991] 2 All SA 88 (N), it was decided that the court could declare the murderer's benefit from the joint estate forfeit on the basis of considerations of public policy. Since the respondent *in casu* was not the "murderer" of the deceased, the forfeiture order by the court can be seen as a new development, which will undoubtedly form the subject of further interesting academic debate. (This case note is, however, more concerned with the intention requirement in s 2(3) and will not pursue this aspect any further).

4 *Taylor v Taylor*

4 1 Facts

In *Taylor*, the applicants applied for a certain document referred to as a "wish list", to be accepted as an amendment to a last will and testament. The key question in this application was whether or not the deceased, when he drafted the "wish list", intended it to be an amendment of his existing will as contemplated by s 2(3) of the Wills Act. In determining

whether or not the deceased had such intent at the time he drafted this document, the court, with reference to *Van Wetten v Bosch* 2004 (1) SA 348 (SCA) parr 15-16, indicated that the court is not bound to apply the established principles of documentary interpretation, but to examine the content of the document itself and the document in the context of the surrounding circumstances which prevailed when it was executed (par 6).

The deceased died on 24 October 2006. Approximately one year before his death, he became aware that he was suffering from terminal lung cancer and this knowledge spurred him to undertake certain estate planning exercises. Seven months prior to his death, on 23 March 2006, he executed a last will in terms of which he bequeathed his fixed properties to his children (applicants), and his personal effects and residue to the first respondent (wife). On 6 September 2006, the deceased drafted a so-called "wish list", with regard to the distribution of some of the movable assets and the use of the fixed property after his death. It was signed by him and dated.

4 2 Judgment

The court concluded that, when analysing the document itself, the relevant surrounding and background circumstances of which the court was aware should be taken into account (par 12). While some of the pertinent facts are mentioned here, this brief discussion does not lend itself to a detailed discussion of all the facts. The facts, background and surrounding circumstances were decisive to the final outcome, with regard to the deceased's "intention". The following facts were emphasised (par 12): The deceased knew he had cancer one year before his death; he went on to regulate his affairs as best he could and he conducted an estate planning exercise; he executed a will; and on 6 September 2006 he executed the "wish list" at a time he was contemplating his death. With these facts in mind, the court examined the language of the document itself (par 13). The two bold headings referred to "my wishes" regarding, in the first instance, the fixed property and, in the second instance, his personal effects and the residue of his estate. Throughout the document are statements such as "it is my wish"; "the two flats can be rented"; "It is suggested that". When dealing with the cash, shares or overseas investment, the deceased changed the language slightly by stating that these items "should be divided among my three children." However, this sentence (also) came under the general heading "My wishes regarding my personal effects and the residue of my estate"; and in the court's view was therefore to be governed thereby. Shortly thereafter the deceased stated "in the distribution of all of the above please be as fair and equitable as possible and ensure that my wife and children are all aware and involved in the process." The court, in view of this, stated as follows (par 15):

> *... the language employed by the deceased in this document does not demonstrate an intention on the part of the deceased to amend his last will and testament.* On the contrary, what it would appear to indicate is that the deceased intended that his last will and testament should stand but that it

> was his desire, notwithstanding the bequests made therein, that his family should stand together when it came to the administration of the estate and the distribution of the assets and that they should be distributed equitably amongst all the parties involved. In this regard, it seems to me, he had faith in both his children (first to third applicants) and his wife, (first respondent) to, notwithstanding the bequests made in his will, distribute his personal effects and the residue of his estate fairly and equitably and in accordance with his wishes as expressed in the wish list which was executed subsequent to his will. In addition, the words quoted above "in the distribution of all of the above please be as fair and equitable as possible and ensure that my wife and children are all aware and involved in the process.", by no means evince an intention on the part of the deceased to amend the will and tend rather to support the view that he trusted his family with the task of distribution (own emphasis).

The following circumstances and facts were highlighted by the court (parr 19-21): The deceased realised he had to regulate his affairs; he knew formalities were required for a will to be valid, he intended for the parties to work together; although his death was imminent he still had sufficient time to have the document formally executed. The case differs from *Smith v Parsons* 2010 (4) SA 378 (SCA) and *Van Wetten,* where the respective deceased either committed, or contemplated suicide. These were compelling factors in favour of them intending it to be a will or an amendment (par 20). The application was, accordingly, dismissed.

4 3 Discussion

An interesting aspect is that both the applicants (children), as well as respondent (wife), could potentially have benefitted, and on the other hand, have lost full claim to some of the assets, through the granting of the section 2(3) order. According to the "wish list", it was the deceased's wish that although the house was bequeathed to the children, the wife should have been allowed to continue living in the house (this was not mentioned in the will). However, if the application was granted, she would have lost her full claim to the personal effects (as was stated in the will). An aspect the court, in my opinion, failed to address, was the sentence: "My personal effects and the residue of my estate have been bequeathed to my wife *for the sake of simplicity"* (own emphasis). What did the deceased mean/intend with this phase? Can it not be argued that he indeed intended the "wish list" to be read as "supplement" to the will? In other words, he didn't want to deal with the exact detail of how he wanted each and every single movable asset to be distributed in his will (but rather through a "wish list")? Such an argument does not seem to be valid. If he wanted the list to be read with the will, he would have referred to the list in his will. It was, furthermore, only prepared some six months after the will. The format, structure, content and unambiguous wording of the document is also indicative of his intention. In *Taylor,* the deceased did not indicate that he wanted the document to be seen as an amendment, supplement or replacement of his existing will. This also supports the court's argument (par 15).

5 Conclusion

The intention requirement in section 2(3) has occasioned a number of conflicting judgments to date. There seems to be no agreement on precisely where the emphasis should be placed with regard to the testator's intention. In *Ex parte Maurice* 1995 2 SA 713 (C)), the court found, for example, that the disputed document itself must have been intended by the testator to be his will. The court can thus not condone a document "which simply expressed the testator's wishes for the distribution of his estate" as a will. A similar approach was followed in *Anderson and Wagner NNO v The Master* 1996 3 SA 779 (C) (see also *Letsekga v The Master* 1995 4 SA 731 (W)). In *Smith v Parsons* and *Van Wetten v Bosch,* the court found that the respective deceased had the intention of committing suicide, or contemplating suicide, when they drafted the respective documents concerned. This was a compelling factor in favour of them intending such documents to be, in the one instance, a final will, and in the other, an amendment of an earlier will.

Even though the eventual outcome in *Longfellow* is supported, the case should have been decided on the second requirement being absent. The document was not drafted or executed by a person who has since died. In view of *Maurice, Anderson and Wagner, Letsekga* and *Van Wetten,* it is suggested that *Mabika* was wrongly decided. The document itself was intended to be instructions for the drafting of a will. It was not intended to be her last will as required by section 2(3) and supported by the mentioned cases. Even though it was envisaged (see Keightley "Law of Succession" 2003 *Annual Survey of SA Law*) that the law in this regard (intention requirement) would continue to develop on a case-by-case basis, dependent on the facts and circumstances, rather than on settled principles, the well established and by now generally accepted principles set down by the courts above, should not lightly be discarded. The judgment in *Taylor*, on the other hand, contains a recognition of the abovementioned principles, while the court convincingly (on the facts), concluded that the document was not intended to be an amendment. This is in line with established principles laid down in *Letsekga* and *Anderson/Wagner* cases. The judgment in *Taylor* is supported.

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Equity Aviation v SATAWU (478/09) [2011] ZASCA 232 (30 November 2011)

The issue of separate strike notices where employees are not members of a trade union

1 Introduction

Recently the question whether employees who are not members of a trade union may strike "lawfully" where they have not given (separate) notice to strike to their employer in terms of section 64(1)(b) of the Labour Relations Act 66 of 1995 (the LRA) was considered by the Supreme Court of Appeal. The court held a different view from the majority of the Labour Appeal Court. Since the preferred interpretation of section 64(1)(b) has been described by some as resulting in a *prima facie* limitation of the right to strike the judgment merits discussion (the judgment has also been referred to the Constitutional Court).

2 Requirements for a Protected Strike

The LRA regulates the fundamental right of workers to strike (as found in s 23(2)(c) LRA) in more detail. In chapter IV of the LRA the procedural and substantive requirements for a protected strike are set out. As far as procedural requirements are concerned two conditions are relevant: first the issue in dispute must have been referred for conciliation. Section 64(1) requires that the dispute must have been referred to either a bargaining or statutory council or to the Commission for Conciliation, Mediation and Arbitration (CCMA) and a certificate must be issued that the dispute remains unresolved, or 30 days must have lapsed since referral. Secondly, the employer must be given at least 48 hours' notice of the intended strike – in the case of the public service 7 days (see s 64(1)(c) LRA). If a notice to commence a strike does not specify the exact time and date of commencement, it will be defective. A strike can be suspended and it is not necessary to give a new notice for the resumption of a protected strike. There are some instances when these procedures are inapplicable. For example, where a lock-out is in reaction to a strike or lock-out which does not conform to the LRA, or where (in the case of a strike) the strike is in reaction to the unilateral change to conditions of service (s 64(3), (4) LRA). It is no longer a requirement that a ballot be held first before employees may make use of the strike mechanism (s 67(7) LRA). Although a ballot is not required before employees may make use of the strike weapon, the LRA does stipulate that the constitution of a union must provide for a ballot to be held, and that a member may not be disciplined or his/her membership terminated for non-participation in a strike, unless a ballot was held and the majority of the voting members voted in favour of the strike (see s 95(5)(p), (q) LRA).

It is evident that parties remain to some extent free to contract out of (a) the right to strike and recourse to the lock-out (see s 65(1)(a) LRA);

(b) the procedures to be followed before they can embark upon industrial action (see s 64(3)(a), (b) LRA). However, this leaves the question whether a strike can be protected when complying with the procedural requirements of the LRA but not with the more stringent requirements of a collective agreement. Many recognition agreements provide that should the parties deadlock during wage negotiations they will hold a number of "cooling off" meetings and, if no agreement can be reached at these meetings, the parties will then refer the dispute to mediation before resorting to industrial action. In *County Fair Foods (Pty) Ltd v FAWU* 2001 5 BLLR 494 (LAC) the issue before the Labour Appeal Court was this: If a recognition agreement provides for a specific pre-strike procedure but the union chooses to deviate from the agreed procedure and to follow the procedures laid down in the LRA instead, is the strike unprotected? The court answered this question with a firm negative. It reasoned that section 65(1)(a) of the LRA, which prohibits strikes if the employees are "bound by an agreement that prohibits a strike or lock-out in respect of the issue in dispute", applies only to agreements that prohibit strikes over specific "substantive" issues. In other words, the agreement will prevail over the LRA only if the parties agree that they will not strike over certain kinds of disputes. The court stated that if section 65(1)(a) was to be extended to *procedural* requirements laid down in collective agreements the phrase "in respect of the issue in dispute" would be rendered meaningless (par 13).

Although the Constitutional Court did not finally hold thus, the LRA does not recognise a so-called duty to bargain that can be enforced in a court of law. O'Regan J noted in an *obiter dictum* that a justiciable duty may present difficulties to all concerned (see Van Niekerk *et al Law@work* (2012) 372 regarding *SANDU v Minister of Defence* 2006 11 BLLR 1043 (SCA)) in the *SANDU* case (par 55):

> [I]t should be noted that were section 23(5) to establish a justiciable duty to bargain, enforceable by either employers or unions outside of a legislative framework to regulate that duty, Courts may be drawn into a range of controversial industrial relations issues.

In *NEWU v Leonard Dingler (Pty) Ltd* 2011 7 BLLR 706 (LC) the Labour Court expressly held that an employer is not obliged to bargain with a union. Parties therefore remain free to make use of industrial action in order to enforce their demands in this regard (that is in respect of, for example, a refusal to recognise a trade union or to agree to the establishment of a bargaining council, the withdrawal of recognition of a collective bargaining agent, resignation from a bargaining council, and disputes about appropriate bargaining units, bargaining levels, or bargaining subjects). However, the LRA does impose a procedural constraint in the event of such a dispute: a party may only give notice of industrial action once an advisory arbitration award has been obtained (see s 64(2) LRA).

For completeness sake, one should add that there can only be a protected strike if the strike is not prohibited by section 65 of the LRA. In addition, there must be an issue in dispute. In *City of Johannesburg*

Metropolitan Municipality v SAMWU 2011 7 BLLR 663 (LC) the point was raised that before a union can fulfil any procedural requirements there must be an issue in dispute (which issue must be a matter of mutual interest) to be referred to conciliation. The court cautioned against the view that requires terms such as "demands" and "deadlocks" as used under the Labour Relations Act 28 of 1956 (see par 12). The court cited the categorisation of the Labour Appeal Court (per Zondo JP) in *TSI Holdings (Pty) Ltd v NUMSA* 2006 *ILJ* 1483 (LAC) par 27: "[There are] three categories of strikes, namely, those which have a demand, those where there is no demand but there is a grievance and those in which there is a dispute". The court however stated (par 12) that:

> [t]here are no bright lights between these categories. Sometimes the word 'demand' is used in a generic sense to refer to all three categories of strikes; sometimes it is used to refer to demands for higher wages. But these are not statutorily sanctioned requirements. The LRA refers only to a 'grievance' or a 'dispute'. There is thus no statutory requirement for the existence of a deadlock before a referral to either the CCMA or a bargaining council.

Furthermore, the definition of "dispute" in section 213 of the LRA also includes "an alleged dispute". The court thus stated (par 14) that for "the purposes of the definition of a strike, therefore, all that need be established as an objective fact is the allegation of a dispute, not its existence."

In cases where there is an express demand, the Labour Court held in *FGWU v The Minister of Safety & Security* 1999 4 BLLR 332 (LC) that the "issue in dispute" may be identified by asking what the addressee of the demand is actually expected to do in order to bring the dispute to an end.

3 The Facts in the Equity Aviation Case

The facts are summarised in the judgment of the Supreme Court of Appeal (refer to par 4-9).

Equity Aviation Services (Pty) Ltd (Equity) is an aviation logistics company providing services on the ramps and runways of South African airports. The South African Transport and Allied Workers Union (SATAWU) at the time of the dispute was the majority union for Equity Aviation's employees (725 out of some 1157 employees were members of the union). The respondents other than SATAWU were employees not belonging to the majority union. The union referred a wage dispute to the CCMA on 13 November 2003. A month later, after unsuccessful conciliation the CCMA issued a certificate declaring that the dispute remained unresolved on 15 December 2003. The union then issued a strike notice to the employer on the same day. The strike notice informed the employer that: "We intend to embark on strike action on 18 December 2003 at 08h00." The union members proceeded to strike for some four months, which strike was considered protected as it complied with section 64(1)(b) of the LRA. However, other employees who were not members of the union also participated in the strike and the employer considered such participation as unprotected as these non-union employees had not given separate notice of their intention to

strike. These employees were dismissed on 19 November 2004 for unauthorised absenteeism during the strike. The non-union dismissed employees referred a dispute about the fairness of their dismissal to the CCMA. (The Supreme Court of Appeal used the term "lawfulness" instead of "fairness".) In order for the Labour Court to decide whether the employees' dismissals were automatically unfair in terms of s 187(1)(a) of the LRA the court had to decide whether the dismissed respondents were required to be members of the union in order to participate in the strike without fear of dismissal. Almost two years after their dismissal, on 15 June 2006, the court found that the dismissed employees actually were members of the union at the time of the strike "but that in any event, they were not required to be members in order to participate lawfully". Their dismissals were thus held to be automatically unfair. Equity Aviation was ordered to reinstate them with back pay. Leave to appeal was granted, which appeal was heard on 18 June 2008 (two years after the court *a quo's* judgment). The Labour Appeal Court handed down its judgment on 14 May 2009. That court unanimously held that the dismissed employees were not members of the union at the relevant time and that the strike notice of the union did not refer to the dismissed employees. However, the court members differed regarding the impact of such fact. The majority held that the dismissed employees had not been required to refer a separate dispute to conciliation. Furthermore, Khampepe ADJP, noting that section 64(1) is silent on *who* must refer a dispute to the Commission and on *who* must give the notice to strike, held that the section had to be interpreted in the light of the purpose of the LRA as a whole and the purpose of the section itself. She also found that to require the dismissed employees to issue separate strike notices would be "too technical and constitute an absurdity which the legislature could not have contemplated" (par 174). Another interpretation would limit participation in strike action without justification and, according to this interpretation the judge added that in terms of section 64(1)(b) an employer is entitled to notice of the commencement of a strike but not to be informed about the identity of the strikers (par 175). The court's conclusion was therefore that the dismissed employees' participation in the strike action was not unprotected (par 175).

The issue to consider on further appeal was formulated as follow by the Supreme Court of Appeal (par 3):

> At issue is whether, where a union has given the requisite notice on behalf of its members, and has embarked on a strike, other employees who are not members of that union need also to give notice in order for their strike action to be lawful. Khampepe ADJP and Davis JA in the Labour Appeal Court held not. Zondo JP held that a separate notice must be given by the non-union members in order for their strike to be protected. This appeal lies with the special leave of this court.

4 The Right to Strike

As indicated earlier the right of workers to strike is a fundamental right in South Africa. This and other provisions underline the significance of the right to strike. The preamble to the LRA states that the aim of the LRA

is to change the law governing labour relations and, *inter alia*, "to promote and facilitate collective bargaining". As many modern statutes do today, the LRA boasts with both purpose (s 1) and interpretation (s 3) provisions. Section 1(c) of the LRA notes that two of its purposes are "to provide a framework within which employees and their trade unions and employers and employers' organisations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest" and "to promote orderly collective bargaining" (s 1(d)).

In addition, section 67(2) of the LRA states that:

> [a] person does not commit a delict or a breach of contract by taking part in a protected strike or a protected lock-out or in any conduct in contemplation or in furtherance of a protected strike or protected lock-out.

The Constitutional Court has on more than one occasion acknowledged the importance of this right to workers and unions and, ultimately, for successful collective bargaining. In *Re Certification of the Constitution of the Republic of South Africa 1996* 1996 4 SA 744 (CC) the court held that the inclusion of the right to strike in the Constitution (but not the right to lock out for employers) does not diminish the right of employers to engage in collective bargaining, nor does it weaken their right to exercise economic power against workers (par 65). In fact, while workers must act collectively and ultimately depend on the right to strike to further their interests and achieve desired outcomes, employers as the stronger party in the employment relationship have other social and economic means to further their interests. It should perhaps be mentioned that the LRA does not generally prohibit the use of replacement labour during industrial action (refer to s 76).

In *NUMSA v Bader Bop (Pty) Ltd* 2003 2 BLLR 103 (CC) the court considered the right of a minority trade union to strike in support of a demand that the employer recognise the union's shop stewards. The court, in accordance with section 39(1) of the Constitution, recognised the importance of the right to strike and preferred an interpretation that would not unduly limit the right to strike which was also more in accordance with interpretations of Conventions 87 and 98 by the International Labour Organisation supervisory bodies.

5 The Strike Notice

Although the Labour Relations Act 28 of 1956 did not provide for a strike or lockout notice the courts, in a number of cases, did require unions to give the employer prior notification of strike action. The industrial court in 1987 (*MAWU v BTR Sarmcol* 1987 *ILJ* 815 (IC) 836g) and in 1988 (*BAWU v Palm Beach Hotel* 1988 *ILJ* 1016 (IC) 1023g) stated that the failure to give notice was unfair. In fact in the *BAWU* case the industrial court (1023g) held that the failure to give notice was a serious failure. The respondent in this case was a hotel and had an obligation to its guests. The Labour Appeal Court created by section 17 of the 1956-Act as well as the then Appellate Division of the Supreme Court followed this approach. The National Manpower Commission (established in 1990) then

recommended that a written notice be given before the commencement of a lawful strike (see Technical Committee of the National Manpower Commission "Proposals for the Consolidation of the Labour Relations Act" (1990) 11 *ILJ* 285 297).

Traditionally the aspects raised with regard to strike notices related to the content thereof – whether it specified the commencement and the scope of the proposed industrial action sufficiently. In 1997 the Labour Appeal Court considered the requirements for a valid strike notice (*Fidelity Guards Holdings (Pty) Ltd v PTWU* 1997 9 BLLR 1125 (LAC)). Myburgh JP held the notice "'that we give you 48 hours notice of the workers' intent to embark on strike action. The strike will not commence before the expiry of the 48 hours notification' … might have been defective in that it had not given a specific time for the commencement of the proposed strike" (1132). Froneman DJP also considered the notice and made some additional remarks (with which Myburgh JP agreed). The discussion starts with the prior judgment of the Labour Appeal Court in *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction and Allied Workers Union* 1997 6 BLLR 697 (LAC) 702:

> The provisions of section 64(1)(b) need to be interpreted and applied in a manner which gives best effect to the primary objects of the Act and its own specific purpose. That needs to be done within the constraints of the language used in the section. One of the primary objects of the Act is to promote orderly collective bargaining. Section 64(1)(b) gives expression to this object by requiring written notice of the commencement of the proposed strike. The section's specific purpose is to give an employer advance warning of the proposed strike so that an employer may prepare for the power play that will follow. That specific purpose is defeated if the employer is not informed in the written notice in exact terms when the proposed strike will commence. In the present case the notice is defective for that reason. The provisions of section 64(1)(b) were not complied with.

Froneman DJP continued to state that in the *Ceramic Industries* case non-compliance with section 64(1)(b) was expressly linked to the non-fulfilment of the purpose of the section. That purpose was identified as providing advance warning to an employer of a proposed strike so that the employer may prepare for what will follow.

Recently, in *Transnet Ltd v SATAWU* 2011 11 BLLR 1123 (LC)) the Labour Court considered whether a notice was deficient and the resultant strike therefore unprotected. In this case the union demanded that the applicant abandon changes to its workers' shift roster and the discipline of a manager for "incompatibility" or incompetence. After the relevant bargaining council certified the dispute unresolved the union gave notice of its intention to call its members out on strike.

The court (par 12) also cited the case of *Ceramic Industries* (701-702):

> In determining whether there has been compliance with section 64(1)(b) of the Act an interpretation must be sought, as stated earlier, which best gives effect to the broader purpose of the Act and the specific purpose of the section itself. Section 64(1)(a) sets out the first requirement to be met before embarking on a protected strike viz an attempted conciliation of the issue in

> dispute before collective action is taken. Section 64(1)(b) sets out the next requirement: notice of the proposed strike to the employer. Its purpose is to warn the employer of collective action, in the form of a strike, and when it is going to happen, so that the employer may deal with that situation. By their very nature strikes are disruptive, primarily to the employer, but also to employees and, sometimes, to the public at large. One of the primary objects of the Act is to promote orderly collective bargaining. Section 64(1)(b) assists in that orderly process. A failure to give proper warning of the impending strike may undermine that orderliness. This might, in turn, frustrate labour peace and economic development, other important purposes of the Act (section 1). Compliance with the provisions of the section is thus called for.

The court held that warning employers of a proposed strike may have at least two consequences for the employer (par 12; see also the *Ceramic Industries* case 701-702): "The employer may either decide to prevent the intended power play by giving in to the employee demands, or, may take other steps to protect the business when the strike starts."

In casu the notice was deficient for the second reason – the employer did not know when, after 48 hours, the proposed strike will commence. The notice also did not specify at which depot it would occur. The court continued by clearly indicating that the language and purpose of section 64(1)(b) require that a *specific time* for the commencement of the proposed strike be set out in the written notice. According to the court the legislature was "anxious" that attention be paid to the "commencement" of the strike (par 12; see also the *Ceramic Industries* case 701-702):

> The use of an exact time expressed in hours as a minimum of the notice to be given seems to indicate that the longer period envisaged by the phrase 'at least' should also be expressed in an exact manner. The manner in which the time of the commencement of the strike is expressed may, however, differ depending on the nature of the employer's business. Strikes can occur which involve the whole workforce and others which merely involve one or more shifts. In a shift system notice of the exact time of the proposed strike in respect of particular shifts may be necessary.

In addition, the court held that the fact that the applicant could infer from the facts and the circumstances the extent of the strike did not remedy the defect in the strike notice (par 14).

In *Public Servants Association of South Africa v Minister of Justice and Constitutional Development* 2001 11 BLLR 1250 (LC) par 68 the court held that the grievance need not be set out in the strike notice as the notice will have been preceded by negotiations and at conciliation meetings opportunities would have been created to explore the nature and ambit of the demand. In *SAA (Pty) Ltd v SATAWU* 2010 *JOL* 24947 (LC) the court differed from the above judgment. The court stated that the employer must be in a position to know with some degree of precision which demands a union and its members intend to pursue through strike action and what is required to meet those demands (see par 27). Although this may *prima facie* appear to introduce a further limitation on the right to strike as the court goes further than the *Public Servants Association* case, this approach relates to the purpose of the strike notice

as mentioned in the *Ceramic Industries* case, namely to enable the employer to decide whether its interest are best served by resisting the union's demands or acceding to them. In *Edelweiss Glass & Aluminium (Pty) Ltd v National Union of Metal Workers of South Africa* 2012 1 BLLR 10 (LAC) the court had to consider whether a change to a demand not made during the conciliation process, but during the course of the protected strike, renders the strike unprotected (see par 46). The court found that the demand for the 13th cheque did not render the protected strike unprotected. The strike will only lose its protected status if the employees used the protected strike as leverage to achieve objects in respect of which no strike action could be taken (par 52). It appears from the *Edelweiss* case that a party may bring a proposal to the table, after the commencement of the strike, if the purpose of the proposal is an attempt to resolve the dispute that gave rise to the strike. One may ask whether the *Edelweiss* case allows the employer to know with a degree of precision which demand the union will pursue, if such demands are not mentioned in the strike notice.

The recent dispute regarding the strike notice in the *Equity Aviation* case dealt with another aspect – that is, who is covered under a strike notice. In other words, where a strike notice is given to an employer (which notice is not deficient in any way) a further question, namely whether such notice covers all the employees who are proposing to embark on the proposed strike, should be answered. In the *Equity Aviation* case the court refused to view the requirement of a notice as a limitation of a right. The court stated that it (the strike notice) "is a procedural requirement for the *exercise* of the right to embark on strike action" (par 26). Therefore, the court stated, requiring all employees to serve such a notice does not impinge on their rights.

The appellant argued that the majority judgments of the Labour Appeal Court did not have proper regard of the purpose of section 64(1)(b), namely advance warning for the employer and that to allow employees to strike, who had not given notice of their intention to strike, would lead to disorderly strike action (par 11). The argument was made that if an employer does not know how many employees will embark on the strike (par 20):

> It would thus not be able to make an informed decision as to whether to accede to the employees' demands; would be prevented from taking adequate steps to protect its business; could not make informed decisions on pre-strike regulatory decisions; and would be precluded from implementing adequate health and safety measures.

This reasoning is in line with the fourfold purpose of the strike notice as formulated by Seady and Thompson ("Strikes and Lockouts" in *South African Labour Law* (eds Thompson & Benjamin) (loose leaf) Vol 1 AA part 1 314 *et seq*): first, serving as a warning to the employer that "words are about to escalate into deeds"; second, promoting orderly industrial action; third, limitation of damages; and fourth advancing health and safety considerations.

The Supreme Court of Appeal added a fifth purpose, namely to protect employees (par 15). The court stated that if employees issue a strike notice in proper terms they are protected under the LRA and their conduct is lawful. The court thus held that it is in all parties' interests that a strike notice is given by or on behalf of *all* those who intend to strike.

The Supreme Court of Appeal concluded by preferring the minority judgment of Zondo JP's interpretation of section 64(1)(b), namely that those employees who do not belong to the union giving the strike notice must "in order lawfully to embark on strike action, give notice that they too intend to strike. They may do so through a representative or personally, provided that their notice alerts the employer to the extent of the strike … and allows it to make the necessary arrangements" (par 28).

The court was of the opinion (in agreement with Zondo JP) that another interpretation would not only promote disorderly collective bargaining but would also "usher in an era of chaotic collective bargaining in our labour dispute resolution system" (par 28).

6 Evaluation

At first glance the procedural requirements found in section 64 seem uncomplicated and simple. However our courts have been called upon to engage with the content of this section on numerous occasions, indicating that the legislature could be more prescriptive in terms of the requirements for a valid strike notice.

A distinction is made by Zondo JP in respect of the purposes of section 64(1)(a) and section 64(1)(b). The purpose of section 64(1)(a) is to provide parties with the opportunity to resolve their dispute through conciliation or mediation. During this cooling-off period parties can reflect and determine how to resolve the dispute.

If one accepts that the purpose of section 64(1)(b) is to give an employer advance warning of the proposed strike to enable the employer to prepare for the power play that may follow, then prior knowledge of the number of employees that will partake in the strike is of some importance as it would be much easier for an employer to prepare for the industrial action if it knows how many employees will be involved. As stated by the Supreme Court of Appeal (par 15), a strike notice given in proper terms by all those who intend to strike is also beneficial to the employees as they may then be protected under the LRA.

One of the reasons given for a notice of strike action in the *Ceramic Industries* case 1997 6 BLLR 697 (LAC) was to enable the employer to decide whether to prevent strike action by giving into the union's demands. Notifying the employer of the exact number of employees intending to strike may influence the employer's decision whether to accede to the union's demands. If more employees are taking part in the strike, the employer might be under greater pressure to accede to the union's demands, thereby averting the strike. This will be beneficial for both employers and employees. This illustrates how information about the number of employees planning to take part in the strike can influence

the power play that will follow. The judgments by Zondo JP and the Supreme Court of Appeal, underwrite the approach followed in the *Ceramic Industries* case. In both the *Equity Aviation* case and the *Ceramic Industries* case (and in the minority judgment of Zondo JP in the Labour Appeal Court) it was highlighted that section 64(1)(b) gives expression to one of the primary objects of the LRA, namely to promote orderly collective bargaining. The Supreme Court of Appeal adopted the approach followed by Zondo JP that requiring all employees to give notice is not a limitation of their rights and this requirement does not need to be read into the section. In fact the requirement that all employees must serve notice is a logical interpretation of section 64(1)(b). The Supreme Court of Appeal in this case made it clear that the purpose of this section is to give an employer advance warning of the proposed strike, enabling the employer to make informed decisions. The different purposes of section 64(1)(a) and section 64(1)(b) lead to the different interpretations of the sections. The employees dismissed by the appellant in this case were not required to issue a separate referral of the same dispute in terms of section 64(1)(a), however in terms of section 64(1)(b) they were required to inform the employer of their intention to embark on strike action.

The right to strike should not be limited unduly, in fact this right should be limited as little as possible (see *eg S v Zuma* 1995 2 SA 642 (CC); *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* 1990 *ILJ* 321 (LAC); *NUMSA v Bader Bop (Pty) Ltd* 2003 2 BCLR 182 (CC); *Business South Africa v The Congress of South African Trade Unions* 1997 6 BLLR 681 (LAC) (in particular the minority judgment of Nicolson JA)). The question posed by the case under discussion is whether the requirement of notice by non-union members is a limitation of a right. If one accepts that the requirement of a notice is a procedural hurdle employees must overcome to exercise the right to strike, then this requirement cannot be viewed as a real limitation of a right. The court in the current matter also found it unnecessary to read this requirement into section 64(1)(b) and found it to be a logical interpretation of the section; warning the employer of the power play and enabling the employer to make informed decisions. This procedural requirement should ensure orderly collective bargaining and thereby promote an important purpose of the LRA. Internationally, procedural restrictions on the right to strike are permissible, however these restrictions may not place substantial limitations on the right to strike (Ben-Israel "The Scope and Extent of the Right to Strike" in *International Labour Standards: The Case of Freedom to Strike* (ed Ben-Israel) (1988) part III). Procedural requirements must be reasonable. According to the Supreme Court of Appeal informing the employer of the number of employees that will partake in the strike can be construed as reasonable and does not impose a serious limitation on workers' right to strike.

Any commentary on this judgment would in earlier years probably have ended at this juncture. However, since the LRA has to be interpreted in light of the Constitution and South Africa's international obligations,

and since orderly collective bargaining is but one of the primary objects of the LRA, there remains a small measure of discomfort. The import of section 64(1)(b) has been interpreted primarily having regard to the purpose of a strike notice (set out earlier in this contribution), which has been formulated by the Labour Appeal Court and the Supreme Court of Appeal. According to the Supreme Court of Appeal the purpose of a strike notice is to assist and protect not only employers but also employees. No doubt SATAWU and its members remain unconvinced and may advance the view that where the express wording of a provision does not limit the right to strike a court should be very hesitant to find that an additional hurdle (whether of a substantive or procedural nature) exists. Employees may very well argue that several requirements now have to be met in order to embark on a protected strike (notice of the exact commencement of the strike, the extent of the strike, the formulation of the demands/issues in dispute with some degree of precision, and information about the identity of the employees planning to strike). These requirements coupled with the general, albeit not unlimited right to make use of replacement labour, may very well impact on the effectiveness of planned industrial action. After all is said and done the Constitutional Court has recognised that workers must act collectively and ultimately depend on the right to strike to further their interests and achieve desired outcomes. The matter is forthcoming in the Constitutional Court – *South African Transport and Allied Workers Union and Others v Moloto* CCT128/11 – so that we may expect finality on this issue once and for all.

A matter of concern is the time this case took to reach the Supreme Court of Appeal. Seven years had lapsed from the referral of the dismissal dispute to the CCMA until the case was heard in the Supreme Court of Appeal. This delay in our dispute resolution system does not support the purpose of the LRA, namely the effective resolution of labour disputes.

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