DE JURE

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Editorial

Our world is one of increasing simplicity when it comes to creating and representing information in a tangible form. Think of the applications for your smart phone or tablet computer that allow you to communicate with others through a picture alone, or by simply updating a status or sending a short information burst into the universe containing no more than 140 characters.

We have trimmed down our daily communications to almost Spartan levels. While this is definitely economic and does save time, it is unfortunate that this form of instant gratification communication does nothing to promote the art of writing well.

The act of writing is as much a part of a successful career in law as being able to think fast and speak well. However, the art of writing well is what sets apart the average and everyday from the exceptional. You may have a keen legal mind, and an exceptionally insightful grasp of your chosen field – but it will be futile if you are unable to transfer this knowledge in a concise, useful way.

Unfortunately writing skill is no longer a discipline that is focussed on very much in undergraduate studies. This makes the prospect of further studies daunting and dissuades many students who would otherwise have something to offer the legal world.

Now the question arises: How do you master the art of writing well? I have found it to be a time consuming project, for which there are no short cuts. There is however a failsafe way of improving your skill – read what others have written. Infuse your mind with well phrased and detailed arguments and ask yourself what elements of the piece make it successful. I am of the opinion that the path that leads to greater writing skill, runs straight through the process of reading well written pieces.

This does not mean that economy of words is a negative thing, but there is a difference between a well thought out economically unadorned writing style, and text so sparse that it leaves the reader unfulfilled because the author was simply not interested in illustrating his opinion with more that the most basic of words. Ernest Hemingway, that great proponent of economic writing still had the ability to take your breath away with a single sentence. As with all aspects of the law, this is a very fine balancing act. Finding the perfect combination of personal expression and honest simplicity will take practice, but Marcus Fabius Quintilianus put it so well when he said “Write quickly, and you will never write well; write well and you will soon write quickly”.

In this third volume of *De Jure* for 2013 we have a wide variety of interesting and thought provoking contributions in the form of articles, case discussions and notes from local and international authors.

I trust that our readers, in all their differing stages on the road to exceptional legal writing will be able to take something positive away from this volume.

EW Aukema-Heymans
Assistant Editor

The application of "repealed"* sections of the Companies Act 61 of 1973 to liquidation proceedings of insolvent companies

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OPSOMMING

Die Toepassing van "Herroepe" Artikels van die Maatskappywet 61 van 1973 op Likwidasieverrigtinge van Insolvente Maatskappye

Die Maatskappyewet 71 van 2008 het op 1 Mei 2011 in werking getree en die Maatskappyewet 61 van 1973 herroep. Nietemin is die bepalings in die 1973-Wet insake korporatiewe insolvensieverrigtinge in wese behou deur artikel 224 en item 9 van skedule 5 by die 2008-Wet. Die 2008-Wet bevat bepalings om die likwidasie van solvente maatskappye in werking te stel maar geen prosedures om dit deur te voer nie, soos wat die 1973-Wet wel bevat. Geen substantiewe bepalings in verband met die gronde en prosedures vir die likwidasie van insolvente maatskappye is ontwikkel en geïnkorporeer in die 2008-Wet nie. In plaas daarvan, en met spesifieke verwysing na die likwidasie van 'n maatskappy wat insolvent is, is die bepalings van hoofstuk 14 van die 1973-Wet van toepassing "asof hierdie bepalings nie herroep is nie". In lig van die voormelde en in die konteks van die likwidasie van insolvente maatskappye, oorweeg hierdie artikel drie vrae. Eerstens word die vraag gevra of 'n interpretasie van item 9 van skedule 5 by die 2008-Wet 'n ruim benadering ondersteun waarvolgens daar gesteun mag word op bepalings van die 1973-Wet wat buite die grense van hoofstuk 14 van die Wet val. Tweedens word eksperimentele oorweging verleen aan die toepassing van die bovermelde benadering om sodoende te kan steun op die bepalings van artikels 12 en 13 van die 1973-Wet. Die saak van *Botha NO v Van den Heever NO* word in hierdie verband bespreek. Derdens word die vraag gevra of die inhoud van die bepalings insake jurisdiksie (artikel 12) en sekuriteit vir kostes (artikel 13) waarde toevoeg tot die uitvoering van likwidasie prosedures, dus in effek of daar 'n behoefte is om hierdie bepalings te behou binne die konteks van die toepassing van hoofstuk 14 en die likwidasie-prosedures vervat in die 1973-Wet. In afwagting van omvattende wetgewing om insolvensie prosedures te reguleer, word daar voorgestel dat die bepalings van die

* The setting of the word *repealed* in inverted commas is gleaned from the use by Delport & Vorster *Henochrsberg on the Companies Act, 71 of 2008 Vol 2* (1994) (Looseleaf, update December 2012, Service Issue 4) (available http://0-www.mylexisnexis.co.za.innopac.up.ac.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu, (accessed 2013-04-10)) APPI-3 *et seq*.

> 1973-Wet in soverre dit betrekking het op die likwidasie van insolvente maatskappye, selfs waar hierdie bepalings nie binne die grense van hoofstuk 14 vervat is nie, steeds aangewend mag word in sekere gevalle.

1 Introduction

On 1 May 2011 the Companies Act[1] 71 of 2008 (the 2008 Act), as amended by the Companies Amendment Act 3 of 2011,[2] became operational.[3] In terms of section 224 of the 2008 Act, it repealed the Companies Act[4] (the 1973 Act). The 2008 Act was a result of *inter alia* a comprehensive corporate law review which culminated in a draft policy framework.[5] The policy framework was intended to serve as a preliminary basis for further consultation and ultimately for the envisaged legislation.[6] In essence, corporate reform was needed for the following reasons:[7]

> The weaknesses in current company law and the changes to the nature of the global and domestic economy together with the constitutionally mandated process of transformation of South African society compel a comprehensive review of South African company law.

Guidelines for corporate reform were drafted as part of the reform process.[8] These were intended to be the foundation of the directives to be forwarded to the chief drafter of the new company law legislation.[9] The following six core categories were isolated as the focus of the reform: "Corporate formation; corporate finance; corporate governance; business rescue and mergers and takeovers; not-for-profit companies; and administration and enforcement".[10] Although the review did refer to

1 71 of 2008.
2 3 of 2011.
3 S 225 2008 Act; GN R32 *GG* 34239 of 2011-04-26.
4 61 of 1973.
5 Department of Trade and Industry *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform May 2004* (2004) 4-5, 52-53 (available http://0-discover.sabinet.co.za.innopac.up.ac.za/webx/access/policydocuments/policies04/DD078362.pdf (accessed 2013-03-05)) (the *DTI Guidelines*).
6 *Ibid*.
7 *Idem* 19.
8 Mongalo "An overview of company law reform in South Africa: From the Guidelines to the Companies Act 2008" 2010 *Acta Juridica* xiii xv-xvi. The transformation of the South African "social, political and economic scene" precipitated the reformative process, a process that was last done in the field of corporate law prior to the introduction of the 1973 Act – see Luiz "Company Law (including Close Corporations)" 2008 *Annual Survey of SA Law* 144.
9 Mongalo 2010 *Acta Juridica* xiii xv-xvi.
10 *Idem* xvi.

close corporations to some extent, reference will primarily be made to companies for purposes of this discussion.[11]

Notwithstanding a particular focus on the principles and legislation regulating companies in South Africa,[12] the provisions pertaining to corporate insolvency procedures in the 1973 Act were retained.[13] The motivation, as can be ascertained from the 2004 policy framework, was that these provisions would be incorporated into comprehensive legislation regulating insolvency and business rescue.[14] Nevertheless, the provisions relating to business rescue were not excluded from the ambit of the 2008 Act and chapter 6 of the 2008 Act deals with these proceedings.[15] No substantive provisions relating to the grounds and procedure for the liquidation of insolvent companies were developed and

11 See Luiz 2008 *Annual Survey of SA Law* 144 145 for a short discussion on the effect of the 2008 Act (which was still a Bill that time) on the Close Corporations Act 69 of 1984 (the Close Corporations Act). See also Delport & Vorster *Vol 1* 314 on the use of sources pertaining to close corporations in order to assist with the interpretation of aspects relating to companies – the authors argue that identical principles would be applicable in light of the amendment effected to s 66 Close Corporations Act.

12 *DTI Guidelines* 10.

13 See s 224, it 9 sch 5 2008 Act.

14 *DTI Guidelines* 44. Note in the *DTI Guidelines* 43 that, initially, the submission was to keep winding-up procedures within the ambit of corporate law. See also Department of Trade and Industry *The Companies Act No. 71 of 2008 An Explanatory Guide Replacing the Companies Act, No 61 of 1973* (2010) (available http://www.thedti.gov.za/DownloadFileAction?id=548, (accessed 2013-04-03); http://www.thedti.gov.za/publications.jsp?year=2011<&subthemeid= (accessed 2013-05-30) 12 (the *DTI Explanatory Guide*): "The Department of Justice and Constitutional Development has informed the DTI of proposals to develop uniform insolvency legislation. If brought to use, this legislation would overlap and may conflict with the regime set out in the Companies Act, 1973 for dealing with and winding up insolvent companies. The Act therefore provides for transitional arrangements that will retain part of the current regime for the interim, until any new uniform insolvency law is introduced". See also Blackman *et al Commentary on the Companies Act Vol 1* (2002) (Looseleaf, Revision Service 6, 2009) Overview-3. For a prospective view of potential legislation purported to "consolidate, unify and amend the law relating to the insolvency of natural persons, companies, close corporations, trusts, partnerships and other legal entities, with or without legal personality", see the draft Insolvency and Business Recovery Bill, 2003 (available http://www.justice.gov.za/master/m_docs/insolve-unified-insolvency-bill-july2003.pdf, (accessed 2013-05-14)) as well as the unofficial working draft of 2010 on file with authors. These versions still provide for judicial management and the indications on the working draft ss 122, 123 are that these provisions should be adapted to align it with the 2008 Act.

15 See Loubser "Business rescue in South Africa: a procedure in search of a home?" 2007 *CILSA* 152 153 *et seq*, where the author discusses whether business rescue proceedings resort under insolvency law, company law or whether it is a *sui generis* procedure under commercial law. Loubser ultimately argues (169-171) for the segregation of business rescue to a single, comprehensive and separate statute. In the context of insolvency law, she notes (169) that business rescue is perceived as the "beginning of the end" or "merely another route to liquidation", which detracts from its purpose (154) to "[rescue] a failing business". Note (171) that this was

incorporated into the 2008 Act.[16] Instead, should a company that is insolvent be liquidated, the provisions of chapter 14 of the 1973 Act finds application "as if these have not been repealed".[17]

The critical question that we address in this paper is the interpretation of item 9 of schedule 5 to the 2008 Act. This is of particular importance when considering the scope of the application of the 1973 Act within the context of the liquidation of insolvent companies, as item 9 provides for the following:

> 9. Continued application of previous Act to winding-up and liquidation. —
>
> (1) Despite the repeal of the previous Act, until the date determined in terms of subitem (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to subitems (2) and (3).
>
> (2) Despite subitem (1), sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.
>
> (3) If there is a conflict between a provision of the previous Act that continues to apply in terms of subitem (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails.
>
> (4) The Minister, by notice in the *Gazette*, may —
>
> (a) determine a date on which this item ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding-up and liquidation of insolvent companies; and
>
> (b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation contemplated in paragraph (a).

2 Orientation

Against this broad background, the research question that we will consider in the discussion below is whether an interpretation of item 9 of schedule 5 to the 2008 Act supports a broad approach whereby recourse may be had to provisions relating to the winding-up of an insolvent company that fall outside of the ambit of chapter 14 of the 1973 Act due

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argued a time when the Companies Draft Bill of 2007 had been published in February 2007 for comment.

16 The 2008 Act does set out the grounds for liquidation of a solvent company, which incorporates some of the grounds set out in the 1973 Act – see ss 79-81 2008 Act. The 2008 Act also incorporates the procedures set out in the 1973 Act for the liquidation of the solvent company – see s 79(2) 2008 Act. In the *DTI Guidelines* 43, it was stated "that provisions relating to the winding-up of companies [should be] retained in company law" although reference is often made to the draft Insolvency and Business Rescue Bill in the document. See also Loubser 2007 *CILSA* 152 159.

17 It 9(1) sch 5 2008 Act. See also *HBT Construction and Plant Hire CC v Uniplant Hire CC* 2012 5 SA 197 (FSB) par 3.

to the very wording of this item. This question will be considered in view of the judgment of *Botha NO v Van den Heever NO*[18] as a case in point which related to the special resolution required for voluntary winding-up in terms of the 1973 Act, and with reference to some other scenarios that may call for a consideration of the research question. In particular, the provisions relating to jurisdiction (section 12) and security for costs (section 13) of the 1973 Act have not been repeated in the 2008 Act and experimental consideration will be given to these. The decisions to reflect on sections 12 and 13 were made in the light of the practical proximity of these two sections to winding-up proceedings: Whilst the jurisdictional directions of section 12 may be directly applicable and central to companies and liquidation proceedings,[19] the same cannot be said for section 13 in the sense that it provides recourse to a litigant that does not necessarily need to be a party to the liquidation proceedings.[20] On the other hand, the address of the company for jurisdictional purposes is potentially applicable to all litigating companies,[21] whether these are solvent or insolvent whilst security for costs within the ambit of section 13, is only relevant to an impecunious or insolvent company.

18 Unreported case no 40406/2012 (NGP), delivered on 2012-07-23.

19 See Horn "Die 'woonplek' van 'n binnelandse maatskappy" 1990 *De Jure* 363 363 *et seq*; Van der Linde & Van der Merwe "Company residence and jurisdiction" 1994 *SALJ* 780 in respect of residence and jurisdiction; Theophilopoulos *et al Fundamental Principles of Civil Procedure* (2012) 43-44. In comparison, see GN R667 *GG* 35618 of 2012-08-24: Interpretation and application of s 23 of the Act & Regulation 43 of the Companies Regulations, 2011: *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf and Country Estate (Pty) Ltd*: Practice Note 2 of 2012 (Government gazette No. 35618) (Department of Trade and Industry: Practice Note 2 of 2012 in terms of Regulation 4 of the Companies Regulations, 2011) (DTI Practise Note 2) where the implications of the judgment of *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country and Others* 2013 1 SA 191 (WCC) relating to jurisdiction is brought to the attention of companies "whether existing or still to be formed".

20 See *Kemp NO and another; Trustees for the time being of Erf 591 Riversbend Trust v Ralbern Properties (Pty) Ltd* [1999] 3 All SA 154 (SE) 169 (for contextual purposes, the full paragraph is included): "On my reading of s 13 of the Companies Act I find nothing that indicates that the legislature did not envisage that a party could be both plaintiff and defendant in the same lawsuit. *All that the s refers to is 'plaintiff or applicant in any legal proceedings' and to 'defendant or respondent'.* A plaintiff is a litigant who seeks satisfaction of a claim, which he contends he has against another, by way of action. A counterclaim is such an action. This does not make a plaintiff in reconvention any less a plaintiff than a plaintiff in convention. I am unable to think of any valid reason why, if the requirements of s 13 of the Companies Act are satisfied, a court should not be empowered to order a company, which is a plaintiff in reconvention, to furnish security for costs. If this was the position it would mean that a Court would have no power to order security for costs in respect of a claim in reconvention in the event of the claim in convention for some reason or other not being proceeded with. No reason comes to mind why this should be so." (Own emphasis.)

21 In this regard, see Horn 1990 *De Jure* 363 in general where the author argues the "residence" of a company in a context not specifically related to liquidation ie s 12 1973 Act and removed from the context of service. Where no general provision is made similar to s 12, determination of

Delport and Vorster state as a point of departure to their commentary on the 2008 Act, that the wording of item 9 of schedule 5, "as if [the 1973 Act] had not been repealed", designates "that the 'repealed' sections of the 1973 Act apply to the extent that it is necessary to give effect to Chapter XIV of the 1973 Act".[22] However, they do not elaborate on their commentary. On the other hand, the wording of the 2008 Act and 2004 guidelines indicate that the drafters of the 2008 Act as well as the researchers undertaking the corporate law reform project seemed to have been under the impression that chapter 14 of the 1973 Act and the provisions of the Insolvency Act of 1936,[23] were solely prescriptive of the liquidation provisions for insolvent companies.[24] Chapter 14 and the provisions of the Insolvency Act are the primary sources for the provisions relating to the liquidation proceedings pertaining to companies not able to pay their debts,[25] but it must be kept in mind that these provisions functioned within the broader framework of the 1973 Act.[26]

At present it is submitted that the parameters of the scope of section 224 of the 2008 Act, that is the repealing provision read with item 9 of schedule 5, is not set. Some authors[27] as well as the presiding officer in *Botha NO v Van den Heever NO*[28] acknowledge the need for the extension of the scope to include non-chapter 14 provisions. Delport and Vorster proceed in their analyses of the provisions of the 1973 Act in respect of winding-up proceedings, to refer, for example, to the provisions of section 12 of the 1973 Act.[29] However, the judiciary has, more often than not, viewed provisions set out in other chapters of the 1973 Act as having been repealed, specifically within the context of sections 12 and 13 of the 1973 Act.[30]

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21 jurisdiction for all procedural purposes falls to the interpretation of the applicable courts' act and common law principles – see Horn 1990 *De Jure* 363 363-364. The author (363) further notes the distinction between "service" and "jurisdiction" within the context of the 1973 Act and the Supreme Court Act 59 of 1959. Contra – see eg DTI Practice Note 2.

22 Delport & Vorster *Vol 2* APPI-3 *et seq*.

23 Act 24 of 1936 (the Insolvency Act).

24 *DTI Guidelines* 43; it 9 of sch 5 2008 Act.

25 *DTI Guidelines* 43.
See eg the approach of Hiemstra AJ in *Botha v Van den Heever op cit*.

27 Delport & Vorster *Vol 2* APPI-3.

28 *Op cit*.

29 Delport & Vorster *Vol 2* APPI-42.

30 See eg *Ngwenda Gold (Pty) Ltd v Precious Prospect Trading 80 (Pty) Ltd* [2012] JOL 28599 (GSJ); *Haitas v Port Wild Props 12 (Pty) Ltd* 2011 5 SA 562 (GSJ); *Argentarius No 1 (Pty) Ltd v South African Financial Exchange* [2012] ZAGPJHC 136 (available http://www.saflii.org/cgi-bin/disp.pl?file=za/ cases/ ZAGPJHC/2012/136.html&query=argentarius (accessed 2013-05-13)); *Genesis on Fairmount Joint Venture v KNS Construction (Pty) Ltd* [2012] ZAGPJHC 264 (available http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ ZAGPJHC/2012/264.html&query=genesis (accessed 2013-05-30)); *Sibakhulu Construction v Wedgewood Village Golf Country op cit*; *Vienings v Paint*

In the premises, we submit that the provisions of chapter 14 of the 1973 Act cannot be read in isolation where liquidation proceedings in respect of an insolvent company are undertaken. It is argued that a contextual approach should be taken whereby reliance may be placed on provisions in the 1973 Act that fall outside of the scope of chapter 14 but directly relate to the winding-up proceedings of insolvent companies. This is of particular importance where the practical application of the provisions of chapter 14 incorporates the use of these *other* sections of the 1973 Act. Against this background, the judgment in the *Botha*-case and sections 12 and 13 will thus be considered. It is finally submitted that a contextual interpretation implies that sections, such as section 13, which have been "repealed", may still be utilised during the liquidation of an insolvent company. The scope of this part of the paper is limited to a *reading* or *interpretation* of the manner in which the provisions of the 2008 and 1973 Acts interrelate at present.

It is submitted, contrary to authors such as Van Loggerenberg and Malan,[31] that the absence of a provision similar to section 13 is not necessarily an oversight but a based on an ascertainable policy decision.[32] However, whether the policy decision is correct, stands to be debated. In the second part of the paper, we discuss whether the need for sections similar to section 12 and 13 necessitates that these provisions should be drafted into legislation as procedural mechanisms.[33]

3 Current Position

The critical question that this discussion highlights is whether provisions of the 1973 Act that do not fall within the scope of chapter 14 of that Act can still be utilised when liquidating an insolvent company. In order to contextualise the discussion and lay the foundation for the arguments to follow, it is necessary to consider the following:

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and Ladders (Pty) Ltd [2012] ZAKZDHC 61 (available http://www.saflii.org/cgi-bin/disp.pl?file = za/cases/ZAKZDHC/2012/61.html&query = vienings (accessed 2013-08-12)); *Firstrand Bank Ltd, Wesbank Division v PMG Motors Alberton (Pty) Ltd* [2013] ZAGPJHC 203 (available http://www.saflii.org.za/za/cases/ZAGPJHC/2013/203.html (accessed 2013-08-31)).

31 "Security for costs by local companies: back to 1909 in the Transvaal or not?" 2012 *THRHR* 609 621. According to Willis J in *Genesis v KNS Construction op cit* par 9 "there is a debate that is raging [as] to whether this omission from the new Companies Act, No 71 of 2008, as amended, was a *lacuna* or not".

32 See *Ngwenda Gold v Precious Prospect Trading op cit* parr 12-13. Van der Merwe AJ argues that the exclusion of a similar provision is not an oversight and that the legislator had constitutional considerations in mind. See also the discussion *supra* regarding suitable legislation for the regulation of winding-up procedures.

33 See Van Loggerenberg & Malan 2012 *THRHR* 609 620, 621 *re* amending the relevant legislation to provide for a s 13-procedure in the light of the authors' contention that this was a legislative oversight.

(a) The correlation between the 2008 and 1973 Acts including the relevant policy considerations;

(b) The provisions that guide the interpretation of the linkage between the two Acts;

(c) The judicial interpretation of the relevant provisions;

(d) Whether a principled-based approach can be developed and structured within a set framework; and

(e) Whether the application of such approach can be applied to sustain an argument to allow for a litigant to rely on provisions of the 1973 Act that do not fall within the borders of chapter 14, but outside of it.

The first three aspects will form the framework referred to as the "external" framework, that is the framework conducive to developing the principle-based approach. After the principle is developed, it is set to function within an "internal" framework in order to be applied logistically.

A brief overview of the external framework follows.

Section 224 of the 2008 Act provides for the repeal of the 1973 Act. Schedule 5 to the 2008 Act contains the transitional provisions with relation to the 1973 Act. At first glance, the wording of this section indicates that this is a complete and comprehensive repeal subject to certain transitional provisions. However, on a textual interpretation,[34] the transitional provisions set out in schedule 5 specifically item 9, segregate the application of these provisions to chapter 14 of the 1973 Act.[35]

At present, the courts have consistently indicated that the repeal of the 1973 Act via the 2008 Act, is strictly adhered to in the sense that only the provisions contained in Chapter 14 is still of consequence under the 2008 Act.[36] In general, chapter 14 first and foremost applies fully in the winding-up proceedings where insolvent companies are liquidated. The section relating to the provisions of security for costs by an applicant or

34 See Botha *Statutory Interpretation: An introduction for students* (2012) 97 par 5.3.2 for a discussion of the text-in-context approach.

35 It is interesting to note the wording of the amended s 66 Close Corporations Act as referred to by King AJ in *Standard Bank of South Africa Limited v R-Bay Logistics CC (Registration No 2003/010632/23)* [2013] 1 All SA 364 (KZN) par 9: "The respondent in this action is a close corporation and one must look the provisions of the Close Corporations Act 69 of 1984 … to find what it provides about applications to wind-up close corporations. S 66(1) thereof has been amended and not reads as follows: 'The laws mentioned or contemplated in it 9 of sch 5 of the Companies Act, *read with the changes required by the context*, apply to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act'." (Own emphasis.) See also the case of *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 4 SA 539 (SCA).

36 See eg *Ngwenda Gold v Precious Prospect Trading op cit* referring to *Haitas v Port Wild Props*. See also Kamdar & Foster "Security for costs: An oversight or overkill?" (2012-09-28) *Legalbrief Today*.

plaintiff company serves as a case in point.[37] The court in *Ngwenda Gold v Precious Prospect Trading*[38] indicated that, as a result of the repeal of section 13 and the fact that the 2008 Act did not contain an equivalent provision; reference has to be made to the common law provisions when deciding on whether a company should be obliged to provide security for costs. Van der Merwe AJ duly noted that rule 47 of the Uniform Rules of Court regulated the procedural aspects of security for costs but that the principles of the common law governed the specific instances when security could be sought in the absence of legislative stipulations.[39]

In *Haitas v Port Wild Props*[40] the court developed the common law to allow for an order directing a plaintiff insolvent company to provide security for costs for the action instituted by it. Therefore, at present the judiciary considers section 13 (which falls outside of the borders of chapter 14) to have been repealed, security for costs can still be demanded from an insolvent company in terms of rule 47 of the Uniform Rules of Court and based on the criteria created through the development of the common law principles.[41] This does not reinstitute the provisions of section 13,[42] but allows for the court to consider whether the interest of justice, the risk of vexatious litigation, the risk of non-payment of an adverse cost order and general prejudice would prefer the provision of security for costs[43]

However, in the matter of *Botha NO v Van den Heever NO*[44] the court relied on provisions that do not fall within the scope of chapter 14 in order to decide whether proper liquidation proceedings had been initiated. This case is distinguished from the above-mentioned cases as the former were directly concerned with either section 12 (re jurisdiction for liquidation proceedings) or section 13 (re request for security for costs), whilst the *Botha* case was concerned with the process of liquidating an insolvent company (re in strict dependence on the provisions of chapter 14 relating to the winding-up and administration of companies in liquidation). Within the framework of the initial policy document,[45] respective provisions of the 2008 Act and the approach of the judiciary in the cases under consideration, a principle is developed to underlie a specific approach and same is tested on two sections namely section 12 and 13. The crux of the matter therefore does not lie with the substantive findings of the judiciary (what the definition of a resolution is), but the approach followed (reliance on the provisions of chapters in

37 Van Loggerenberg & Malan 2012 *THRHR* 609 609 *et seq* discuss the prospects for provision of security for costs by *incola* companies in the light of the 2008 Act and the decisions of *Haitas v Port Wild Props* and *Ngwenda Gold v Precious Prospect Trading*.
38 *Op cit* parr 8-10.
39 *Idem* par 10.
40 *Op cit*.
41 *Idem* specifically parr 13-15.
42 *Ngwenda Gold v Precious Prospect Trading op cit* par 9.
43 *Haitas v Port Wild Props op cit* parr 13-15.
44 *Op cit*.
45 *DTI Guidelines*.

the 1973 Act other than chapter 14 provisions) to reach the outcome that the presiding officer did.

The principle, as will be seen below, is then further delineated to presume the "internal" framework, which will limit the scope of the principle-based approach to liquidation proceedings in respect of insolvent companies. The primary reason for this is the expectation of "alternative legislation" as per subitem 9(3) of schedule 5 and the subsequent deduction that the 2008 Act was not intended to deal with the insolvency of companies, as will be noted throughout this discussion.

3 1 Delineation of the Scope of the Application of the 1973 Act *re* Insolvency

3 1 1 Introduction

The failures of companies are economic realities.[46] The winding-up of a solvent company *vis-a-vis* an insolvent company has different outcomes in the sense that there are rights and interests[47] (including public, economic and societal) to protect where an insolvent company is liquidated, especially as not all financial interests in the company can be protected. A clear need therefore exists for an effective and comprehensive process to deal with insolvent companies when it comes to their liquidation.[48]

The 2008 Act does not provide for this,[49] as a case in point the "COR 40.1" pertains to solvent companies.[50] The 1973 Act does make extensive provision for administrative and subsequent protective legislative functions to deal with an insolvent company.[51] Whilst the 2008 Act provides a link ("bridge") to the provisions of the 1973 Act, it would not make sense to pick and choose processes "piece meal" by choosing between 2008 Act and 1973 Act as and when needed,

46 See eg the published statistics for liquidations where "[l]iquidation refers to the winding-up of the affairs of a company or close corporation when liabilities exceed assets and it can be resolved by voluntary action or by an order of the court" (available http://www.statssa.gov.za/Publications/P0043/P0043June2013.pdf (accessed 2013-08-23)).

47 *DTI Guidelines* 43-44. See also Cassim *et al Contemporary Company Law* (2012) 67-68.

48 *Idem* 43.

49 Parr 1, 2. See also Henning *et al Close Corporations and Companies Service Volume 2: Close Companies* (1990) (looseleaf, update April 2013, Service Issue 40) Part 1 16-5; Cassim *et al* 913-914.

50 *Botha v Van den Heever op cit* parr 15, 17. Of ancillary importance is the choice of wording of it 9(3) sch 5 in respect of conflicting legislation, enforcing that the part of the 2008 Act that relates directly to the winding-up of companies, does so within the strict borders of the concept of "solvent": "If there is conflict between a provision of the previous Act that continues to apply in terms of subitem (1), and a provision of Part G of Chapter 2 of this Act with respect to *a solvent* company, the provision of this Act prevails". (Own emphasis.)

51 See the comment of Cassim *et al* 913-914.

especially where a proper, comprehensive, tested and coherent procedure is available within the legal framework of the 1973 Act.[52]

The transitional provisions of the 2008 Act are clear in that the provisions of chapter 14 of the 1973 Act are only applicable where the winding-up of a company is involved.[53] The whole chapter 14 applies in a broad fashion to the liquidation of insolvent (or not solvent) companies although the procedure set out in chapter 14, subject to provisions such as section 79 of the 2008 Act, is also applicable to the winding-up of solvent companies.[54] It is therefore of particular importance for the purposes of discussing the applicability of Chapter 14 that the concept of insolvency be properly defined where relevant to activate the provisions of the 1973 Act.[55]

In the recently reported case of *Standard Bank v R-Bay Logistics CC,*[56] King AJ was concerned with deciding whether states of actual or commercial insolvency were relevant to initiate the process set out in chapter 14 of the 1973 Act. Although the subject of the matter was a close corporation, the process to be followed was in essence the same.[57] The conflict in this matter revolved around the failure of the applicant to

52 See the comment in the *DTI Guidelines* 28-29: "Hand in hand with the need for simplicity is the need for comprehensiveness. Although the importance of the courts in developing the law cannot be gainsaid, the Act should not leave matters of fundamental importance to its schedules or to common law. Furthermore, the Act and its regulations should as far as possible combine all legislation relevant to the formation and management of companies, so that one reference is provided to business people".

53 It 9 sch 5 2008 Act.

54 *Ibid.* See also ch 2 part G 2008 Act.

55 Delport & Vorster *Vol 1* 312: "The position is that for the provisions of Chapter XIV of the 1973 Act to come into operation (by virtue of item 9 of schedule 5 of the 2008 Act …), the company must not be solvent … However, the question as to what 'solvency' is, is not clear … [I]t is submitted that in the context of Part G of Chapter 2 of the Act (and also in respect of Chapter XIV of the 1973 Companies Act), i.e. whether a company is to be wound-up as being solvent or not, the test should be if the solvency (or lack thereof) would be a reason or ground for winding-up, i.e. necessitating the application of Chapter XIV of the 1973 Companies Act. If it is the case the company is not solvent (i.e. insolvent and liable to be wound-up for that reason). This interpretation, which in accordance with the meaning of 'solvent' as would appear from item 9 of Schedule 5, should then cover both the factual and commercial solvency situations, depending on the circumstances. The use of s 345(1) of the 1973 Companies Act would, it is respectfully submitted, least be *prima facie* evidence that the company is not, least, commercially solvent, possibly also not factually solvent as the inability to pay a debt is surely *prima facie* evidence also that the company is not factually solvent … The issue of commercial and factual (in)solvency was also addressed in respect of ss 311 and 312 of the 1973 Act (ss 114 and 115 of the 2008 Act), the principles which, it is submitted, remain relevant". See also *Edge Geo LLC v Geothermal Energy Systems (Pty) Ltd* [2012] ZAWCHC 391 par 21 (available http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAWCHC/2012/391.html&query=edge%20geo%20llc (accessed 2013-08-20)).

56 *Op cit*.

57 *Idem* par 10. The court further noted that "at present, no alternative

allege the insolvency of the respondent,[58] that is the respective meanings of "solvent" and "insolvent" within the scope of item 9 and Part G of the 2008 Act.[59] Counsel for the respondent, as summarised by the court, alleged that:[60]

> Because the application is based upon the ground that R-Bay is alleged to be unable to pay its debts, the application must be treated as one which has been brought under the provisions of Chapter 14 of the old Companies Act which relates only to insolvent companies.
>
> Standard Bank has failed to make any allegations in its papers as to whether R-Bay is solvent or not. In the absence of evidence to establish that R-Bay is insolvent, Standard Bank cannot rely upon the provisions of the old Companies Act, bringing its application.

The court set out the position in South African Law and acknowledged that there was a difference, duly acknowledged by the legislator,[61] between "actual or literal insolvency" and "commercial insolvency".[62] Both financial states resonated under the general term of "insolvency".[63] Whilst actual insolvency (or factual insolvency as it is also known)[64] indicates a state where the subject's assets are of a lesser value than its liabilities, commercial insolvency signals an impaired cash-flow that results in the inability of the subject to satisfy its financial obligations as and when these become legally due and payable.[65] Different tests apply in order to establish the different forms of insolvency noted above.[66]

The 1973 Act allowed for commercial insolvency as contemplated in the provisions of sections 344(f) and 345, which provided that a company could be wound-up if it was unable to pay its debts.[67] On the strength of the court's consideration of section 344 of the 1973 Act, it decided that it was needless to require the applicant to confirm that the

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legislation exists for the winding-up and liquidation of insolvent companies".

58 *Idem* par 12.

59 *Idem* parr 14, 16.

60 *Idem* par 12. The court duly noted (par 18) that the 2008 Act does not define either of these concepts.

61 *Idem* par 33.

62 *Idem* parr 14-15.

63 *Ibid*.

64 *Idem* par 31. See also *Absa Bank Ltd v Scharrighuisen* [2000] 1 All SA 318 (C).

65 *Standard Bank v R-Bay Logistics CC supra* n 33 parr 14-15. See also *Ex parte De Villiers NNO: In re Carbon Developments (Pty) Ltd (in liquidation)* [1999] 1 All SA 441 (A) 444.

66 *Standard Bank v R-Bay Logistics CC op cit* par 25.

67 *Ibid.* This discussion is primarily focused on a very basic differentiation between the use of the 1973 and 2008 Acts and not on the debate whether ss 344, 345 allow for factual insolvency as a basis for winding-up by court order – see *Ex parte De Villiers NNO op cit* as well as the cases referred to in *Standard Bank v R-Bay Logistics CC op cit* for commentary relating to the insolvency thresholds applicable. See also the discussion in Faris (ed) LAWSA 4(3) 123; Delport & Vorster *Vol 1* 314 submit that there is still not clarity on the matter.

company it sought to have wound-up was both commercially and factually insolvent.[68] In the premises, evidence of commercial insolvency is sufficient to activate the provisions of the 1973 Act.[69] Where this is established, the provisions of the 2008 Act would no longer be of consequence.[70] Consequently, King AJ decided that a company need only establish commercial solvency for the provisions of the 2008 Act relating to the winding-up of solvent companies, to be applicable.[71] *Contra* thereto, Delport and Vorster submit that an interpretation of "solvent" within the context of item 9 of schedule 5 could encompass both commercial and actual states of solvency where the facts allow for the interpretation of the respective states.[72]

It therefore seems that commercial insolvency will be sufficient cause to aver that the issue before the court arises under the 1973 Act[73] within the context of the grounds for liquidation of an insolvent company.[74] Proof of commercial solvency will, whilst disallowing the use of the 1973 Act's provisions unless the company is later found to be insolvent as contemplated in section 79(3), allow the use of the provisions of the 2008 Act regarding the grounds for winding-up.[75] However, Delport and Vorster submit, within the context of section 79(3) of the 2008 Act

68 *Standard Bank v R-Bay Logistics CC op cit* parr 25-27, 29.

69 *Idem* par 36. See also *Ex parte De Villiers NNO op cit* 444-445. See also *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) op cit* par 33: "My problem with the proposal that the business rescue practitioner, rather than the liquidator, should sell the property as a whole, is that it offers no more than an alternative, informal kind of winding-up of the company, outside the liquidation provisions of the 1973 Companies Act which had, incidentally, been preserved, for the time being, by item 9 of schedule 5 of the 2008 Act … A fortiori, I do not believe that business rescue was intended to achieve a winding-up of a company to avoid the consequences of liquidation proceedings, which is what the applicants apparently seek to achieve."

70 *Standard Bank v R-Bay Logistics CC op cit* parr 6, 11, 26, 28. See also it 9(1) sch 5 2008 Act.

71 *Standard Bank v R-Bay Logistics CC op cit* parr 29 & 32 *et seq*. The court differed in par 38 of its judgment from a previous decision of its division namely *Business Partners Limited v Yellow Star Properties 1061 (Pty) Ltd* (unreported case number 7188/2011 (available http:// www.saflii.org/cgi-bin/disp.pl?file = za/cases/ZAKZDHC/2012/96.html&query = Business %20P artners %20Limited %20v %20Yellow %20Star %20Properties %201061 %20 (Pty) %20Ltd (accessed 20130803)), which suggested that factual solvency is needed for the provisions of the 2008 Act to be applicable to winding-up procedures. In a similar fashion, the court differed in par 37 from *HBT Construction v Uniplant Hire op cit* as it was of the opinion that the court in *HBT* did not consider the contexts of "solvent" and "insolvent" and simply accepted that reference was made to factual insolvency. See also it 9(2) sch 5 2008 Act.

72 Delport & Vorster *Vol 1* 312. The authors also reiterate (312) that the 2008 Act relies on the term "not solvent" and not "insolvent" and that the application of the 1973 Act is dependent on the company being "not solvent". See also the discussion 314 *et seq*.

73 See the expression used by Binns-Ward J in *Sibakhulu Construction v Wedgewood Village op cit* par 11 "matters arising under the 2008 Act".

74 *Standard Bank v R-Bay Logistics CC op cit* 36.

75 *Idem* parr 26, 28.

relating to winding-up and liquidation by order of court, that the "ordinary meaning" should be given to the phrase "may be insolvent", which refers to factual insolvency.[76]

In the light of the judgment of *Standard Bank v R-Bay Logistics CC* it seems, therefore, that the winding-up of a company that is factually solvent but commercially insolvent will be dealt with under the 1973 Act as the liquidation of an insolvent company and not as a solvent company under the 2008 Act. If the scope and policies underlying the 2008 Act is considered and argued to exclude the regulation of proceedings relating to the winding-up of insolvent companies,[77] this approach is of particular importance when considering a potential extended scope of the provisions available under the 1973 Act.[78]

3 2 *Botha NO v Van den Heever NO*[79]

The conflict in *Botha v Van den Heever* arose from the appointments of two sets of provisional liquidators to a company in liquidation by the North and South Gauteng Masters of the High Court respectively.[80] Botha, Van Tonder and Maenetja (the applicants) were appointed by the South Gauteng Master after the company had, ostensibly, initiated voluntary winding-up proceedings by way of a special resolution and the registration thereof.[81] Van den Heever and Parbhoo (the first and second respondents) were appointed by the North Gauteng Master in accordance with a provisional winding-up order made by the North Gauteng High Court.[82] Both appointments were made on the 10th of April 2012.[83]

Although the parties' primary dispute related to the procurement of jurisdiction by the respective Masters, it was not related to the sequential appointments of the provisional liquidators, but argued to be assumption

76 *Vol 1* 310.
77 *Op cit*.
78 On an ancillary note, see the comment of Mayat J in *Firstrand Bank Ltd, Wesbank Division v PMG Motors Alberton (Pty) Ltd op cit* parr 43, 44: "This is particularly so as it is my view that the principles underlying companies having more than one 'residence' within the framework of the 1973 Act can potentially still apply in relation to joint liquidators if central control and/or joint administration of the liquidated company for the benefit of creditors is conducted by more than one joint liquidator from more than one jurisdiction … This is particularly so as the new provisions of the 2008 Act relating to the registered office of a company being the same location as the principal office of a company, obviously do not apply once a company is liquidated". Although this matter related to jurisdiction *vis-à-vis* joint liquidators which were ultimately sought to be decided upon common law grounds, the considerations of the court and comments on *Sibakhulu* deserve mentioning.
79 *Op cit*.
80 *Idem* parr 1, 3.
81 *Idem* par 1.
82 *Ibid*.
83 *Ibid*.

of jurisdiction.[84] The court proceeded to evaluate the authenticity of the winding-up proceedings undertaken within the jurisdiction of the South Gauteng Master of the High Court.[85] Counsel for the first respondents disputed the applicant's appointments on the basis of the invalidity of the resolution passed to initiate the voluntary winding-up proceedings and its subsequent registration.[86] In terms of the 1973 Act, a special resolution passed by the members of the company and its proper registration is needed for voluntary winding-up of an insolvent company.[87]

The court referred to the definition of a special resolution set out in chapter 1 of the 1973 Act, as well as the definition in the 2008 Act in order to determine whether the special resolution for the liquidation of the company was correctly passed.[88] It found that the contents of the document presented as a special resolution did not comply with the requirements as it was not passed by the members, as required by both the 1973 and 2008 Acts.[89] Furthermore, the document was titled "resolution" instead of "special resolution", which the court found to be peculiar under these circumstances where a special resolution was explicitly required by the 1973 Act.[90] In essence, the document did not pass the criteria set out in section 349 of the 1973 Act.[91]

The second aspect that the court considered was the registration of the resolution.[92] Although, by the court's own account later in the judgement, the second tier of the court's consideration was unnecessary as the court had already decided that the resolution did not comply with section 349 of the 1973 Act, the court's deliberation is of particular importance for the discussion hereafter.[93] The court applied the provisions of sections 351(1) and 200 of the 1973 Act to the actual procedure implemented when the resolution was purportedly registered.[94]

The applicants made use of form CoR 40.1 in terms of section 80 of the 2008 Act and regulation 40(f) of the 2011 Companies regulations.[95] In terms of chapter 7, the court indicated that correct form to be used where a section 200 resolution is registered is CM 26.[96] The reasoning behind the use of the 1973 Act instead of the provisions of the 2008 Act

84 *Idem* par 1 *et seq*.
85 *Idem* par 7 *et seq*.
86 *Idem* par 5.
87 *Idem* parr 22, 23.
88 *Idem* parr 8, 11. As this article relates to the principle of the approach in *Botha v Van den Heever* and not the outcome of the decision, a discussion of other provisions relating to the concept of "resolution" (see eg item 7(5)(c)) is beyond the overall scope of the discussion.
89 *Idem* parr 8, 11.
90 *Idem* par 10.
91 *Idem* par 11.
92 *Botha NO v Van den Heever NO op cit* parr 12-21.
93 *Idem* parr 17, 18.
94 *Idem* parr 12-17
95 *Idem* par 15.
96 *Idem* parr 15-16.

was that the form prescribed necessitated information and notification requirements that the 2008 Act did not require.[97] In particular, recourse to the incorrect legislation wrongly signalled the liquidation of a solvent company instead of an insolvent one.[98] In light of the above, the substantive and procedural requirements for the voluntary winding-up of the insolvent company, insofar as these related to the resolution, were not met.[99] The applicants' appointments as provisional liquidators were therefore declared to be unfounded by virtue of the invalidity of the voluntary winding-up proceedings.[100]

The approach of the court, by referring to provisions that fall outside of the ambit of chapter 14, is not unique. Delport and Vorster for instance suggest that recourse should be had to the provisions of section 1 of the 1973 Act pertaining to "liquidator" and "winding-up order", and subsequently the calculation of time periods and aspects relating to special resolutions for the winding-up of companies.[101] The authors rationalise the approach towards the definitions contained in section 1 and the provisions relating to a special resolution, by referring to the absence of comparable definitions in the 2008 Act.[102]

4 The Liaison Between the 2008 and 1973 Acts

4 1 Legislative Interpretation

The first aspect to consider is whether an interpretation of the 2008 Act supports a comprehensively inclusive approach to the winding-up procedures of the 1973 Act relating to insolvent companies. The principles relevant to the interpretation of statutes create a presumption that legislation only purports to modify the current legal position in so far as are required.[103] The concept of the prevailing legal position ("existing law") is deemed to refer to common law as well as statute law in respect

97 *Idem* parr 13-17 specifically par 15.
98 *Idem* par 17.
99 *Idem* parr 22, 23.
100 *Idem* parr 21, 23.
101 Delport & Vorster *Vol 2* APPI-4.
102 *Ibid*. At various occasions, with the exception of *Botha v Van den Heever,* mentioned throughout this article, the judiciary relied on the common law provisions to deal with matters that were initially dealt with in the 1973 Act but omitted in the 2008 Act. It must be noted that the facts in cases such as *Sibakhulu Construction v Wedgewood Village Golf Country op cit* and *Firstrand Bank Ltd, Wesbank Division v PMG Motors Alberton (Pty) Ltd op cit* relate to the insolvency of the company.
103 Du Plessis "Interpretation of Statutes and the Constitution" in *Bill of Rights Compendium* par 2C24 (last updated June 2012) (available http://butterworths.up.ac.za/nxt/gateway.dll/2b/zc/tna/fcy3/1cy3/9cy3?f=templates$fn=document-frameset.htm$q=%22interpretation%20of%20statutes%22%20$x=Advanced#LPHit1 (accessed 2013-03-08))

of relevance to the presumption referred to above.[104] One of the purposes advanced in support of this presumption is the preservation of legal certainty as "it discourages an undue destabilisation or unsettling of the law as it stands".[105] In *Twani v Special Investigating Unit and Another,*[106] the court indicated the following:

> The interpretation of a provision of a statute should always be in contextual harmony with both the letter and spirit of the whole body of law, statutory and common. Regard must be had therefore not only to the pervasive presumption – (that the legislature does not intend to alter or modify the existing law more than is necessary and any intention to do so must be declared in clear and unequivocal language; or the inference must be such that the inevitable conclusion is that the legislature did have such an intention) but *to the Act as a whole, to its preamble and general framework*.

In *Stellenbosch Farmers Winery Ltd v Distillers Corporation (SA) Ltd and another* 1962 (1) SA 458 (A) Wessels MA warned at 476E-F that:

> ... it is the duty of the Court to read the section of the Act which requires interpretation sensibly, i.e. with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the *contextual scene*, which involves consideration of the language of the rest of the statute as well as the '*matter of the statute, its apparent scope and purpose, and, within limits, its background*.' In the ultimate result the Court strikes a proper balance between these various considerations and thereby ascertains the will of the Legislature and states its legal effect with reference to the facts of the particular case which is before it.

The above extracts highlight the importance of considering factors other than only the obvious words of a statutory provision, as is done in this discussion. Notwithstanding the above substantive reasoning as to the practicalities of following the approach in *Botha v Van den Heever supra*, perhaps the more direct approach of section 11 of the Interpretation Act[107] deserves to be mentioned. Firstly, a distinction should be drawn between scenarios where the facts support a section 11 approach as to when the facts support a section 12 approach.[108] The confusion between reading the relevant provisions semantically as opposed to contextually is created by the reference worded to refer to chapter 14 of the 1973 Act.

In terms of section 11 of the Interpretation Act, which deals with "[r]epeal and substitution", "[w]hen a law repeals wholly or partially any former law and substitutes provisions for the law so repealed, the repealed law shall remain in force until the substituted provisions come into operation". Section 12(1) of the Interpretation Act, provides for the "[e]ffect of repeal of a law" as follows:

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104 *Ibid.* See also *Bestuursliggaam van Gene Louw Laerskool v Roodtman* [2003] 2 All SA 87 (C) 95.
105 *Ibid*.
106 [2001] JOL 9009 (E) par 16. *Own emphasis*.
107 33 of 1957 (the Interpretation Act).
108 See Botha 69-76.

> Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted.[109]

Section 12 of the Interpretation Act is not relevant in all respects since the 2008 Act did keep chapter 14 of the 1973 Act "alive"– in effect it can be argued that the 2008 Act did, in practice, not constitute a complete repeal of the 1973 Act by virtue of the phrasing of section 224 and schedule 5 to the 2008 Act as noted above and discussed hereafter.

4 2 The 2008 Act

As indicated above, the 2008 Act is not in principle concerned with the initiation of winding-up proceedings of *insolvent* companies as this was intended to be regulated by comprehensive insolvency legislation.[110] The preamble to the 2008 Act furthermore does not refer to the regulation of corporate insolvency or winding-up of insolvent companies as it indicates that the legislation primarily relates to the general regulation of companies in South Africa. In particular, item 9(4) of schedule 5 to the 2008 Act, provides that:

> 9. Continued application of previous Act to winding-up and liquidation. —
>
> (1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).
>
> (4) The Minister, by notice in the Gazette, may —
>
> (a) determine a date on which this item ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the *winding-up and liquidation of insolvent companies*; and
>
> (b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation contemplated in paragraph (a). (Own emphasis).

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109 *Vienings v Paint and Ladders (Pty) Ltd op cit* parr 14-16. See also Botha 69-76.

110 Par 1 *supra*. See also *Standard Bank v R-Bay Logistics CC op cit* parr 21, 22: "To answer, I think it is first necessary to consider the apparent intention behind the transitional provisions encapsulated in item 9. It seems clear that the Legislature's ultimate objective is to replace the provisions of Chapter 14 of the old Companies Act, dealing with the winding-up of companies, with new legislation which would deal, separately, with 'solvent' companies and 'insolvent' companies. However, the time the new Act came into force, the Legislature had not got round to creating any new legislation to deal with the winding-up of 'insolvent' companies. It is, therefore, clear that item 9 is intended to serve only as a stopgap, until such new legislation is passed. Item 9(4)(a) specifies that Chapter 14 of the old Companies Act must continue in force until such new legislation, dealing with 'insolvent' companies, is actually in place."

It is clear that the 2008 Act does not regulate the insolvency of companies but that this function, although the importance thereof has been recognised,[111] has been put on hold in favour and in anticipation of effective substitute legislation.[112] In the matter of *Mthembu v Letsela and Another,*[113] the court indicated that:

> A law (which includes subordinate or delegated legislation) may be impliedly repealed 'by a later repugnant law of the same or a superior legislature' (*R v Sutherland* 1961 (2) SA 806 (A) 815A; *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 at 397). If the later law 'professes, or manifestly intends, to regulate the whole subject to which it relates, it necessarily supersedes and repeals all former acts, so far as it differs from them in its prescriptions' (*New Modderfontein Gold Mining Co v Transvaal Provincial Administration* (*supra*) at 397). What is necessary, then, is to ascertain the 'true interpretation' of the Intestate Succession Act, so as to establish its ambit.

In the premises, it is submitted that chapter 14 of the 1973 Act (and by virtue of section 339, the Insolvency Act) cannot be seen as a strict delineation of the applicability of the provisions of the 1973 Act insofar as it applies to corporate insolvency.[114] Mongalo indicates that the purpose of the corporate review undertaken in 2003 was not focused solely on amending legislation that had not been reviewed in three decades.[115] It was intended to solicit a profound overhaul of the South African legislation pertaining to corporate law.[116] A strict approach does not correlate with the report of the review committee, who emphasised that corporate legislation should be comprehensive.[117] The drafted guidelines/policy framework recognised that whilst "the importance of the courts in developing the law cannot be gainsaid, the Act should not leave matters of fundamental importance to its schedules or to common law'.[118]

It would be imprudent to interpret the limited provisions of schedule 5 to the 2008 Act in a narrow manner. This would result in the abolishment of important measures (including procedural measures such as jurisdictional guidance) in place to address matters relating to corporate insolvency in the absence of comprehensive legislation that can be viewed as an improvement on the present situation. It is expected that the legislator would at least retain the necessary provisions for orderly liquidation of insolvent companies instead of repealing the legislation and obliging recourse to the common law prior to the

111 *DTI Guidelines* 43-44.
112 It 9(4) sch 5 2008 Act. See also *DTI Guidelines* 43-44.
113 [2000] 3 All SA 219 (A) par 28.
114 As indicated above, this submission is supported by the approaches of Hiemstra AJ in *Botha v Van den Heever op cit*; Delport & Vorster *Vol 2* APPI-3–APPI-4.
115 2010 *Acta Juridica* xiii xv.
116 *Ibid*.
117 *DTI Guidelines* 28.
118 *Ibid*.

introduction of the expected new insolvency legislation, as had been observed in the case law referred to throughout this article. In *R v Sutherland*,[119] the court stated that:

> It must be conceded that a law which expires automatically by effluxion of time or, equally automatically, upon the happening of a prescribed event, other than an act of repeal, cannot be said to have been repealed by another law within the meaning of that expression in sec[tion] 12(2) of the Interpretation Act. The repeal of a law, which is a matter of substance and not of form, can be effected, apart from an expressed repeal, in more than one way. So, for instance, is subordinate legislation regarded as impliedly repealed upon the repeal of the enabling statute (*Lockhat Bros. & Co. Ltd. v. Minister of Finance*, 1932 N.P.D. 469 at pp. 475-6 and *Hatch v. Koopoomal*, 1936 A.D. 190 at p[age] 197), and there is an implied repeal of a law by a later repugnant law of the same or a superior legislature. (*Leges posteriors priores contrarias abrogant*.)

Sec[tion] 12(2) of the Interpretation Act is not limited to expressed as opposed to implied repeals, and if a law is totally done away with by legislative act in any manner, that law is, in my opinion, repealed within the meaning of that expression in sec[tion] 12(2).

4 3 Discussion

As mentioned above, the revoking of legislation is concerned with substantive considerations.[120] The court's deliberations in *Botha v Van den Heever*[121] were not undertaken in the absence of recognition that the 1973 Act had in principle been repealed by the 2008 Act but that the provisions of chapter 14 were still applicable. Item 9(1) of schedule 5 to the 2008 Act specifically indicates that the provisions of chapter 14 apply "as if the [1973] Act has not been repealed'.[122] The subsequent reference that subjects this subitem to subitems (2) and (3), the promulgation of comprehensive legislation to regulate insolvency proceedings, creates

119 [1961] 3 All SA 50 (A) 54, 55.

120 *Ibid*. In our opinion the Interpretation Act (specifically ss 11, 12) is not of particular assistance to deal with this matter in light of the transitional provisions invoking the provisions of the 1973 Act and the approach of the court in *Botha v Van den Heever*. In *Vienings v Paint and Ladders op cit* par 13 *et seq* the court did rely on the provisions of s 12(2)(c) of the Interpretation Act in order to ascertain whether the 1973 or 2008 Act was applicable. However, the point of departure was similarly the fixed notion that s13 had been repealed and could not be utilised. Our discussion precedes the point of departure.

121 *Op cit* par 2.

122 Own emphasis. The further question is: how wide should the term "still applicable" be interpreted ie how literal (each word has its ordinary meaning and is there for a reason) or practical (in order to work properly, other ss through the gateway of chapter 14 is needed). See Botha in general for a discussion of these principles.

the impression that these sections will only be factually repealed upon the realisation of the future prospective statute.[123]

However, Hiemstra AJ had recourse, in our view correctly, to the provisions in the 1973 Act that were incorporated into other chapters of the statute.[124] In particular, reference was made to the definition in chapter 1, section 200 pertaining to resolutions in chapter 7 as well as the general liquidation proceedings in terms of chapter 14.[125] In each instance, the section referred to, that fell outside of the ambit of chapter 14, was clearly linked to a section that formed part of chapter 14. The use of the term "special resolution' in section 349 in chapter 14 was directly applicable to the definition of "special resolution' in section 1 in chapter 1 of the 1973 Act.[126]

In a similar fashion, the incorporation of the provisions of section 200 in chapter 7 of the 1973 Act was a natural consequence of the reference to section 200 in section 351 in chapter 14.[127] It is of particular relevance that the court distinguished between a solvent and insolvent company, specifically within the context of the contents of the forms used to register a resolution and the notification requirements.[128] In the premises, the court's treatment of sections 1 and 200 was "as if that Act [the 1973 Act] had not been repealed",[129] notwithstanding the reference in item 9(1) of schedule 5 to the 2008 Act to chapter 14 of the 1973 Act. It is therefore questionable whether the 1973 Act had been "totally done away with"[130] or whether it is reliant on the "happening of a prescribed event".[131]

The formalities preferred by the court, in this context, the use of prescribed forms set out in the appendixes to the 1973 Act, deserves special mention as this is a relevant area where the court distinguishes between solvent and insolvent companies.[132] The use of a form set out in an appendix to the 1973 Act, specifically created for the purpose

123 Botha 69-70. The author notes, with illustrative reference to it 9 sch 5 2008 Act, that "[w]hen a lawmaker substitutes (repeals and replaces) legislation with another enactment, there might be a possibility that the replacing law is not in force when the other legislation departs from the scene. In order to prevent this type of 'legislative short circuit' or gap in the law, the repealing legislation could expressly provide for a suitable transitional measure".
124 *Op cit*.
125 *Ibid*.
126 *Botha v Van den Heever op cit* parr 7-11.
127 *Idem* parr 12-16.
128 *Idem* parr 15, 17.
129 It 9(1) sch 5 2008 Act.
130 *R v Sutherland op cit* 55: "Sec. 12 (2) of the Interpretation Act is not limited to expressed as opposed to implied repeals, and if a law is totally done away with by legislative act in any manner, that law is, in my opinion, repealed within the meaning of that expression in sec. 12 (2)".
131 *Idem* 54.
132 *Botha v Van den Heever op cit* par 15.

related to section 200, can be referred to the provisions of section 351.[133]

5 Preliminary Review

In this regard is submitted that, where a section of the 1973 Act which has been repealed, is directly applicable to an aspect relating to the liquidation of an insolvent company, the provisions of that section can be invoked in principle, bar a clear indication to the contrary.[134] The approach of Hiemstra AJ in the North Gauteng High Court in *Botha v Van den Heever,*[135] was analysed as a case in point, illustrating the use of sections not included within the parameters of chapter 2 (such as section 1) to assist in deciding the validity of a resolution for purposes of liquidating an insolvent company. In the light of *Botha v Van den Heever,*[136] it seems as if the provisions of chapter 14, being the main concise body of provisions relating to the winding-up and liquidation proceedings of insolvent companies, is the point of departure for these proceedings.[137] Where a section in chapter 14 that makes specific reference to an action, function or partaker in respect of which another section of the 1973 Act which falls outside of the ambit of chapter 14 is applicable for its proper execution, the section may be used even if it is not included in chapter 14.[138] It is submitted that this is allowable as the authorising section falls within the scope of chapter 14 of the 1973 Act and thus item 9 of schedule 5 to the 2008 Act.[139]

In the second part of this article, the effect of the analyses on the practical application of two procedural aspects set out in sections outside of the ambit of chapter 14 is discussed. In particular, reliance on the jurisdictional provisions of section 12 and the provisions relating to security for costs in terms of section 13 is argued.

The discussion in the second part serves to illustrate the necessary use of "repealed' sections of the 1973 Act in order to facilitate the proper conduct of winding-up proceedings of insolvent companies.[140]

6 The 1973 Act

Sections 12 and 13 were incorporated into chapter 2 of the 1973 Act. In this regard, these provisions have, on an interpretation of section 224

133 *Idem* parr 12, 15.
134 See *inter alia* par 1 *supra*.
135 See par 3 3 *supra*.
136 See par 3 3 *supra*.
137 Par 4 3 *supra*.
138 *Ibid*.
139 *Ibid*.
140 This is, however, evident from the continuous reliance on common law provisions to deal with matters previously regulated by the 1973 Act in the context of winding-up of companies as referred to throughout this article.

and schedule 5 to the 2008 Act, been repealed. This was confirmed by the respective presiding officers in *Haitas v Port Wild Props*[141] and *Sibakhulu Construction v Wedgewood Village*.[142]

However, sections 12 and 13 are of particular importance for the execution of proper winding-up proceedings in respect of an insolvent company. The scope of section 12 is of such a nature that it finds application to the election of the court competent to decide liquidation applications and grant subsequent provisional and/or final winding-up orders for insolvent companies. Section 13 deals with the provision of security for costs where a company instigates legal proceedings and, although not necessarily formally in liquidation, is likely to be incapable of satisfying an adverse cost order subsequent to unsuccessful litigation.

6 1 Section 13

6 1 1 General

Section 13 of the 1973 Act, set out in its chapter 2, reads as follows:

> 13. Security for costs in legal proceedings by companies and bodies corporate.– Where a company or other body corporate is *plaintiff or applicant in any legal proceedings*, the Court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, *if it is being wound up, the liquidator thereof*, will be unable to pay the costs of the defendant or respondent if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given. (Own emphasis.)

Subsections 386(3) and (4)(a) of the 1973 Act, set out in its chapter 14, reads as follows:

> (3) The liquidator of a company [has the power] —
>
> ...
>
> (4)(a) to *bring* or defend in the name and on behalf of the company any action or other *legal proceeding of a civil nature*, and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings: Provided that immediately upon the appointment of a liquidator and in the absence of the authority referred to in subsection (3), the Master may authorize, upon such terms as he thinks fit, any urgent legal proceedings for the recovery of outstanding accounts. (Own emphasis.)

6 1 2 Commentary

In *Haitas v Port Wild Props*[143] the applicants requested the respondents to furnish security for costs in terms of rule 47 of the Uniform Rules of Court. The respondent company had been liquidated as it was insolvent

141 *Op cit*.
142 *Op cit*.
143 *Op cit*.

and did not have realisable property or money readily available.[144] It had instituted action against the applicant three years prior to its final liquidation, but the matter had since not been brought to its logical conclusion.[145] It would in all probability have been incapable of payment of the legal costs of the applicants/defendants where the litigation was unsuccessful and a subsequent adverse cost order was made against the respondent/plaintiff.[146] Tsoka J reiterated that section 13 of the 1973 Act had been repealed by the 2008 Act and that this section could not be utilised in the present case.[147] In the absence of a corresponding section in the 2008 Act, the court elected to avail itself of its inherent jurisdiction in terms of section 173 of the Constitution.[148] The court further decided that the lack of a similar provision in the 2008 Act does not restrict the judiciary from exercising its inherent power to set its own process and to develop the common law.[149]

In the premises, the court ruled that the common law principle, that an *incola* insolvent company is not obliged to provide security for costs for actions brought by it, should be developed in the interests of justice.[150] The deciding considerations centred on the prevention of unscrupulous and unfounded litigation by litigants that would in reality not bear the risks and consequences of their conduct.[151]

Delport and Vorster[152] as well as Van Loggerenberg and Malan[153] indicate that the absence of a provision for obtaining an order for security for costs from an insolvent company is not unknown of as a similar position reigned prior to section 216 of the Companies Act.[154] Although not arguing substantive reasons for the retaining of a section 13 provision relating to security for costs, Van Loggerenberg and Malan do seem to favour a legal dispensation that mirrors that of the 1973 Act.[155]

144 *Idem* par 2.
145 *Idem* par 10.
146 *Idem* par 2.
147 *Ibid*.
148 *Idem* parr 7-8, 13-15. The reference to the Constitution is to the Constitution of the Republic of South Africa, 1996.
149 *Op cit* par 13.
150 *Idem* parr 13-15.
151 *Idem* par 13.
152 *Vol 1* 106.
153 *Op cit* 609. Van Loggerenberg & Malan 2012 *THRHR* 609 further indicate (609) that the inclusion and exclusion of a s 13 position has reigned since the common law ie with the Companies Act 25 of 1892 (Cape), Companies Act 46 of 1926 and the 1973 Act had this or a similar provision whilst the common law, Companies Act 31 of 1909 (Transvaal) and Companies Act 71 of 2008 did and does not have a similar provision.
154 46 of 1926.
155 2012 *THRHR* 609 620, 621 ie specified legislative provision for the provision of security for costs by insolvent companies. In this regard, although the method of the courts is criticised, the authors ultimately concur with the outcome that the presiding officers intended in *Haitas v Port Wild Props* and *Ngwenda Gold v Precious Prospect Trading* namely that an *incola* company may be requested and obliged to provide security for costs.

The authors provide various alternatives, substantiated by the position in foreign jurisdictions, to obtain this outcome, namely amendments to the relevant legislation.[156] (It is submitted that these alternatives will be useful to consider in future.)

In the matter of *Ngwenda Gold v Precious Prospect Trading,*[157] the court was of the opinion that the omission of an equivalent to section 13 of the 1973 Act in the 2008 Act could not be considered as unintentional or blamed on carelessness on the part of the Legislator. The court noted that the purpose of section 13 was to sanction a definite departure from the South African common law principle that an impoverished or insolvent *incola* company is not obliged to provide security for costs to the respondent or defendant where the company is the applicant or plaintiff in legal proceedings.[158] It was further submitted that this approach, which was in effect a policy decision, necessitated a consideration of the intentional omission of a section or sections analogous to section 13 of the 1973 Act along with the rights encompassed in section 34 of the Constitution.[159] The court finally decided that the considered aspects indicated that the legislator allocated more significance to a litigant's ability to access the judiciary than the protection afforded by section 13, which may reduce that ability.[160]

A proper consideration of the potential applicability of section 13 is of importance, as aptly illustrated by Pillemer AJ in *Vienings v Paint and Ladders (Pty) Ltd.*[161] The course of events extended over the period time in which the 1973 Act was repealed and the 2008 came into operation.[162] The summons in the matter was served whilst the 1973 Act was still in full effect but the application for security for costs was only brought after the 2008 Act had become operational.[163] This sequence of facts allowed the learned judge to compare the 1973 and 2008 Acts, although with respect to the repeal and lack of substitution of section 13, this judgment does not depart from the generic approach followed by courts such as *Haitas* and *Ngwenda* discussed earlier.[164] However, the distinction of the requirements for section 13 and a common law application for security of costs within the course and scope of events involving a company that is seemingly experiencing financial strain,[165] is of value for further discussion. The court stated that:[166]

156 *Ibid*.
157 *Op cit* parr 11-14.
158 *Idem* parr 11-13.
159 *Ibid*.
160 *Idem* par 14.
161 *Op cit* 28.
162 *Idem inter alia* par 11.
163 *Idem* par 11.
164 *Op cit*. *Vienings v Paint and Ladders op cit* par 11.
165 *Vienings v Paint and Ladders op cit* eg par 10.
166 *Idem* par 11. As this article relates to the principle of the approach in *Botha v Van den Heever*, a discussion of other provisions relating to the concept of "resolution" (see eg item 7(5)(c)) or comparable provisions (see eg item

S13 is the section that confers the right to seek security for costs against a company or corporation. The bar that has to be achieved by the party seeking security is much more easily met under s13, than under the common law under which the test is much more stringent. The court has an inherent power to order security in relation to unnecessary and vexatious proceedings by impecunious plaintiffs. It has also been held to have the power if it is in the interests of justice to make such an order in relation to vexatious, reckless and unmeritorious litigation bearing in mind the right of every litigant to have any dispute settled in a court of law (see *Haitas & Others v Port Wild Props 12 (Pty) Ltd* 2011 (5) SA 562 (ESJ) at 533H). It is therefore important to decide whether s13 applies to these proceedings or not to determine the appropriate test to be applied in exercising the discretion to grant or refuse an order for security for costs. It is clear that if section 13 is not of application, a case under the common law has not been made out.

6 1 3 Discussion

On an interpretation of *Botha v Van den Heever,*[167] a clear distinction needs to be drawn between the actions taken in respect of an insolvent company and that of a solvent company. The provisions of Part G of Chapter 2 of the 2008 Act, dealing with the winding-up of companies, relate to solvent companies. The reference in item 9 of schedule 5 to chapter 14 does not distinguish between solvent and insolvent companies apart from setting out the circumstances under which the provisions of the 2008 Act, incidentally always in respect of *solvent* companies, will prevail. Further, subitem 9(4) relates to alternative legislation *re insolvent* companies. This distinction, introduced by the legislation itself, is the foundation when deciding whether to use the provisions of the 1973 Act or that of the 2008 Act,[168] and this has been

5(11)) is beyond the overall scope of the discussion. The court's reference to par 13 sch 5(11) *re* comparable provisions, is of further interest: "Schedule 5(11) of the 2008 Companies Act preserves any right or entitlement enjoyed by or obligation imposed on any person in terms of any provision of the 1973 Act which is a valid right or entitlement of or any obligation imposed on that person in terms of any comparable provision of the 2008 Act as from the date that right or entitlement first arose subject to the provisions of the 2008 Act. As mentioned earlier, s13 does not have a comparable provision in the 2008 Act. The schedule is therefore of no assistance in determining whether s13 relief is available after the repeal of the 1973 Act since there is no comparable provision in the 2008 Act". Our reasoning as set out above (see eg parr 1, 2 *supra*) is that the 2008 Act was not intended to regulate circumstances where companies were insolvent or experiencing financial difficulty (apart from the business rescue provisions) and as such, it is to be expected that no comparable provision was drafted for inclusion into the 2008 Act. See also the comment of Mayat J in *Firstrand Bank Ltd, Wesbank Division v PMG Motors Alberton (Pty) Ltd op cit* par 33: "It is well known in this regard that business rescue proceedings relating to financially distressed companies were not contemplated in terms of the 1973 Act, and accordingly constitutes an innovation introduced by the 2008 Act".

167 *Op cit* parr 15, 17.

168 It 9 sch 5 2008 Act.

confirmed by case law. Utilising the provisions of the 2008 Act may result in the related activities being null and void.[169]

It is submitted that, where the core issues are related to an insolvent company, the provisions of the 1973 Act should be exclusively used to resolve the matter.[170] Sections 386 and 13 are cases in point, the latter especially as it applied to companies in financial distress – "impecunious or insolvent". It is argued that, under circumstances where the provisions of the 2008 Act are applicable, that is proceedings relating to companies that are considered solvent (even where the latter can be seen as *impecunious*), an equivalent to section 13 of the 1973 Act does not exist. Under these circumstances, the developed version of the common law used in conjunction with rule 47 of the Uniform Rules of Court, is applicable.[171]

Section 386(4)(a) refers to the power of a liquidator to litigate for and on behalf of a company in liquidation. This includes both the initiation and defence of civil proceedings.[172] As quoted above, the wording of section 13 indicates its specific applicability to litigation where companies in liquidation, though the appointed liquidator, are *dominus litis*. It is submitted that there are two direct jurisdictional connections between the provisions of the two sections under consideration being *liquidation* and *litigation*, which have direct bearing on the wording of the provisions of section 13. It is further submitted that section 13 is related to the winding-up and liquidation of companies as referred to in item 9(1) of schedule 5 to the 2008 Act. As section 386, set out in chapter 14, authorises litigation within the context of liquidation proceedings, section 13, even though it is contained in chapter 2 of the 1973 act, continues to apply "as if [the 1973 Act] had not been repealed".[173]

Van Loggerenberg and Malan are of the opinion that the judgments of *Haitas v Port Wild Props* and *Ngwenda Gold v Precious Prospect Trading* are unfounded.[174] It is important for purposes of this discussion to note that the authors' criticism is not levelled at the consistent decisions of the respective courts that section 13 of the 1973 Act has been repealed.[175] The dissent is based in the grounds for the sanctioning of security for costs through the mechanisms of Uniform Rule 47, the court's inherent power to regulate and protect its own process and the development of the common law.[176] However, it is submitted that a view other than their assumptions on this point can be advanced. Their first assumption is that the courts are correct in their interpretation of the interrelation of the

169 *Botha v Van den Heever op cit* parr 22-23.
170 See *inter alia* Cassim *et al* 913-914.
171 See eg *Haitas v Port Wild Props* and *Ngwenda Gold v Precious Prospect Trading op cit*.
172 S 386(4)(a).
173 It 9(1) sch 5 2008 Act read with the approach of the court in *Botha v Van den Heever op cit*.
174 Van Loggerenberg & Malan 2012 *THRHR* 609 610.
175 *Idem* 610, 612.
176 *Idem* 614-615, 617-619.

2008 and 1973 Acts, namely that section 13 has been repealed and is no longer a usable tool available to a defendant.[177] Our view of this matter was discussed in detail above.

Their second assumption that the discussion below diverge from, is that the lack of a provision similar to that of section 13 of the 1973 Act is a legislative oversight.[178] In particular they argue that the failure to amend, repeal or address section 8 of the Close Corporations Act[179] supports the contention that the lack of incorporation of section 13 in any form in the 2008 Act, was unintended.[180]

In the Department of Trade and Industry's explanatory guide on the 2008 Act, it is stated:

> All existing close corporations will retain their current status until such time as their members decide that it is in their interest to convert to a company. Therefore, the Act provides for the *indefinite continued existence of the Close Corporations Act*. However, it also provides for the closing of that Act as an avenue for the incorporation of new entities, or for the conversion of any existing companies into close corporations, as of the effective date of the Companies Act.[181]

It may therefore be asked if the lack of amendment of an act which was not intended to be extensively amended is grounds for substantiating a claim of legislative oversight.

The second ground for stating that the lack of a security provision is an oversight addresses the assumption of the court that the Legislator preferred the utmost adherence to section 34 of the 1996 Constitution over a position that allowed for interference with a litigants right of access to courts.[182] The authors contend that section 13 of the 1973 Act and section 34 of the 1996 Constitution could co-exist and that the contention of the court was not sustainable.[183] In *Giddey NO v JC Barnard and Partners,*[184] a Constitutional Court case referred to by Van Loggerenberg and Malan,[185] the court stated that "[t]he sharp commercial reality of such an order is that at times where the plaintiff or

177 See eg *Haitas v Port Wild Props* and *Ngwenda Gold v Precious Prospect Trading op cit*.
178 *Idem* 619, 621. Contra *Ngwenda Gold v Precious Prospect Trading op cit* par 12.
179 69 of 1984.
180 Van Loggerenberg & Malan 2012 *THRHR* 609 619.
181 *DTI Explanatory Guide* 12. (Own emphasis.) See also *DTI Guidelines* 43-44. See also Blackman *et al Vol 1* Overview-2–Overview-3.
182 Van Loggerenberg & Malan 2012 *THRHR* 609 617-619.
183 *Idem* 619.
184 2007 5 SA 525 (CC) par 29. See also Brickhill & Friedman "Access to courts" in *Constitutional Law of South Africa Vol 4* (eds Woolman *et al*) (2002) (last revised Service 4, 2012) 59-64.
185 2012 *THRHR* 609 618. The authors also aver that, whilst the constitutionality of s 13 has not been addressed by the two highest courts in the country, none of these courts have referred to the unconstitutionality or potential unconstitutionality of this section.

applicant cannot find security for costs it will not be able to pursue its action. This seems an inevitable and intended result of section 13". It is quite plausible that the Legislator is aware of the practical outcome of section 13 which (as per *Giddey v Barnard*), although it has not been found to be unconstitutional,[186] is still contra-indicatory when considered in the light of section 34 of the Constitution.[187] Whether this is indeed the considerations of the legislator can, however, only be purposefully argued once the legislation which governs the context within which this section is purported to function, that is corporate insolvency, is comprehensively drafted and incorporated into law and either contains or lacks a provision such as section 13.

From a practical point of view it can be argued that section 13 was a rather convenient process that could be used by a solvent litigant to request security for costs against a company litigant being unable to pay such costs.[188] Presently, it is submitted that section 13, as a "procedural matter incidental to civil proceedings",[189] should still find application within a spectrum clearly delineated by the insolvent state of a company, especially as the 2008 Act was not intended to regulate proceedings relating to insolvent companies.[190] It is contended that the lack of a provision such as section 13 was not an oversight on the part of the Legislator in relation to insolvent companies as the latter was not called upon to consider security for costs within this ambit.[191] At present, the provision relating to the provision of security for costs in the unofficial 2010 working draft of the Insolvency and Business Recovery Bill is a hybrid version of section 13 and the developed version of the common law by the courts in *Haitas* etcetera.[192] Clause 174(6) of the unofficial working draft stipulates that

> [t]he liquidator or administrator need not give security for the costs of any such proceedings, unless the court on application of the defendant or respondent is satisfied that the proceedings are frivolous or vexatious.

186 *Idem* 618.
187 *Giddey v Barnard op cit* parr 4, 27, 29-30.
188 See *Vienings v Paint and Ladders (Pty) Ltd op cit*. See also *Giddey v Barnard op cit inter alia* par 7: "A salutary effect of the ordinary rule of costs – that unsuccessful litigants must pay the costs of their opponents – is to deter would-be plaintiffs from instituting proceedings vexatiously or in circumstances where their prospects of success are poor. Where a limited liability company will be unable to pay its debts, that salutary effect may well be attenuated. Thus the main purpose of s 13 is to ensure that companies, who are unlikely to be able to pay costs and therefore not effectively risk an adverse costs order if unsuccessful, do not institute litigation vexatiously or in circumstances where they have no prospects of success thus causing their opponents unnecessary and irrecoverable legal expense."
189 *Giddey v Barnard op cit* par 22.
190 See parr 4 2, 4 3 *supra*.
191 See par 4 3 *supra*.
192 *Op cit*.

The provision is limited to chapter 7 and chapter 21 proceedings, which are proceedings pertaining to "impeachable dispositions" and "personal liability for fraudulent, reckless or insolvent trading" respectively.[193]

The Draft Bill purports to regulate both judicial and non-judicial persons.[194] In this regard, it may be that this general section, which closely resembles the current developments pertaining to security for costs as per *Haitas v Port Wild Props*, does not account for the differences between natural and corporate persons. In this regard, the following *dictum* by Brand JA aptly summarises this point:[195]

> [15] To my way of thinking this line of approach is indicative of a fundamental misdirection, because it fails to recognise the crucial dissimilarity in the legal substructures on which the two different applications are based. Against an insolvent natural person, who is an *incola*, so it has been held, security will only be granted if his or her action can be found to be reckless and vexatious (see *Ecker v Dean* 1938 AD 102 at 110). The reason for this limitation, so it was explained in *Ecker* (at 111), is that the court's power to order security against an *incola* is derived from its inherent jurisdiction to prevent abuse of its own process in certain circumstances. And this jurisdiction, said Solomon JA in *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 274, 'is a power which ... ought to be sparingly exercised and only in very exceptional circumstances'. (See also e.g. *Ramsamy NO v Maarman NO* 2002 (6) SA 159 (C) 173F-I.)
>
> [16] In the exercise of its discretion under s 13 of the Companies Act, on the other hand, there is no reason why the court should order security only in the exceptional case. On the contrary, as was stated in *Shepstone & Wylie* (*supra*) 1045I-J, since the section presents the court with an unfettered discretion, there is no reason to lean towards either granting or refusing a security order. It follows, in my view, that although *bona fides* of the company's claim is a consideration that may legitimately be taken into account in the exercise of the court's discretion, as one of many factors, mere *bona fides* in itself cannot serve as a basis to refuse security when applied for under s 13.
>
> [20] One of the very mischiefs s 13 is intended to curb, is that those who stand to benefit from successful litigation by a plaintiff company will be prepared to finance the company's own litigation, but will shield behind its corporate identity when it is ordered to pay the successful defendant's costs. A plaintiff company that seeks to rely on the probability that a security order will exclude it from the court, must therefore adduce evidence that it will be unable to furnish security; not only from its own resources, but also from outside sources such as shareholders or creditors (see e.g. *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1)* 1997 (4) SA 908 (W) 920G-

193 s 174. The reference to the applicable chapters in the arrangement of sections differs from the actual wording of the sections. The arrangement refers to the applicability of s 174 to chrs 7, 24 whilst the actual s 174 refers to chrs 7, 21. The wording of the actual chapters was relied on for this discussion.

194 *Op cit*.

195 *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 6 SA 620 (SCA) parr 15, 16, 20.

J; *Keary Developments* at 540f-j; *Shepstone & Wylie* at 1047A-B; *Giddey NO* at paras 30, 33 and 34).

Although this aspect was not researched further, it also seems odd that the legislator would retain the rights and privileges of insolvent companies and their liquidators but not that of third parties who may be directly affected by the insolvency of the company where they are not party to the insolvency proceedings itself. It is however conceded that to argue for the applicability of section 13 in the circumstances may be a bridge too far.

6 2 Section 12

6 2 1 General

Section 12(1) of the 1973 Act reads as follows:

> 12. Jurisdiction of Court under this Act and review of decisions of Registrar.–(1) *The Court which has jurisdiction under this Act in respect of any company* or other body corporate, shall be any provincial or local division of the High Court of South Africa within the area of the jurisdiction whereof the registered office of the company or other body corporate or the main place of business of the company or other body corporate is situated. (Own emphasis.)

It is trite that an insolvent company may be liquidated by virtue of an order of court and that the court is provided with specific authority when deciding said application.[196] In *Sibakhulu Construction v Wedgewood Village,*[197] the court indicated that section 12(1) of the 1973 Act had been repealed and that the 2008 Act did not make provision for a similar jurisdictional determination. In the premises, the court ruled that the common law would define the jurisdictional parameters for matters arising from the 2008 Act.[198]

The court specifically indicated that "[j]urisdiction in respect of matters *arising under the 2008 Act* therefore falls to be determined on common-law grounds *unless it can be said that a proper reading of the Act reflects a different intention"*.[199] Delport and Vorster, however, argue that

196 Ss 343, 346, 347 1973 Act.

197 *Op cit* par 11. In this case, the court was confronted with two proceedings instituted in different jurisdictions. The business rescue proceedings were instituted in the Port Elizabeth High Court and the liquidation (winding-up) proceedings were instituted in the Western Cape High Court. The court's decision was concerned with the correct *ratio jurisdictionis* and Binns-Ward J had to interpret ss 23, 131(6) 2008 Act in the absence of an equivalent to s 12 1973 Act.

198 *Ibid*. See contra Magid *et al* (ed) *Meskin Insolvency Law and its operation in winding-up* (1990) (November 2012, Service Issue 39) 15-22–15-23. The authors submit that, notwithstanding the repeal of the definition in s 1(1), the courts within which the main place of business or registered office is situated has jurisdiction "since these courts ordinarily have jurisdiction over the company".

199 *Op cit* par 11. Own emphasis.

section 12 of the 1973 Act had been replaced by section 23 of the 2008 Act.[200] The relevant parts of section 23 read as follows:

> (3) Each company or external company must —
>
> (a) continuously maintain at least one office in the Republic; and
>
> (b) register the address of its office, or its principal office if it has more than one office —
>
> (i) initially in the case of —
>
> (aa) a company, by providing the required information on its Notice of Incorporation;
>
> or
>
> (bb) an external company, by providing the required information when filing its registration in terms of subsection (1); and
>
> (ii) subsequently, by filing a notice of change of registered office, together with the prescribed fee.

6 2 2 Discussion

It is doubtful that the court had item 9 of schedule 5 to the 2008 Act specifically, in relation to insolvent companies, in mind when this provision was made.[201] As indicated above, it can be argued that procedural matters relating to the winding-up and liquidation proceedings of insolvent companies do not arise from the 2008 Act.[202] It arises from the provisions of chapter 14 of the 1973 Act as sanctioned by the 2008 Act.[203] Ostensibly, the method of the court in *Botha v Van den Heever* is easily applicable to this scenario. In a similar fashion as the court's reflection on the provisions of sections 1 and 200 in deciding

200 *Vol 1* 104.

201 In par 20 the judge noted, albeit in general and not in relation to insolvent companies, as follows: "The transitional provisions in terms of s 224 and Schedule 5 of the 2008 Companies Act make no reference to the issue of a pre-existing company's registered office. The result of this must be that a pre-existing company is obliged to change its registered office in terms of s 23(3)(b) of the Act if the address of the office does not coincide with that of its principal place of business. The requirement that a company register the address of its principal office is plainly intended for the benefit of third parties who might wish to obtain information about it, communicate with it, or in any manner formally transact with or in connection with it." Furthermore, see par 11: "The 2008 Companies Act, which in large measure repealed the 1973 Act, contains no equivalent provision to s 12(1) of the earlier Act. Jurisdiction in respect of matters arising under the 2008 Act therefore falls to be determined on common-law grounds unless it can be said that a proper reading of the Act reflects a different intention. The provision in the previous Companies Acts which expressly provided that the place of a company's principal place of business has jurisdiction was consistent with the *actor sequitur forum rei* principle of common law. According to that principle it is residence within the territory of the court's remit that determines whether a court has jurisdiction over a person."

202 *Standard Bank of South Africa Limited v R-Bay Logistics CC op cit* parr 11, 12, 23, 24. See also *Sibakhulu Construction v Wedgewood Village op cit* par 11.

203 *Standard Bank of South Africa Limited v R-Bay Logistics CC op cit* parr 23, 24.

whether the document before the court complied with the requirements for a special resolution and its proper registration, it is submitted that a court could consider the provisions of section 12 when deciding whether it has jurisdiction to hear a matter relating to the winding-up and liquidation of an insolvent company.

Reference to the concept of "court" is found in *inter alia* sections 343 to 347. Section 1 of the 1973 Act defines "Court" as "in relation to any company or other body corporate, means the Court which has jurisdiction under this Act in respect of that company or other body corporate, and, in relation to any offence under this Act, includes a magistrate's court having jurisdiction in respect of that offence". Of particular importance to this discussion, is the use of the phrase "the Court which has jurisdiction under this Act in respect of that company", which is echoed in section 12(1). Further to the above, a definition of "court" is not provided in the general definitions of the 2008 Act, but in section 128 finding application only to the chapter 6 rescue procedure. Section 128(e) provides as follows:

> 'court', depending on the context, means either —
>
> (i) the High Court that has jurisdiction over the matter; or
>
> (ii) either —
>
> (aa) a designated judge of the High Court that has jurisdiction over the matter, if the Judge President has designated any judges in terms of subsection (3); or
>
> (bb) a judge of the High Court that has jurisdiction over the matter, as assigned by the Judge President to hear the particular matter, if the Judge President has not designated any judges in terms of subsection (3).

However, as it has been noted above on multiple occasions, the factual setting for the implementation of all the provisions of the 1973 Act is insolvency, more particularly, commercial insolvency.[204] The wording of section 13 clearly states that its scope of application is reserved for "impecunious" or "insolvent" companies. It is submitted above that, where a company is insolvent, the litigant involved in proceedings instituted by the liquidator of the insolvent company, should still be able to revert to the protective measures of section 13 and existing case law.[205]

Regarding the ascertainment of jurisdiction in relation to liquidation matters to which chapter 14 of the 1973 Act applies, it is submitted that the approach of Delport and Vorster can be questioned as section 23 of the 2008 Act deals with the registration of the company's address, whilst

204 See par 3 2 *supra*.
205 See par 4 3 *supra*.

section 12 of the 1973 Act dealt with jurisdictional issues directly.[206] Section 12 can also be distinguished from section 13 in scope and application as the wording of section 12 of the 1973 Act makes it clear that the provision was not specifically reserved for proceedings relating to corporate insolvency. Under the 1973 Act, a section with similar provisions regarding the registration of an office, as contemplated in section 23, would have been section 170.[207] The approach of the court in *Sibakhulu Construction v Wedgewood Village* is therefore correct insofar as the court acknowledges that the 2008 Act does not contain a similar section to section 12.[208] The court's approach is further correct in reverting to the common law for purposes of ascertaining "jurisdiction in respect of matters arising under the 2008 Act'.[209]

The questions are however, based on the analysis of *Botha v Van den Heever*, whether section 12 would still find application in liquidation proceedings and whether it would have any practical effect in light of the decision in *Sibakhulu Construction v Wedgewood Village* and as explained below.[210]

In *Sibakhulu Construction v Wedgewood Village,* a clear distinction was made between the approach of the 1973 and 2008 Acts respectively with regard to geographical indicators for jurisdictional determination.[211] The 2008 Act regulates the registration of companies' registered addresses, a prescription relevant to all companies notwithstanding their solvency status.[212] In the premises, companies registered under the 1973 Act[213] have to adapt to the provisions of the 2008 Act and amend their

206 Delport & Vorster *Vol 1* 104, *Sibakhulu Construction v Wedgewood Village op cit* par 10. See also Horn 1990 *De Jure* 363 363 on die differentiation between jurisdiction and service.

207 See also *Sibakhulu Construction v Wedgewood Village op cit* par 17. See also par 16, where the court stated that "[i]t falls to be considered whether the provisions of s 23(3) of the 2008 Companies Act, which had no equivalent in the legislation in force when *Dairy Board* and *Bisonboard* were decided alter the position determined in those cases". These cases were reported in 1976 and 1991 respectively.

208 *Sibakhulu Construction v Wedgewood Village op cit* par 10.

209 *Idem* par 11.

210 See also: DTI Practice Note 2.

211 *Sibakhulu Construction v Wedgewood Village op cit* par 19: "A material distinction between a 'registered office' under the 2008 Act and its predecessors, however, is that under the current Act the registered office must be the company's only office, alternatively, if it has more than one office, its 'principal office' … Thus, where the 1973 Companies Act expressly acknowledged the possibility of a distinction between a company's registered office and its 'main place of business', the 2008 Act requires the registered office and the principal place of business for jurisdictional purposes to be one and the same address." See also par 21.

212 One of the purposes of the 2008 Act set out in its long title and echoed in s 7 is to provide for the "incorporation, registration, organisation and management of companies". See also *Sibakhulu Construction v Wedgewood Village op cit* par 22.

213 *Contra* to this statement, see the (in our opinion *obiter*) comment of Mayat J in *Firstrand Bank Ltd, Wesbank Division v PMG Motors Alberton (Pty) Ltd and*

registered offices where the latter are not the same as the principal places of business.[214] In the light of the involvement of the court on various levels such as ordinary litigation, business rescue proceedings, applications for the winding-up of both solvent and insolvent companies, etcetera, the court's reasoning that the 2008 Act sought to introduce a regime in terms of which one High Court has the authority to preside over matters relating to the company, is sound.[215]

The court duly noted that there are various *rationes jurisdictionis* that apply when jurisdiction is determined.[216] Whilst the nature of the matter determines whether a higher or lower court can adjudicate on the matter pertaining to the application for the winding-up of the insolvent company, the address ("residence") of the company determines the geographical location of the court that must hear the matter.[217] Van der Linde and Van der Merwe argue that corporate "residence" relates to both the *ratio jurisdictionis* and the principle of effectiveness.[218]

In determining whether the *Botha v Van den Heever* approach is relevant to section 12, the following considerations are merited. Firstly,

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Others op cit par 45 (par 46 is included for contextual purposes): "Furthermore, if it is assumed on the basis of the provisions of s 23(3) of the 2008 Act that a company incorporated prior to the 2008 Act is compelled to take steps to have its registered office and its principal office in the same location, and if its further assumed that PMG Alberton and PMG Kyalami had not been liquidated, then both these companies would have been compelled to change their registered office from KZN to Gauteng where their principal offices were located. In addition, it is my view that as s 23(3) of the 2008 Act does not have any bearing in relation to the appointment of liquidators, fairness dictates that there is a legal presumption in these circumstances that the new principles underlying the said s do not apply retrospectively to liquidators of companies, which were already incorporated prior to the 2008 Act coming into effect. As already indicated, it is also my view that in the absence of anything to the contrary in both the 1973 Act as well as the 2008 Act, the conceptual notion of "residence" of joint liquidators with administrative offices having a registered office and a principal place of business in different locations in terms of the 1973 statutory framework."

214 *Sibakhulu Construction v Wedgewood Village op cit* par 20: "The transitional provisions in terms of s 224 and Schedule 5 of the 2008 Companies Act make no reference to the issue of a pre-existing company"s registered office. The result of this must be that a pre-existing company is obliged to change its registered office in terms of s 23(3)(b) of the Act if the address of the office does not coincide with that of its principal place of business". See also DTI Practice Note 2.

215 *Sibakhulu Construction v Wedgewood Village op cit* eg parr 9, 14, 19, 23. See specifically par 23: "Furthermore, winding-up and business rescue are also matters which are interlinked in such a manner by the provisions of the 2008 Act that it is undesirable for reasons of comity between courts of equal status, efficiency, commercial convenience and certainty that they be amenable to proceedings in concurrent jurisdictions".

216 *Idem* par 11. See also Van der Linde & Van der Merwe 1994 *SALJ* 780.

217 Theophilopoulos *et al* 43, 49-50.

218 Van der Linde & Van der Merwe 1994 *SALJ* 780 780, 787. The authors note (780) that "[r]esidence of the defendant has been held to 'entrench' the jurisdiction of the court".

whether the focus is on the merits of the matter, that is the insolvency and liquidation of the company or whether the focus is on the proceedings in the court which would centre on the address of the company. The first is a substantive question which is determined by the meaning of "insolvency"[219] and the application of either the 1973 Act or the 2008 Act. If this is the primary consideration, then section 12 should still be applicable where an insolvent company is liquidated in terms of the provisions of the 1973 Act. The second is a procedural question governed by common law principles and legislative provisions and rules of court such as the Supreme Court Act and Uniform Rules of Court relating to civil procedure.[220] It is submitted that the court in *Sibakhulu Construction v Wedgewood Village,*[221] preferred the latter approach:

> I consider that it would give effect to the purposes set out in section 7(k) and (l) to interpret section 23 of the Act to the effect that a company can reside only at the place of its registered office (which, as mentioned, must also be the place of its only or principal office). The result would be that there would in respect of every company be only a single court in South Africa with jurisdiction in respect of winding-up and business rescue matters. I think it admits of no doubt that winding-up and supervision for business rescue purposes are both matters going to the status of the subject company; and that the power to make a determination on a question of status involves a *ratio jurisdictionis* exercisable *only by the court within whose jurisdiction the company "resides" or is domiciled*. (I do not perceive there to be scope for any distinction within South Africa between a local company's residence and its domicile.) Furthermore, winding-up and business rescue are also matters which are interlinked in such a manner by the provisions of the 2008 Act that it is undesirable for reasons of comity between courts of equal status, efficiency, commercial convenience and certainty that they be amenable to proceedings in concurrent jurisdictions. These are considerations militating in favour of the recognition of a regime that recognises a company only to be resident in one place rather than two thereby assuring that only one court will have jurisdiction.

The court clearly noted that this aspect is governed by the 2008 Act and proceeded to focus on the administrative aspect of the company *re* its address[222] rather than the liquidation thereof.[223] The court also reiterated that the 2008 dispensation allowed for only one address as a "jurisdictional connecting factor", effectively eliminating the preceding position where a company was allowed to have "dual residenc[y]" and

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219 See 2 2.

220 *Sibakhulu Construction v Wedgewood Village op cit* par 11. See also Theophilopoulos *et al* chrs 4, 5; Horn 1990 *De Jure* 363.

221 *Sibakhulu Construction v Wedgewood Village op cit* par 23. (Own emphasis.) It must be noted that the term "winding-up" is not used specifically within the context of an insolvent company although, from the facts of the case, it would seem that the company under consideration was experiencing financial difficulties.

222 See also Van der Linde & Van der Merwe 1994 *SALJ* 780.

223 *Sibakhulu Construction v Wedgewood Village op cit* par 23.

permitting concurrent jurisdiction.[224] It is further submitted that the decision of the court and practical effect thereof was, although inspired through a lack of a similar provision to section 12, not primarily based on the repeal of the section. The decision was informed by the altered dispensation under the 2008 Act relating to the registered office of a company and the correlation thereof with the company's main place of business.[225]

Notwithstanding the *dictum* of the court in *Sibakhulu Construction v Wedgewood Village* regarding one address for insolvency and business rescue proceedings, it is important to consider the situation where a company has not aligned its main place of business and its registered address. The critical question in this regard is whether a company can still have different addresses as its registered address and main place of business respectively and what the legal ramifications, if any, will be.[226] It is submitted that, in the absence of a definite sanction to incentivise companies to change their addresses formally, it is doubtful whether these changes will be effected on own accord.[227] Liquidation and business rescue proceedings may simply be brought in a court that has jurisdiction as per *Sibakhulu Construction v Wedgewood Village* without incurring the inconvenience of changing an established address. Furthermore, other statutes, such as section 65A of the Magistrates' Courts Act 32 of 1944 provide for a notice to be sent to a debtor who has failed to perform in terms of judgment for payment of money. The legislation makes provision for the notice to be

> issued … if the judgment debtor is a juristic person, from the court of the district in which the registered office or main place of business of the juristic person is situate[d], … calling upon the judgment debtor or, if the judgment debtor is a juristic person, a director or officer of the juristic person as representative of the juristic person and in his or her personal capacity, to appear before the court in chambers on a date specified in such notice in order to enable the court to inquire into the financial position of the judgment debtor and to make such order as the court may deem just and equitable.

Similarly, the rules regulating the proceedings in the magistrates' courts provide for service at a company's "registered address or its principal place of business within the court's jurisdiction" in terms of rule 9(3)(e). In the premises, retaining potential concurrent jurisdiction[228] for purposes of liquidation is not unique in the post-2008 Act era alternatively there is a clear need for alignment of provisions of the different statutes/provisions if the position in *Sibakhulu Construction v*

224 *Idem* parr 19, 23, 25. See also Van der Linde & Van der Merwe 1994 *SALJ* 780 783.
225 *Sibakhulu Construction v Wedgewood Village op cit inter alia* parr 21, 23, 32.
226 See in general Horn 1990 *De Jure* 363; Theophilopoulos *et al* chrs 4, 5.
227 See eg DTI Practice Note 2 where the CIPC commissioner indicates "that the other High Courts may support and follow this judgment".
228 S 29(1)(fA) Magistrates' Courts Act 32 of 1944 makes provision for this court to have jurisdiction where a close corporation is liquidated.

Wedgewood Village is to become the prevailing legal position in South African Law.[229]

A further aspect that needs to be considered is whether the applicant in liquidation proceedings would have a legal ground for instituting insolvency proceedings in the court where the company's main place of business is situated or, *vice versa*, whether the respondent, if any, would be able to aver lack of jurisdiction on a legally sustainable ground.[230] Apart from the above reasoning pertaining to the *Botha v Van den Heever* matter, limiting jurisdictional options decreases the applicability of basic jurisdictional principles such as effectiveness, convenience, consent and common sense.[231] In the matter of *Firstrand Bank Ltd, Wesbank Division v PMG Motors Alberton (Pty) Ltd*,[232] albeit within the context of the jurisdiction of joint liquidators, to a dual residency approach as initially contemplated by the 1973 Act.

7 Conclusion

The above discussion set out the framework for the rationale, nature and scope of the 2008 Act.[233] The 2008 Act repealed the 1973 Act but retained the provisions relating to the liquidation of solvent and insolvent companies.[234] It was argued that the purpose of the 2008 Act was not to regulate the winding-up of insolvent companies.[235] However, the judiciary strictly adhered to the delineation of the applicable provisions *re* chapter 14 of the 1973 Act and, with the exception of Hiemstra AJ in *Botha v Van den Heever* consistently proceeded to deal with matters relating to *inter alia* security for costs and jurisdiction in respect of

229 See eg DTI Practice Note 2 where the CIPC commissioner indicates that "service of legal documents and process on the company (at the very least in respect of business rescue and winding up applications) should be its registered office and not alternatively its principal place of business, as currently provided for by Rule 4 of the Uniform Rules of Court". The CIPC Commissioner further alerts companies that notification of change of registered office address can be effected through the relevant forms in terms of s 23(3)(b).

230 Theophilopoulos *et al* 43-44, 49-50.

231 *Idem* 44-46. Also see *Rostami Beleggings CC & Others v Nedbank Ltd* unreported case number 2008/020459 (SGJ) (available at http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAGPJHC/2012/197.html&query=rostami%20beleggings (accessed 2013-05-14)).

232 *Op cit* par 43: "This is particularly so as it is my view that the principles underlying companies having more than one 'residence' within the framework of the 1973 Act can potentially still apply in relation to joint liquidators if central control and/or joint administration of the of the liquidated company for the benefit of creditors is conducted by more than one joint liquidator from more than one jurisdiction." The presiding officer distinguished this case from *Sibakhulu* as the latter referred to s 23 2008 Act and the facts of the matter involved both an application for liquidation due to insolvency and an application for business rescue – see par 44.

233 See parr 1, 2 *supra*

234 See par 1 *supra*.

235 See eg parr 1, 3 *supra*.

liquidation proceedings, from the point of view that sections 12 and 13 had been repealed.[236]

The wording of item 9 of schedule 5 that the legislation continues to apply "as if it had not been repealed" precedes the query on whether provisions in other chapters of the 1973 Act may still be applicable under certain circumstances.[237] In the light of the above, a principle-based approach was formulated. In terms of this approach, reliance may be placed on provisions of the 1973 Act that do not fall within the boundaries of chapter 14 of the 1973 Act, but which is directly related to proceedings contemplated in chapter 14.

The contextual approach of Hiemstra AJ in *Botha v Van den Heever* indicates the importance of interpreting the provisions of the 1973 Act relating to the winding-up of insolvent companies in the light of provisions that do not fall within the ambit of chapter 14.[238] The court relied on provisions not contained in chapter 14 of the 1973 Act but which could be directly linked through recurring concepts and phrasing for its evaluation of the facts of the matter.[239] The court therefore utilised the definition of "special resolution" in chapter 1 to ascertain whether the provisions of chapter 14 had been complied with.[240]

The learned judge's approach is supported by the policy framework, explanatory booklet and preamble of the 2008 Act which determines that the scope of the 2008 Act was not purported to include the regulation of liquidation proceedings relating to insolvent companies.[241] In anticipation of comprehensive legislation regulating insolvent proceedings, it is submitted that the provisions of the 1973 Act relating to the liquidations of insolvent companies, even where these do not fall within the "physical" boundaries of chapter 14, may still find application.[242] In this regard it is further submitted, with respect, that the various courts' recourse to the common law and its subsequent development within the scope of the authority bestowed in accordance with section 173 was unnecessary.[243]

Within the context of litigation with and liquidation of insolvent companies, provisions in the 1973 Act that were repealed, were not mirrored in the 2008 Act, although these provisions were of cardinal procedural importance.[244] In this regard, the approach was tested against sections 12 and 13.[245] The aforementioned sections, relating to the determination of the jurisdiction of the court and security for costs

236 See eg par 4 *supra*.
237 See par 2 *supra*.
238 See parr 2-4.
239 See par 3 3 *supra*.
240 *Ibid*.
241 See *inter alia* parr 2, 3 3 *supra*.
242 See *inter alia* parr 1, 3, 4 *supra*.
243 See *inter alia* parr 3 4, 6 *supra*.
244 See par 6 *supra*.
245 *Ibid*.

when litigating against an insolvent company were repealed but not replaced by the 2008 Act.[246] The authors submit that there is a need for sections 12 and 13 to be retained in its current form as can be ascertained by the ensued litigation and case law set out above. However, we submit that the approach of the court in *Botha v Van den Heever* can be applied to incorporate the provisions of sections 12 and 13 where there is a factual basis, where the matter relates to the liquidation of an insolvent company or litigation against a liquidator of an insolvent company in liquidation.

246 *Ibid*.

Diverse probleme rondom die bestaan en geldigheid van 'n testament by die dood van die erflater (deel 2)

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SUMMARY

Miscellaneous Problems Relating to the Existence and Validity of a Will at the Death of the Testator (part 2)

Executing a will is an important step in estate planning. A will gives the testator the opportunity to bequeath his assets and to indicate how he wants his estate to be distributed after his death. Not only is the proper execution of a will important but it should be updated regularly and carefully to provide for changed circumstances. The will must accordingly be readily available for the testator to amend or revoke. The availability of the will after the testator's death is crucial in order for the administration process to commence. Although an easy accessible will can lead to problems surrounding the authenticity of the will, it can contribute to the prompt administration of the estate as it must be submitted to the master in terms of the Administration of Estates Act.

In this article numerous problems relating to the existence, availability and recovery of a will at the death of the testator are discussed. Interrelated issues such as forgery, lost wills, missing wills, concealment of wills and revocation by destruction of a will are discussed with reference to case law and other examples. Questions as to the proper custody of the will, before and after the death of the testator, resolving disputes amongst next-of-kin, and the onus of proof, are discussed. Cases that in fact dealt with common law lost wills, but where section 2(3) condonation applications were incorrectly brought, are discussed. Possible resolutions for the miscellaneous problems with wills are explored and recommendations made to solve potential problems.

6 Waar 'n Testament nie Gevind is nie, maar Beweer word dat daar wel 'n Testament was

6 1 Algemeen

Dikwels kan 'n testament by die dood van 'n testateur nie gevind word nie.[115] Indien dan aangevoer word dat daar wel 'n testament verly is, ontstaan die volgende vrae:

115 Vgl FISA "Original Will Lost" beskikbaar by http://fidsa.org.za/original–will–lost/ 2010 (besoek 2010-03-04); Solicitors free helpline "Revoked Missing or Lost Will Lost or Deliberately Revoked" beskikbaar by http://www.probatesolicitoraustralia.com/ (besoek 2013-01-31) wat opmerk: "Wills get lost for any number of reasons, and it's not an uncommon situation. In

(i) Waar is die "vermiste of verlore" testament?

(ii) Wat het daarvan geword?[116]

Die belangrikheid daarvan om voor en na die dood van 'n testateur sorgsaam met 'n testament om te gaan moet weereens beklemtoon word.[117] Die omvang van probleme met vermiste testamente word soos volg saamgevat op die Australiese webtuiste *Probate Lawyers Australia*:[118]

> *This thorny topic is one that consistently appears in probate courts and principally relates to dishonesty by potential beneficiaries who believe that they may have been excluded from a will. If the first person on the scheme after death finds a will in which they do not appear as a beneficiary, they may well destroy that will in the hope that an earlier will may take precedence or in the hope that the intestacy rules may include them as a beneficiary. There are many other equally difficult scenarios. If a will has been chewed by the dog was it an accident or did the testator give the will to the dog to tear up as an act of revocation? If the original has been lost or destroyed or spirited away by another disgruntled person can a copy take its place and form the basis for a grant of probate or has the missing original been destroyed and removed by the testator as an act of revocation? All of these situations and many other vexed questions are dealt with by judges in the probate courts and in every case the end result and the final judgement depend on the overall evidence presented to the court by the claimant who must, on balance of probability, prove the case in order to be awarded judgement in their favour.*

Smith v Sampson[119] is 'n voorbeeld van presies hoe bedrieglike optrede met 'n testament verkeerd kan loop. Die testateur en sy vrou het 'n stormagtige huwelik gehad. Die testateur verly in 1992 terwyl hy van sy vrou vervreem is, 'n testament waarin hy sy dogter (een van ses kinders) as eksekuteur en enigste erfgenaam van sy boedel aanwys. Hy sterf in 2005 en sy vrou (met wie hy intussen versoen geraak het) meld die boedel as intestaat aan (die 1992-testament word nie geopenbaar nie). Sy word aangestel om die boedel af te handel ingevolge artikel 18(3) van

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some cases, for instance, the deceased stored it in a safe deposit box and failed to mention it to their family and when it's not found but a copy is, its assumed to be a lost will."

116 Vir ander regstelsels wat soortgelyke probleme ervaar sien Hamill "How to find a lost will (or at least where to look)" 2009 *Estate Planning, probate/ estate administration* beskikbaar by http://www.lhamillattorney.typepad.com/Massachucetts (besoek 2012-07-23); Burger "*How to find a lost will*" 1999 beskikbaar by http://www.burger.///willfind.htm (besoek 2012-09-02); Biggs "Losing It" 2005 *The Step J* 28; Duhaime "The Lost Will" 2007 *Legal Resources* beskikbaar by http://www.org/LegalResources/ElderLawWillsTrustsEstates/Law Article–270/The–Lost–Will.aspx (besoek 2012-09-22). Sien verder Jacobs "The Lost or Missing Testamentary Instrument" *The Elec J Bar Assoc Q'land* beskikbaar by hhtp://www.hearsay.org.au (besoek 2012-08-14); Jooste 2010 *Finweek* 48.

117 Sien par 3 1 hierbo.

118 Sien "Revoked Missing or Lost Will" beskikbaar by http://www.australianprobate.com/lost.html (besoek 2012-08-28).

119 [2013] ZAWCHC 11 par 15.

die Boedelwet.[120] In 2010, nadat sy deur die meester ingelig is dat die 1992-testament nou by hom ingehandig is (die verlore/versteekte testament is gevind) voer sy aan dat sy en die oorledene 'n gesamentlike testament in 2002 verly het waarin hulle mekaar oor en weer as enigste erfgename aangewys het (nuwe testament kom nou te voorskyn). Die sogenaamde gesamentlike testament kan na die dood van die oorledene nie gevind word nie (die latere testament is ook nou weg). Sy bring 'n artikel 2A aansoek om die 2002-testament te herkonstrueer (sy versoek dus die hof om 'n sogenaamde afskrif van die verlore tweede testament te aanvaar as die geldige testament). Die aansoek word afgewys weens 'n gebrek aan getuienis.[121]

Dit is duidelik dat die moontlike probleme wat voorkom by die dood van 'n testateur rakende die testament, legeo is, en dat 'n mate van oorvleueling, afhangende van die feite van die geval, kan voorkom. Vir doeleindes van hierdie bespreking word sover moontlik onderskei tussen gevalle waar:

(i) Die testateur voor sy dood die testament in die besit van iemand (onbekend) of op 'n onbekende plek gelaat het.[122]

(ii) Die testament versteek of verberg is.[123]

(iii) Die testament vermis of verlore is.[124]

(iv) Of die testament per abuis vernietig of deur vernietiging herroep is.[125]

Die eerste drie moontlikhede word as vermiste testamente bespreek, en die vierde as per abuise vernietiging of herroeping.

6 2 Vermiste Testamente

6 2 1 Testament Gelaat in Besit van Onbekende of op Onbekende Plek Gelaat

Indien die plek waar die testament gehou word nie bekend is nie kan dit gebeur dat die testament nooit gevind word nie.[126] In *Ex parte Gowree*[127] het die testateur na verlyding van 'n testament na Duits Suidwes-Afrika (vandag Namibië) vertrek waar hy tydens die oorlog sterf. Hy het sy testament saamgeneem en dit is na sy dood onbekend waar die testament is. In *Hassan v Mentor*[128] kon geen oorspronklike testament na

120 Dit blyk 'n a 18(3)-boedel te wees waarvan die waarde minder as R50 000 was. Sien Abrie ea 105-106.

121 Par 5: "*The deceased passed away … and both Mr. Chotia and the applicant have been* unable to find the Will. *All Mr. Chotia could furnish the applicant with was a* 'draft copy' *of the Joint Last Will. This* 'draft copy' *is however a* reconstructed Will. *This document is annexed to the papers.*"

122 Par 6 2 1.

123 Par 6 2 2.

124 Par 6 2 3.

125 Par 6 3.

126 Senekal 2002 *Rapport* 11.

127 1915 CPD 108.

128 [2012] ZAGPPHC 74.

die dood van die erflater gevind word nie. Die oorledene se seun wat in Tanzanië woon, kom na Suid-Afrika om sy siek vader te versorg. Na die dood van sy vader word 'n afskrif van 'n dokument, wat soos 'n testament lyk, tussen die oorledene se persoonlike dokumente gevind. In *Macdonald v The Master*[129] stoor die testateur sy testament in 'n lêer op sy rekenaar. In 'n selfmoordnota openbaar hy waar die testament gevind kan word deur gebruik te maak van sy persoonlike wagwoord. In *Lipchick v Master*[130] het die testatrise haar handgeskrewe testament by 'n familievriend gelaat.[131]

Soos hierbo gesien is die "vermiste testament" ook problematies in ander regstelsels.[132] Die Kanadese saak *Re (Anthony) Wagenhoffer Estate*[133] handel met 'n geval waar die testateur 'n tweede testament maak wat die eerste testament herroep. Hy en twee getuies teken die testament. Hy vou dit op, sit dit in die sak van sy jas en vertrek huis toe. Die testament kon na sy dood nêrens gevind word nie en dit is onbekend wat hy daarmee gedoen het. Die testament is deur die hof geherkonstrueer.

6 2 2 Verberg of Versteekte Testamente

Dit kan wees dat *die testateur* (self), na verlyding van 'n testament, die testament versteek of verberg ten einde dit moeilik te maak vir erfgename om dit te bekom. Kahn[134] bespreek die geval van verberging van 'n testament deur die erflater self: Hertzog, 'n skatryk oujongkêrel, verly 'n testament waarin hy 'n sakevernoot as begunstigde aanwys. Ene Heyer help hom daarmee en teken as getuie. Heyer sien hoe die testateur die testament in 'n boek wat hy besig was om te lees versteek. Na die dood van die testateur hou Heyer die plek waar die testament versteek is 'n geheim. Hy oortuig die begunstigde dat hy die testament sal soek teen vergoeding.[135] In *Van Wetten v Bosch* het die oorledene waarskynlik self

129 2002 5 SA 64 (O).
130 [2011] ZAGPJHC 49.
131 Sien ook Van Wyk "Gesin dink glo nie aan boedel, 'wil Lolly net terughê'" *Beeld* (2010-07-02) 4 en Tau "Mystery surrounds Lolly's 'missing will'" 2010 beskikbaar by http://www.iol.co.za/news/south–africa/mystery–surrounds–lolly–s–missing–will–1.486677 (besoek 2012-07-22) waar aantuigings gemaak word dat Lolly Jackson 'n latere testament nagelaat het wat in sy kluis geberg was.
132 Hamill "How to find a lost will (or at least where to look)" 2009 *Estate Planning;* Burger "*How to find a lost will*" 1999; Biggs "Losing It" 2005 *The Step J* 28; Duhaime "The Lost Will" 2007 *Legal Resources;* Jacobs "The Lost or Missing Testamentary Instrument" *The Electronic J Bar Assoc Q'land*; Shakespeare "*Lost Wills*".
133 26 Sask R 30. Die hof aanvaar die getuienis van die getuies om die testament te herkonstrueer.
134 Sien Kahn (2003) 149 ev vir "Albert Heyer – the missing Hertzog will".
135 Die versteekte (verlore testament) is dikwels die onderwerp van speurverhale. Die bekendste speurverhaal in die konteks is seker dié van "*Poirot investigates: The case of the missing will*" deur Agatha Christie (1924). Die erfgenaam se vernuf word getoets deurdat sy 'n versteekte testament moet vind, voordat sy kan aanspraak maak op haar erfporsie.

die tweede testament in sy kas versteek.[136] Versteekte testamente vind ook hulle weg na stadslegendes. So word vertel dat geeste van mense, wat onlangs oorlede is, soms aan hul geliefdes verskyn ten einde belangrike boodskappe oor te dra. Die gees van James Chaffin se pa (wat in 1921 gesterf het) verskyn aan hom in 1925 in 'n droom en openbaar aan hom waar gesoek moet word na die testament. In die voering van die jas se sak het die broers 'n boodskap in hul pa se handskrif gevind. Die boodskap het hulle opdrag gegee om Genesis 27 in die Familiebybel te gaan lees.[137]

Dit kan egter ook gebeur dat 'n potensiële erfgenaam (iemand anders) ontevrede is met die uitkoms van die testament (deurdat hulle nie erf nie, of te min erf) en dit na die dood van die testateur verberg of versteek,[138] ten einde intestaat te erf of die testament te vervang met 'n vervalste testament. In *Yassen v Yassen*[139] is aangevoer dat een van die begunstigdes 'n latere testament versteek of vernietig het. Die hof bevind dat 'n persoon wat 'n erflater se testament verberg of vernietig, onbevoeg sou wees om ingevolge die testament te erf. *Tshona v Wauchope*[140] handel met die geval waar 'n pastoor die gesamentlike testament van die oorledenes verberg het, die bestaan daarvan ontken, en 'n latere testament, waarin hy homself as begunstigde aanwys vervals het.

6 2 3 Ander Verlore Testament

'n Testament kan verder vir einge ander rede verlore of vermis word.[141] Dit blyk dat probleme met verlore testamente en die bewys daarvan universeel is.[142] In die saak *Marais v Botha*[143] kan 'n tweede testament,

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Indien sy dit nie regkry nie vererf die hele boedel aan liefdadigheid. In fynskrif met onsigbare ink is die finale testament op 'n koevertjie geskryf wat haar as die enigste erfgenaam benoem.

136 Vgl verder *Ex parte Slade* 1922 TPD 220; *Ex parte Serralha* 1939 CPD 417; *Davis v Steel and Eriksen* 1949 3 SA 177 (W) 183; *Ex parte Warren*-saak. Vgl Potgieter "Franse egpaar: Geheime testament opgespoor" *Nuus24* (2011-01-27).

137 Op die eerste bl van die hfst in die Bybel word die versteekte testament gevind. Sien "Case of the Will of James L Chaffin" 1928 *Proceedings of the Society for Psychical Research* 517-524 beskikbaar by http://www.aeces.info/Top40/Cases_51-75/Case73_WhereWill.pdf (besoek 20130325).

138 In *Marais v Botha* [2008] ZAWCHC 111 word die moontlikheid dat die oorledene se vrou die latere testament versteek of vernietig het deur die hof genoem.

139 1965 1 SA 438 (N). Vgl ook *Le Roux v Le Roux* 1963 4 SA 273 (K).

140 1908 EDC 32. Vgl ook Kahn (2003) 153.

141 Per abuise vernietiging word hieronder bespreek.

142 Vgl *Curley v Duff* (1985) 2 NSWLR 716 719; *Allan v Morrison* [1900] AC 604. Sien *Sorkos v Cowderoy* 2006 CanLII 31722 (CA) waar die seun van die testatrise aanvoer dat haar tweede testament waarin sy Sorkos, 'n man saam met wie sy 40 jaar gebly het, bevoordeel, herroep is. Indien die testament ongeldig verklaar word, sal die seun erf as die enigste begunstigde ingevolge 'n vroeëre testament. Sorkos moet op 'n oorwig van waarskynlikheid die vermoede weerlê dat die verlyde afskrif van die testament verlore is. Sien ook *Lefebvre v Major* [1930] S C R 252 257. Vir

waarna die oorledene voor sy dood verwys het, en wat na bewering sy voormalige vrou (wat aan moord op hom skuldig bevind is) onterf, nie gevind word nie (dit is waarskynlik vernietig of versteek deur 'n ongelukkige erfgenaam).[144] In *Nell v Talbot*[145] het die oorledene en sy vrou die testament saam met ander dokumente gelaat in die sorg van 'n ou familievriend van die oorledene. Jare later by die afsterwe van die erflater is die testament nie meer in die vriend se kluis nie. Mondelinge getuienis is toegelaat om te bewys dat niemand weet waar die testament is nie[146] en om dit te herkonstueer. In die Australiese saak *In the Estate of Hall*[147] het die erflater 'n testament in 2009 verly. Ten spyte daarvan dat die huis deeglik deursoek is, kan die testament nie gevind word nie. Dit blyk dat die oorledene se ouers op 'n stadium na sy dood die eiendom opgeruim het en sekere dokumente weggegooi het.[148]

In *In the goods of S S Jacobsohn (deceased)*[149] word mens teruggeneem na die tragedie in 1912 toe die RMS Titanic gesink het. 'n Mosie-aansoek word met sukses gebring om 'n afskrif van 'n testament geldig te verklaar, deur die weduwee van Sidney Jacobsohn. Sy en haar man was beide passasiers op die Titanic. Hy sterf op 15 April 2012 'n waterdood toe die skip 'n ysberg tref, maar sy is gered en oorleef. Sy voer aan dat nadat hulle in 1910 in die huwelik tree het, die oorledene 'n testament gemaak het waarin sy as bevoordeelde aangewys is. Die testament was gedeponeer in 'n swart houer by Standard Bank van Suid Afrika. Op 25

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die Engelse reg sien a 20 Wills Act 1837. Al die territoriale gebiede in Australië het wetgewing wat herroeping deur vernietiging reël bv a 21(b)(ii) Wills Act 1936 (ACT); a 22(d) Wills Act 1936 (SA);Div 5 a 11 Succession Act 2006 No 80 (NSW); Sekere state in die VSA het wetgewing wat met verlore testament handel: Washington State RCWs Tit 11 Ch 11 20 S 11 20 070 en Toronto Rules of Civil Procedure RRO 1990 Reg 194.

143 [2008] ZAWCHC 111 par 1-2; *Theart v Scheibert* par 9.

144 Vgl ook Huisgenoot van 5 Augustus 2010 waar berig is: "Ma kry niks uit boedel van R200 miljoen" waar die oorledene se verloofde en ma van twee van sy kinders beweer dat die testateur 'n latere testament gemaak het, maar die "bruin koevert" wat aan die prokureur oorhandig is verdwyn het. Vgl ook Huisgenoot (2009), beskikbaar by http://www.huisgenoot.com/druk/Plaaslik/2009 (besoek 2012-06-28). Sien ook Nombembe "Woman left penniless by fiancé" (2010) en verder Makwabe "Relations sour over mogul's R200m estate" *Die Burger* (2010-11-26).

145 1972 1 SA 207 (D): "*If that is what happened, the non-existence of the will after the death of Mr. Nell would not readily give rise to an inference that it had been lost or accidentally destroyed, for a rebuttable presumption would arise that the will was not available because it had been destroyed* animo revocandi *by the testator or testators*". Sien ook *Uys v Uys* par 6.

146 Sien ook *Ex parte Bremont* 1930 WLD 127.

147 [2011] SASC 117. Sien ook *Hassan v Mentor* [2012] ZAGPPHC 74 par 4 1; *In re Estate Ortlepp* 1948 2 SA 275 (N).

148 Sien ook *Sugden v St Leonards* 1876 11 PD 154 (CA). Oor Tertius Bosch se verlore testament sien Meyer "Bosch 'wink uit die graf' vir suster" *Rapport* (2001-09-19) 3.

149 "Last Will & Testament: Lost on Titanic - In the High Court of Justice Probate, Divorce and Admiralty Division (Before the Rt. Hon. Samuel Evans, President)" *Daily Chronicle* (1912-07-23) beskikbaar by http://www.encyclopedia-titanica.org/last-will-testament-lost-titanic.html3 (besoek 2013-10-04).

Maart 2012 het hulle die houer afgehaal en in 'n trommel geplaas wat hulle saamgeneem het na hulle kajuit op die skip. Die testament het vergaan saam met die skip. Onlangs word daar ook gerapporteer dat 'n soldaat wat 67 jaar gelede in Normandië gesterf het, se testament gevind is. Sy testament raak op 'n bus verlore en word in 2012 toevallig by die busdepot gevind en aan sy familie besorg.[150]

Die saak *Succession of R H Hatchell*[151] handel met die geval waar die testateur in 1987 'n testament verly waarin hy sy kinders wat vir 2 jaar geen kontak met hom gemaak het nie, onterf. Een van sy dogters, Mev B, was die enigste begunstigde in die nuwe testament. Na die testateur se dood het Mev B 'n afskrif van die testament voorgelê omdat die oorspronklike testament *weg was*. Die hof bevestig die beginsel dat indien 'n testament by die dood van die testateur nie opgespoor kan word nie, daar 'n vermoede ontstaan dat die testateur die testament vernietig het met die bedoeling om dit te herroep. Mev B voer sekere getuienis aan ten einde hierdie vermoede te weerlê. Sy beweer dat sy op verskeie geleenthede die oorspronklike testament by haar pa se huis gesien het en dat die laaste keer dit by haar suster, Mev D wat onterf is, se huis was.[152] Daar was verskeie e-posse wat tussen die broers en susters uitgeruil was, wat dui op die bestaan van hierdie 1987 testament. Die hof bevind dat die testament wel betsaan. Mev B het die vermoede wat geld by herroeping voldoende weerlê.

6 3 Per abuise Vernietiging of Herroeping deur Vernietiging van 'n Testament

6 3 1 Onderskeid tussen 'n Testament wat Herroep of Per Abuis Vernietig is en Herroepe Testamente

Indien 'n testament by die dood van 'n testateur nie gevind kan word nie, ontstaan een van twee verdere moontlikhede behalwe die hierbo bespreek:

(a) Die testament is *per abuis* vernietig (nalatigheid); óf

150 Parsons "Mystery solved for family of young war hero" beskikbaar by *Daily Mail* (2012-08-21).

151 In die minderheiduitspraak *Succession of R H Hatchell* 2003 CA 0163 word saamgestem met die uitkoms van die saak, maar nie met die analise van die hof mbt die vermoede van herroeping nie. Daar word verwys na *Succession of Talbot* 530 So 2d 1132 (La 1988) waar die hof die reël aanvaar dat indien 'n testament nie gevind word nie, wat behoorlik verly was deur die testateur, asook in die besit was van of geredelik toeganklik was vir die testateur voor sy dood, sal dit aanleiding gee tot die vermoede van herroeping. Dié testament was egter nie in die testateur se besit of geredelik toeganklik vir hom voor sy dood nie. Dus het die vermoede van herroeping nooit ter sprake gekom nie.

152 Indien 'n testament vermis word by die dood van die erflater sal bewys moet word (i) dat daar 'n testament was en (ii) wat die inhoud daarvan is. *Theart v Scheibert* parr 25-27.

(b) die testateur (of iemand namens en in opdrag van hom) het dit *doelbewus* vernietig om dit te herroep.

Hierdie vorms van vernietiging kan maklik met mekaar verwar word en gee aanleiding tot ernstige geskille oor die status van die testament, gevolg deur uitgerekte litigasie tussen belanghebbendes.[153] Die per abuise vernietiging van 'n testament is 'n verdere scenario wat kan voorkom ten aansien van die vermiste testament.[154] Daarteenoor is herroeping deur vernietiging van 'n testament 'n gemeenregtelike erkende herroepingswyse. Naasbestaandes wat as intestate erfgename kwalifiseer, wil gewoonlik aantoon dat die testament herroep is deur vernietiging.[155] Daarteenoor sal naasbestaandes wat glo hulle is bevoordeel in die vermiste testament, wil aantoon dat die testament nie deur vernietiging herroep is nie, maar per abuis vernietig is.[156] In die Nieu Seelandse saak *Allan v Morrison*[157] word bevind:

> *The hypothesis of accidental loss or destruction is unreasonable. There is a presumption against the hypothesis of fraudulent abstraction. There is a reasonable possibility that the deceased destroyed the will himself. In order to find for the will we must be morally satisfied that it was not destroyed by the testator* animo revocandi.

In beide die gevalle van vernietiging geld die gemeenregtelike beginsels[158] en kan die bestaan of herroeping van die testament bewys word deur 'n afskrif of *aliunde* getuienis.

6 3 2 Per Abuise Vernietiging van 'n Testament (Vermis)

Nalatigheid kan daartoe lei dat 'n testament na die dood van die erflater nie opgespoor kan word nie. Dit kan wees dat dit nie herroep is nie maar per abuis verlê of vernietig is.[159] Die testateur of die testamentopsteller maak byvoorbeeld sy kantoor skoon en gooi per ongeluk die testament saam met ander dokumente weg, of die kantoor, saam met die

153 Sien n 132 *supra* vir "*lost wills*".
154 Verlore testament is reeds bespreek in par 6 2 3.
155 *Uys v Uys* waar die langlewende van die testateurs benoem is as erfgenaam, maar die kinders wat intestaat sou erf voer aan die testament is weg, omdat dit herroep is.
156 Voet 28 4 1-4; *Theart v Scheibert* par 11; *Gow v The Master* 1936 CPD 296; *Senekal v Meyer* 1975 3 SA 372 (T); *Marais v The Master*; *Ex parte Warren*. Die bewyslas om aan te toon dat die testament nie herroep is nie, rus op die persoon wat op die testament wil steun.
157 [1900] AC 604.
158 Sien die bespreking hieronder; Voet 28 4 1, 3; Corbett ea 97; Van der Merwe & Rowland 190; Schoeman 1994 *De Jure* 397. Die probleem met herroeping deur vernietiging teenoor verlore testament word algemeen ondervind in ander regstelsels: Sien *Welch v Phillips* 12 ER 828 vir die
158 Engelse reg en "Last will and testament" http://livingtrustnetwork.com/estate-planning/last-will-and-testament.html (besoek 2012-10-02) vir Amerikaanse reg. Die Australiaanse reg word bespreek deur Jacobs 2012 *The Elec J Bar Assoc Q'land*. Vir die Kanadese reg sien Todd *The Elec J Bar Assoc* 2010.
159 Per abuise vernietiging is 'n wyse waarop die testament verlore kan raak.

testament en ander dokumente, word in 'n brand vernietig.[160] Die testament kan ook deur eksterne faktore tot niet gaan.[161] Eksterne faktore kan insluit 'n aardbewing, posdienste, brand, waterskade ensovoorts.[162] Op die webblad *Living Trust Network* [163] word verduidelik

> *… if your last will and testament is accidentally destroyed by fire or water damage, or because it was inadvertently thrown away, many states will admit a photocopy of your will to probate. However, to admit a photocopy, there must be evidence that it was accidentally lost or destroyed.*[164]

Indien die testament nie meer bestaan nie of vermis word, maar nie herroep is nie, is dit steeds 'n geldige testament.[165] Die bestaan, verlyding en inhoud sal bewys moet word. Verder moet die vermoede dat die testament herroep is, weerlê word, indien aangevoer word dat die testament net (per abuis) weg is, en daar moet bewys word dat die vermoede *nie* toepassing vind *nie*. Hierdie vereiste verswaar die bewyslas by verlore testament teenoor herroeping van testamente. In die Kanadese saak *In Re Weeks*[166] het die hof geweier om die afleiding te maak dat die testament op 'n bedrieglike wyse vernietig is ten spyte van die feit dat die regter die omstandighede as uiters verdag gevind het. Die hof pas die vermoede derhalwe toe en die testament word geag herroep te wees.[167] Daar kan van 'n afskrif of *aliunde* getuienis gebruik gemaak

160 Biggs 2005 *The Step J* 28 verwys ook na die moontlikheid dat die testament versnipper (shredded) is.

161 Vgl *Ex parte Gowree* 1915 CPD 108.

162 Die Suid Afrikaanse Regkommissie *Hersiening van die Erfreg: Wysiging en Herroeping* (1987) par 3 37 verwys na testamente wat per abuis tot niet kan gaan as gevolg skimmel, ouderdom of muise wat dit opvreet. Vgl ook De Waal & Schoeman-Malan 96. Vir *per errorem* herroeping sien *Ex parte Lutchman* 1951 1 SA 125 (T); *Ex parte Olfsen* 1976 1 SA 205 (W).

163 "Last will and testament" beskikbaar by livingtrustnetwork.com/estate-planning/last-will-and-testament.html (besoek 2012-10-12).

164 Vgl ook *In the goods of S S Jacobsohn (deceased).* Sien ook n 142 vir ander regstelsels.

165 Van der Merwe & Rowland 192. Appleby 19 verduidelik dat indien die metaalhouer waarin 'n testament was verdwyn, die testament geldig bly, aangesien die bedoeling om te herroep afwesig is.

166 1972 3 OR 422. In die uitspraak bevind die hof verder dat die vrou van die oorledene hom verpes het om sy testament te verander en 'n groter gedeelte aan haar na te laat. Net sy het toegang gehad tot die geslote laai waar die testament gehou is. Sien in die algemeen vir die posisie en toepassing van die vermoede in die Kanadese reg Todd "Lost Wills" *The Scrivener* (Junie 2004) 54-55. Vgl ook *Sigurdson v Sigurdson* 1935 4 DLR 529 waar die hof die vermoede aanwend. Todd *The Elec J Bar Assoc* 2010 verduidelik die weerlegging van die vermoede. Sien ook *Unwin v Unwin* 1914 6 WWR 1186.

167 Todd *The Elec J Bar Assoc* 2010 verduidelik die weerlegging van die vermoede. Sien ook *Unwin v Unwin* 1914 6 WWR 1186.

word om die testament te herkonstrueer.[168] In *Ex parte Warren*[169] voer die oujongnooi vriendin van die oorledene aan dat die testament nie herroep is nie maar per abuis vernietig word. Die hof bevind egter:[170]

> *It is not a piece of paper which can be easily mislaid. The applicant tried to explain its disappearance by the bold allegation that the deceased was unmethodical, but this statement cannot be true with regard to the deceased's private and business papers. The condition in which her papers were found contradicts it*.

Daarteenoor word in *Uys v Uys*[171] bevind dat die testament wat nie gevind kan word nie per abuis verlore geraak het.

6 3 3 Herroep van 'n Testament deur Vernietiging

Herroeping van 'n testament deur vernietiging is 'n erkende gemeenregtelike herroepingswyse.[172] Die erflater kan dus indien hy die testament wat in sy besit is, wil herroep, dit fisies vernietig deur die testament op te skeur, te verbrand of stukkend te sny, weg te gooi of selfs op te frommel.[173] Soos hierbo verduidelik oorvleuel herroeping met per abuise vernietiging. Die herroepingshandeling hoef nie in teenwoordigheid van 'n getuie verrig te word nie en iemand kan die handeling in opdrag van die testateur namens hom verrig. Verder geld die vermoedens dat indien die testament by die dood van die testateur nie gevind kan word nie dat indien die testament in besit was van die

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168 Die testament bly in beginsel geldig maar die bestaan en inhoud van die testament sal bewys moet word. Vgl ook *In the goods of SS Jacobsohn (deceased); Theart v Scheibert*; *Uys v Uys* par 12; *Ex parte Porter* par 11; *Yokwana v Yokwana* par 1; *Ex parte Gowree* 1915 CPD 108: *Ex parte Ntuli* 1970 (2) SA 278 (W) en *Nell v Talbot* 1972 (1) SA 207". Vgl verder Corbett ea 116-117.

169 1955 4 SA 326 (W). Indien die testament na die dood (i) nie gevind kan word nie, of (ii) beskadig gevind word en daar twyfel bestaan of die vernietigingshandeling geldig is, kan by die hof ingevolge a 2A(b) Wet op Testamente aansoek gedoen word om die testament as herroep te verklaar. Art 2A(b) Wet op Testamente word nie hier volledig bespreek nie. Daar word aan die hof die bevoegheid verleen om 'n testament wat nie ingevolge die gemeenregtelike wyses herroep is nie, herroep te verklaar.

170 330. Sien ook Cronjé & Roos 114 ev.

171 Par 2. Sien ook *Le Roux v Le Roux* 1963 4 SA 2 73 (K); Corbett ea 99.

172 Voet 28 4 1. Schoeman *"Herroeping van 'n testament deur vernietiging of informele handeling"* 1990 *De Jure* 219. Vgl De Waal & Schoeman-Malan 105; Corbett ea 114. Die Australiese webblad *Solicitors free helpline* verduidelik soos volg: "*The most problematic reason for a lost will scenario is the possibility that it was intentionally destroyed by the testator. One valid way to revoke a will is for the testator to deliberately physically destroy it with the intention of revocation. For example, the testator might tear up or burn the document*". Beskikbaar by "Revoked Missing or Lost Will Lost or Deliberately Revoked" Australië (besoek 2013-01-31).

173 Voet 28 4 4; *In re Odendaal* 1899 16 SC 271; *In re Bain* 1912 NPD 258; *Fram v Fram's Executrix* 1947 1 SA 787 (W); *Gow v The Master*; *Ex parte Ntuli*; *Ex parte Warren*; Wood-Bodley *"Revocation of a Will by the Presumed Destruction of a Copy: Sensole NO v Ncube"* 2006 *SALJ* 3; Bouwer *Die Bereddering van Bestorwe Boedels* (1978) 431; Van der Merwe & Rowland 190; Corbett ea 97-99.

testateur, dit deur *vernietiging* herroep is en indien die testament beskadig gevind word, dat die testateur dit *animo revocandi* vernietig het.[174]

In *Ex parte Warren*[175] was die betwiste testament van die testarise voor haar dood in haar besit en kon na haar dood nie opgespoor word nie. Omdat sy in besit was van dié testament en dit vermis word, tree die vermoede dat sy dit vernietig het (herroep) in werking. In *Uys v Uys*[176] word bevind dat die testament net verlore is en die vermoede weerlê is:

> *The theory that a will is presumed revoked when it was last seen in the hands of the testator and cannot be found, contemplates this ambulatory nature and requires clear and convincing proof to overcome the presumption of revocation.*

7 Kombinasie van Testament by dood Gevind, maar wat daarna Verlore raak

Twee moontlikhede word hier bespreek. Eerstens word gekyk na gevalle waar twee of meer van bogenoemde scenario's voorkom soos waar die testament vermis word en dan kom 'n nuwe of vervalste testament te voorskyn by die dood van die testateur. Die ander moontlikheid is dat die testament wel gevind word by die dood van die testateur maar daarna wegraak.

7 1 Kombinasie van Enige van Bogenoemde Gevalle

In *Smith v Sampson*[177] word onreëlmatighede met 'n testament tot nuwe hoogtes gevoer. Eers word 'n testament verberg, vyf jaar later kom dit te voorskyn nadat die boedel as intestaat aangemeld is. Daarna word beweer dat daar 'n sogenaamde gesamentlike testament was, wat die eerste testament herroep het, maar dié testament kan nie opgespoor word nie. Die vrou en haar seun kon nie die sogenaamde testament gerekonstrueer kry nie weens 'n gebrek aan getuienis. Die hof bevind:

> *The Master's report explained in detail why the 1992 Will was accepted. He points further to certain inconsistencies in the applicant's version, inter alia, in reporting the estate as being 'intestate'. This led to the applicant filing a supplementary affidavit in which she attempted to explain her case and tries to explain why she is now asking the Master to accept a reconstructed version of the Will rather than an unsigned one. She also explains why she initially reported the*

174 Voet 28 4 2; *Theart v Scheibert* par 25-27; *In re Beresford, Ex parte Graham* 1883 2 SC 303; *Nelson v Currey* 1886 4 SC 355 356; *Wynne v Estate Wynne* 1908 25 SC 951 960; *Ex parte Slade*; *Davis v Steel and Eriksen*; *Le Roux v Le Roux;* Corbett ea 99; De Waal & Schoeman-Malan 98 ev; Pace & Van der Westhuizen A16 1.

175 1955 4 SA 326 (W) 327. Jacobs 2012 *The Elec J Bar Assoc*: "*At common law, there is a presumption that a testator destroyed a Will with the intention of revoking it, where the Will was in the custody of the testator and it is either lost or missing on the death of the testator*". Vgl ook *Allen v Morrisson* 1900 AC 604.

176 Par 2. Sien ook *Le Roux v Le Roux*; Corbett ea 99.

177 [2013] ZAWCHC 11 parr 11, 15. Sien ook bespreking *supra*.

deceased's estate as being intestate by saying she did so for 'practical' reasons. This explanation is unsatisfactory.

In *Theart v Scheibert*[178] verly die testateur en testatrise 'n gesamenlike testament waarin hulle boedelsamesmelting beoog. Die testatrise oorhandig 'n afskrif van die testament aan haar enigste afstammeling. Na die testatrise se dood word haar boedel nie aangemeld nie. Die testateur verly daarna drie testamente waarin hy 'n neef aanwys as erfgenaam. Toe die testatrise se dood wel sewe jaar later aangemeld word, word dit nie geopenbaar dat sy binne gemeenskap van goed getroud was met die testateur nie. Die neef maak aanspraak op die hele boedel ingevolge die testatrise se testament. Die appèllant voer aan dat die testatrise se helfte na haar toe moet kom soos bepaal in die afskrif van die gesamentlike testament.[179] Die hof aanvaar dat daar by die dood van die testatrise 'n testament was wat nie deur die testateur geadieer is nie en wat nie geopenbaar is nie. Die langslewende kan nie oor die helfte van die gesamentlike boedel beskik nie. Die afskrif word aanvaar om die inhoud van die testament te bewys.[180]

By 'n vervalste testament sal dit dikwels gebeur dat die oorspronklike geldige testament vernietig of verberg is.[181]

7 2 Testament by Dood Gevind maar wat Daarna Verlore Raak

Die opspoor van 'n testament is nie net by die dood van 'n testateur problematies nie. Dit gebeur dikwels dat die testament na die dood, tydens die bewaring of versending daarvan, wegraak.[182] In *Ex parte Ntuli*[183] het die oorledene reeds in 1946 'n testament verly. Tydens sy

178 [2012] ZASCA 131.

179 Die hof bevind (par 27): … *[i]n correspondence annexed to the applicant's founding papers the applicant (through her attorney) informed the first respondent that the original will* 'was handed to the testator and testatrix. … The present whereabouts of the original document are unknown' *and that the applicant* 'is unable to confirm (or deny) that the original will was ever lodged with the Master of the High Court'."

180 Verder par 27: "*For these reasons, even if the presumption applied, it was in my view … clearly rebutted. But in order for the presumption to apply, it must be established that the will was last known to be in the testator's possession – because the presumption, according to the first and third authorities to which I have already referred in para 25 above, does not apply if the will was in the hands of a third party.*"

181 *S v Van Zyl*. Vgl ook *Tshona v Wauchope*; Kahn (2003) 152-174 se bespreking van "Isadore Liondore's will - *the charge of forging and uttering*", "The Lituanian will - *an unnecessary piece of play-acting*". Vgl verder Versluis "Siek pa verander nie laaste wens, sê regter" *Beeld* (2011-10-12) 3 waar vier dogters van die erflater onterf word en een van hulle na die dood 'n "nuwe" testament te voorskyn bring wat haar as die enigste bevoordeelde instel.

182 Sien *Ex parte Erasmus: In re Erasmus' Estate* 1994 2 SA 751 (K); Schoeman "Ex parte Erasmus: In re Erasmus' Estate" 1997 *De Jure* 397; Van der Spuy "Ex parte Erasmus: In re Erasmus' Estate" 1994 *De Jure* 402; Pace & Van der Westhuizen A16 1; Cronjé & Roos 47; Corbett ea 99.

183 1970 2 SA 278 (W) 279.

lewe het hy gereeld daarna verwys. Die testament is aan sy vrou oorhandig met die opdrag om dit veilig te bewaar tot sy dood. By sy afsterwe in 1968 het sy vrou die boedel aangemeld en die oorspronklike testament aan die bank oorhandig. Sy is deur die bank na 'n prokureur verwys. Nadat sy die oorspronklike aan die prokureur oorhandig het raak dit weg. Die hof bevind: "*The will had been removed from the offices of the attorney by some unauthorised person, and was irretrievably lost*." Die inhoud van die testament is deur getuienis bewys.

Nog so 'n geval kom voor in *Ex parte du Plessis*[184] waar 'n prokureursklerk die oorspronklike testament saam met 'n afskrif daarvan na die meesterskantoor stuur, maar die testament daarna spoorloos verdwyn.[185] In *Ex parte Porter*[186] kon die oorspronklike testament, wat afgelewer is by die kantoor van die prokureur, na die dood van die erflater, nie gevind word nie. Die ontvangsdame kon getuig dat sy die bruin koevert ontvang het maar sy weet nie wat daarvan geword het nie. 'n Elektronies weergawe (soos per e-pos gestuur) was steeds beskikbaar (afskrif). Die hof gelas die meester om dit as bewys van die inhoud van die testament te aanvaar aangesien dit slegs vermis word. In *Uys v Uys*[187] het die oorledene se vrou die oorspronklike testament na die bank geneem vir versending aan die trustmaatskappy. Die testament is verlê nadat dit by die bank ingehandig is. Die intestate erfgename (die kinders wat nie ingevolge die testament erf nie) voer aan dat die testament wat vermis word, herroep is.[188] Die hof bevind die testament is slegs verlore.

8 Bewyslas en Gevolge by Bestrede Testamente

Ongeag of die betwiste testament wel by die dood van die testateur *gevind* word, of *nie* 'n testament *gevind word nie*, en of bewerings van enige ander onreëlmatighede soos vervalsing, bedrog, verberging of per abuise vernietiging gemaak word, slegs die hof kan bepaal wat die status van die testament is. Daar moet bewys word dat die tersaaklike testament behoorlik verly is;[189] die omstandighede waaronder die

184 1954 3 SA 92 (O).
185 Daar was geen bewys dat die testament in die koevert was waarvoor die meesterskantoor geteken het nie, aangesien pos per hand ontvang, eers 'n dag later oopgemaak word. Vgl ook Cronjé & Roos 47.
186 2010 5 SA 546 (WK).
187 [2008] ZANCHC 30. Sien ook *In re Estate Ortlepp* 1948 2 SA 275 (N).
188 Par 8. 'n Fotostatiese afskif van die testament is aanvaar.
189 *Ex parte Bremont* 1930 WLD 227; *Ex parte Roux* 1937 OPD 32; *Rex v Foreman*; *Ex parte Erasmus: In re Erasmus' Estate*; *Marais v Botha* par 10; *Yokwana v Yokwana* par 2; *Harbans v Haribans* par 9. *Succession of R H Hatchell* 2003 CA 0163; *In the Estate of Aileen Gibbs (deceased)* [2012] SASC 230.

testament verlore geraak het met inagneming van die vermoedens;[190] wat die inhoud van die verlore testament is.[191]

Die algemene beginsel van die bewysreg geld naamlik hy wat beweer moet bewys.[192] Die hof sal op 'n oorwig van waarskynlikhede oortuig moet word dat die aansoek moet slaag.[193] *Smith v Sampson*[194] word die bewyslas soos volg verduidelik:

> *It is well established that where the original Will has been lost or destroyed it will be necessary to apply to Court for an order declaring a copy of the Will to be the Will of the deceased and an order authorising the acceptance by the Master of the copy. However where no copy of a lost Will is available, evidence is admissible to prove the contents of the Will, and where such evidence satisfactorily establishes the contents of the Will, a Court will order that the reconstructed Will will be accepted as the Last Will of the testator. However, in order to grant such relief the Court must be satisfied that the reconstruction is both accurate and complete.*

190 In *In Re Weeks* 1972 3 OR 422 waar bevind is dat alhoewel net sy vrou toegang gehad tot die geslote laai waar die testament gehou is, die vermoede steeds toegepas is. Sien ook Todd "Lost Wills" *The Scrivener* (Junie 2004) 54-55; *Sigurdson v Sigurdson* 1935 4 DLR 529; *Unwin v Unwin* 1914 6 WWR 1186. Vlg *In the Estate of Aileen Gibbs (deceased)* [2012] SASC 230 waar die testateur 'n testament laat voorberei het deur Tower Trust Ltd en dit is aan haar gepos. Uit korrespondensie tussen die testateur en Tower Trust Ltd kon die afleiding gemaak word dat die testateur die testament verly het en dat dit wel in haar besit was. Die oorspronklike testament kon egter nie by haar dood gevind word nie. Die vermoede van herroeping het ter sprake gekom en is nie weerlê nie. In 'n bespreking van *Succession RH Hatchell* 2003 CA 0163 (beskikbaar by http://caselaw.findlaw.com/la-court-of-appeal/1475611.html (besoek 2013-04-06) word gemeld: "*When a will cannot be found at the testator's death, there arises a presumption that the testator has destroyed the will with the intent of revoking it.* Succession of Talbot*, 530 So.2d 1132, 1134-1135 (La.1988) The presumption may be rebutted by 'clear proof' (1) that the testator made a valid will;(2) of the contents or substantiality of the will; and (3) that the will was not revoked by the testator.* In Re Succession of Claiborne*, 99-2415, p. 3 (La.App. 1 Cir. 11/3/00), 769 So.2d 1267, 1268, writs denied, 2000-3283 (La.2/16/01), 786 So.2d 98 and 2000-3310 (La.2/16/01), 786 So.2d 99 (citing* Succession of Nunley*, 224 La. 251, 69 So.2d 33, 35 (1953))*".

191 Sien Corbett ea 116-117; Van der Merwe & Rowland 192; De Waal & Schoeman-Malan 93.

192 *Kunz v Swart* 1924 AD 618 681-682; *Lipchick v Master* parr 16, 25; *Harbans v Haribans* par 7; *Trotman v Thompson* 2006 CanLII 4953 ON SC; *In Estate of Mitchell* 1993 623 So 2d 274 275; Schwickkard & Van der Merwe *Beginsels van die Bewysreg* (2009) 613. Vgl ook Pace & Van der Westhuizen A16; Kahn (2003) 153.

193 In *Ex parte Warren* 335 neem die hof die volgende faktore in ag ten einde te bepaal of die bewyslas gekwyt is: "*One of the two most important additional facts, however, is the state in which the deceased's papers were kept and preserved. The respondent's husband produced in Court, in the condition in which they had been found, all the deceased's private papers – eight covers in which most of the documents had been found and which contained business papers dating as far back as 1932, each cover bearing in neat inscription an indication of the subject-matter in it. It is wholly unlikely that the deceased would not have kept her will in one of these files, or in a similar file, and if that assumption is correct, its accidental loss becomes inexplicable.*"

194 [2013] ZAWCHC 11 par 12.

The onus to prove this on a balance of probabilities is on the party seeking the relief.

Indien daar bewys word dat:

(i) Die testament vervals is, is die vervalste testament ongeldig.[195]

(ii) Die testament vermis en nie opgespoor kan word nie, moet die testament geherkonstrueer word.[196]

(iii) Die testament herroep is deur vernietiging, is die testament ongeldig.[197]

(iv) Dat die testament per abuis vernietig is dan bly die testament geldig.[198]

(v) Die testateur, sy testament per abuis verloor of vernietig het, sal daardie testament dan ingevolge die materiële reg geldig bly alhoewel daar bewysregtelik probleme kan wees om die inhoud te bewys.[199]

9 Foutiewe Aanwending van Artikel 2(3) van die Wet op Testamente

Voor die inwerkingtreding van die Wet tot Wysiging van die Erfreg[200] op 1 Oktober 1992 is alle geskille, wat gehandel het met verlore, vermiste

195 *Tshona v Wauchope* 1908 EDC 32; *S v Van Zyl; S v TS Maqubela* (WKH) (beskikbaar by http://www.saflii.org/blog/?page_id = 134 (besoek 2013-04-06)). Vgl ook Pienaar "Moord: Regter se testament vervals, beslis hof" *Beeld* (2013/01/31). Van der Westhuizen "Geen twyfel oor valse handtekening" *Beeld* (1997-09-18); "Miljoenêr-boer se voorman getuig oor dié testament 'Hy het my vertel hy't dit vervals'" *Beeld* (1997-08-01) 3.

196 *Ex parte Roux* 1937 OPD 32; *Uys v Uys* par 12; *Ex parte Porter* par 11; *Smith v Sampson* par 1; *Yokwana v Yokwana* par 1. Die testament bly in beginsel geldig maar die bestaan en inhoud van die testament sal bewys moet word. Appleby 19; Vgl Duhaime *Legal Resources* 2007-aanlyn met verwysing na *Re Wagenhoffer Estate* ivm herkonstruksie.

197 *Yokwana v Yokwana* par 3; Schoeman 1994 *De Jure* 397; Van der Merwe & Rowland 191, 197; Duhaime Legal Resources 2007-aanlyn; Corbett ea 97.

198 *Theart v Scheibert* par 9 2. Die hof gelas die meester om 'n afskrif daarvan, selfs 'n elektroniese afdruk, te aanvaar as die laaste wil en testament. Indien 'n afskrif nie beskikbaar is nie kan *aliunde* getuienis aangebied word: Vgl *Ex parte Porter*; *Re Webb* 1964 1 WLD 509. Indien 'n afskrif nie beskikbaar is nie kan 'n prokureur se konsepvorm of rekenaar leêr gebruik word om te bewys dat die testament steeds geldig is, maar weg is: Vgl *Uys v Uys*; *Ex parte Erasmus: In re Erasmus' Estate*. Vir ander getuienis sien Voet 28 4 2; *Nell v Talbot* 210; *In re Wyatt* 1952 1 All ER 1030; Jacobs 2012 *The Elec J Bar Assoc*. In *Sugden v St. Leonards'* 1876 11 PD 154 CA is die inhoud van die vermiste testament bewys deur mondelinge getuienis. Sien ook Gray 2012 *The Step J* se bespreking van die Australiese sake *In the Estate of Engelhardt (deceased)* 2010 SASC 196 20; *In the Estate of Roediger (deceased)* 1967 SASR 118 120; *Cahill v Rhodes* 2002 NSWSC 561 55; *Curley v Duff* 1985 2 NSWLR 716 718; *In the Will of Molloy* 1969 1 NSWR 400.

199 Vgl Corbett ea 116-117; *Uys v Uys* par 12; *Ex parte Porter* par 11; *Ex parte Gowree*; *Ex parte Ntuli*; *Nell v Talbot* 210; Duhaime *Legal Resources* 2007-aanlyn. Oor toelaatbaarheid van die oorledene se testamentêre bedoeling sien *R v Basson* 1965 1 SA 697 (CPD) 699C-H; *R v Foreman* 1952 1 SA 423 (SC).

200 43 van 1992.

of vernietigde testamente (asook die geldigheid, verlyding, wysiging, herroeping) deur die howe hanteer deur gebruik te maak van die gemeenregtelike beginsels.[201] Na die inwerkingtreding van artikel 2(3)[202] van die Wet op Testamente was daar 'n vlaag van aansoeke om testamente wat na die dood van 'n erflater te voorskyn gekom het en nie aan formaliteitsvereistes voldoen het nie, geldig te laat verklaar.[203] Artikel 2(3) handel spesifiek met kondonering van nie-nakoming van formaliteite in artikel 2(1) en bied nie gepaste regshulp waar 'n "geldige verlyde testament" vermis word of verlore geraak het nie. Artikel 2(3) val dus streng gesproke buite die konteks van hierdie bespreking. Daar blyk egter onduidelikheid te wees ten aansien van die aanwending van artikel 2(3). 'n Artikel 2(3)-aansoek maak nie voorsiening vir kondonering van 'n afskrif van 'n geldige testament nie, maar vir 'n dokument wat nie aan die formaliteitsvereistes voldoen nie.[204] Die vraag na die toepassing van artikel 2(3) in geval van vermiste of verlore testamente het pertinent ter sprake gekom in *Ex parte Porter*[205] en *Yokwana v Yokwana.*[206] In beide sake het regter Binns-Ward die uitsprake gelewer. In *Ex parte Porter* (waar die testament na die dood van die testateur vermis word) word tereg bevind dat 'n artikel 2(3)-aansoek nie die korrekte prosedure is om 'n *verlore testament* te bewys nie. By 'n verlore testament, soos in dié saak (waar die testament juis nie gevind word nie) moet die testament

201 Voet 28 4 1-4; *Ex parte Webb's Estate* 1922 EDL 150 – testament weg; *Ex parte Bremont* 1930 WLD 127 – oorspronklike testament is weg – geen *animus revocandi* word bewys nie; *Ex parte Roux* 1937 OPD 32 – gesamentlike testament weg en hof bevind dat 'n afskrif aanvaar kan word; *Ex parte Hartley* 1937 SAR 237- testament kan nie gevind word nie en afskrif word aanvaar.

202 Ingevoeg deur die Wet tot Wysiging van die Erfreg 43 van 1992.

203 Vir die kondonasiebevoegdheid in die algemeen sien oa *Bekker v Naude* 2003 5 SA 173 (HHA); *Longfellow v BOE Trust* [2010] ZAWCHC 117; *Mabika v Mabika* [2011] ZAGPJHC 109; *Taylor v Taylor* [2011] ZAECPEHC 48; *Raubenheimer v Raubenheimer* 2012 5 SA 290 (HHA); *Van Wetten v Bosch* 2004 1 SA 348 (HHA); *De Reszke v Maras* 2006 2 SA 277 (HHA). Vgl die bespreking van hierdie en ander sake in Corbett ea 57; De Waal & Schoeman-Malan 72-82.

204 In *Haribans v Haribans* is 'n aansoek gebring om 'n afskrif van 'n sogenaamde testament te kondoneer: "*They had requisitioned a copy of deceased's late wife's will from that office and apparently went there on the 20th November 2009 to obtain a copy of that will. When they arrived in Pietermaritzburg they met Mr Mlaba from the Master's office and he gave them a copy of the deceased's late wife's will. Attached to that copy, which was certified by Mr Mlaba, was a copy of the disputed will.*" Die hof was egter nie oortuig dat die betwiste testament geldig is nie. Vgl Corbett ea 117; *Yokwana v Yokwana; Uys v Uys*; Biggs 2005 *The Step J* 29; Jacobs 2012. In "Lost will – Proving a copy for grant of probate" beskikbaar by http://www.contested probate.co.uk/lost.html (besoek 2011-05-17) word die moontlikheid bespreek dat 'n kondoneringsaansoek gebring kan word in die Australiese reg maar word daarop gewys dat die bewyslas tav vermiste testament steeds toepassing vind.

205 2010 5 SA 546 (WK).

206 [2013] ZAWCHC 22.

geherkonstrueer word.[207] In geval van 'n kondonasieaansoek word daar *wel* 'n dokument gevind wat nie behoorlik verly is nie. Regter Binns-Ward het tereg geweier om ingevolge artikel 2(3) die dokument as die testateur se kodisil te aanvaar. Die kodisil wat vermis word, was 'n behoorlik verlyde dokument en dus nie vormgebrekkig nie. Die hof bevind:

> *A proper case for relief under the common law would be made out in a matter in which the executed will had been lost and the court was satisfied on the evidence that the reconstruction was both accurate and complete. Thus the formulation of relief in this application, predicated as it was on the provisions of s 2(3) of the Wills Act, was misconceived. The relief should rather have been sought under the common law, in terms of which the court may in a proper case authorise that a 'reconstructed copy' of a will be accepted by the Master. A proper case for relief under the common law would be made out in a matter in which the executed will has been lost and the court is satisfied on the evidence that the reconstruction is both accurate and complete.*[208]

In *Hassan v Mentor*[209] lyk dit of regter Davis die standpunt van regter Binns-Ward volg waar 'n aansoek om kondonering van 'n afskrif gedoen is. Die testament was behoorlik verly maar het verlore geraak. Die hof verklaar dat die afskrif as testament aanvaar kan word.[210] Daar is egter nie 'n uitdruklike aanduiding of die kondonasie roete of die gemeneregtelike roete toepas is nie.[211]

'n Verdere wangebruik van artikel 2(3) kom voor in *Reichman v Reichman*[212] waar die seun van die oorledene, wat ook die eksekuteur is, besluit om die boedel te verdeel tussen die intestate erfgename. 'n Aansoek word gebring om dié seun as eksekuteur te onthef uit sy amp. 'n Testament wat deur slegs een getuie geteken is en deur die eksekuteur se seun in sy eie handskrif geskryf is, word nie by die dood ingehandig nie. Toe daar beswaar gemaak word teen die likwidasie- en distribusierekening, dreig die eksekuteurseun die ander erfgename dat hy 'n aansoek gaan bring om die testament, wat hom na bewering as

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207 Sien ook *Smith v Sampson*; *Yokwana v Yokwana*; Jacobs 2012 *The Elec J Bar Assoc* verduidelik dat 'n kondonasieaansoek as alternatief steeds gepaard sal gaan met voldoening aan die beginsels van verlore testament. In "Lost will – Proving a copy for grant of probate" beskikbaar by http://www.contested probate.co.uk/lost.html (besoek 2011-05-17) word die moontlikheid bespreek dat 'n kondoneringsaansoek gebring kan word in die Australiese reg maar word daarop gewys dat die bewyslas tav vermiste testament steeds toepassing vind.

208 Par 11. Eie kursivering. Vgl ook *Ex parte Gowree*; *Ex parte Ntuli; Nell v Talbot*. R Binns-Ward bevind ook in *Yokwana v Yokwana* par 1: "*It was accepted by the applicant's counsel, quite correctly, that relief under s 2(3) of the Wills Act was not available because the document in question was not the original allegedly signed by her, and thus did not qualify as the document allegedly executed by her.*"

209 [2012] ZAGPPHC 74.

210 Par 5.

211 Par 4 1 en 14 2. In *Smith v Sampson* word aansoek gedoen dat 'n "afskrif van 'n dokument" ingevolge a 2A Wet op Testamente gekondoneer word. Art 2A handel met kondonering by die herroeping van testament.

212 [2011] ZAGPJHC 117.

enigste erfgenaam aanwys, te laat kondoneer. Hy wil in retrospek 'n artikel 2(3)-aansoek bring om die testament geldig te verklaar.[213]

10 Samevatting

Probleme wat by die dood van 'n testateur met testamente ontstaan moet teen die agtergrond van die volgende gesien word: Die verlyding van 'n testament is gewoonlik 'n emosionele ervaring aangesien mens met die onafwendbaarheid van die dood gekonfronteer word.[214] Die formaliteitsvereistes in artikel 2(1) skep 'n raamwerk om die testateur te beskerm teen onbehoorlike beïnvloeding, bedrog, en dit bevorder geheimhouding.[215] Ten spyte daarvan dat die erns en noodsaaklikheid daarvan om 'n testemant te verly besef word, word versuim om die testament na verlyding sorgsaam te bewaar, wysig of herroep en by veranderde omstandighede aan te pas.

Alhoewel daar statutêre maatreëls vir die verlyding, en wysiging van testamente is[216] en ook vir die bereddering van die boedel,[217] geniet (i) die testateur en (ii) die testament geen beskerming tussen die verlydingsproses van die testament en die dood van die testateur nie. Die meeste van die probleme wat met testamente ervaar word kom in hierdie "onbeskermde fase" voor en kan waarskynlik daaraan toegeskryf word dat daar geen verpligting op die testateur (of testamentopsteller) is om (i) die bestaan en (ii) plek van bewaring van 'n testament te openbaar of aan te teken nie. Dit dra daartoe by dat testamente op groot skaal vermis of betwis word. Verder kan 'n testateur sterf sonder dat dit bekend is dat hy ooit 'n testament gemaak het.[218]

10 1 Status Quo

Die toename in litigasie rondom testamente is kommerwekkend.[219] Tans is die enigste uitweg om 'n geskil tussen potensiële erfgename by te lê, om die hof te nader vir 'n bevinding oor die "betwiste testament".[220] In gevalle waar die netto waarde van die boedel nie veel

213 Par 10: "*Although the Summons was issued by the second respondent, in reality the first respondent is seeking to have the deceased's 'will' declared to be valid so that he can receive all the benefits of such 'will' to the exclusion of the applicant and, for that matter his sister, Mrs Sacke. The second claim in the Summons is one which, if valid, should be pursued by the executor*".
214 De Villiers "Ons almal sterf ten minste een keer" beskikbaar by http://www.woes.co.za/bydrae/rubriek/ons-almal-sterf-ten-minste-een-keer (besoek 2011-05-17).
215 Kahn (1984); Leigh 2012 *Ehow*.
216 A 2(1)(a), (b) Wet op Testamente.
217 A 8, reg 5 Boedelwet.
218 Kahn (1984) 138; Gunnarson 2006 *Ill Bar J* 532.
219 Gausden & King 1.
220 *Smith v Sampson* par 1.

is nie, kan litigasie die hele boedel uitwis.[221] Indien daar by die dood van die testateur bewerings van bedrog, vervalsing, vernietiging of herroeping is, is die gepaste regshulp, 'n bevel ingevolge die gemeenregtelike beginsels.[222] Testamentopstellers behoort testateurs te waarsku dat sorgeloosheid met die testament potensiële probleme kan skep.[223] Teen die agtergrond van probleme met testamente som Kahn dié posisie soos volg op:[224]

> *Is forgery or falsification of a will a widespread and largely undiscovered crime? Basically, our will is ... so simple in form and so easy to falsify. All that are really needed are the apparent signatures of the testator and two witnesses. If a plot is considered desirable, well, as Mr Justice Jacob de Villiers put it in his dissenting judgment in Kunz v Swart, 'what is easier than for a person ….to conspire with one or more persons to make a false will without a trace of such conspiracy coming out?' If a conspiracy is too difficult to arrange, witnesses can be lead to believe they are witnessing another document.*[225]

10 2 Herverdelingsooreenkoms

'n Moontlike oplossing (indien litigasie nie oorweeg word nie) is om van 'n herverdelingsooreenkoms gebruik te maak om geskille by te lê. Die ooreenkomste het egter beperkte aanwending binne die beredderingsproses.[226] Die herverdelingsoorkeenkoms bied nie werklik 'n oplossing by problematiese testamente nie, maar kan wel in uitsondelike gevalle gebruik word om geskille tussen erfgename op te los. Die algemene beginsels van 'n herverdelingsooreenkoms moet egter in

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221 Gausden & King 1. In die saak *Thorner v Major* 2009 UKHL 18 het die familielid op die oorledene se plaas gewerk en alle aanduidings was daar dat hy die enigste erfgenaam sou wees. Die testament kon nie gevind word nie. Vier jaar en £400 000 later is die aangeleentheid geskik. Vgl Shakespeare (2010).

222 Voet 28 1 4. Sien *Yokwana v Yokwana* par 1: "*The applicant applied for an order in terms of s 2(3) of the Wills Act 7 of 1953, alternatively, under the common law directing the Master to accept a document purporting to have been signed by his late mother, Ms. Fete, as testatrix, as her will*".

223 Pace & Van der Westhuizen A 20: "*As also discussed earlier, a duplicate original will may now be accepted by the Master (see 16.1 above). Because of this dispensation, some institutions believe that it is prudent for a testator to prepare and correctly sign up to four copies of the will, each of which can be considered an original. This will result in there being that many originals to be kept by the testator and various other people or institutions on his behalf and consequently there would always be an original available on the death of the testator. This could be considered an acceptable practice but could nullify the consequences of the aforementioned rebuttable presumption.*"

224 Kahn (2003) 152. Sien ook Kahn (1984) 126 ev; Havenga 2006 *Fundamina* 16 ev vir die toename in versekeringsbedrog.

225 Kahn (1984) 138, (2003) 153: "*The number of relevant cases, civil and criminal, in our law reports, on falsification and forgery concerned with a will, apart from several bringing no success to the plaintiff or prosecution, of course is no reflection of the extent of the problem. Still, a few are interesting, if only as showing that there is not so queer as folks – or, I would add, so crooked, at times.*"

226 Sien *Ex parte Estate Dickins* 1953 2 SA 529 (N) vir 'n familieooreenkoms.

gedagte gehou word.[227] Slegs mede-erfgename (testaat en intestaat) kan met mekaar ooreenkom om bates te herverdeel.[228] Herverdeling sal net suksesvol wees indien daar tot 'n vergelyk gekom kan word tussen erfgename wat in 'n spesifieke testament benoem word.[229] Die beginsels van skenkings en afstanddoening moet hier in ag geneem word en kan herverdeling in die wiele ry.[230] In *Lipchick v Master*[231] bevind die hof:

> *It is common cause that the parties have made several attempts to settle the matter. Unsettled, this is a dispute that will haunt the parties for years, regardless of what the correct determination of the matter may be.*

Daar is dus nie veel ruimte om geskille by te lê anders as deur die hof nie.[232]

10 3 Voordoodse Register

Alhoewel daar 'n nadoodse register van testamente bestaan (wat deur die meesterskantore gehou word)[233] is daar geen registrasie van testamente vir die tyd tussen verlyding daarvan en die dood van 'n testateur nie. Sekere banke en instansies hou wel vir doeleindes van hulle eie administrasie rekord van testamente wat deur hulle opgestel word.[234] Daar is egter niks wat 'n testateur verhoed om indien hy wil die testament te verander of te vernietig nie. 'n Voordoodse notering of registrasiestelsel vir testamente is al jare gelede voorgestel deur Kahn ten einde (i) onreëlmatighede te beperk tydens verlyding en bewaring van testamente, en (ii) die aanmelding van testament met groter omsigtigheid te kontroleer.[235] In 1991 het die Suid-Afrikaanse regskommissie ook oorweging geskenk aan die wenslikheid van 'n

227 Abrie ea 131-132; De Waal & Schoeman-Malan 253, 255.
228 Bouwer 126; Claassens "Herverdelingsooreenkoms in die beredderingsproses van bestorwe boedels" 2004-2005 *T vir Boedelbeplanning* 82, 99; Cronjé & Roos 245.
229 Metode van kondonasie: Die meester keer die herverdelingsooreenkoms goed en dit is 'n manier om kostes te bespaar deurdat die erfgename tot 'n vergelyk kom.
230 Vgl ook *De Klerck v Registrar of Deeds* 1950 1 SA 626 (T).
231 Par 2.
232 Sien ook *Bydawell v Chapman* 1953 3 SA 514 (A) waar 'n familieooreenkoms om af te wyk van die testament ongeldig is; *Narshi v Ranchod* 1984 3 SA 926 (K) vir 'n skriftelike ooreenkoms tussen die testateur en sy seun wat deur die hof verwerp is.
233 In 'n voordrag wat Mnr Tienie Cronjé lewer tydens die tweede jaarlikse FISA kongres in 2010 verwys hy na die meester van die hooggeregshof se "*integrated case management system (ICMS)*" webportaal. Die portal bedien amper 400 landroskantore (bestorwe boedel dienspunte) en alle meesters kantore. Die *ICMS* portaal maak inligting beskikbaar wat deur die meesterskantore ingesamel is sedert 2000 asook inligting wat daagliks vasgelê word by die dienspunte en meesterskantore. Vgl Manyathi "Suicide notes as wills on FISA agenda" 2012 *DeRebus* 48.
234 Veritas eksekuteurkamers bied aan om jou testament kosteloos te stoor. Beskikbaar by www.veritasboe.co.za (besoek 2013-03-04).
235 Kahn (1984) 138 ev.

voordoodse registrasiestelsel. Daar is egter bevind dat die administrasie rondom so 'n stelsel hoë kostes sal meebring.[236] In 2003 vat Kahn[237] die situasie soos volg saam:

> *We have no register of wills in any form, with the consequence that it is possible for the existence of a will by a deceased person to be unknown or kept secret by the person or persons who alone know of it and who would benefit from this absence of knowledge. Whether this situation should continue to exist has been considered by several writers and by the South African Law Commission, which concluded that things should be left as they are. The ease and possible cheapness of making an underhand will are advantages that outweigh any consequent risk of illicit actions. That seems to be the opinion of most commentators.*

'n Registrasiestelsel hou die voordele in dat daar sekerheid is dat die testament gevind sal word; bedrog met verlyding van 'n nuwe testament sonder die wete van die erflater sal voorkom word; korrupsie met moontlike vernietiging kan voorkom word; en dit neem die druk van die testateur af om sekere mense te bevoordeel.[238] Die nadele van so 'n stelsel is dat daar 'n mate van beperkinginge op testeervryheid is (deurdat die testament aangemeld moet word). Stappe sal geneem moet word om die inhoud van die testament vertroulik te hou.

Die wenslikheid van 'n voordoodse registrasiestelsel moet opgeweeg word teen die beginsel van testeervryheid. Die oogmerk moet wees om die testateur en sy testament te beskerm. Daar is geen rede waarom die testateur nie vrye toegang tot sy testament kan hê nie, terwyl die inhoud van die testament steeds vertroulik bly. Argumente dat dit 'n duur administratiewe struktuur behels is ongegrond. Sonnekus[239] voer tereg aan dat so 'n stelsel voordele inhou en

> *all in all registration is merely another way to ascertain that the last will of the testator is honoured. With computerised technology there seems to be no sound reason why a central register could not be set up in South Africa*.[240]

Indien so 'n stelsel oorweeg word kan daar met vrug by ander regstelsels kers opgesteek word. Daar is deesdae wêreldwyd 'n tendens om voor die dood van die erflater sogenaamde elektroniese registers van testamente

236 Regskommissie (1991) par 2 163.
237 (2003) 152.
238 Kahn (1994) 32 skryf oor voordele by formaliteitsvereistes, maar dieselfde redes kan aangevoer word ten opsigte van 'n voordoodse registasiestelsel.
239 2007 *Exploring the Law of Succession* 92.
240 SARK (1991) par 2 163 oorweeg so 'n stelsel aan die hand van of die bevolkingsregister of 'n sogenaamde "testament notering" waarvolgens rekords gehou word van verlyde testamente.

reeds te hou.[241] *Willdata*[242] in die Verenigde Koningkryk verskaf so 'n diens.[243]

Daar kan nie veel langer gewag word om 'n meer formele stelsel te implementeer ten einde onnodige komplikasies met testamente by die dood van 'n testateur te ondervang nie. So 'n stelsel kan desnoods deur die meesterskantore of 'n staatsinstelling aanlyn hanteer word of andersins deur 'n privaatinstansie. Daar is gevorderde rekenaarprogramme en progammatuur wat aanlyn registrasie teen 'n baie lae koste moontlik maak. Na die verlyding van 'n testament kan die testateur aanteken op so 'n registrasiestelsel en die datum van verlyding en plek van bewaring te noteer.[244] 'n Stelsel met die nodige sekuriteit ingebou, sal verseker dat slegs die testateur, met 'n persoonlike wagwoord wat aan hom toegeken word, toegang tot sy testament het. Indien hy sy testament wil wysig of herroep, teken hy weer aan en registreer die gewysigde of nuwe testament deur die datum en plek van verlyding te verskaf. Dit behoort nie omvangryke administrasie te verg om so 'n stelsel te skep nie. Alhoewel so 'n registrasiestelsel nie sonder probleme is nie en die gedagte nie is om testeervryheid aan bande te lê nie, kan dit

241 Gray 2012 *The Step J* bespreek die posisie in die Australiaanse reg tav hoe die misplaaste testament gevind kan word en beveel 'n elektroniese register aan. Sien ook Duhaime *Legal Resources* 2007-aanlyn vir die Kanadese reg en Shakespeare (2010) vir die Engelse reg. Vgl ook Certainty "National Wills register and Will Services" beskikbaar by http://www.certainty.co.uk/ (besoek 2012-09-18); Gunnarsson 2006 *Ill Bar J* verduidelik hoe die problematiek in Illinois hanteer word, en word aanbeveel dat 'n statutêre geskepte sentrale "*testament repository*" die antwoord mag wees.

242 "Find a Lost Will, Register your Will - National Will Register UK" beskikbaar by http://www.willdata.info/ **(**besoek 2012-10-04**).** Hewson "Registering Your Last Will and Testament: What's the Point?" 2011 beskikbaar by http://legalwills.wordpress.com /author/timhewson/ (besoek 2013-03-06) se standpunt dat daar geen sin is in 'n registrasiestelsel nie en dat die erflater doodeenvoudig die eksekuteur moet vertrou. Sy standpunt is miskien 'n oorvereenvoudiging van die probleme maar dit is seker waar dat indien die testateur die eksekuteur vertrou om sy boedel na sy dood te beredder hy hom seer sekerlik voor sy dood kan vertrou met inligting oor waar die testament geberg word.

243 Indien daar gesoek word na 'n testament kan jy die opsie "soek" druk op die *Willdata UK National Will Register* webblad. Hulle hou vertroulike inligting oor die status van testamente met die nodige *registrasie datums* so ver terug soos 1900.

244 Biggs *The Step J* 28: "If you cannot persuade your testator to leave their will with you, then suggest it is lodged in the Probate Registry. The Wills (Deposit for Safe Custody) Regulations 1978 provide for wills of living persons to be deposited in the Principal Registry of the Family Division. Wills may be lodged for deposit in the Principal Registry, any District Probate Registry or sub-Registry on payment of £15. All wills so deposited are logged into the Registries' national computer system, which is checked, *inter alia*, on every grant application".

'n beginpunt wees om potensiële onsekerhede by vermiste testamente op te los.[245] So 'n stelsel kan bydra tot regsekerheid aangaande die bestaan van 'n testament (al dan nie) en ook om die plek waar die testament gehou word te kan identifiseer na die dood van die erflater en ter selfdertyd bedrog, vervalsing, vernietiging en die vermissing van testamente hokslaan.[246]

245 Senekal 2002 *Rapport* 11 het reeds in 2002 'n beroep gedoen op registasie. Hewson "Registering Your Last Will and Testament: What's the Point?" 2011 beskikbaar by http://legalwills.wordpress.com /author/timhewson/ (besoek 2013-03-06) se standpunt is dat daar geen sin in is om 'n registrasiestelsel in te stel nie en dat die erflater doodeenvoudig die eksekuteur moet vertrou. Sy standpunt is miskien 'n oorvereenvoudiging van die probleme maar dit is seker waar dat indien die testateur die eksekuteur vertrou om sy boedel na sy dood te beredder, hy hom seer sekerlik voor sy dood kan vertrou met inligting oor waar die testament geberg word.

246 Senekal 2002 *Rapport* 11 verwys na www.fount.co.za wat so 'n diens lewer maar hulle webblad is nie meer aktief nie.

The role of a curator *ad litem* and children's access to the courts

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OPSOMMING

Die Rol van die Kurator *ad litem* en Kinders se Reg op Toegang tot die Howe

Normaalweg is dit 'n kind se ouer(s) wat hom of haar in litigasie bystaan of vir en namens die kind litigeer. In uitsonderlike gevalle is dit egter nie moontlik of wenslik om hierdie funksie aan die ouers of voogde oor te laat nie. Dit is deel van ons Romeins-Hollandse regserfenis dat kurators *ad litem* in hierdie gevalle gebruik word om kinders se ontbrekende of beperkte verskyningsbevoegdheid aan te vul. In hierdie bydrae word aangetoon dat die regspraak die rol van die kurator *ad litem* duidelik omskryf het deur dit onder andere te onderskei van die rol van die Gesinsadvokaat en 'n regsverteenwoordiger. Daar word voorts ook aangetoon dat die howe egter verder gegaan het en die rol van die kurator *ad litem* wat vir kinders optree, uitgebrei het om onder andere ook die belange van kinders in die algemeen te dien, dus in gevalle waar hulle nie voor die hof was nie. Die uitbreiding van die rol van hierdie kurators kan op vele maniere verklaar word. Dit kan egter nie betwyfel word dat die Kinderwet 38 van 2005 en litigasie wat in die openbare belang ten behoewe van kinders onderneem word, 'n leeue-aandeel hierin gespeel het nie.

Hierdie uitbreiding word verwelkom omdat toegang tot die howe noodsaaklik is ten einde sosiale geregtigheid te bewerkstellig en kinderregte te verwesenlik. Daar word egter ook aangetoon dat die Suid-Afrikaanse kinderreg in hierdie verband by ander regstelsels kan kersopsteek, aangesien kinders in sekere gevalle steeds hul reg op deelname aan belangrike besluitneming ontneem word.

1 Introduction

Access to the courts is essential to achieve social justice. This is true with respect to everybody, including children. A curator *ad litem* legally assists children in litigation.[1] A curator *ad litem* is appointed "to avoid injustice.

* I wish to express my gratitude towards Prof Ann Skelton, Director of the Centre for Child Law for making unreported judgements available to me and two of the academic associates in the Department of Private Law, Hanneke Verwey and Lizelna Botha, for their assistance. A draft version of the paper was presented at the "Private Law and Social Justice Conference", Port Elizabeth, 2013-08-19.

1 See *Molete v MEC for Health, Free State* (2155/09) [2012] ZAFSHC 126 where it was decided that a curator *ad litem* would serve no purpose because the trial had been finalised. The court did proceed to appoint a curator *bonis* to manage the child's estate and compensation that the child received.

… [T]he Court has power to appoint, and will appoint, a curator *ad litem* to assist persons to vindicate rights where there is no other suitable means…".[2] The purpose of this article is to establish the role of a curator *ad litem* appearing for children in South African courts, and in particular whether the role of the curator *ad litem* has developed to the extent that it improves children's right of access to the courts.

A very brief comparative study will be included comparing the curator *ad litem* under South African law to similar appointments in other jurisdictions. The aim of this comparison is to shed light on the contribution these appointments make in securing access to the courts for all children.

2 The Common Law Origin

The Roman Dutch law distinguished between an *infans*, a child under the age of seven years, and a *minor*, a child of seven years or older, when considering the legal capacity of the child.[3] The *infans* had no capacity to litigate, at least not in his or her own name.[4] The parent or guardian of the *infans* had to sue or be sued on behalf of the *infans*.[5] A *minor* had limited capacity to litigate.[6] The general tenor regarding litigation in the common law involving minors was that minors had no *persona standi in iudicio* and could not institute court proceedings or defend legal proceedings without the assistance of their parents or guardians.[7] De Groot explained that minors do not have the capacity to litigate because they do not care for themselves or manage their own affairs.[8]

2 Per Reynolds J in *Ex parte Phillipson and Wells NNO* 1954 1 SA 245 (E) 246.

3 Voet 2 4 4. However, it must be borne in mind that "*minor*" sometimes refers to all children, thus including *infantes* and sometimes in the narrow sense, only referring to children aged seven and above.

4 Voet 2 4 4, 26 7 12. This incapacity of the *infans* originated in Roman law. See De Groot 1 8 4; Van der Keessel *Theses Selectae* 127, *Praelectiones* 1 8 4.

5 De Groot 1 4 1, 1 6 1, 1 7 8. He confirmed 1 8 4 that all legal proceedings must be conducted in the name of the guardian. Compare also Voet 2 4 4, 5 1 11, 26 7 12; Van Leeuwen *RHR* 5 3 5; Van der Keessel *Theses Selectae* 127, *Praelectiones* 1 4 1, 1 8 4; Van der Linden *Koopmans Handboek* 3 2 2.

6 De Groot 1 4 1, 1 8 4. Compare Van der Vyver "Verskyningsbevoegdheid van minderjariges" 1979 *THRHR* 129 131.

7 De Groot 1 4 1 mentions an exception in criminal matters.

8 De Groot 1 4 1. See also De Groot 1 6 1, 1 7 8, 1 8 4; Groenewegen *De Leg Abr* 3 6 3 2; Van Leeuwen *RHR* 5 3 5. Voet 2 4 4 mentions that minors may not be summoned without the authority of a guardian. He adds (5 1 11) that a minor ought not to institute proceedings without a guardian and explains (26 7 12) that a guardian's duty is to appear on behalf of his ward in legal proceedings, whether he institutes an action on behalf of a minor or defends him when the minor has been sued by another. See also Van der Keessel *Theses Selectae* 127 explaining that a minor could not appear in court either as plaintiff or defendant without the assistance of his or her guardian. In *Praelectiones* 1 8 4 he comments that minors who institute proceedings or defend such proceedings could not do so in their own

From the above it is clear that a child lacks the capacity to conduct himself/herself in legal proceedings. The parent(s) or guardian will usually assist the child or act for and on behalf of the child to supplement this deficiency. If that is not possible or desirable a curator *ad litem* is appointed to assist the child in litigation.

In the common law there were four established grounds for the appointment of a curator *ad litem* for a child.[9] Case law confirms that curators *ad litem* are still being appointed in all four these instances, namely where:

(a) The minor is without parents or guardian.[10]

(b) A parent or guardian cannot be found or is not available (for example, due to an accident).[11]

(c) The interests of the minor are in conflict with those of the parent or guardian, or there is a possibility of such a conflict.[12]

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name. Compare Van der Linden *Koopmans Handboek* 1 5 5, 3 2 2 where he mentions that if an action is to be instituted by a minor, it must be brought in the name of the guardian and if one wishes to sue a minor, the guardian must be summonsed.

9 De Groot 1 4 1, 1 8 4; Voet 5 1 11; Van Leeuwen *CF* 2 1 10 8.

10 *Ex parte Greeve* (1907) 24 SC 202; *Swart v Muller* (1909) 19 CTR 475; *Yu Kwam v President Insurance Co Ltd* 1963 1 SA 66 (T), confirmed on appeal in 1963 3 SA (A) 772; *Thole v Trans-Drakensberg Bank Ltd* 1967 2 SA 214 (D); *Guardian National Insurance v Van Gool NO* 1992 4 SA 61 (A) 66F-H; *Gassner NO v Minister of Law and Order* 1995 1 SA 322 (C), where the mother of an "extra-marital child" died and no guardian was appointed (the out-dated terminology is used in this contribution only because it was used in the case(s) referred to); *Multilateral Motor Vehicle Accident Fund v Mkgohloa* 1996 1 SA 240 (T), where the mother of the "extra-marital child" had deceased; *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T). In the last mentioned case the court appointed a curator *ad litem*, to represent the unaccompanied migrant children detained in a repatriation centre on whose behalf the Centre for Child Law launched an application for their separation from adult detainees and for the opening of welfare proceedings prior to their deportation.

11 *Curator ad litem of Letterstedt v Executors of Letterstedt* 1874 Buch 42 45, where the guardian was abroad; *Ex parte Bloy* 1984 2 SA 410 (D), where the whereabouts of the parents were unknown; *Moosa v Minister of Police, KwaZulu* 1995 4 SA 769 (D), where the mother of "extramarital children" had abandoned them and could not been found.

12 *Wolman v Wolman* 1963 2 SA 452 (A) 459C, where the father applied to have the grandfather's will set aside when such will would be to the detriment of the son; *B v E* 1992 3 SA 438 (T); Van Heerden *et al Boberg's Law of Persons and the Family* (1999) 903 n12, where the child's injuries are attributable partly to the parent's negligence and partly to the negligence of a third party and this is why Boberg "Law of Delict" 1959 *Annual Survey of South African Law* 114 criticised *Kleinhans v African Guarantee & Indemnity Co Ltd* 1959 2 SA 619 (E). There was a conflict between the father's interests as plaintiff in his representative capacity as the child's guardian, and his interests as a potential defendant in a subsequent action by the present defendant to recover a contribution from him. Boberg opined that under those circumstances a curator *ad litem* should have been appointed.

(d) The parent or guardian unreasonably refuses to assist the minor.[13]

It is also customary to appoint curators *ad litem* for the unborn, for example where their hereditary interests are at stake.[14] While the child's parents/guardians are still alive, curators are only appointed in *exceptional* circumstances, such as the instances mentioned above. This is the reason why the application for the appointment of a curator *ad litem* was dismissed in *Ex parte Oppel*.[15]

Ex parte Kajee creates the impression that curators *ad litem* are appointed to represent the interests of minors in dependants' claims.[16] This is true if both parents die, for example in a motor vehicle collision, like in *MacDonald v Road Accident Fund,*[17] or when the whereabouts of the parents are unknown, as in *Ex parte Bloy*.[18] It would be incorrect, however, to appoint a curator *ad litem* if one of the parents is able to institute action for and on behalf of the child or to duly assist the child, the exception being if the parent's negligence contributed to the child's damage. In such a case the breadwinner's contributory negligence would result in the breadwinner and the third party being regarded as joint wrongdoers against the dependant.

In the past, a child had to be represented by a *curator ad litem* in paternity suits/proceedings for an order declaring the child to be "illegitimate".[19] This was apparently done because the finding could affect the status of the child, but the practice was criticised and rightly

13 *Ex parte Oppel* 2002 5 SA 125 (C) 126A-B, 145I; Van der Vyver & Joubert *Persone- en Familiereg* (1981) 178; Van Heerden *et al* 904 n13.

14 *Du Plessis NO v Strauss* 1988 2 SA 105 (A); *G v Superintendent, Groote Schuur Hospital* 1993 2 SA 255 (C) 257D, 259C-G. But not when the pregnant mother applied for an abortion in terms of the now repealed Abortion and Sterilisation Act 2 of 1975: *Christian League of Southern Africa v Rall* 1981 2 SA 821 (O).

15 2002 5 SA 125 (C) 129G-H. An application was presented to the court for the appointment of a curator *ad litem* to prepare a report regarding the need to appoint a curator *bonis* or trustee for the estate of the minor son of the applicants. He was involved in a motor vehicle collision and suffered serious head injuries. The applicants sued the Road Accident Fund for damages. The parties eventually entered into a settlement agreement. The settlement offer was subject to the appointment of a curator *bonis* to the estate of the minor. See also *Molete v MEC for Health, Free State* [2012] ZAFSHC 126 parr 15, 59.

16 2004 2 SA 534 (CPD).

17 [2012] ZASCA 69.

18 1984 2 SA 410 (D).

19 *V v R* 1979 3 SA 1006 (T) 1009H; *Seetal v Pravitha* 1983 3 SA 827 (D) 863D-E; *Ngubane v Ngubane* 1983 2 SA 770 (T) 772; *M v R* 1989 1 SA 416 (O) 419I-J; *B v E* 1992 3 SA 438 (T) 439E-F read with 442D; *S v L* 1992 3 SA 713 (EC) 714; *O v O* 1992 4 SA 137 (C) 139G; *D v K* 1997 2 BCLR 209 (N) 221D-H.

so.[20] Now the Children's Act[21] (CA) has abolished discrimination against children based on their parents' marital status. The finding that a child is not the offspring of a married father but the child of an unmarried father (because the *pater est quem nuptiae demonstrant* presumption has been rebutted) does not affect the child's status in the same way. It is therefore no longer essential to appoint a curator *ad litem* for the child under these circumstances.

Herbstein and Van Winsen[22] allege that section 6(1) [*sic*] of the Divorce Act 70 of 1979 provides for the appointment of a curator *ad litem* to represent the interests of minor or dependent children of a marriage which is to be dissolved. This is clearly not correct. The subsection at issue is subsection 6(4) which states that

> [f]or the purpose of this section the court may appoint a *legal representative*[23] to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation.[24]

This opinion of Herbstein and Van Winsen makes it necessary to comment on the different roles of a curator *ad litem* and a legal representative in children's matters. Before doing so, the role of a curator *ad litem* should be considered in the context of the Constitution.[25]

3 Curator *ad litem* for Children in the Constitutional Era

In 1984, years before the acceptance of the 1996 Constitution and the Bill of Rights, Hoexter JA in *Rein v Fleischer NO*[26] referred to the appointment of a curator *ad litem* as "that vigilant protection of the rights of minors which our system of law seeks to promote". In the light of the

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20 See the criticism of Van der Vyver 1979 *THRHR* 129 135-136. Where a child's extra-marital birth was raised in maintenance proceedings, the same was not done: Van Heerden *et al* 360. See *Park v De Necker* 1978 1 SA 1060 (N) and the well-founded criticism of Van der Vyver & Joubert 215-216.

21 38 of 2005.

22 *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* Vol 2 (eds Cilliers, Loots & Nel) 1571.

23 Own emphasis.

24 See also Kassan "Children's right to legal representation in divorce proceedings: proposed guidelines concerning when a s 28(1)*(h)* legal practitioner might be deemed necessary or appropriate" in *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* (eds Sloth-Nielsen & Du Toit) (2008) 227 231 *et seq* on s 6(4). See also *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) where De Villiers J was of the view that the case was not an appropriate one in which to appoint a curator *ad litem*, because the mother of the children was available and willing to assist them. He was not persuaded by arguments regarding a potential conflict of interests. The court agreed that the children needed legal assistance, but favoured the assignment of a legal representative in terms of s 28(1)(h).

25 Constitution of the Republic of South Africa, 1996.

26 1984 4 SA 863 (A) 874C.

present South African constitutional dispensation we have become *more* vigilant about the protection of children's rights.

The South African Constitution is renowned for its specific provision for children and the rights provided to children over and above the fundamental rights guaranteed to all persons.[27] In the context of children's right of access to the courts, section 28(1)(h) is of vital importance. In terms of section 28(1)(h) every child has the right to have a legal practitioner assigned to him or her by the state at state expense in civil proceedings affecting the child, if substantial injustice would otherwise result. The Constitutional Court has interpreted this right of children to include the appointment of a curator *ad litem*. In *Du Toit v Minister of Welfare and Population Development*[28] the court referred to its obligation to appoint a curator *ad litem* for children where there is a risk of substantial injustice and specifically stated that in matters where children's interests are at stake, those interests must be "fully aired" before the court so as to avoid substantial injustice to those children and possibly to others.[29] This broad interpretation of section 28(1)(h) to include the appointment of a curator *ad litem* is clearly correct.[30]

The principle of proclaiming children's best interests to be paramount is also important in this context. The Bill of Rights dictates that a child's best interests are of *paramount* importance in every matter affecting that child.[31] The Constitutional Court found that the best interests standard creates a right that is independent of the other children's rights specified in section 28(1) of the Constitution.[32] In *Christian Education South Africa v Minister of Education*[33] Sachs J found the failure to appoint a curator *ad litem* to represent the children's interests in a constitutional attack on the prohibition of corporal punishment in schools very unfortunate. He explained his view as follows:

> The children concerned were from a highly conscientised community and many would have been in their late teens and capable of articulate expression. Although both the State and the parents were in a position to speak on their behalf, *neither was able to speak in their name.*[34] A curator could have made sensitive enquiries so as to enable their voice or voices to be heard. Their actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and

27 S 28.
28 2003 2 SA 198 (CC) 201G par 3. See also *S v Mokoena* 2008 5 SA 578 (T) 589C.
29 201G-201H: "Where there is a risk of injustice, a court is obliged to appoint a *curator* [*ad litem*] to represent the interests of children. This obligation flows from the provisions of s 28(1)(h) of the Constitution…".
30 See also Du Toit "Legal representation of children" in *Child law in South Africa* (ed Boezaart) (2009) 93 97.
31 S 28(2).
32 *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) par 17.
33 2000 4 SA 757 (CC) par 53.
34 Own emphasis.

experiential foundations for the balancing exercise in this difficult matter would have been more secure.

There is a debate regarding the constitutionality of the appointment of curators *ad litem* for persons with mental or physical disabilities as it is regarded as interference with those persons' constitutional rights to freedom of the person, security and control over their bodies, dignity and privacy.[35] Without addressing any of the arguments in that particular debate, it is submitted that the constitutionality of the appointment of curators *ad litem* for children cannot be questioned.

4 The Procedure to Appoint a Curator *ad Litem*

The appointment of a curator *ad litem* is usually[36] based on an *ex parte* application[37] to the High Court[38] or on notice[39] to the Magistrate's Court,[40] stating the grounds on which the applicant claims *locus standi*, the court's jurisdiction,[41] the child's age and gender, the relationship between the child and the applicant and the name and address of the person suggested for appointment as curator *ad litem*.[42] The office of curator *ad litem* must preferably be held by an advocate of the High Court

35 Cockrell *Bill of Rights Compendium* LAWSA par 3E33 -3E34. See ss 12, 10, 14 Constitution.

36 The courts have inherent discretion to appoint a curator *ad litem mero motu*. See *Legal Aid Board in re Four Children* [2011] ZASCA 39 par 12. The sole guide in exercising this discretion is the child's best interests: par 13.

37 The child or any person who is able to show an interest in the child may bring this application.

38 R 57(1) Uniform Rules of Court. However, in *Nkosi v Minister of Justice* 1964 4 SA 365 (W) 367 the application for the appointment of a curator *bonis* was in "unusual circumstances" made from the bar. In that particular case a curator *ad litem* represented a paralysed adult (prisoner) who had suffered gunshot wounds in the neck in a claim for damages. This action was then settled and the application to appoint a curator *bonis* to manage the "substantial sum of" money was made from the bar. No case could be found where a curator *ad litem* was appointed in this way.

39 Jones & Buckle *The Civil Practice of the Magistrates' Courts in South Africa (Volume II: The Rules)* by Van Loggerenberg *ad* s 33.

40 S 33 Magistrate's Court Act 32 of 1944 states that the court may appoint a curator *ad litem* in any case in which such a curator is required or allowed by law for a party to any proceedings brought or to be brought before the court. Note that s 33 deals with a curator *ad litem* only. The Magistrate's Court has no power to appoint other curators.

41 Which in the case of children need not be domiciled or in permanent residence but have a mere physical presence in that court's jurisdiction: *Ex parte Kajee* 2004 2 SA 534 (C) 542-543. Also see the remark made by Sachs J in *AD v DW (Centre for Child Law as* Amicus Curiae; *Department of Social Development as Intervening Party)* 2008 3 SA 183 (CC) par 30 that a child's best interests "should not be mechanically sacrificed on the altar of jurisdictional formalism".

42 R 57(2) Uniform Rules of Court. When the court appoints a curator *ad litem* it usually directs the Bar Council to appoint a suitable advocate as curator. However, the court may also appoint a specific advocate to that position.

with no interest in the matter, failing such, by an attorney.[43] A statement by the nominated person consenting to act as curator *ad litem* must be annexed to the papers.[44] Notice of the application for the appointment of a curator *ad litem* must be given to the party against whom the minor would be bringing the lawsuit.[45] The latter party can then oppose the application if he or she is of the opinion that the appointment is not justified.[46]

Most divisions of the High Court have their own Practice Rules regarding the appointment of curators *ad litem*. These Practice Rules contain additions to the above-mentioned directives, for instance that the applicant must establish the experience of the proposed curator *ad litem* in the type of litigation which the litigant wishes to institute,[47] that the costs of the application be reserved for determination in the contemplated trial[48] and that a settlement may only be reached with the approval of a judge.[49] It is interesting to note that these Practice Rules in essence correspond with the reasoning behind the two-stage approach followed in *Ex parte Bloy*,[50] namely to ensure that the person appointed as curator *ad litem* for a child has sufficient experience and expertise and to avoid the child being responsible for the costs of unsuccessful litigation.[51] This two-stage approach entails that the notice of motion contains two prayers: The first, for the appointment of the curator *ad litem* for the minor to investigate and report back to court, and the second for the granting of further powers to the curator as may be necessary for due prosecution of the action. The court opined that in personal injury claims an application for the appointment of a curator *bonis* should be included in the second prayer.[52]

It has been suggested that Family Advocates accept appointment as curators *ad litem* in certain circumstances involving divorce litigation.[53]

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43 R 57(5) Uniform Rules of Court. See also *Ex parte Griesel* 1948 2 SA 219 (O) 220; *Ex parte Maritz; Ex parte De Klerk* 1968 4 SA 130 (C) 134F-H; *Ex parte Van der Linde* 1970 2 SA 718 (O) 721F; *Ex parte Bloy* 1984 2 SA 410 (D) 413, Kriek J stating that it is obligatory; *Martin v Road Accident Fund* 2000 2 SA 1023 (W) 1035G.

44 *Ex parte Bloy* 1984 2 SA 410 (D) 412E; Van der Vyver & Joubert 179.

45 *Ex parte Wilkinson* 1946 2 PH F79 (C).

46 *Ex parte Donaldson* 1947 3 SA 170 (T) 174. In motor vehicle insurance claims on behalf of a minor, this includes the insurance company: Joubert & Faris (eds) *LAWSA* Vol 4 (3rd ed) "Appointment of curators to minors and persons absent from jurisdiction" by Harms & Harms par 500. Service on the master is normally required in all such cases: *ibid*.

47 R 15.9 no 1 North Gauteng Practice Rules.

48 R 15.9 no 3 North Gauteng Practice Rules.

49 R 15.9 no 4 North Gauteng Practice Rules. See also no 5 that the approval may be granted by a judge in chambers that has been allocated by the Deputy Judge-President.

50 1984 2 SA 410 (D) 413. See Van der Vyver & Joubert 377.

51 *Ex parte Padachy* 1984 4 SA 320 (D&C) 326G which followed *Ex parte Bloy* 1984 2 SA 410 (D) 411-413.

52 *Ex parte Bloy* 1984 2 SA 410 (D) 413.

53 Van Heerden *et al* 904 n13.

However, this statement is neither supported by the enabling statute nor by the distinct roles associated with these offices and should therefore be rejected. The Family Advocate is a creation of statute. The role and function of the Family Advocate is defined in the Mediation in Certain Divorce Matters Act[54] and is limited to those functions as set out in that Act. The office has three main functions. The first is to monitor all court documentation and settlement agreements to ensure that the agreements are *prima facie* in the best interests of the child.[55] The second function is to mediate between the parties.[56] Lastly, the office carries out full evaluations in cases where this is required, culminating in a report[57] that sets out its findings and recommendation to the court.[58] Section 2(1) of the Mediation in Certain Divorce Matters Act which mandates or empowers the Family Advocate, makes no mention of the appointment as a curator *ad litem*. The Family Advocate takes on a neutral role[59] while the same cannot be said of a curator *ad litem*. Indeed, the court has on occasion reprimanded a curator who approached his responsibilities in a neutral manner. In *Du Plessis NO v Strauss*[60] an order had been made by a court in favour of the persons represented by the curator. On appeal the curator advanced argument in favour of the appeal because he considered that it would assist the court if he adopted a "more objective view".[61] Van Heerden JA took him to task:[62]

> *Hierdie houding was klaarblyklik strydig met sy pligte, want dit is nouliks nodig om te sê dat 'n* curator-ad-litem *se eie seining ontersaaklik is en dat van hom verwag word om alle moontlike argumente ten behoewe van die minderjariges en*

54 24 of 1987.
55 Van Heerden *et al* 522.
56 *Soller v G* 2003 5 SA 430 (W) par 22. Mediation is not defined in the Act, but is described by Van Zyl, a former Family Advocate, as being an alternative dispute-resolution mechanism used by the Family Advocate to actively encourage the parties to participate in a discussion seeking a mutually acceptable solution in regard to matters pertaining to children: 2000 *Obiter* 372 377-378.
57 *Soller v G* 2003 5 SA 430 (W) par 21. The Family Advocate may also appear in court when requested by the court or *mero motu* in cases where he or she deems it to be in the best interests of any child: s 4(3) of the Mediation in Certain Divorce Matters Act 24 of 1987. See *Van Vuuren v Van Vuuren* 1993 1 SA 163 (T) 166; Van Heerden *et al* 519; Robinson "Children and divorce" in *Introduction to Child Law in South Africa* (ed Davel) (2000) 68.
58 See *Van den Berg v Le Roux* [2003] 3 All SA 599 (NC) 606-610 indicating that these functions and powers could be somewhat contradictory. Also compare *R v M* (unreported, case no 5493/0, 20040227) par 16 where Govindasamy AJ found that there are many complex cases where the office of the Family Advocate cannot contribute sufficiently. He reached the conclusion that the Family Advocate could not play an effective role in that particular case. However, the same Govindasamy AJ sat aside that judgment on 2005-09-15. The court may also choose not to follow the recommendations of the Family Advocate: *Whitehead v Whitehead* 1993 3 SA 72 (SE).
59 See also *FB v MB* 2012 2 SA 394 (GSJ) 397F par 17.
60 1988 2 SA 105 (A).
61 145J.
62 146A-B. See also *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 par 21.

> *ongeborenes aan te voer; soveel te meer indien uitspraak reeds in hulle guns gegee is.*

This can clearly be contrasted with the role of the Family Advocate who does not represent any particular party to the dispute, not even the child, but rather considers the relevant facts to assist the court with balanced recommendations as to the best care and contact arrangements for the child.[63]

5 The Duties of a Curator *ad litem* for Children

The position of a curator *ad litem* is a responsible one because the court depends on his or her report.[64] The child must be interviewed without delay, the child must be informed of the reason for the visit and the curator must make such further enquiries as he or she deems necessary. The curator's report should bring any facts or circumstances pertinent to the application to the court's attention. The curator *ad litem* represents the best interests of the child by advancing all arguments that can reasonably be put forward on the child's behalf.[65] This denotes the real difference between a curator *ad litem* and a child's legal representative. The curator *ad litem*, while assisting the court and the child during the legal process, advances the child's best interests; the legal representative takes instructions from the child and represents the child's views.[66] This is why (in Hague abduction applications) it is said that[67]

> [i]n cases where very young children are involved, the role of the legal representative would be more akin to that of a *curator ad litem*, while with older children, the legal representative would take instructions from the child, act in accordance with those instructions and represent the views of the child.[68]

63 *Soller v G* 2003 5 SA 430 (W) parr 23, 24. See also par 27 that the Family Advocate provides a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer.

64 In certain circumstances functioning rather as *amicus curiae*: R 57(5) Uniform Rules of Court; *Steyn v Steyn* 1972 4 SA 151 (NC) 152G, providing the court with the necessary information/evidence.

65 *Du Plessis NO v Strauss* 1988 2 SA 105 (A) 146B. The personal opinion of the curator is thus irrelevant: *Du Plessis NO v Strauss* 1988 2 SA 105 (A) 145J-146B; *Martin NO v Road Accident Fund* 2000 2 SA 1023 (W) 1035A-B.

66 *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T) par 23 for the distinction between the roles of a curator *ad litem* and a legal representative. The legal representative is however not a mouth piece. He or she adds adult insight and legal knowledge to the views of the child: *Soller v G* 2003 5 SA 430 (W) par 27.

67 Woodrow & Du Toit "Child abduction" in *Commentary on the Children's Act* (eds Davel & Skelton) (Revision Service 5, 2012) 17–27. See also Du Toit 109.

68 Approved in *Central Authority of the Republic of South Africa v B* 2012 2 SA 296 (GSJ) par 2; *B v G* 2012 2 SA 329 (GSJ) par 12.

Whether these different roles should be undertaken by the same person in a particular case by and large depends on the experience, skills and qualifications of the person concerned.[69] It is also undesirable for a person to be both curator and legal representative if the earning of professional fees might create a conflict of interest.[70] A curator *ad litem* may in his or her official capacity be substituted as a party in place of the child.[71] The court may appoint a curator *ad litem* for a child without his or her knowledge and even against his or her will if it can be shown to the court that the appointment will be for the child's benefit and in his or her best interests.[72]

6 The Developing Role in the Case of Children

In recent years the courts have been interpreting the common law relating to curators *ad litem* and are using curators *ad litem* in a wide range of circumstances:

(a) *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)*[73] dealt with the joint adoption of children by a same-sex couple in terms of the now repealed Child Care Act.[74] The Constitutional Court had a report filed by a curator *ad litem* appointed by the court *a quo* regarding the welfare of the couple's teenage children and of children (born and unborn) in general.[75]

(b) The case of *S v M (Centre for Child Law as Amicus Curiae)*[76] involved the sentencing of the primary care-giver of young children. The Constitutional Court appointed a curator *ad litem* to investigate the circumstances of the children of the appellant.[77]

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69 *Legal Aid Board in re Four Children* [2011] ZASCA 39 par 14.

70 *Martin NO v Road Accident Fund* 2000 2 SA 1023 (W) 1034B-C per Wunsh J.

71 *Kotze NO v Santam Insurance Ltd* 1994 1 SA 237 (C) 249A, in which case it was done for a person (an adult) suffering from mental incapacity due to a head injury; *Santam Insurance Ltd v Booi* 1995 3 SA 301 (A) 313C, in a similar case on the strength of the common-law authorities on this issue; *Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C) 471C-D, where the court applied the *dictum* of the *Booi* case.

72 Jones & Buckle *ad* section 33, ostensibly because the dissatisfied child had no *locus standi* to appear in opposition of the appointment. See *Legal Aid Board in re Four Children* [2011] ZASCA 39 par 12. However, see *Ex parte Burton* 1948 4 SA 602 (O) where the court was prepared to postpone the case until after the minor's attaining majority, which was just a month away.

73 2003 2 SA 198 (CC).

74 74 of 1983.

75 Par 3. Skweyiya AJ observed that this obligation "flows from the provisions of s 28(1)(h) of the Constitution". However, equating the roles of legal representatives and curators *ad litem* overlooks the fact that the curator in this case also reported on the interests of other children and even the unborn. This is not something that a legal representative would do. A legal representative is concerned only with his or her client(s).

76 2008 3 SA 232 (CC).

77 Parr 16, 31. The court also had the benefit of the Centre for Child Law admitted as *amicus curiae* to make submissions on the rights of the children involved.

(c) *S v S (Centre for Child Law as Amicus Curiae)*[78] once again dealt with the sentencing of a mother, convicted of forgery, uttering and fraud, who contended that both the Regional Court and the Supreme Court of Appeal failed to establish whether she was a primary care-giver and paid insufficient regard to the best interests of the children. She thus applied to the Constitutional Court for leave to appeal. The Centre for Child Law was admitted as *amicus curiae* and urged the court to appoint a curator *ad litem* to investigate whether there had been significant changes and what the best interests of the children would entail, even if the mother was incarcerated.[79] The Constitutional Court appointed a curator *ad litem* to report on two matters, namely what the effect (if any) of a custodial sentence would be on the children and what measures (if any) needed to be taken if the mother was incarcerated.[80]

(d) In the case of *Van den Burgh v National Director of Public Prosecutions,*[81] which dealt with the seizure of a family home under the Prevention of Organised Crime Act,[82] the court declined to appoint a curator when urged to do so by the Centre for Child Law as *amicus curiae* in the matter, because it held that there was sufficient information about the children before the court.[83] However, the court did state that it may be necessary for a court to appoint a curator *ad litem* in matters such as these, "in exceptional circumstance – where there is insufficient information about the children, or where the information before the court leaves some doubt regarding the children's wellbeing".[84]

(e) In *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)*[85] the Constitutional Court appointed a curator *ad litem* in a matter where an American couple applied for sole guardianship of a child in order to remove the child from South Africa and adopt the child in the United States. The curator's report established the ripeness of the matter because it contained all the information relating to the child's age and development and proved to be decisive.

(f) In the case of *S v J*[86] the Supreme Court of Appeal appointed a curator *ad litem* to present argument on behalf of a four year-old child caught up in a parental responsibilities and rights dispute between her father and maternal grandparents, even though this was at the appeal stage. The court required up to date information about the real-life circumstances of the child in order to establish what would be in the child's best interests.[87]

(g) The High Courts have also appointed curators *ad litem* in a number of ground-breaking cases that suggest a broader role than that which was

78 2011 7 BCLR 740 (CC).
79 Par 27.
80 Par 28.
81 [2012] ZACC 11.
82 121 of 1998.
83 See also *Member of the Executive Council for Health, Free State v MM* [2012] JOL 29178 (FSB).
84 Par 72.
85 2008 3 SA 148 (CC). See also Schäfer *Child law in South Africa: Domestic and international perspectives* (2011) 514.
86 2011 3 SA 126 (SCA) par 4.
87 Par 49.

traditionally foreseen. The Centre for Child Law appointed a curator *ad litem* to investigate the circumstances of children with behavioural disorders and to report back to the court with recommendations.[88]

(h) A curator *ad litem* was appointed for a child who had been burnt by soldiers in Chad and had been brought to South Africa for surgery. The care-giver, the boy's grandmother who accompanied him, and the South African organisation assisting him found themselves in a dispute about his care and treatment. A curator *ad litem* was appointed to investigate all issues pertaining to the child, liaise between the parties, obtain the views of the child, find solutions and make recommendations to the court.[89]

(i) The Aids Law Project successfully brought an application to have a curator *ad litem* appointed in respect of 56 unaccompanied children who were living at the Central Methodist Church in Johannesburg, in order to investigate the circumstances, obtain the views of all the parties, including the children, and make recommendations regarding the care arrangements for the children.[90] The report included recommendations regarding unaccompanied foreign children more generally.[91]

(j) In 2010 the MEC for Social Development in the North West brought an application before the North Gauteng High Court for a curator *ad litem* to be appointed to investigate the circumstances surrounding the cases of 15 children, in a situation where a presiding officer in the children's court had made allegations that the adoption practices being followed by a care and protection organisation were tantamount to child trafficking. The curator undertook the investigation and reported back to the court.[92]

(k) The Western Cape High Court *mero motu* appointed a legal representative (but with powers akin to a curator *ad litem*) to assist the children who attended a public school on a private property and who were facing eviction.[93]

(l) The KwaZulu-Natal High Court in Durban in *Ex parte Centre for Child Law in re: six minor children*[94] appointed a curator *ad litem* to conduct an enquiry and report to the court regarding the circumstances of the inter-country adoption of six children and to determine whether the legal rights of the said children were being infringed.[95] The case dealt

88 Boezaart & Skelton "From pillar to post: Legal solutions for children with debilitating conduct disorder" in *Aspects of disability law in Africa* (eds Grobbelaar-du Plessis & Van Reenen) (2011) 107 *et seq* on these cases.

89 *Ex Parte Centre for Child Law (For the appointment of a curator* ad litem *for the minor child RZD)* unreported case no 12166/08 (NGP).

90 *The Aids Law Project v Minister of Social Development, the MEC for Social Development, Gauteng and the City of Johannesburg* unreported case no 52895/09 (SGJ).

91 Par 7.2 of the curator's report.

92 *Ex Parte MEC for Social Development, Women, Children and People with Disabilities, North West (For the Appointment of a curator* ad litem*)* unreported case no 18923/11 (NGP).

93 *Botha NO and others v MEC for Education, Western Cape and others* unreported case no 24611/11 (WC).

94 Unreported case no 11762/2012.

95 Aged between 18 months and 2 years and 10 months.

with inter-country adoptions of South African children by Canadian citizens. The adoption process was facilitated from South Africa's side by an accredited agency but then stalled due to a moratorium placed on adoptions between South Africa and Canada. The Canadian High Commission in South Africa did not issue travel documents to these children due to an investigation into alleged irregularities regarding inter-country adoptions. The six children who were already matched (and had Skype contact) with Canadian parents were left in limbo for several years. The curator *ad litem* was given extremely wide powers to review the documents and to make enquiries to persons and government officials who she believed would be able to provide information to her or to facilitate the resolution of the matter. The curator *ad litem* consulted various role players to investigate the alleged irregularities and consulted with a clinical psychologist on the likely effect the bungled adoptions might have on the children. The curator *ad litem* found that the delay in investigation was unconscionable and that various fundamental children's rights were being violated. She unsuccessfully resorted to both the Canadian High Commission and the South African authorities. Finally, she filed an urgent application to court for an order directing the authorities to finalise the investigation by no later than 30 April 2013.

(m) The KwaZulu-Natal High Court in Pietermaritzburg appointed a curator *ad litem* to investigate the situation and advise on the best interests of children who were moved from a children's home that had been closed down by the government and moved to other places.[96] In a similar case in Gauteng, the South Gauteng High Court appointed a curator to protect the interests of the children living in a children's home that was being threatened with closure.[97]

7 The Reason Behind the Developing Role

Many reasons may be presented to explain and/or substantiate the developing role of curators *ad litem*:

(a) International law clearly provides for children's participation in legal proceedings on the basis of their best interests. The Convention on the Rights of the Child (CRC) obliges state parties to act in a child's best interests (article 3) and to ensure that the child's views are heard and duly considered (article 12).[98] The African Charter on the Rights and Welfare of the Child (ACRWC) contains a powerful statement that the best interests of the child shall be *the* primary consideration and ensures the child's right to be heard.[99] It is significant that the ACRWC

96 *The MEC for Social Development, KwaZulu-Natal v Patricia Dawn Irons NO: KwaZulu-Natal,* unreported case no 5919/12, KwaZulu-Natal High Court, Pietermaritzburg.

97 *The Amazing Grace Children's Home v The Minister for Social Development: Gauteng,* unreported case no 44443/2012, South Gauteng High Court, Johannesburg.

98 Art 12(2) CRC assures the child "the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the rules of national law". South Africa has ratified the CRC 19950616.

provides for the child who is capable of communicating his/her own views *as* "*a party to the proceedings*".[100]

(b) The Constitution made a huge impact. Access to the courts is a fundamental right afforded to everyone.[101] As far as children are concerned, section 28(1)(h) of the Constitution incorporated, to a degree, the principles contained in article 12(2) of the CRC, providing for the child's right to have a legal practitioner assigned to the child by the state and at state expense in civil proceedings affecting the child, if substantial injustice would otherwise result. The paramountcy of the best interests of the child is also clearly articulated.[102]

(c) The important role of the CA is unquestionable. Section 9 reiterates that children's best interests are paramount. Section 10 provides for child participation in conformity with the dictates of international law. Section 14 of the CA ensures that every child has access to the courts, provided that the matter falls within the jurisdiction of that court. Section 14 takes the matter one step further in providing that children have the right to be "assisted" in bringing a specific matter to a court. Unfortunately, section 14 does not prescribe the manner in which a child is to bring a matter to court. In *FB and Another v MB*[103] a divorced father who intended to relocate (to Portugal) and his son who wished to accompany him applied for the appointment of a specific advocate to represent the second applicant and his interests in an application to change the residency arrangements. The court confirmed that section 14 does not determine the manner in which a child is to bring a matter forward, the paramount consideration being or remaining, the best interests of the child concerned.[104]

(d) The upsurge in public interest litigation. Both the Constitution[105] and the CA[106] contain provisions on public interest litigation. Nearly anybody can act in a child's best interests on the basis of section 15(2)(b) of the CA, which provides that anyone who acts in the interest of a child may approach a court. Section 15(2)(d) coincides with section 38(d) of the Constitution, which authorises anyone acting in the public interest to approach a court.[107] The common law rules of standing have been broadened to ensure the upholding of fundamental rights.[108]

(e) Legal Aid South Africa has played a prominent role in securing children's right of access to the courts.[109] It could happen that neither of the parents of the child is supporting the child to bring an application

99 In sub-arts 4(1), 4(2) respectively. Own emphasis added. Also see art 7. South Africa has ratified the ACRWC 2000-01-07.
100 Own emphasis.
101 S 34.
102 S 28(2).
103 2012 2 SA 394 (GSJ).
104 Par 12.
105 S 38; *Legal Aid Board in re Four Children* [2011] ZASCA 39 par 25.
106 S 15.
107 *Jonker v Manager, Gali Thembali/JJ Serfontein School* [2013] JOL 30108 (E) 10.
108 *Stutterheim High School v The Member of the Executive Council, Department of Education, Eastern Cape Province* [2009] 4 All SA 364 (E) parr 51, 52.
109 In line with s 3 Legal Aid Act 22 of 1969. See also *Legal Aid Board in re Four Children* [2011] ZASCA 39 parr 19, 22, 24.

for the appointment of a curator or legal representative. *Legal Aid Board v R*[110] indicated that a litigant-parent is not entitled to intervene or influence the decision by Legal Aid South Africa to appoint a representative for the child in a civil matter.[111] In this case a 12 year-old girl approached Childline for assistance in a divorce matter where custody (now "care") was in dispute. The court held that the Legal Aid Board was entitled to render assistance to a child at the state's expense in the discharge of the state's obligation in terms of s 28(1)(h) of the Constitution if the failure to do so would otherwise result in substantial injustice.[112] The court further held that the Legal Aid Board was not constrained by a need to obtain either the consent of the child's guardian or that of any person exercising parental responsibilities and rights in relation to the child, or an order of the court.[113] It is submitted that the Legal Aid Board could also have applied to the court for the appointment of a curator *ad litem* in terms of section 14 of the CA. In such cases the child would not have the opportunity to choose any particular lawyer, but the appointment can be made even after litigation has commenced.[114]

8 Access to the Court for Children in Other Jurisdictions

A comparative survey is difficult due to the inconsistency in terminology and the lack of an agreed definition of curator or guardian *ad litem* internationally. In the United States of America children lack capacity to litigate and they have a "next friend" or guardian *ad litem* to represent them in court.[115] It is usually the parents who would assist a child in this way and generally they need not be formally appointed.[116] When there is a conflict of interests, for instance when parents apply to court to have their disabled child sterilised, any person with an interest in the welfare of the child could act as the child's "next friend".[117] The guardian *ad litem* is responsible for representing and protecting the best interests of the child in a particular court proceeding.[118] Legislation on the prevention and treatment of child abuse gave prominence to the role of a guardian

110 2009 2 SA 262 (D). Also see Boezaart & De Bruin "Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate" 2011 *De Jure* 416 431-432.
111 Par 6.
112 264E-G par 3.
113 264F-H par 4.
114 Par 8.
115 Fed R Civ P 17(c), where minors and incompetent persons are treated identically and *In re Marriage of Osborn* 135 P 3d 199 (Kan Ct App 2006), where a teenager was denied standing to modify contact with her father so that she could attend a summer camp.
116 Davidson "The child's right to be heard and represented in judicial proceedings" 1990-1991 *Pepperdine LR* 255 257.
117 *In re Grady* (1981) 426 A 2d 475 NJ.
118 Davidson 1990-1991 *Pepperdine LR* 255 258.

ad litem.[119] The *Child Abuse Prevention and Treatment Act* required that each state must provide children in child protection proceedings with a guardian *ad litem*.[120] The idea was that these guardians *ad litem* act as counsel, advocate, investigator and guardian in the interests of the children involved.[121] After significant changes were made to that Act in 1996, it specified that a guardian *ad litem* may be an attorney or a special court appointed advocate "to obtain first-hand, a clear understanding of the situation and needs of the child; and to make recommendations to the court concerning the best interests of the child".[122] There are huge differences in the different states with regard to the role and function of these guardians *ad litem* and guardians *ad litem* appointed in other cases. In some states guardians *ad litem* are unpaid lay citizens and volunteers.[123] It has been shown that the volunteer model is effective and that the services provided to children are even superior to that of lawyer guardians as far as investigation and monitoring activities are concerned.[124] This model might seem attractive because of saving on costs, but this should be discounted against the infrastructure, training, recruitment, management and support systems that it requires.[125] It has also been suggested that the term "guardian *ad litem*" should be eliminated or at least that lawyers should not fulfil this role.[126] As in South African law, it is undesirable in the United States that one person

119 Child Abuse Prevention and Treatment Act of 1974 Pub L No 93-247 s 4(B)(3) 88 Stat 4 (1974) 42 USC s 5101-5119c (2005), commonly referred to as CAPTA.

120 Referred to as GAL. See also Davidson 1990-1991 *Pepperdine LR* 255 268; Atwood "Representing children: The on-going search for clear and workable standards" 2005 *J Am Acad Matrimonial Lawyers* 183 188-189.

121 Peters "How children are heard in child protective proceedings, in the United States and around the world in 2005: Survey findings, initial observations, and areas for further research" 2005-2006 *Nev LJ* 966 997 n100.

122 Child Abuse Prevention and Treatment Act Amendments of 1996 Pub L No 104-235 § 107 107(b)(2)(A)(ix)(1)-(11) 110 Stat 3063, 3073-74 (1996) 42 USCA 5105a(b)(2)(A)(ix)(1)(11). In 2003 further amendments were made to require appropriate training of guardians *ad litem*: 42 USC 5106a(b)(2)(A)(xiii).

123 Davidson 1990-1991 *Pepperdine LR* 255 261; Adams "CASA: A child's voice in court" 1995-1996 *Creighton LR* 1467; Prescott "The guardian *ad litem* in custody and conflict cases: investigator, champion, and referee?" 2000 *U Ark Little Rock LR* 529 537; Peters 2005-2006 *Nev LJ* 966 1002; Bilson and White "Representing children's views and best interests in court: An international comparison" 2005 *Child Abuse Rev* 220 229; Atwood 2005 *J Am Acad Matrimonial Lawyers* 190, 192-193, 196.

124 Bilson & White 2005 *Child Abuse Rev* 220 229.

125 Adams 1995-1996 *Creighton LR* 1467 1468-1469; Bilson & White 2005 *Child Abuse Rev* 220 230.

126 Elrod "Client-directed lawyers for children: It is the right thing to do" 2007 *Pace LR* 869 910. The context of Elrod's suggestion must be seen against the backdrop of her plea that child-directed lawyers should be employed but then not to do mediation, case management and counselling. Her view point is shared by Spinak 2006 *Nev LJ* 1385 1386. Also see Atwood 2005 *J Am Acad Matrimonial Lawyers* 185 where she states that "[the] chameleon designation of 'guardian *ad litem*' has given rise to rampant confusion".

acts as both the curator *ad litem* and the legal representative.[127] The literature reveals a drive towards client-directed lawyers for children in the United States with less optimism towards guardians *ad litem* in certain circumstances.[128]

The term guardian *ad litem* (or "next friend") is also used in the United Kingdom.[129] The guardian role had its roots in the Children Act of 1975.[130] The "tandem model" developed which is very similar to the South African practice where both a curator *ad litem* and a legal representative can be appointed. The guardian *ad litem's* role was increasingly regulated. At first panels of guardians were established and later these were absorbed in a non-departmental agency, the Child and Family Courts Advisory and Support Services (CAFCASS).[131]

In Scotland the role of the South African equivalent of the curator *ad litem* is fulfilled by "Safeguarders".[132] They also report back to court while advancing all arguments reflecting the best interests of the child.[133]

Northern Ireland has guardians *ad litem* who are usually social workers.[134] These guardians *ad litem* appoint a lawyer to represent the child following the tandem model mentioned above.

In Germany the *Kindschaftsrecht* introduced guardians *ad litem* in 1998 and in 2000 a professional association was established, the National Association of Guardians *Ad Litem* for Children and Young People, which accepted and published national standards.[135] The guardian *ad litem* may be ordered to act for a minor to further the child's interests but must be appointed in certain circumstances, for instance if there is conflict between the child and his or her legal representative.[136]

127 Atwood 2005 *J Am Acad Matrimonial Lawyers* 185 185-186, 200-201, 205, 211, 221-222. See in particular 203-205 on how states have tried to address the conflicts inherent in such a situation.
128 *Idem* 185-186, 196-198, least in care/custody disputes; Spinak 2006 *Nev LJ* 1386; Elrod 2007 *Pace LR* 907-909, 919.
129 See *In re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619 where the child was given leave to intervene in an international parental abduction application by his litigation friend who was somebody of the Children's Legal Centre.
130 Bilson & White 2005 *Child Abuse Rev* 220 223.
131 *Idem* 224.
132 *Idem* 225.
133 S 41(1)(b) Children Act (Scotland) 1995.
134 Bilson & White 2005 *Child Abuse Rev* 220 226.
135 *Idem* 227.
136 *Ibid*.

In Australia children also need a guardian *ad litem* or a "next friend"[137] to institute civil litigation[138] and although it is usually the child's legal guardian, it is not always the case.[139] Guardians *ad litem* are often lay people, like a family member or social worker, who support the child during the proceedings.[140] Australia also employs Independent Children's Lawyers (ICL) when a court considers that the child's interest requires independent representation.[141] *Re K*[142] sets out 13 grounds for appointing ICLs and some of these grounds are similar to the instances in which South African courts appoint curators *ad litem*.[143] Other similarities are that ICLs are not children's legal representatives (but a lawyer and not a lay person) and do not take instructions from the child.[144] The ICL is as much committed to furthering the child's interests as is a curator *ad litem* in the South African legal system.[145] The *Guidelines for Independent Children's Lawyers* reveal that the role and functions of ICLs are very similar to South African curators *ad litem* as well. It could serve as an example in areas where South Africa needs to improve on children's participation rights, such as sterilisation.

9 Conclusion

International law, the South African Constitution and the Children's Act have all played their part in broadening the role of curators *ad litem* assisting children. Most importantly, the role of judicial precedent should not be underestimated. The courts have clearly defined the role of curators *ad litem* differentiating it from the function of the Family Advocate and distinguishing it from the role of a legal representative. The courts have also expanded the common-law rules on legal standing for children in employing curators *ad litem* to investigate and represent the

137 Also called "litigation guardian" (in the Supreme Court, County Court, Children's Court, Magistrates' Court, Victorian Civil Administrative Tribunal or Federal Magistrates' Court), "litigation friend", "prochein ami", "tutor" or "case guardian" (in the Family Court).

138 High Court Rules O 16 r 18. See also Federal Court Rules O 43 r 1(1), (2).

139 The only exception will be if the child is "Gillick-competent": Fernando *Judicial Meetings with Children in Australian Family Law Proceedings: Hearing Children's Voices* (PhD Thesis 2011 University of Tasmania) 100. "Gillick-competent" stems from the case *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 and means that the child has matured to such an extent that he or she has sufficient understanding and intelligence to understand fully what the process/proceedings entails.

140 Walsh & Douglas "Lawyers, advocacy and child protection" 2011 *Melbourne U LR* 621 648.

141 Fernando "How can we best listen to children in family law proceedings?" 2013 *New Zealand LR* 387 394.

142 *Re K* (1994) FLC 92-461 82, 774. See Fernando 2013 *New Zealand LR* 387 394.

143 Like conflicting interests.

144 Fernando 2013 *New Zealand LR* 387 394.

145 See Family Law Courts *Guidelines for Independent Children's Lawyers (2007)* http://www.familylawcourts.gov.au/wps/wcm/recources/file/eb02ee023790 2cd/ICL%20guidelines-6-12-07.pdf (accessed 2013-07-28). See par 11 of the *Guidelines* on the role of the ICL when sterilisation of a child is considered.

interests of children who are *not* before the court. These developments enhance children's right of access to the courts.

When comparing the role and function of South African curators *ad litem* with similar institutions in other jurisdictions, one should bear in mind that South Africa is still a developing country and should not involve lay people in that role. However, there are lessons to be learnt from other jurisdictions: Guardians *ad litem* or ICLs are used to represent the interests of children when the parents apply for permission to have a child sterilised.[146] In South African law the child enjoys no representation at all under these circumstances.[147] The decision is left to the parents/guardians, one report of a medical practitioner and the panel at the facility where the sterilisation is to be performed.[148] This is not in conformity with the country's international obligations in terms of the CRC,[149] the ACRWC[150] and the Convention on the Rights of People with Disabilities[151] and should be rectified. Curators *ad litem* have a major role to play in realising access to the courts for *all* children.

146 Eg *In re Grady* (1981) 426 A 2d 475 NJ; *The Secretary, Department of Health and Community Services v J W B and S M B* [1992] HCA 15; (1992) 175 CLR 218 (1992-05-06) (*Marion's* case); *Re: Angela (Special medical procedure)* [2010] FamCA 98 (2010-02-16).

147 Boezaart "Protecting the reproductive rights of children and young adults with disabilities: The roles and responsibilities of the family, the state, and judicial decision-making" 2012 *Emory Int LR* 69 85 available http://www.law.emory.edu/fileadm/journals/eilr/26/26.1/Boezaart.pdf (accessed 2013-07-28).

148 Ss 2(3)(b), 3(1)(b), 3(2) Sterilisation Act 44 of 1998.

149 At least arts 3, 12, 23 CRC.

150 At least arts 4(2), 7, 13 ACRWC.

151 Arts 3, 7, 23(1)(c). See Boezaart "The Children's Act: A valuable tool in realising the rights of children with disabilities" 2011 *THRHR* 264 265 (available http://ssrn.com/abstract = 2016861 (accessed 2013-07-28)) on the provisioning for children with disabilities in the international instruments and the strengths and weaknesses of the Children's Act in this regard.

What would my mother say? Refusal, forgiveness and the subjectivity of South African women*

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OPSOMMING

Wat sou my Ma sê? Weiering, Vergifnis en die Subjektiwiteit van Suid-Afrikaanse Vroue

Hierdie artikel handel hoofsaaklik oor die subjektiwiteit van Suid-Afrikaanse vroue bespreek vanuit die oogpunt van vergifnis en versoening. Die prosesse van die Waarheids- en Versoeningskommissie (WVK) word as fokuspunt gebruik om oor die posisie van vroue na te dink. Die getuienis van 'n moeder voor die WVK asook ander narratiewe word bespreek teen die agtergrond van die konsep van "weiering" soos mee omgegaan binne die post-apartheid regsleer. Daar word gepoog om aan te dui dat die prosesse van die WVK bygedra het tot die huidige posisie van Suid-Afrikaanse vroue. "Weiering" word voorgehou as 'n moontlike alternatiewe benadering tot die reg wat eweneens alternatiewe moontlikhede na vore kan bring. In die artikel word daar voorgestel dat aandag aan die manlike kulturele orde geskenk moet word om sodoende die marginalisering van vroue aan te spreek. Verder word daar voorgestel dat die konsep van "weiering" die daaglikse lewe en stryd van Suid-Afrikaanse vroue kan uitlig en na vore bring.

1 Introduction

In the context of post-apartheid jurisprudential thought, Van Marle has asked about the possibility of women as subjects with the capacity to resist and refuse.[1] It is from this perspective that I engage, in this article, in some instances of refusal. The framework of forgiveness and reconciliation is utilised as focal point in order to reflect on the subjectivity of South African women.[2] I discuss the story of a mother testifying before the Truth and Reconciliation Commission (TRC) in the

* This article is based on relevant parts of my LLM dissertation titled *Contemplating a Post-Apartheid Feminist Jurisprudence* completed at the University of Pretoria. An earlier version of this paper was also presented at the Law Teacher's Conference held in Stellenbosch during February of 2011. I would like to thank Karin van Marle for her guidance, friendship and valuable advice. I would also like to thank my former colleagues at the Department of Jurisprudence, University of Pretoria for their support.

1 Van Marle "Laughter, refusal, friendship: Thoughts on a 'Jurisprudence of Generosity'" 2007 *Stell LR* 198 198.

2 One of the larger issues underlying this research is the search for alternatives considering law's failure to alter the lives of women in a meaningful way. Du Toit reminds that rape figures have remained fairly constant from the political transition to the present, meaning that

first section below. I also employ other feminine descriptions. It is from the belief that the power of narrative may displace stereotypes associated with women as well as bring to light unspoken politics, that I consider some stories. Thereafter, I explore Du Toit's feminist analysis of the processes of the TRC, not only as a possible explanation for the current position of South African women, but also as a concrete example of their marginalisation.[3] The notion of "refusal" as described within post-apartheid jurisprudence is considered in the last section so as to suggest a possible alternative approach to law.[4]

2 Forgiveness and Feminine Refusal

The Gugulethu Seven incident was one of the better known killings during the mid 1980s that involved the murder of seven young ANC activists.[5] Notrose Konile testified before the TRC as the mother of one of the Gugulethu Seven. Most of the other mothers testifying before the Commission showed an extraordinary spirit of forgiveness.[6] Mrs Ngewu, also the mother of one of the Gugulethu Seven, responded to the question of a lengthy prison sentence for her son's murderers in the following way:

> I do not agree with this view. We do not want to see people suffer in the same way we did suffer. We do not want to return the suffering that was imposed on us ... We would like to see peace in this country ... I think all South Africans should be committed to the idea of reaccepting these people back into the community. We do not want to return the evil that the perpetrators

democratisation and a bill of rights that ensures gender equality has had little or no impact on the rape of women and children in South Africa. See Du Toit *A Philosophical Investigation of Rape: The Making and Unmaking of the Feminine Self* (2009) 2. Critical legal scholars as well as writers in the post-apartheid legal context have also continuously maintained that the law is lacking it its capacity to effect social change. See for example Van Marle 2007 *Stell LR* 198, Douzinas *The End of Human Rights* (2000).

3 Du Toit 9-32.

4 Many legal scholars, in an attempt to reflect on the place and nature of law in post-apartheid South Africa, have been committed to formulating and searching for a post-apartheid jurisprudence. These engagements have attempted to rethink established ideas around and related to law. The engagements around the notion of refusal may be seen as part of the search for a post-apartheid jurisprudence. Van Marle (ed) *Refusal, Transition and Post-Apartheid Law* (2009).

5 Krog, Mpolweni & Ratele *There Was This Goat: Investigating the Truth Commission Testimony of Notrose Nobomvu Konile* (2009) 5. See Jooste *Contemplating a Post-Apartheid Feminist Jurisprudence* (LLM dissertation University of Pretoria 2011) 102-106. An estimated 30,000 people attended the funeral of these young activists. Krog *et al* asserts that this underlined the perception that the tide against the apartheid system could no longer be stemmed. The Gugulethu Seven killings demonstrated like few others the fatal mix in the townships of poverty, anger, unemployment, the desire to take up arms, change and liberation which were manipulated and fuelled by the operations of the apartheid police and security forces. Krog *et al* 5.

6 Krog *et al* 5.

> committed to the nation. We want to demonstrate humanness towards them, so that they in turn may restore their humanity.[7]

Krog *et al* mentions that in identifying and calling the mothers of the Gugulethu Seven to give testimony, the Truth Commission was looking for a certain kind of narrative: "that of a brutal regime, stoic struggle by the human spirit for truth and freedom and an eventual triumph over evil."[8] The family members of the Gugulethu Seven were supposed to show how resilient they were and eventually how forgiving. Although the Commission had been given parts of this grand narrative from the other mothers, they did not get it from Notrose Konile. Her testimony was one of the most incoherent testimonies that came before the TRC. She talked for a long time about a dream she had of a talking goat and of being trapped under a rock.[9] She did not relay the events leading up to her son's death chronologically and jumped from the realm of dreams to the realm of reality and back again to her dreams.[10] She confused spaces and places. I quote from Krog, Mpolweni and Ratele:

> Mrs Konile began her testimony by sighing heavily six times within five rather short sentences, as if she were saying: 'I am so tired - I am so tired even before this process of which I already despair begins.' While the Truth Commission hearings were meant to deal precisely with 'telling' it's cathartic effect and thus forgiveness, the Commissioners appeared unprepared for and uneasy about Mrs Konile – they addressed relatively few questions to her. On the video footage the discomfort of the other mothers with her testimony is also clearly visible. It was as if her story resisted the imposed framework of the hearings, as if her mind resisted easy readings. She seemed to say 'mine is not part of what you want to hear. I will tell you of my dreams, my miserable life. I want to do my own kind of accounting'.[11]

Her response to the question on forgiving her son's murderers was the following:

> I wouldn't be able to talk to them, it is their fault that now I am in this misery, now I wouldn't know what to do with them ... I can never tell them what to do. I have just given up everything.[12]

In a subsequent interview many years later, she stated: "I do not want to lie ... I did not forgive them".[13] The all-forgiving black mother is usually portrayed as the basis of reconciliation. Notrose Konile refused to embrace this symbolic space and she relayed her story in a particular cultural and metaphoric way. In the context of law and reconciliation, the words of the fictional Winnie Mandela in Njabulo Ndebele's novel *The Cry*

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7 *Idem* 11.
8 *Idem* 56.
9 *Ibid*.
10 *Ibid*. See 6-17 for a detailed account of Mrs Konile's testimony.
11 *Ibid*.
12 *Idem* 17.
13 *Idem* 145. Krog *et al* mentions that the mothers of the Gugulethu Seven were supposed to become the "custodians of the collective memory of the fallen hero".

of Winnie Mandela have been quoted many times. It seems again appropriate considering Notrose Konile's testimony:

> I give you my heaven as possibly the single element of consistency in my political life: My distrust of reconciliation ... I will not be an instrument for validating the politics of reconciliation. For me, reconciliation demands my annihilation.[14]

Two more instances of female refusal may be evoked in the context of reconciliation. In his work on mourning, refusal and forgiveness, Jaco Barnard-Naudé recalls the murder of two brothers.[15] Vuyani and Madoda Papiyana went out celebrating on the evening of 27 April 1994 just after casting their votes in South Africa's first democratic elections. Later that evening Vuyani was killed and Madoda found injured. The brothers were victims of a drive-by shooting. Their attackers were Cornelius Pyper and James Wheeler who supported the AWB or *Afrikaner Weerstand Beweging* which is the well-known rightwing organisation that in the run-up to the elections called on its members to militantly oppose the transition to a democratic South Africa. Both Wheeler and Pyper were found guilty and sentenced to fifteen years' imprisonment.[16] The father of Vuyani and Madoda, Zenam Papiyana, received a letter from Pyper stating that he would like to pay for Vuyani's funeral costs and that he wished to see Mr Papiyana in order to apologise for murdering his son.[17] Zenam Papiyana agreed to meet with Pyper and declared it to be the best thing he could ever have done as it helped him to overcome some of the emotional problems he had as a result of his son's death.[18] Mrs Papiyana declined the invitation stating that she would not be able to face her son's murderer.[19] The other instance brought up by Barnard-Naudé is the words of the character of Joyce Mtimkhulu. When asked whether she will forgive those responsible for her son's death, she replied: "Not today".[20]

The female refusals above may be associated with the refusal of Ophelia in East-German playwright Heine Müller's *Hamletmachine*. Müller rewrote Shakespeare's *Hamlet* in eight pages and considered Ophelia the main character. Ophelia turns her body into vehement revolt by declaring:

> This is Electra speaking. In the heart of Darkness. Under the sun of torture. To the capitals of the world. In the name of the victims. I eject all sperm I have received. I turn the milk of my breasts into lethal poison. I take back the world I gave birth to. I choke between my thighs the world I gave birth to. I

14 Ndebele *The Cry of Winnie Mandela* (2003) 112-113.
15 Naudè "The work of mourning, refusal, forgiveness" in *Refusal, Transition and Post-Apartheid Law* (ed Van Marle) (2009) 103.
16 *Ibid*.
17 *Ibid*.
18 *Ibid*.
19 *Ibid*.
20 *Idem* 119. Joyce Mtimkhulu is a character in Michael Lessac's musical play *Truth in Translation*. The character is modelled on the real Joyce Mtimkhulu who testified before the TRC about the disappearance of her son Siphiwo Mtimkhulu.

> bury it in my womb. Down with the happiness of submission. Long live hate and contempt, rebellion and death. When she walks through your bedrooms with butcher knives you'll know the truth.[21]

In this play Ophelia refuses the Lacanian designation of her as an object of male desire.[22] She revolts against her place in the masculine symbolic order. Du Toit has argued that the TRC established or contributed to the establishment of a masculine symbolic order in the South African context.[23] In her analysis Du Toit focuses on rape, but her argument also sheds light on the broader aspect of women's political agency and subjectivity within a masculine symbolic order. In her reading of the processes of reconciliation, the TRC entrenched a single-sex model of politics in which masculine agency and victimhood posed as the universal. According to Du Toit, the TRC imitated and reiterated the strategy of the larger Western Symbolic order to dichotomise female sexuality and agency.[24] Before turning my attention to Du Toit's analysis it should be mentioned that within what is called "the feminine turn" of twentieth century European philosophy, the dominant Western cultural order is identified as masculine and patriarchal.[25] In other words it is a hegemonic cultural order sanctioned by male ideologies and concerns. The "feminine" within this order is excluded and subordinate and this, *inter alia*, results in feminine invisibility.[26] Harms committed against women, such as rape and other forms of sexual violence, as well as their marginalisation in general is located by feminist sources as a product of

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21 Müller *Hamletmachine* at Théâtre Gérard Philipe in Saint-Denis 1979. See Hirvonen "Desiring Body in Revolt: Transgression in Ophelia" 2010 copy on file with author.

22 See Jooste 88, 97. In Lacanian psychoanalysis the moment when the infant recognises itself as having an identity separate from the mother, it experiences loss and pain. The pain and loss results in a repression that buries the memory of the relationship with the mother in the unconscious and simultaneously the infant enters the Symbolic realm so as to fulfil its desire for the Other. Once the infant is projected into language, the primary identification with the mother is projected only as lack. The phallic mother and what she represents cannot be expressed in language. Lacan appropriates signification in general with the masculine. Woman as a result, in Lacanian psychoanalysis, is identified only by her lack of phallus and can therefore not be represented in the symbolic order. See in general Minsky *Psychoanalysis and Gender: An Introductory Reader* (1996).

23 Du Toit *op cit*. See also Jooste 12-15.

24 Du Toit 12.

25 *Idem* 3-7.

26 According to Derrida the conflation of reason (logos) with the phallus (the authoritarian origin of a decidedly male symbolic order) has led to phallogocentrism as being characterised as the foundational feature of Western thought. Here we find reason and narrative brought together in a gendered unity. The combination of a logocentric system of exclusion and inclusion and a phallic symbolic order results in the exclusion of woman from the narrative of Western thought and it also results in feminine invisibility. Clark explains this in simple terms: To be a meaningful member of the societal order is to be phallogocentric. See Clark "Deconstruction, feminism and the law: Cornell and Mackinnon on female subjectivity and Resistance" 2005 *DUKEJGLP* 126. See also Jooste 80-88.

a one-sided or masculine cultural order.[27] Questions on the marginalisation of women automatically render questions on women's subjectivity within a masculine symbolic. Therefore, in order to address the marginalisation of women, the nature, extent and consequences of the larger cultural order should be addressed. The Western symbolic order is therefore described as an order of gender hierarchy. Du Toit mentions that South Africa's longstanding history of interaction with the West, its predominantly Western legal system, its place in the global economy and the historical collaboration between social systems indicates that an equation with the masculine Western symbolic order with the South African cultural order is not only appropriate, but necessary.[28] Moreover, it is well taken from various feminist sources that the feminine and women occupy a subordinate position within traditional Western metaphysics of which currently dominant liberal theories is a consequence.[29] This of course includes those theories underlying the progressive South African constitution. She aptly notes that although Western metaphysics are evidently Western in origin:

> the economic and military dominion of the West has ensured that virtually no spot on earth remains fully outside the orbit of, and thus untouched by, the symbolic orders, 'meaningful universes' and master narratives of western modernity.[30]

Therefore, the western symbolic, as the currently globally dominant cultural order, leaves no single so called "non-western" culture intact.[31]

I detect from Du Toit's critical analysis five main reasons for the TRC's establishment of a masculine symbolic order which I discuss in the section below.

3 Reconciliation and the Masculine Symbolic

In the first instance Du Toit contends that the TRC did not take women seriously as first order victims.[32] Secondly, the TRC repressed the issue

27 Du Toit 3.
28 *Idem* 3, 202.
29 *Idem* 202. The Constitution of the Republic of South Africa, 1996. The South African constitution that has the familiar features of a liberal democracy also contains a more substantive vision of democratic inclusion, participation and accountability. It envisions the redistribution of the country's resources and benefits as well as the reconstruction of our society along egalitarian lines.
30 *Ibid*. A major contingent of Australian feminists has come to the same insight. See for example Pateman & Gross (eds) *Feminist Challenges: Social and Political Theory* 1987. Western modernity is characterised by its persistence on the masculine specific as universal.
31 Du Toit 4 mentions that the feminist critiques of the colonial era illustrated that dominant African symbolic frames collaborated with Western ones, at least insofar as both were patriarchal and one-sidedly masculine and both possibly became more so as a result of their interaction.
32 Du Toit 11. For a more detailed discussion on Du Toit's analysis of the processes of the TRC see Jooste 12-23.

of rape in its dealings with struggle rape victims.[33] Thirdly and importantly, historically and traditionally within the South African context, women have been excluded from definitions of the political through highly patriarchal cultures and social institutions.[34] The TRC did not conceive of the possibility of the need for political reconciliation between the sexes. It therefore failed to consider whether there shouldn't also be political transformation on the level of sexual difference, sexual politics and sexual oppression.[35] In the fourth instance, Du Toit suggests that the TRC failed to recognise rape as a political instrument. She contends that rape, by locating within a masculine symbolic order, functions as a way of maintaining the political space as masculine.[36] Struggle rape victims were never asked to forgive rape as an attempt to negate their female sexual difference. This connects with the third reason above, namely, that sexual difference was not conceived of as a political issue. Lastly, the TRC modelled victimhood and political agency on masculine presumptions by failing to recognise the masculine political context within which the hearings took place.[37]

With regard to women not being taken seriously as first-order victims, Du Toit explains that women were given a prominent place in the processes of reconciliation and in the public performances of forgiveness.[38] The typical scenario was that women were asked to forgive human rights violations against their male family members, usually their husbands, sons, fathers and brothers. Hundreds of women publically forgave on behalf of those recognisable as the political agents on both sides of the struggle.[39] There were very few instances where women were asked to forgive on behalf of themselves.[40] And it would seem from the discussion above, where they were asked to forgive on behalf of themselves; they were expected to indeed forgive.

The typical scenario during the processes of reconciliation leads Du Toit to declare that women weren't taken seriously as first-order victims. She further explains that during 1996 when the hearings was well underway and when it became clear that women were doing most of the

33 Du Toit 11. Struggle rape victims refer to women that were raped by apartheid security forces in the course of interrogation as well as women raped by so-called struggle soldiers.
34 *Idem* 20.
35 *Ibid*.
36 *Idem* 9.
37 *Idem* 12, 20. Du Toit explains that the nature and harm inflicted and violation of rape is not and has not been obvious because of the fact that symbolic orders dominated or heavily influenced by the history of western ideas have a blind spot when it comes to acknowledging rape as a political and sex-specific crime. Rape and sexual violence is also seen as a way of securing or maintaining the social and political sphere as a masculine space as well as being seen as the result of a society that denigrates women. See for example Hester, Kelly & Radford (eds) *Women, Violence and Male Power: Feminism, Activism, Research and Practice* (1996).
38 Du Toit 11.
39 *Ibid*.
40 *Ibid*.

public forgiving, the Centre for Applied Legal Studies at the University of Witwatersrand made a submission to the TRC in what they perceived as a lack of sensitivity when it came to gender issues.[41] The TRC, in response, established the Special Women's Hearings or Gender Hearings. These hearings were grouped together with the hearings of children and military conscripts and they were also separately conducted and reported on. Du Toit contends that by making women into a special case and by dealing with their victimhood on the side, the issue of the masculinity of the political sphere was avoided.[42] These issues were contained outside of the main processes of reconciliation and further served to affirm the marginality of women.[43] The TRC also avoided the issue of rape. It was overshadowed by other forms of oppression and violence where men were the vast majority of victims.[44] She argues that the issue of rape was suppressed when the official version of the struggle was forged during the hearings and in subsequent report writing.[45] Du Toit states:

> Framing the struggle in terms of men's struggles, leaving women on the roadside of history, the TRC contributed to the disappearance of rape and women's particularities – including women's history and their role in the liberation struggle – from the political and public consciousness and agendas after 1994.[46]

Du Toit explains that during the struggle the rape of women was politically justified.[47] Rape was used as an instrument of torture, a weapon of terror and a reward for soldierly acts; stripping away women's political identity, agency and dignity.[48] There were deliberate attempts to shame women morally and sexually. In many cases women's bond with their children was exploited to expose them as vulnerable and there were attempts to tap into their sense of responsibility for dependent others.[49] On both sides of the struggle certain women were reduced to

41 *Idem* 12.
42 *Idem* 12.
43 *Ibid*. Du Toit further asserts that the marginality of women in the processes of reconciliation should have been seen as a structural necessity for the processes of masculine reconciliation. She contends that it remains a superficial gesture to ask whether women are included or excluded in a particular paradigm, system or symbolic order. Women or the feminine serves to guarantee or uphold the borders, boundaries and logic of a symbolic order or paradigm. With reference to Lyotard "One of the things at stake in women's struggles" in *The Lyotard Reader* (ed Benjamin) (1989) 144-115 she explains that the feminine is at the very heart or centre of the western political paradigm. The feminine constitutes its borders. It constitutes the limits of the rational, thinkable and political. Although women in this paradigm are endowed with activity, in the sense that the feminine is the condition for the existence of the paradigm, the feminine is still repressed and silenced without a voice of her own.
44 *Ibid*.
45 *Ibid*.
46 *Idem* 17.
47 *Idem* 16.
48 *Ibid*.
49 *Idem* 19.

unpaid prostitution which created a "license" for sexual abuse by the police, interrogators and soldiers.[50] Du Toit further mentions that in the ANC camps abroad, women comrades were raped and used as concubines, their role in the struggle therefore reduced to a sexual function.[51] She identifies a paradox at the heart of the struggle: Women (and children) were portrayed as the ultimate reason for it while at the same time being foreign to it in the sense that they were marginalised and exploited.[52] Women were therefore associated with what ultimately lies outside of reality, politics and war, but also associated with that which is being fought over, namely, land, home, family and human existence.[53]

For support to her readings, Du Toit discusses Antjie Krog's reports on the TRC hearings.[54] From Krog's analysis it becomes clear that women militants were "broken" in jail by communicating to them that women should stay out of politics and should stay home and see to the responsibility of looking after their families.[55] Responsible women are purely private, apolitical creatures. They do not have an autonomous political identity and their role is merely supportive. Du Toit contends that women, during the struggle, could not be women in the sense of political agency or sexual specificity. If women entered the political sphere, which is masculine territory, they silently agreed to have their sexuality made into a public commodity in the service of the struggle.[56] Whether imprisoned in the freedom fighter camps or incarcerated in apartheid prisons, women were likely, on Krog's reports, to be notified that their presence there meant that they had made the choice to make their sexuality available.[57] In this way the feminine or female sexuality was put up against political agency and the simultaneous incorporation of both was made logically impossible.[58]

Du Toit describes how women as a group experienced great difficulty during the hearings to account for the sex-specific suffering.[59] She attributes this to the difficulty in explaining their political role in a context which perpetuated a masculine understanding of the political.[60] They were expected to translate their oppression in masculine universal terms perceived to be neutral terms. For Du Toit this resulted in the effective silencing of women's voices.[61] She contends that it is therefore not surprising that many women chose to remain silent about their rape.[62]

50 *Ibid*.
51 *Ibid*.
52 *Ibid*.
53 *Idem* 16.
54 Krog *Country of My Skull* (1998) as cited by Du Toit *op cit*.
55 Du Toit 18-19.
56 *Ibid*.
57 *Ibid*.
58 *Ibid*.
59 *Ibid*.
60 *Ibid*.
61 *Ibid*.
62 *Idem* 20.

Several women declared that they were raped during the struggle, but could not testify about this before the TRC. The TRC had the mandate of getting as complete a picture as possible of the nature, causes and extent of politically motivated gross human rights violations. Acts of torture, killing, abduction and severe ill-treatment were some of the included violations.[63] Rape, however, was not included in the list. Du Toit argues that rape and other forms of sexual violence committed against women in South Africa currently should be understood against the background of the processes of reconciliation and its failure in dealing with rape.[64] She reminds that South African rape figures are contested, but that there is wide consensus over the fact that South Africa either has the highest or one of the highest rates of rape *per capita* in the world. There is an estimated 1.7 million rapes per year whilst 41 % of victims are under the age of twelve.[65] According to Du Toit, the TRC attempted to establish closure on a violent and illegitimate past. This resulted in the existence of a vacuum when it comes to gross rights violations at the moment. The rape of women and children is seen as private matters against the backdrop of a perceived morally and legitimate political sphere.[66] Violence against women and children is removed from the political sphere and political attention because of the fact that it has successfully been privatised or domesticated.[67]

In Du Toit's reading the failure of the TRC to do justice to women rape victims as well as its failure to take women seriously as first-order victims was not a simple oversight, but is rather constitutive of the patriarchal symbolic order dominating the South African political landscape.[68] By not creating a space for a truly sexually differentiated politics and cultural order the TRC dichotomised female sexuality and agency. It failed to forge a new vocabulary and space within which to address the structural marginalisation of women in politics.[69] Thus, the failure of the TRC to recognise the masculine context within which the hearings took place in the first place resulted in the new dispensation being built, as it was before, on masculine presumptions and ideologies. The processes of reconciliation perceived as an integral historical, political and social turning point, resulted, *inter alia*, in the continuance of a patriarchal political and masculine symbolic.

As mentioned in the introduction, Van Marle has asked about the possibility of women as subjects with the capacity to resist and refuse. Before concluding, I turn my attention to her engagement with the notion of refusal.[70] I also discuss other post-apartheid jurisprudential

63 Ch 1 def 1(xi) Promotion of National Unity and Reconciliation Act 34 of 1995.
64 Du Toit 11.
65 *Idem* 2.
66 *Idem* 16.
67 *Ibid*.
68 *Idem* 6.
69 *Idem* 12.
70 Van Marle 2007 *Stell LR* 198.

engagements with this notion. The refusal to forgive may in this regard be associated with the refusal to submit to certain approaches to law, human rights and constitutionalism.

4 Post-Apartheid Jurisprudential Refusal

Van Marle has linked the notion of refusal with the notion of laughter. She discusses Cavarero who draws on a certain passage from Plato. The passage reads as follows:

> While looking at the sky and scrutinizing the stars, Thales fell into a well. Then a quick and graceful maidservant from Thrace laughed and told him that he was far too eager to find out about everything in the heavens, while things around him, at his feet, were hidden from his eyes.[71]

Van Marle mentions Cavarero's response to this passage:

> I am not sure that she was a servant or that she came from Thrace, but some woman laughed at the philosophers. A quick smile can often be seen on the faces of women as they observe the self-absorption of brainy intellectual men. Philosophers have put this down to biased ignorance, not realizing that it is the expression of a kind of detachment that locates the roots and meaning of female existence elsewhere.[72]

Laughter and detachment are put forward as ways of refusing and resisting patriarchy. Detachment and laughter on this reading discloses the possibility for women to seek to create their own spaces from where to engage in political ways of living.[73] Laughter is "a response of refusal, neither active nor passive, but a refusal nevertheless".[74] Cavarero's mention of "detachment that locates the roots and meaning of female existence elsewhere" denotes an alternative outside of or other than that of the masculine symbolic universe.[75] Van Marle also discusses Cavarero's engagement with Penelope. Cavarero, Van Marle explains, retells the narrative of Penelope in which Penelope's act of weaving and unweaving is interpreted as a way of refusing the order that was forced upon her by patriarchal society.[76] Penelope weaves during the day and unweaves during the night. According to Van Marle Penelope, by weaving and unweaving, creates her own rhythm thereby creating a space for refusal.[77] Penelope has no desire to be part of Odysseus' world, but she also does not accept the role of women, producing clothes. Cavarero states:

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71 *Idem* 197-198. Cavarero *In Spite of Plato: A Feminist Rewriting of Ancient Philosophy* (1995) 31 as cited by Van Marle. See also Jooste 103-131.
72 *Ibid*.
73 *Ibid*.
74 *Ibid*.
75 *Ibid*.
76 *Ibid*.
77 *Ibid*.

> On the contrary, by unravelling and thereby rendering futile what little work she has done, she weaves impenetrable time... by doing and undoing Penelope weaves the threads of a feminine symbolic order from proportionate materials.[78]

The role of all Greek women of Penelope's time is connected to the home and Penelope by weaving and unweaving refuses the space and role given to her by patriarchy. In the weaving room, the women engage in action and speech. The weaving room becomes a public space for political action. Van Marle contends by using Cavarero that:

> According to the conventional standards of men's time as well as women's time, Penelope's time is 'empty' and 'futile' and therefore 'negative', 'a pure denial'. However, when judged against its own standards, this space and time becomes a 'feminine space' where women belong to themselves. It displaces the patriarchal order, setting up an impenetrable distance between that order and itself.[79]

The notion of refusal is utilised by Van Marle to reflect on the possibility of a politics of refusal and ultimately a way of refusing traditional ways of thinking and doing law. The possibility that may arise from this engagement is the beckoning of another law and another politics. She also engages with the notion of generosity which illustrates the unexpectedness that breaks with the formality and predictability of law. It is this unexpectedness that discloses possibilities for refusal and therefore for new directions in law. She explains that Karl Klare's notion of transformative constitutionalism connects with a "jurisprudence of generosity" as used by Patricia Williams:

> Jurisprudential conservatism ... may induce a kind of intellectual caution that discourages appropriate constitutional innovation and leads to less *generous* or innovative interpretation and applications of the constitution ... Caution in this context refers to a legal actor's relationship to legal materials and to interpretive work, not her moral courage ... My fear is that 'caution' of this kind might in some cases discourage a judge or advocate from investing intellectual resources ... Constitutional transformation might suffer accordingly.[80]

Van Marle laments the fact that in South Africa it would seem as if transformation, socio-economic reparation and other social problems like violence are addressed mostly through the law and human rights.[81] She reminds of the argument that the law is lacking in its capacity to effect social change.[82] Van Marle relies on Hannah Arendt and Julia Kristeva to demonstrate the dangers of a society being overtaken by law, human rights and constitutional discourse:

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78 *Ibid*.
79 *Ibid*.
80 Van Marle "Refusal, Risk, Liminality" in *Refusal, Transition and Post-Apartheid Law* (ed Van Marle) (2009) 1. Author's emphasis.
81 Van Marle 2006 *Stell LR* 194. Jooste 115-121.
82 *Ibid*.

> ... namely the result of a society where political action, thought, eternal questioning and contestation are absent and replaced with an understanding of freedom as mere commercial/economic freedom and of thought as calculated and instrumental.[83]

Kristeva refers to "revolt in the psychic sense" which is a "permanent sate of questioning, transformation, change and endless probing of appearances". The notion of refusal may also be perceived as disruption. Patrick Hanafin mentions Herman Mellville's character Bartleby in relation to refusal.[84] When Bartleby starts a new job and is asked to do certain tasks, he merely states: "I would prefer not to". He refuses to submit to any requests. Van Marle notes Hanafin's words with regard to Bartleby: "his not saying, his passivity, his persistent just being there is enough to disrupt".[85] Hanafin connects Bartleby to Maurice Blanchot as one of the French intellectuals that participated in the drafting of the Declaration on the Right to Insubordination in the war in Algeria.[86] The Declaration insisted on the right to refuse to go to war against the Algerian people. The Algerian War of Independence lasted form 1954-1964 and was marked by repeated massacres and torture. The signatories of the Declaration asserted an absolute right of insubordination and it was because of the inability of, *inter alia*, legal institutions to bring the military to account that Blanchot's and the others felt themselves compelled to take a public stance. Hanafin discusses Blanchot's reply to the criticism that the right to refusal embodied an ineffective gesture.[87] This criticism, according to Blanchot, misrecognises the force of an ineffective gesture. It was not just a mere negation, but rather demanded a response.[88] Blanchot stated that the Declaration and the right to refuse therein was:

> ... an act of judgment ... and intellectual act, which decides firmly, in the actual situation of the Algerian War and of that of the transformation of military power into political power, that which is just and that which is not ... When the state provokes or allows an oppressive force to threaten essential liberties, then every citizen has the right to refuse and denounce it. Nothing more. Is this ineffective? Perhaps, even if all the political developments stemming from this simple word demonstrate the contrary ... such a word, a word of judgement, owes all its actual efficacy from its refusal to make itself contingent on calculations of political and practical effectiveness ... it is

83 *Idem* 195-196. Kristeva *Revolt She Said* (2002). Arendt *The Human Condition* (1985).
84 *Idem* 201-202. Hanafin "The writer's refusal and the law's malady" 2004 *JLS* 8.
85 *Ibid*.
86 Hanafin regards Blanchot's involvement as a response to the call to responsible to the unknown other. Van Marle (2009) 21, 23. The other refers to Emannuel Levinas' conception of the (im)possible ethical responsibility of struggling against the appropriation of the other into any preconceived meaning of his/her difference or singularity. It is an aspiration to a non-violent ethical relationship with the other. Levinas *Totality and Infinity: An Essay on Exteriority* (1969).
87 Van Marle (2009) 155-156.
88 *Ibid*.

> necessary that at a certain point it be pronounced, whatever the consequences may be ... that is its power; it is a just word ... Certainly the ruling order can always ... strike at those who speak. But the word as such is beyond grasp. It has been said, and that which is said will remain said ... We must all protect this right, protect it because, reaffirmed and maintained, it remains that which it is ... the power to say No.[89]

Botha has highlighted the fact that the struggles of ordinary people in South Africa so often remain hidden and absent from public consciousness.[90] Refusal may be able to offer the possibility of a richer conception of politics. For Botha refusal could open up a political conception that offers complexity and multiple perspectives and it could challenge traditional conceptions of democracy.[91] It could disclose ways of talking about and considering singularity, solidarity, plurality, equality and difference.[92] Van Marle perceives the notion of risk or a risking law as an alternative disclosed by refusal:

> If the refusal of traditional ways of approaching law can take us to other kinds of approaches to law and even a different law, what will these approaches look like?, what kind of law will this be?[93]

She tentatively suggests that it might be a risking law. Generally, it merely refers to the possibility of taking the risk in using law in order to address one or the other aim.[94] More pertinently, it refers to an approach that goes beyond the certainty of predictable approaches and is candid about the risks involved when engaging with law.[95] This leads to the question of law's limits or relflexivity. Central to risk is the refusal of a certain "Razzian logic of exclusionary reasoning".[96] Therefore, refusal becomes the effort of having humility with respect to our own analytical reasoning. Van Marle explains that refusal should be seen as a counter-hegemonic action, challenging the law in its mode of business as usual. Refusal is an action imbued with reflection and thought and thinking is central to it.[97] Refusal is also situated within the limit or "in-between" space.[98] It always already refers to another place or time to come. Refusal therefore does not close off or end. This is one of the reasons why refusal is not nihilist or passive. It is a contemplative gesture, risking thought.

Refusal in the post-apartheid jurisprudential context involves the rethinking of prevalent ideas on law, transformation and democracy.[99] It is a call to refuse instrumental approaches to knowledge and

89 *Ibid*.
90 *Idem* 10.
91 *Ibid*.
92 *Ibid*.
93 *Ibid*.
94 *Ibid*.
95 *Ibid*.
96 *Idem* 3.
97 *Idem* 13.
98 *Idem* 6-7.
99 See Jooste 103-131.

reductionist, easy formations. It highlights not only the complexity of law, politics and life, but also the everyday, marginalised and material contexts of suffering and exploitation of South African people. The technisation of law and human rights discourse are challenged and resisted as well as neo-liberalism and modern technology.[100] Refusal may be perceived as a mode of critical thought, but ultimately as a possible alternative approach to law.[101] Van Marle explains that refusal involves a slow time, the time and place of refusal is uncertain, unfixed and continuous. Refusal therefore takes the risk of thought without the burdens of having to prove immediate success or relevance.[102]

5 Conclusion

In reflecting on women's subjectivity and selfhood, the notion of refusal may disclose some meaningful possibilities. In the era of human rights and constitutionalism, this alternative approach to law puts forth what remains to be thought in addressing the needs of South African women. It is an approach that beckons alternatives. The refusal to forgive, immediately renders another possibility, namely, to not forgive, or at least not today. This notion may be able to illuminate the sexual violence perpetrated against women daily as well as the economic hardship and suffering of the majority of South African women. The context of reconciliation and forgiveness serve to illustrate some of the symbolic spaces that women are still forced to occupy. The feminine descriptions and narratives represent the possibility of refusing occupation. Du Toit's analysis offers a possible starting point in dealing with the marginalisation of women. Her analysis demonstrates the need for reconciliation on the level of sexual difference, but more importantly, the necessity to address the larger masculine symbolic order. She has contended that women's association with home, care and forgiveness contributed to the framing of the TRC in feminine terms. She asks: "If reconciliation is so closely connected to the feminine, where do women go to reconcile?"[103] This insight seems almost too appropriate if one considers Justice Albie Sachs's description of how the Truth Commission came about.[104] The portrait of the African mother is invoked here again. In 1993 a meeting was held by the Executive Committee of the ANC. One particular issue that was raised involved the question of how to deal with the comrades that perpetrated human rights violations during the struggle. One participant stood up and asked: "What would my mother say?" After the participant relayed what he thought his mother would have said, Professor Kader Asmal declared that a Truth Commission is the only option. Mrs Konile might have preferred to say no.

100 *Idem* 13.
101 *Ibid*.
102 *Ibid*.
103 Veitch (ed) *Law and the Politics of Reconciliation* (2007) 188-190.
104 Sachs *The Strange Alchemy of Life and Law* (2009) 68.

Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance*

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OPSOMMING

Uiteensetting van "Toenemende Verwesenliking", die Verband met Hulpbronne, Kernminimum en Redelikheid, en Sekere Metodologiese Oorwegings om Nakoming te Toets

"Toenemende verwesenliking" is een van die beperkings waaraan die implementering van sosio-ekonomiese regte in verskeie grondwette, sowel as internasionale standaarde, onderwerp is. Die beperking kan deur state gebruik word om implementering te vertraag indien hulle die betekenis van die beperking nie korrek verstaan nie of dit misken. Hierdie artikel poog om te verduidelik wat die beperking behels. Die artikel oorweeg of 'n benadering van toenemende verwesenliking tot die afdwinging van sosio-ekonomiese regte inhou dat die verwesenliking van die regte van armes, benadeeldes, verstotenes of die mees miskendes in die samelewing, uitgestel word en of dit waarde toevoeg tot die begrippe "dwingende nood" of "redelikheid" soos deur die Suid-Afrikaanse Konstitusionele Hof ontwikkel. Laastens oorweeg die artikel metodes wat benut word om voldoening aan die toenemende verwesenliking-vereiste te toets.

1 Introduction

Despite the socio-economic rights guarantees in various human rights instruments, access is not always provided as universal from the outset. In these instruments, the effective implementation or realisation of socio-economic rights is often subject to the qualifications of "availability of resources" and "progressive realisation". The International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)[1] and the

* This article is based on research carried out for the Studies in Poverty and Inequality Institute in 2010. The article is a shortened but revised version of the research paper that was produced. It has been revised to include, among others, information from the African Commission on Human and Peoples' Rights and two other methodologies in measuring progressive realisation. I would like to thank Jackie Dugard for her valuable comments on an earlier draft of the current article.

1 South Africa has signed but not yet ratified the ICESCR; however, it acts as persuasive authority in the interpretation of rights by virtue of ss 39, 233 Constitution. At the time of writing, Cabinet had approved South Africa's ratification of the ICESCR but it is yet to be tabled before Parliament. See "Statement on Cabinet meeting of 10 October 2012", http://www.gcis.gov.za/content/newsroom/media-releases/cabstatements/11Ict2012 (accessed 2013-07-08)

Constitution of the Republic of South Africa, 1996 (the Constitution) are some of the human rights instruments which recognise that socio-economic rights have to be realised over time and the progress towards full realisation is dependent on the availability of resources. This raises the question of the degree of obligation or expectation for immediate implementation. Some provisions under the ICESCR are capable of immediate implementation; and some rights in the Constitution, such as the right to be protected against arbitrary evictions in section 26(3), children's socio-economic rights in section 28 and the socio-economic rights of detained persons in section 35, are not subjected to "progressive realisation". Thus, not all rights provisions employ the "progressive realisation" terminology. Also, the African Charter on Human and Peoples' Rights, 1981 (African Charter), to which South Africa is a party, does not expressly use the terminology. This does not however mean that a progressive realisation approach to enforcing the rights in the African Charter has been excluded (as explained below).

As explained subsequently, the progressive realisation qualification requires a state to strive towards fulfilment and improvement in the enjoyment of socio-economic rights to the maximum extent possible, even in the face of resource constraints. A state's performance in terms of the progressive realisation would depend on, among other things, both the actual socio-economic rights people enjoy at a given moment as well as the society's capacity of fulfilment (in terms of the resources available to the state).[2]

This article elaborates on what a progressive realisation approach to socio-economic rights means, drawing from the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR),[3] the jurisprudence of the South African Constitutional Court, and to a limited extent and where relevant, the African Commission on Human and Peoples' Rights (African Commission).[4] The approach adopted by the paper is to first set out international human rights law on the issue (drawing mainly from the interpretations by the CESCR, and where relevant, the African Commission) and then look at how the South African Constitutional Court has approached the issue, including

2 Fukuda-Parr, Lawson-Remer & Randolph "Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfilment" (2008) *Department of Economics Working Paper Series 22* (University of Connecticut) 7.

3 The CESCR is the supervisory body of the ICESCR. It monitors implementation of the ICESCR and compliance of states with their obligations contained therein through the reporting mechanism – through which states have to submit reports regularly to the Committee on their implementation of the rights in the ICESCR. With the entry into force of the Optional Protocol to the ICESCR on 20130505 (it was adopted in 2008), the CESCR can receive complaints on violations of the rights in the ICESCR. The Committee has elaborated on content of various socio-economic rights and on state obligations in the form of general comments.

4 The African Commission is the supervisory body of the African Charter; and has issued some landmark rulings on socio-economic rights.

acknowledging synergies and analyses strengths and weaknesses in the Court's interpretations.

A consideration of the progressive realisation approach to socio-economic rights is warranted on the basis that the concept of "desperate need" does not seem to take us very far in terms of the enforcement of these rights, as the courts tend to focus more on "access" than on "improvements in access". Moreover, though the Constitutional Court has dealt with this concept, the Court's characterisation of it in a number of instances appears limited.

2 What Progressive Realisation Entails: The Concept in General

2 1 The CESCR and African Commission

The CESCR's definition of the concept[5] points to the fact that progressive realisation introduces an element of flexibility in terms of the obligations of states and also in the enforcement of rights. The concept recognises that the full realisation of socio-economic rights would not generally be achieved in a short period of time. The obligation on states therefore is "to move as expeditiously and effectively as possible" towards full realisation. The CESCR has reiterated that progressive realisation implies a specific and continuing obligation on states to, as much as possible, be expeditious and effective in working towards the full realisation of the right to education.[6] For example, progressive introduction of free education implies that states must not only prioritise the provision of free primary education but must also take concrete steps towards achieving free secondary and higher education.[7] The concept "should not be interpreted as depriving States parties' obligations of all meaningful content".[8] Progressive realisation thus goes beyond achieving the minimum essential levels of a right; and beyond ensuring access to goods and services to improvements in access over time.

There are three main arguments in terms of understanding progressive realisation. First, there must be immediate and tangible progress towards the realisation of rights. The fact that progressive realisation introduces a flexibility to the enforcement of socio-economic rights does not therefore imply that states can drag their feet. Progressive realisation cannot be interpreted under any circumstance to imply for states the right to defer indefinitely efforts to ensure full realisation. States are required to begin immediately to take steps to fulfil their

5 CESCR General Comment No 3 *The Nature of States Parties Obligations* UN doc E/1991/23 (1990) par 9.
6 CESCR General Comment No 13 *The Right to Education* UN doc E/C12/1999/10 (1999) par 44.
7 *Idem* par 14.
8 *Idem* par 44. See also CESCR General Comment No 18 *The Right to Work* UN doc E/C12/GC/18 (2006) par 20

obligations.[9] Progressive realisation therefore includes some immediate (as well as tangible) obligations on states. For instance, in the context of the ICESCR, the obligation to take steps towards progressive realisation "must be taken within a reasonably short time", after entry into force of the ICESCR for the state concerned. However, because the degree of obligations for different socio-economic rights varies to some extent, there is flexibility in terms of progressive realisation. In relation to the right to education, for example, there is less flexibility. States have an obligation to adopt a plan of action "within a reasonable number of years" and the timeframe must "be fixed in the plan". The plan must specifically set out a series of targeted implementation dates for each stage of the progressive implementation of the plan.[10] The steps taken must be effective and not be of negligible impact. Thus, it should not take an unreasonable amount of time to create effects. In addition, progressive realisation requires, for instance in the context of social security, that a state has a comprehensive social security system in place and carries out regular reviews of it to ensure that it is consistent with the right to social security.[11] However, regular reviews of legislation or mechanisms without any improvements in the level of rights enjoyment would not pass the progressive realisation test.

The second argument is that states cannot pursue deliberate retrogressive measures, as progressive realisation also implies that deliberate retrogressive measures are not permissible and have to be fully justified by reference to the totality of rights. In this regard, the CESCR has stated that there is a strong presumption of impermissibility of any retrogressive measures taken in relation to rights such as education and water; retrogressive measures should in principle not be taken in relation to the right to work; and any retrogressive measures would have to be fully justified.[12] In relation to justifying retrogressive measures, Liebenberg has stated that such measures may be justifiable where, for example, a state can show that the retrogressive measures are necessary to achieve equity in the realisation of the right or a more sustainable basis for adequate realisation of the rights. She, however, cautions that where retrogressive measures result in depriving marginalised and vulnerable groups of access to basic social services,

9 Limburg Principles on the Implementation of the ICESCR UN doc E/CN4/1987/17, Annex, par 21; reproduced in 1987 *Human Rights Q'ly* 122-135. The Limburg principles have been a source of authoritative interpretation of rights at both the international and national levels.

10 CESCR General Comment No 11 *Plans of Action for Primary Education* UN doc E/C12/1999/4 (1999) par 10.

11 CESCR General Comment No 19 *The Right to Social Security* UN doc E/C12/GC/19 (2008) par 68.

12 General Comment No 13 par 45; CESCR General Comment No 15 *The Right to Water* UN doc E/C12/2002/11 (2003) par 19; General Comment No 18 par 21.

weighty justifications should be required.[13] In relation to the right to social security, the CESCR has listed a number of issues it would consider when retrogressive social security measures are being justified: whether there was reasonable justification for the action; whether alternatives were comprehensively examined; whether there was genuine participation of affected groups in examining the proposed measures and alternatives; whether the measures will have a sustained impact on the realisation of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and whether there was an independent review of the measures at the national level.[14]

The third argument is that progressive realisation requires that special measures for vulnerable and disadvantaged groups need to be put in place. States are required to do more than abstain from taking measures that might have a negative impact on the enjoyment of their rights. The obligation on the state is to take positive action to reduce structural inequality and to give appropriate preferential treatment to vulnerable and marginalised groups. Positive action includes specially tailored measures or additional resource allocation for these groups.[15]

As observed earlier, the African Charter is silent on the progressive realisation terminology.[16] However, in its elaboration on the nature of the obligations of states parties to the African Charter, the African Commission has stated:

> While the African Charter does not expressly refer to the principle of progressive realisation this concept is widely accepted in the interpretation of economic, social and cultural rights and has been implied into the Charter in

13 Liebenberg, *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 190. Liebenberg also considers an interpretative difficulty that arises when dealing with the concepts of progressive realisation and retrogressive measures (189).

14 General Comment No 19 par 42.

15 CESCR General Comment No 5 *Persons with Disabilities* UN doc E/1995/22 (1994) par 9.

16 Contrast this with the African Charter on the Rights and Welfare of the Child, 1990, which uses the progressive realisation qualification (see art 11(3)(b) on children's right to education – the obligation of states to "progressively" make secondary education free and compulsory, art 13(3) on special measures of protection for handicapped children – obligation of states to "progressively" achieve "the full convenience of the mentally and physically disabled person to movement and access to public highway buildings and other places to which the disabled may legitimately want to have access to"). A consideration of the jurisprudence of the African Committee of Experts on the Rights and Welfare of the Child is beyond the scope of this paper but it is worth mentioning that its decision in the *Nubian* case highlights some elements of progressive realisation discourse in relation to education and health care (see generally *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v The Government of Kenya* Communication No Com/002/2009 2011-03-22).

> accordance with articles 61 and 62 of the African Charter. States parties are therefore under a continuing duty to move as expeditiously and effectively as possible towards the full realisation of economic, social and cultural rights.[17]

The Commission's development of this concept in its jurisprudence is however limited. It is clear from its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights that the Commission's has adopted the CESCR's understanding of the concept.[18]

2 2 The Constitutional Court

The Constitutional Court has held that the understanding and meaning of the phrase "progressive realisation", as contained in General Comment No 3, accords with the context in which the concept is used in the South African Constitution, and thus bears the same meaning.[19] The Court observed in *Grootboom* that though the right could not be realised immediately, the state must take steps to achieve the goal of the Constitution, which is that "the basic needs of all in our society be effectively met". The Court, however, as seen below, rejects the minimum core concept, which as I argue in this article, should be seen as part of the concept of progressive realisation. Notwithstanding this, the Court added that progressive realisation means that "accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time". Also, the right must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.[20] However, the Court in its subsequent jurisprudence has not engaged with the latter aspect.

In another case, the Court held that progressive realisation requires that the state "must accelerate reasonable and progressive schemes to ameliorate vast areas of deprivation".[21] Thus, as Liebenberg observes, even where people already have access to socio-economic rights, progressive realisation places a duty on the state to improve the nature and the quality of the services to which people have access.[22] However, the Constitutional Court failed to engage with this aspect in *Mazibuko*, referred to subsequently in this article. In *Modderklip*, the Court held in relation to the right to adequate housing that "[t]he progressive

17 African Commission on Human and Peoples' Rights *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* par 14. The Principles and Guidelines were formerly launched in 2011.

18 *Idem* parr 13-15.

19 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) par 45 (right to adequate housing in the context of an eviction).

20 *Ibid*.

21 *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 8 BCLR 872 (CC) par 705 (regulatory measures in relation to medicines – pricing system for medicines and scheduled substances published by the Minister of Health).

22 Liebenberg 188.

realisation of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable processes are vital".[23] Progressive realisation also requires that measures adopted must be flexible so as to adapt to changing situations.[24] It thus, as observed by Bilchitz,

> involves an improvement in the adequacy of housing for the meeting of human interests ... it means that each is entitled as a matter of priority to basic housing provision, which the government is required to improve gradually over time.[25]

The Constitutional Court adopted a restrictive approach to the concept in *Mazibuko*, stating that the concept "recognises that policies formulated by the state will need to be reviewed and revised to ensure that the realisation of social and economic rights is progressively achieved".[26] The Court was therefore of the view that the revision of policies over the years is consistent with the obligation to ensure progressive realisation of rights,[27] regardless of what the revision entailed and whether it met the basic needs of people or without any consideration of the content of the right or the need of people. The Court was also of the view that progressive realisation requires increasing access to a right on a progressive basis, especially for the poor and disadvantaged groups.[28] However, the Court's analysis is lacking in relation to a thorough assessment of the extent to which the provision of the right in question has increased. The Court noted in this case that the municipality had continued to review its policy regularly and undertaken sophisticated research to seek to ensure that it meets the needs of the poor within the city of Johannesburg. The Court found the continual revision of the policy in question in the ensuing years to have improved the policy in a manner entirely consistent with an obligation of progressive realisation.[29] It stated that "[a] policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution".[30] While regular review in this case improved the policy, the question left unanswered is whether it also improved the level of rights enjoyment. Hence, does regular review per se result in

23 *President of the Republic of South Africa v Moddderklip Boerdery (Pty) Ltd* 2005 8 BCLR 786 (CC) par 49 (a private landowner's efforts to execute an eviction order granted by the High Court against a community occupying its land).
24 *Ibid*.
25 Bilchitz *Poverty Reduction and Fundamental Rights: The justification and Enforcement of Socio-Economic Rights* (2007) 193.
26 *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC) parr 40, 67 (the right of access to water – constitutionality of prepaid water metres and sufficiency of free basic water).
27 *Idem* parr 40, 67, 162, 163.
28 *Idem* par 97.
29 *Idem* par 163.
30 *Idem* par 162.

actual improvement in the enjoyment of rights? While the Court acknowledges that progressive realisation also requires that access be continuously broadened, it does not actually engage with this. The Court thus took a restrictive approach by limiting its analysis to one aspect of progressive realisation – that of regular review of policies. Thus, all that the state had to show was that it regularly reviews its policies. However, regular review in itself is not sufficient as improvement in the enjoyment of rights is also required. The Court's approach in this case is restrictive and problematic because of the reality of poor households being left for days or weeks at a time each month without access to water, and notwithstanding a right of access to sufficient water in the Constitution.

3 Elaborating on How Progressive Realisation Relates to Resources, Minimum Core and Reasonableness

3 1 Progressive Realisation and Resources

The pace at which socio-economic rights are progressively realised depends on the resource availability to a state. This is because states have to take full advantage of their available resources to ensure that these rights are fully realised without discrimination of any kind. However, a state cannot escape the obligation to adopt a plan of action on the ground that the necessary resources are not available.[31] Resources in this context imply the resources both within a state (internal resources) and those available through international assistance and co-operation (external resources).[32] Furthermore, resources are also not limited to financial or human resources; information and technology, for example, are also resources essential in fulfilling most of the rights in the ICESCR.[33] In addition, progressive realisation and resource availability implies that some states' obligations under the ICESCR may vary from one state to another. Also, in relation to the same state, some obligations may vary over time.[34]

3 1 1 Internal Resources, Budget Consideration and Review

3 1 1 1 The CESCR

Though progressive realisation depends on resources, the obligation exists independently of the increase in resources, as it requires effective

31 General Comment No 11 par 9.
32 General Comment No 3 par 13; Limburg Principles par 26.
33 See Robertson "Measuring State Compliance with the Obligation to Devote the Maximum Available Resources to the Realizing Economic, Social, and Cultural Rights" 1994 *Human Rights Q'ly* 693 695-697.
34 Felner "Closing the 'Escape Hatch': A Toolkit to Monitor the Progressive Realization of Economic, Social and Cultural Rights" 2009 *J Human Rights Practice* 402 406.

use of resources available.[35] It can be effected not only by increase in resources but also the development of societal resources necessary for the realisation of rights.[36] Attention must be paid to equitable and effective use of and access to the available resources in determining whether adequate measures have been taken for the realisation of socio-economic rights.[37] When using available resources, states have to ensure the satisfaction of subsistence requirements and the provision of essential services.[38] Where available resources are demonstrably inadequate, the obligation remains for a state to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances;[39] and vulnerable members of society must be protected by the adoption of relatively low cost programmes.[40] The progressive realisation obligation is therefore not completely eliminated due to resource constraints,[41] because resource constraints alone cannot justify inaction.[42] For example, in its concluding observations on the Democratic Republic of the Congo (DRC), while recognising the difficulties faced by the state, the CESCR stated that "budgetary constraints should not be invoked as the only justification for the lack of progress towards the establishment of a social security system".[43]

Furthermore, the essential needs of members of vulnerable and disadvantaged groups must be prioritised in all resource allocation processes.[44] In this regard, in relation to the right to social security, the CESCR has stated that even where there is limited capacity to finance social security, it is important for social security schemes to cover disadvantaged and marginalised groups. Low-cost and alternative schemes could be developed to cover immediately those without access. Policies and legislative frameworks could be adopted for the progressive inclusion of those in informal economy or who are otherwise excluded from social security.[45] The Committee has also requested the states to allocate sufficient budgetary resources to ensure the implementation of a comprehensive housing plan and policies especially for low-income groups and marginalised individuals and groups.[46] It has also requested

35 Limburg Principles par 23.
36 *Idem* par 24.
37 *Idem* par 27.
38 *Idem* par 28.
39 General Comment No 3 par 11.
40 *Idem* par 12.
41 *Idem* par 11.
42 UN doc E/C12/2007/1 par 4.
43 UN doc E/C12/COD/CO/4 par 24.
44 See General Comment No 3 par 10; General Comment No 15 parr 37-38; Limburg Principles parr 25-28; Maastricht Guidelines parr 9-10. See also CESCR General Comment No 14 *The Right to the Highest Attainable Standard of Health* UN doc E/C12/2000/4 (2000) parr 43-47.
45 General Comment No 19 par 51.
46 CESCR *Concluding Observations on the Initial to Third Periodic Reports of Angola* UN doc E/C12/AGO/CO/3 20081201 par 30; CESCR *Concluding Observations on the Combined Initial and Second and Third Periodic Reports of Chad* UN doc E/C12/TCD/CO/3 (2009) par 27.

a state to ensure that the maximum available resources are allocated to the protection and fulfilment of socio-economic rights, especially to the most vulnerable and marginalised individuals and groups.[47]

As mentioned above, the prohibition of retrogressive steps is a component of the progressive realisation concept. The prohibition is an immediate obligation not subject to the availability of resources; and any retrogression, as stated above, has to be fully justified not only with reference to the totality of rights but also with reference to the full use of available resources. The CESCR has stated that if a state uses resource constraints as an explanation for retrogressive steps, such information would be assessed taking into consideration a number of criteria including:

(a) the country's level of development;

(b) the severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant;

(c) the country's current economic situation, in particular whether the country was undergoing a period of economic recession;

(d) the existence of other serious claims on the State party's limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict.

(e) whether the State party had sought to identify low-cost options; and

(f) whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purpose of implementing the provisions of the Covenant without sufficient reason.[48]

3 1 1 2 The Constitutional Court

Unlike the ICESCR which uses the phrase "to the maximum of its available resources", the South African Constitution uses "within available resources", which implies that the obligation placed on the state does not require more than its available resources. McLean has observed in this regard that the phrase as used in the South African Constitution could refer to the resources that the state has made available or all resources that are potentially available to meet the state's obligations. She adds that the latter would require an assessment by the courts as to whether the state has made suitable budgetary allocation to realise the right in question.[49] Mbazira has however pointed out, and quite correctly so, that the differences in the phrase as used in the ICESCR and in the South African Constitution is at best nomenclature,[50]

47 CESCR *Concluding Observations on the Combined Initial and Second to Fourth Periodic Reports of Cambodia* UN doc E/C12/KHM/CO/1 (2009) par 38.
48 CESCR UN doc E/C12/2007/1 par 10.
49 McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 195.
50 Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 91.

In *Soobramoney*,[51] the Constitutional Court held that the obligations imposed on the state to progressively realise the right to have access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources.[52] Subsequently, in *Grootboom*, the Court stated that the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.[53] In *TAC*, the Court held that the obligation does not require the state to do more than is achievable within its available resources or to realise the rights immediately.[54]

Khosa however illustrates that in the absence of clear evidence to show the additional cost of providing a right to an excluded group (in this case permanent residents), a state cannot rely on resource constraints as an excuse for not realising the right of that group.[55] The Court was also of the view that the importance of realising the rights of permanent residents outweighed the financial considerations that the state relied on; this is because a denial impacts on their life and dignity.[56] In *Olivia Road*,[57] the Constitutional Court stated that the state cannot go beyond the extent to which available resources allow, in the realisation of rights.[58] It however added that the concerned municipality had the duty to take reasonable measures within its available resources to make the right of access to adequate housing more accessible as time progresses.[59]

There are apparently synergies between the Constitutional Court's approach and that of the CESCR. The Constitutional Court has however not paid attention to external resources in its analysis. This could arguably be because the resource implications raised by the current cases "could be accommodated within existing budgetary allocations".[60]

3 1 2 Aid / Foreign Assistance

The CESCR has observed that the obligation to use the maximum of available resources entitles a state to seek and receive resources offered

51 *Soobramoney v Minister of Health (KwaZulu Natal)* 1998 1 SA 765 (CC) (a challenge to the resource rationing policy of a state hospital).
52 *Idem* par 11. See also par 43.
53 *Grootboom* par 46.
54 *Minister of Health v Treatment Action Campaign* 2002 5SA 721 (CC) par 32 (the right of access to health care services – access to antiretrovirals).
55 *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) par 62.
56 *Khosa*, par 82.
57 *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 (5) BCLR 475 (CC) (a challenge of several aspects of the City of Johannesburg's practice of evicting residents of so called "bad" buildings for health and safety reasons).
58 *Idem* par 18.
59 *Idem* par 44.
60 Liebenberg 194.

by the international community.[61] It should be noted that all states are entitled to get aid, whether or not they are state parties to the ICESCR, especially as international human rights treaties and standards generally recognise the need for states to seek aid in times of difficulties in realising rights. Failure to do so would amount to a violation of this obligation. Where international cooperation aid is provided to a state, a sustainable institutional framework on the use of such aid must be adopted. If a state fails to use aid or foreign assistance, the state would be in breach of its obligation to take steps to the maximum of its resources towards the progressive realisation of socio-economic rights. Also, development aid must be allocated to priority sectors and a state must ensure that it uses such aid for the progressive realisation of rights.[62]

3 2 Progressive Realisation and Minimum Core

3 2 1 The CESCR and African Commission

A minimum core approach to rights involves identifying such subsistence levels in respect of each socio-economic right and insisting that the provision of core goods and services enjoys immediate priority.[63] It thus represents a "floor" of immediately enforceable entitlements from which progressive realisation should proceed. As recognised by the CESCR, states have a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of socio-economic rights.[64] Minimum core obligations are meant to apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.[65] However, resource constraints are taken into account in assessing whether a state is meeting its minimum core obligations.[66] However, for a state to attribute failure to meet minimum core obligations to resources, it must show that every effort has been made to use all resources that are at its disposal in an effort to satisfy as a matter of priority the minimum obligations.[67]

The African Commission has recognised minimum core obligations, adopting the understanding of the CESCR in this regard.[68] The Commission has referred to minimum core obligations in its

61 CESCR *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant* UN doc E/C12/2007/1 (2007) par 5.

62 CESCR *Concluding Observations on the Combined Second to Fourth Periodic Reports of the Democratic Republic of the Congo* UN doc E/C12/COD/CO/4 2009-12-16 parr 16, 29.

63 Pieterse "Resuscitating Socio-Economic Rights: Constitutional Entitlements to health care Services" 2006 *SAJHR* 473 481); see generally Brand & Russell (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002).

64 General Comment No 3 par 10.

65 Maastricht Guidelines par 9.

66 General Comment No 3 par 10.

67 *Ibid*.

68 *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* par 17.

jurisprudence, particularly in relation to minimum duties of a state as opposed to minimum essential levels of a right. In *SERAC*,[69] the notion of minimum duties is used in relation to the obligations of states to "respect" and "protect" rights. The Commission, in the case, held as follows:

> [T]he minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves.[70]
>
> The government's treatment of the Ogonis has violated all three minimum duties of the right to food. The government has destroyed food sources through its security forces and State Oil Company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves.[71]

It can thus be argued that meeting minimum essential levels of a right is an initial step towards progressive realisation. It is therefore part and parcel of the concept of progressive realisation.

3 2 2 The Constitutional Court

Unlike the CESCR, the Constitutional Court of South Africa has failed to recognise minimum core obligations based on the diversity of people's varying needs and contexts as well as institutional and democratic concerns (the Court saw itself as not equipped to determine what the minimum core standards should be).[72] However, while in the Court's view it might not be possible to give everyone access to a core service immediately, the state must ensure that, as explained by the CESCR in General Comment No 3, at the very least, a significant number of individuals have access.

Notwithstanding its failure to consider a minimum core approach to socio-economic rights, the Constitutional Court has acknowledged that "there may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable".[73] Also that "evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable".[74] The Court has however failed to revisit the issue – the door seems to be closed at least for the foreseeable future. In spite of this, through the reasonableness

69 *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 (2001) AHRLR 60 (alleged violations of the rights to health, to dispose of wealth and natural resources, to a clean environment and family rights).
70 *Idem* par 65
71 *Idem* par 66
72 *Grootboom* parr 32-33; *TAC* parr 34, 35, 38, 39; *Mazibuko* parr 60, 61.
73 *Grootboom* par 33.
74 *TAC* par 34

approach (discussed briefly below), it is argued that the Court thus sets minimum standards to be met in the progressive realisation of socio-economic rights.

It must be emphasised that minimum core obligations should be understood within the broader framework of progressive realisation, as it does not imply that governments should fulfil the bare minimum and then do nothing. The South African Court in *Mazibuko*, though not endorsing the minimum core obligations approach, did state that it will be reasonable for municipalities and provinces to strive first to achieve the prescribed minimum standard then proceed to provide beyond this standard for those to whom the minimum is already being supplied.[75] Bilchitz has provided insight into the relationship between minimum core and progressive realisation, observing that states have an obligation to immediately realise a minimum level of provision of a right and then to improve the level of provision beyond the minimum on a progressive basis.[76] He explains that progressive realisation recognises that

> what government is required to do is to provide core services to everyone without delay that will meet their survival needs and then qualitatively to increase these services so as ultimately to meet the maximal interests that the state is required to protect.[77]

This approach accords with the CESCR's approach in General Comment No 3 of viewing progressive realisation as including the provision of minimum essential levels of a right, which a state is then required to improve on with time. It also accord's with the Constitutional Court's view of avoiding viewing minimum core as a self-standing right but one that is relevant to reasonableness as stated above.

3 3 Progressive Realisation and Reasonableness

3 3 1 The CESCR and African Commission

The ICESCR does not refer to reasonableness but art 8(4) of the Optional Protocol to the ICESCR endorses this standard of review. The Optional Protocol is a mechanism through which socio-economic rights can be adjudicated before the CESCR.[78] The wording of article 8(4) of the Optional Protocol to the ICESCR is derived from *Grootboom*.[79] The Optional Protocol, as mentioned above, only recently entered into force, hence the lack of jurisprudence from the CESCR on a reasonableness

75 *Mazibuko* par 76.
76 Bilchitz "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence" 2003 *SAJHR* 1 11.
77 *Idem* 12.
78 For further reading on the Optional Protocol, see Chenwi "Correcting the Historical Asymmetry between Rights: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" 2009 *Afr Human Rights LJ* 23.
79 Porter "The Reasonableness of Article 8(4): Adjudicating Claims from the Margin" 2009 *Nordic J Human Rights* 39 49.

approach in relation to the progressive realisation. However, the Committee has stated that in assessing state's compliance with the obligations under the ICESCR, it will assess the reasonableness of steps taken, taking into account a number of factors including: the extent to which the measures are "deliberate, concrete and targeted"; whether the state "exercised its discretion in a non-discriminatory and non arbitrary manner"; whether decisions not to allocate resources accords with international human rights standards; whether the state, faced with several policy options, adopted a less restrictive option; "the time frame in which the steps were taken"; and whether the "precarious situation of disadvantaged and marginalised individuals or groups" was taken into account, in a non-discriminatory fashion but prioritised "grave situations or situations of risk".[80]

The reasonableness standard in the Optional Protocol acknowledges the institutional roles and limitations in giving effect to the right to effective remedies for socio-economic rights violations. The Committee's conception of the standard also places emphasis on transparent and participative decision-making processes at the national level.[81] In its general comments[82] and concluding observations,[83] the CESCR has also emphasised the importance of participation of right holders in decision-making processes and genuine consultation in the development and implementation of policies in relation to socio-economic rights.

Like the ICESCR, the African Charter is silent on the "reasonableness" terminology. The African Commission, has however referred in its jurisprudence to the obligation of states to "take reasonable and other measures"[84] and to take "concrete and targeted steps"[85] to ensure realisation of socio-economic rights, but does not elaborate on whether this should be understood within the context of reasonableness as developed by the South African Constitutional Court. The Commission

80 UN doc E/C12/2007/1 par 8.

81 *Idem* par 11.

82 See CESCR General Comment No 4 *The Right to Adequate Housing* UN doc E/1992/23 (1991) parr 8, 12; General Comment No 5 par 14; CESCR General Comment No 7 *The Right to Adequate Housing : Forced Evictions* UN doc E/1998/22 annex IV parr 13, 15; General Comment No 14 par 54; General Comment No 15 parr 48, 56; General Comment No 18 par 42; CESCR General Comment No 17 *The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literacy or Artistic Production of which He or She is the Author* UN doc E/C12/GC/17 (2006) par 78.

83 See UN doc E/C12/FRA/CO/3 par 41; UN doc E/C12/NIC/CO/4 parr 11, 21.

84 *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 (2001) AHRLR 60 par 52

85 *Purohit and Moore v The Gambia* Communication 241/2001 (2003) AHRLR 96 par 84. The Commission in this case "read into Article 16" on the right to the best attainable state of physical and mental health, the obligation of states to "take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind". This provision thus has some elements of progressive realisation as well as reasonableness.

has also observed that the state bears the burden of proving that measures adopted are reasonable;[86] and that the measures should be based on equality and objective and reasonable grounds.[87]

3 3 2 The Constitutional Court

The Constitutional Court employs the reasonableness approach in assessing the government's compliance with its socio-economic rights obligations in the Constitution, which has been the subject of considerable literature, and thus not restated here.[88] However, if one looks at the Court's interpretation of progressive realisation stated above, it is clear that the reasonableness approach is influenced by some aspects of "progressive realisation" and "the availability of resources". Furthermore, the reasonableness approach has some elements of minimum core obligations. While emphasising the progressive realisation of socio-economic rights, the Constitutional Court also holds that people in desperate need should not be left without any form of assistance, intrinsically implying recognition of minimum core. The Court in fact states in *Khosa* that "[a] society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational".[89] Based on this, Bilchitz has concluded that in attempting to avoid recognising a minimum core obligation, the Court has in fact incorporated an obligation to meet, at the very minimum, the short-term needs into the notion of reasonableness.[90] The state is thus required to take immediate interim measures of relief for those in desperate need.[91]

Requiring a state to take immediate measures or meet short-term pressing needs does not release the state of its obligation to provide for medium and long-term needs. Any measure aimed at the progressive realisation, as discussed above, must aim at meeting the short-, medium- and long-term needs, in order for it to pass the test of reasonableness. In providing temporary alternative housing, as evident in the Constitutional Court's housing rights jurisprudence, the state cannot ignore its obligation to make provision for permanent housing. Interim alternative

86 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication 276/2003 (2010) par 172.
87 *Idem* parr 227, 238, 234, 296.
88 See, for example, Liebenberg "Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate" in *Constitutional Conversations* (eds Woolman & Bishops) (2008) 303-329; Liebenberg "Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review" in *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (eds Squires, Langford & Thiele) (2005) 73-88.
89 *Khosa* par 52.
90 Bilchitz 149.
91 Kapindu, "From the Global to the Local: the Role of International Law in the enforcement of Socio-Economic Rights in South Africa" (2009) *Socio-Economic Rights Research Series 6,* Community Law Centre University of the Western Cape 46.

accommodation is provided pending the provision of suitable permanent housing by the government in consultation with those involved.[92] The Constitutional Court's jurisprudence illustrates that it has focussed largely on short-term needs, while leaving decisions on long-term needs in some instances in the hands of the state.

4 Assessing Compliance with Progressive Realisation: Some Methodological Considerations

There are numerous methodologies to assess compliance with the obligation to progressively realise socio-economic rights. The scope of this article does not allow for a consideration of all existing methodologies. The aim is to provide an overview of some of the methodologies (albeit briefly as they have been the subject of previous writings as seen below) while drawing from the jurisprudence of the CESCR where relevant, in order to highlight some of the issues that should be considered when assessing compliance with progressive realisation. The South African Constitutional Court's approach that speaks to three of the methodologies is then briefly considered.

Assessing or monitoring compliance in respect of progressive realisation can be carried out by civil society, institutions of democracy or the state itself, depending on the purpose of the assessment. For instance, while courts play a key role in monitoring socio-economic rights through litigation brought before them, the Constitution mandates the South African Human Rights Commission (SAHRC) to monitor progressive realisation of socio-economic rights by the state.[93] Sadly, the SAHRC has failed to adequately carry out this task resulting in questions on its capacity to monitor progressive realisation and calls for an appropriate monitoring model.[94] The Court has also adopted a restrictive approach in undertaking this task. It must also be stressed that the scope and methods to assessing compliance with progressive realisation varies, based on who is conducting the monitoring and its purpose.

4 1 Overview of Selected Methodologies

Current methodologies include, but are not limited to, indicators and benchmarks, budget and expenditure analysis, violations approach, and "combined" approaches (or methodologies that combine various approaches). There are also various econometrics methodologies, but the

92 See generally *Olivia Road* & *Joe Slovo* cases.
93 S 184(3) Constitution.
94 Klaaren "A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights" 2005 *Human Rights Q'ly* 539 550, 554.

scope of this article does not allow for their consideration, and econometric tools are also quite complex.[95]

4 1 1 Indicators and Benchmarks

Indicators and benchmarks are seen as important ways to monitor progress, stagnation or retrogression in the realisation of a right over a certain period of time.[96] An indicator is a fact that indicates the state or level of something, such as literacy rates.[97] It is important in dissociating unwillingness and the lack of commitment from incapacity.

Benchmarks are targets relating to a given human right indicator, such as child mortality rates, to be achieved over a period of time (for example to halve the child mortality rate in 10 years).[98] Benchmarks can provide an extremely valuable indication of progress and, accordingly, states are required to provide indicators and benchmarks in framework legislation and plans aimed at the realisation of rights.[99] In practice though, states have failed to meet the obligation to set indicators and benchmarks as can be seen from various concluding observations of the CESCR.[100]

Concerns have been raised regarding the use of indicators and benchmarks alone in monitoring the progressing realisation of socio-economic rights based, largely on, the lack of information (because information produced by the state is often inaccessible publicly) and non-disaggregation of data.[101] Another concern relates to the question of how

95 See, for example, Anderson "Using Quantitative Methods to Monitor Government Obligations in terms of the Rights to Health and Education" (2008). http://www.cesr.org/downloads/Quantitative%20methods%20for%20monitoring%20ESCR.doc (accessed 2012-06-12).

96 United Nations *Report of the High Commissioner for Human Rights on Implementation of Economic, Social and Cultural Rights* UN doc E/2009/90 (2009) parr 39, 41.

97 Felner 409.

98 *Idem* 410.

99 General Comment No 13 par 52; General Comment No 1 parr 3 6, 7; General Comment No 12 par 29; General Comment No 14 parr 57, 58; General Comment No 15 parr 47, 53, 54; General Comment No 16 par 39; General Comment No 17 parr 49, 50; General Comment No 18 parr 46, 47; General Comment No 19 par 74-76.

100 CESCR *Concluding Observations on the Second Periodic Report of Benin* UN doc E/C12/BEN/CO/2 (2008) parr 10, 31; *Concluding Observations on the Third Periodic Report of Mo*rocco UN doc E/C12/MAR/CO/3 (2006) parr 13, 34; *Concluding Observations on the Initial Report of Zambia* UN doc E/C12/1/Add 106 (2005) parr 13 35, 48, 54; *Concluding Observations on the Initial Report of Kenya* UN doc E/C12/KEN/CO/1 (2008) parr 22, 24; *Concluding Observations on the Fifth Periodic Report of Poland* UN doc E/C12/POL/CO/5 (2009) par 35; *Concluding Observations on the Second and Third Periodic Reports of Parguay* UN doc E/C12/PRY/CO/3 (2008) par 23(i); *Concluding Observations on the Fifth Periodic Report of Finland* UN doc E/C12/FIN/CO/5 (2008) parr 17, 26; CESCR UN doc E/C12/FRA/CO/3 parr 11, 31; *Concluding Observations on the Second Periodic Report of Bolivia* UN doc E/C12/BOL/CO/2 (2008) parr 27, 34; *Concluding Observations on the Second to Fifth Periodic Reports of India* UN doc E/C12/IND/CO/5 (2008) par 58.

101 UN doc E/2009/90 par 43.

to determine what would be realistic and reasonable pace of progress in the light of available resources.[102] An understanding of how progressive realisation relates to resources (considered above) is relevant in this regard.

4 1 2 Budget and Expenditure Analysis

The OHCHR has identified different ways of conducting budget analysis. The first is referred to as static analysis, which evaluates a given budget by itself.[103] This involves, from a socio-economic rights perspective, mapping out the allocation of resources for each right and comparing them with the percentage of other allocations, which provides an indication of the government's priorities.[104] Alternatively, one could map out the main beneficiaries of some budget allocations. In the area of education, an example of non-compliance is where a significant percentage of the budget is allocated to subsidise private schools that cater for children from middle to high-income families compared with public schools serving low-income sectors of population, which would show that the priorities of government are not in line with its obligation to pay particular attention to the vulnerable and marginalised.[105] The second budget analysis approach is referred to as dynamic analysis, which compares the evolution of budgets over time, looking at variations in allocations and spending over different periods.[106] An example of non-compliance is underspending in an area where targets have not been met or where indicators show significant gaps in the full realisation of socio-economic rights. This would imply that the government is not meeting its obligation to take steps to the maximum of available resources. Consistent underspending over a number of years in a particular sector would also show that planning is inadequate or funds are not released promptly.[107]

The CESCR has considered how states have allocated resources. In doing so, the Committee analyses macro-budget information relating to the national budget allocated to a specific sector, paying particular attention to the adequacy/sufficiency of the budget, government's priorities in terms of resource allocation, lack of clear strategic lines in the budget in relation to the vulnerable and marginalised, regressive patterns of social spending and mismanagement of international cooperation aid. For instance, the Committee raised concern over the decrease in the budget allocated to education in a particular state, despite the rapidly rising number of children in the school age.[108] This implies that budget allocation must take into consideration the changes in the size of beneficiaries of a particular right. The Committee then used

102 Felner 411.
103 UN doc E/2009/90 par 48.
104 *Idem* par 49.
105 *Idem* par 50.
106 *Idem* par 48.
107 *Idem* par 54.
108 UN doc E/C12/AGO/CO/3 parr 39.

macroeconomic growth as a yardstick in assessing the state's compliance, raising concern about insufficient jobs for men and women despite the country's macroeconomic growth, and the state's failure to take advantage of this growth to promote policies to create jobs especially for the marginalised and disadvantaged.[109] The Committee has also raised concerned over high levels of defence expenditure in contrast with shrinking budgets for key socio-economic rights areas;[110] and regressive patterns of social spending.[111] Continuous decrease of resources allocated to social sectors such as health and social protection, while budgetary allocations to defence and public security are increased considerably and international development aid has been provided, would amount to a breach of the progressive realisation obligation.[112]

Budget and expenditure analysis is a challenging exercise as socio-economic rights are not always broken down within the state's budget lines, and funds allocated for other rights can be related to or have an impact on socio-economic rights. The OHCHR has cited the example of birth registration, which is a civil right but also relates to the enjoyment of socio-economic rights such as health, social security and education.[113] In addition, Felner has warned that although budget allocation to a specific sector could, in many instances, be an indication of the level of commitment to promoting that sector, it should not be used as the single indicator in assessing compliance. This is because, other than the budget allocated to a specific social sector, there are several factors related to the availability of resources in a state that bear upon the progressive realisation of socio-economic rights. These include the impact of economic growth on the expenditure spent per person in a given social sector, the impact of extra-sectoral spending on the realisation of socio-economic rights, regressive patterns of social spending, and inefficiency in the use of resources.[114] Another challenge with this approach relates to the role of civil society in assessing compliance with progressive realisation (most human rights activists do not have the technical skills, time and resources to undertake complex budget analysis).[115]

109 *Ibid*.
110 CESCR *Concluding Observations on the Second Periodic Report of the Democratic People's Republic of Korea* UN doc E/C12/1/Add 95 (2003) par 9.
111 CESCR *Concluding Observations on the State of Implementation on the ICESCR in Kenya* UN doc E/C12/1993/6 (1993) par 17; CESCR *Concluding Observations on the Second Periodic Report of Algeria* UN doc E/C12/1/Add71 2001-11-30 parr 18, 20, 34, 40.
112 UN doc E/C12/COD/CO/4 par 16.
113 UN doc E/2009/90 par 53.
114 Felner 412-414.
115 Felner 420.

4 1 3 Violations Approach

This approach was first proposed by Chapman[116] and involves identifying violations that signify negative compliance with obligations. The CESCR avoids using the terminology "violation" in its concluding observations where a state has failed to meet its obligations; instead, it merely expresses its concern over a state not meeting its obligations or refers to a "breach" of obligations, sometimes qualified with the word "serious". However, the CESCR might not be able to avoid the "violation" terminology, considering the opportunity to consider complaints alleging violations of the rights in the ICESCR under the Optional Protocol to the ICESCR.

With the violations approach, three types of violations have to be distinguished.[117] The first is violations resulting from state action and policies (such as adoption of legislation or policies that are incompatible with pre-existing legal obligations relating to rights or adoption of deliberately retrogressive measures). The second is violations relating to acts or policies that reflect discrimination (such as failure to abolish discriminatory laws that impact on enjoyment of rights). The third is violations resulting from a state's failure to fulfil minimum core obligations (such as failure to put in place policies to implement rights).

The violations approach has been criticised for being punitive rather than facilitative;[118] for over-generalising the elements that would constitute violations and avoiding the complexities of the concept of progressive realisation;[119] and for detracting attention from the broader state obligations to promote socio-economic rights.[120] Notwithstanding the criticisms, the violations approach has been seen to be "even more salient" with the adoption of the Optional Protocol to the ICESCR; and if used with indicators, can "enhance treaty compliance" and the enforcement of obligations, "including progressive realisation obligations".[121]

116 Chapman "A 'Violations Approach' for monitoring the International Covenant on Economic, Social and Cultural Rights" 1996 *Human Rights Q'ly* 23.

117 Chapman 43; Maastricht Guidelines parr 14-15; General Comment No 19 par 64.

118 Anderson & Foresti "Assessing Compliance: The Challenge for Economic and Social Rights" 2009 *J Human Rights Practice* 469 471; Anderson & Foresti "Achieving Economic and Social Rights: The Challenge of Assessing Compliance" (2008) *Overseas Development Institute Briefing Paper* 2 2-3 http://www.odi.org.uk/resources/download/1584.pdf (accessed 2012-06-12).

119 Olowu *An Integrative Rights-Based Approach to Human Development in Africa* (2009) 202.

120 Klaaren 552.

121 Kalantry, Getgen & Koh "Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR" 2010 *Human Rights Q'ly* 253 254, 299, 310.

4 1 4 Combined Approaches

The "combined" approaches briefly explained in this section are: the "three-step methodological framework" and the "basic framework" both proposed by Felner,[122] the Index of Social and Economic Rights Fulfillment (SERF index) developed by Randolph, Fukuda-Parr and Remer,[123] and the OPERA framework developed by the Center for Economic and Social Rights.[124] The combined approach, as seen below, incorporates indicators and benchmarks, budget and expenditure analysis and violations.

4 1 4 1 The Three-Step Methodological Framework

The three-step methodological framework is broken down as follows: Step 1 is the identification of deprivations and disparities in the enjoyment of socio-economic rights, using outcome indicators. This step measures the essential levels of enjoyment of socio-economic rights, progressive realisation over time, available resources in relation to progressive realisation, and inequality in enjoyment of socio-economic rights in order to ascertain deprivations and disparities. Step 2 is to identify main determinants of deprivations and inequalities that help in assessing the extent to which the state is complying with its obligations. The determinants include provision, poverty and cultural barriers, and direct (participation, quality and capacity) and indirect factors (demand factors and performance of right-bearer) that affect outcomes. Step 3 is to assess the adequacy of policy efforts to address the determinants identified in step 2. This involves identifying policy failures in the provision and utilisation of essential goods and services, and monitoring resource allocation, using the basic framework (explained below).

4 1 4 2 The Basic Framework

The Basic Framework also comprises three steps. Step 1 requires a comparison of social indicators with gross domestic product (GDP) *per capita*, thus enabling one to measure progress over time in accordance with a country's development. For example, a social indicator such as primary school completion rates as a proxy for the enjoyment of the right

122 See generally Felner *op cit*.

123 Randolph, Fukuda-Parr & Lawson-Remer "Making the Principle of Progressive Realization Opartional – The SERF Index: An Index for Monitoring State Fulfillment of Economic and Social Rights Obligations" (2009) http://www.u.arizona.edu/~gunby/Randolph.pdf (accessed 2012-07-06); Fukuda-Parr, Lawson-Remer & Randolph "SERF Index Methodology: Version 2011.1, Technical Note" (2011) http://www.serfindex.org/wp-content/uploads/2011/02/Data-Technical-Note.pdf (accessed 2012-07-07); Randolph & Guyer "SERF Index Methodology: Version 2012.1, Technical Note" (2012) http://www.serfindex.org/wp-content/uploads/2012/03/Technical-Note-on-SERF-Index-Historical-Trends.pdf (accessed 2012-07-07).

124 Center for Economic and Social Rights "The OPERA Framework: Assessing Compliance with the Obligation to Fulfil Economic, Social and Cultural Rights" (2012). http://cesr.org/downloads/Draft%20CESR%20Paper_%20the%20OPERA%20framework.pdf (accessed 2012-07-07).

to education can be compared with GDP *per capita* as a proxy for available resources. This implies that if a country simultaneously experiences a reversal in a social indicator and a significant economic growth, this would indicate non-compliance with its obligation to progressively realise the specific right. This step is however not helpful in all instances as countries normally make some progress over time. Step 2 requires an analysis, using quantitative tools, of resource allocations (the magnitude, composition and distribution) in order to ascertain whether a state is devoting the maximum of its available resources to the progressive realisation of rights. For instance, in relation to the right to education, if the primary education expenditure ratio of a state (which is the relevant indicator), when compared to other countries (in the same region with similar needs and overall income), is lower, then that state is not complying with its obligation to devote the maximum of its available resources towards the progressive realisation of the right to education. Step 3 is an analysis of expenditure per capita on specific social sectors. Such as analysis could assist in the identification of common policy problems that hinder progressive realisation of rights, establishment of types of policy strategies a state should adopt and disclosure of "deeply embedded inefficiencies" in the use of resources. For example, if a state has a low level of financial commitment to a social sector that also has a low level of expenditure per person in that sector, this would imply a violation of its obligation to devote its maximum available resources to the progressive realisation of the relevant right. One can deduce, with regard to step 3 that an effective and accurate analysis of expenditure *per capita* would require data that is properly disaggregated. For instance, if the poor are not further classified into rural and urban, when using expenditure *per capita* in relation to the poor in general, it would be difficult to establish if the expenditure is balanced or equitably distributed between the rural and urban poor.

4 1 4 3 The SERF Index

The SERF index is relevant in measuring a state's compliance with its obligations of results in relation to the fulfilment of the substantive socio-economic rights in the ICESCR.[125] It thus focuses on outcomes in the enjoyment of rights. The index makes use of indicators and benchmarks and uses "objective, survey-based data published by national and international bodies to measure the performance of countries and sub-national units".[126] The index has two steps: the first involves using indicators to measure the extent to which the different socio-economic rights are enjoyed; and the second involves measuring the extent to which the state is required to fulfil these rights.[127] The SERF index is useful in measuring progression and retrogression in rights fulfilment as well as disparities between regions or groups. However, it is quite technical. It also does not measure aspects such as the extent to which a

125 Randolph *et al op cit*.
126 *Ibid*.
127 *Ibid*.

state has guaranteed procedural rights such as participation, non-discrimination and accountability, which could be seen as a limitation in terms of the index's comprehensiveness.

4 1 4 4 The OPERA Framework

The OPERA model is a four-step framework that can be used to analyse various aspects of the obligation to fulfil socio-economic rights. The rationale behind its development was due to the fact that existing frameworks have developed in isolation and in a fragmented way.[128] As the name suggests, the frameworks looks at "Outcomes, Policy Efforts and Resources to make an overall Assessment".[129] Unlike the SERF index which focuses on obligations of results, the OPERA framework looks at both obligations of conduct and of results.[130] Step 1 ("Outcomes") requires using indicators to collect data in order to measure levels of rights enjoyment.[131] Step 2 ("policy efforts") involves identifying legal and policy commitments, examining their content and implementation, and analysing the policy processes.[132] Step 3 ("resources") involves analysing planned and actual resource expenditure, resource generation and relevant policies.[133] Step 4 ("Assessment") requires identification of contextual factors that limit rights enjoyment, understanding the constraints that the government faces and determining compliance.[134] The Framework proposes a human rights-based analysis. Accordingly, it identifies in relation to each step, relevant human rights standards and principles, including various procedural rights that should be taken into account in monitoring the fulfilment of socio-economic rights as well as the tools and techniques to be used. A positive aspect of the OPERA framework is that it can be adapted to various contexts.

4 2 Methodologies that the Constitutional Court has Used

The Constitutional Court has used some of these methodologies explained in the preceding section, particularly indicators and benchmarks, budget and expenditure analysis and violations approach, in its enforcement of socio-economic rights. With regard to indicators and benchmarks, the Constitutional Court has called on the national government (as in *Mazibuko*), to clearly set targets it wishes to achieve in respect of socio-economic rights so that citizens are able "to monitor government's performance and to hold it accountable politically if the standard is not achieved" or is unreasonable.[135] The Court has used the

128 Center for Economic and Social Rights "Seminar: New Horizons in Economic and Social Rights Monitoring" http://cesr.org/article.php?id=1253 (accessed 2012-07-07).
129 Centre for Economic and Social Rights 1.
130 *Idem* 10.
131 *Idem* 11.
132 *Idem* 13.
133 *Idem* 17.
134 *Idem* 20.
135 *Mazibuko* parr 61, 70.

reasonableness standard in other cases as a benchmark against which government's performance is measured.[136]

On budget and expenditure analysis, while the CESCR has been, comparatively speaking, robust in its budget and expenditure analysis, the Constitutional Court has been cautious in undertaking budgetary analysis or scrutinising resource allocation (the same can be said for the African Commission). Though *Grootboom* did not concern resource constraints issues, the Court emphasised that financial and human resources must be made available for the implementation of measures aimed at the progressive realisation of socio-economic rights, to avoid the government's action being seen as unreasonable.[137] The Court added that the government is required to plan, budget and monitor the fulfilment of immediate needs and the management of crisis.[138] In *Soobramoney*, the Court avoided dealing with budgetary issues but it is clear in the Court's judgment that in the face of resource constraints, there must be clear criteria for regulating access to rights.[139] In *TAC* and *Khosa*, the Court engaged with and rejected the state's contention that it did not have the requisite resources.[140] In *Rail Commuters*,[141] the Court was of the view that an assertion of resource constraints would require careful consideration.[142] In *TAC*, the evidence was that provision of anti-retrovirals (ARVs) would save money, which the Court accepted. *Khosa*, on the other hand, was different in terms of a concrete examination of budgetary increases.

In relation to the violations approach, the Constitutional Court has identified violations of socio-economic rights and granted relief in individual cases. With regard to the first category of violations identified above, *Abahlali* is an example, where the Constitutional Court ruled against legislation that was contrary to the Constitution and housing legislative framework, as it undermined protections against arbitrary evictions. For the second category, *Bhe*[143] and *Gumede*[144] are illustrative examples of such violations in the South Africa jurisprudence. As for the

136 *Idem* parr 78-102; See also *Khosa* parr 44, 48-49, 53-57; *Grootboom* parr 39-45.
137 *Grootboom* par 39.
138 *Idem* par 68.
139 *Soobramoney* par 31.
140 *TAC* par 118 -120, 135; Khosa parr 58-67, 60, 62.
141 *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 4 BCLR 301 (CC) par 88 (positive duties imposed by the South African Transport Services Act 9 of 1989 to secure the safety of commuters).
142 The Court also considered budgetary allocations in the case of *Premier, Province of Mpumalanga, v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 BCLR 151 (CC), in which it set aside the provincial government's policy decision to terminate the payment of subsidies to certain schools and ordered that payments should continue for several.
143 *Bhe v Magistrate, Khayelisha* 2005 1 BCLR 1 (CC) parr 91-93, 241 (challenge of the African customary law principle of male primogeniture).
144 *Gumede v President of the Republic of South Africa* 2009 3 BCLR 243 (CC) parr 34, 35-36 (a challenge of legislation that recognised a husband as the

third category, the Constitutional Court, as observed above, has been reluctant to endorse minimum core obligations but has gone ahead to find the state to be in violation of its obligations by not providing the basic necessities of life such as alternative accommodation in the event of an eviction and social assistance to permanent residents.

Despite considering the above methodologies, the Court has not developed a comprehensive standard on progressive realisation. This has resulted in attempts by other institutions to look at existing methodologies with the goal of developing a methodology that would be suitable to the South African context.

4 3 Fleshing out Methodologies in the South African Context

It is evident from the methodological considerations above that a single methodology cannot be used to adequately assess compliance with progressive realisation. Also, the type of methodology used would be influenced by who is carrying out the assessment and the purpose of the assessment. As noted earlier in this article, the Constitutional Court (and subsequently the government) has focussed on a restrictive approach to progressive realisation that focuses on "access", paying little attention to "actual improvements in access"; hence, the need to properly understand progressive realisation and what to consider in assessing compliance with this obligation.

The SAHRC has used a violations approach in monitoring socio-economic rights, which Klaaren believes could be misconceived in the South African context.[145] He then called for a new model that emphasises the role of information[146] but fails to provide much to start with as regards the design, content and format of a new model. The SAHRC has been considering a model – progressive realisation and constitutional accountability model – for monitoring compliance with progressive realisation, which has three phases.[147] The first phase involves using key quantitative data to identify deprivations and disparities of outcome in respect of the particular right with reference to access, fulfilment, enjoyment and progressive realisation. The second phase is a determination of the reasons for the status of the right and the deprivations identified in the first phase. The third phase is two-fold: an assessment of the adequacy of policy efforts and an undertaking of legal interventions in respect of violations identified. The model seems to draw from the existing approaches as indicators and benchmarks,

family head, with ownership of and control over all family property in the family home).

145 Klaaren 550, 554.

146 *Idem* 554.

147 Jacobs "Demystifying the Progressive Realisation of Socio-Economic Rights in South Africa" (2009) 13-15. Paper Presented at the Public Seminar on Monitoring ESC Rights, Australian National University, 2009-10-19. http://acthra.anu.edu.au/PESCR/Publications/index.html (accessed 2012-06-04).

analysis of resource allocation and use, and identification of violations would be used. The legal intervention dimension is quite novel and its effectiveness could be enhanced if there is co-operation between the SAHRC and civil society organisations and human rights institutions in the implementation of this aspect of the third phase.

Recently, the Studies in Poverty and Inequality Institute (SPII) has proposed that progressive realisation, in the South African context, be measured along four dimensions – access, geography, adequacy and quality.[148] Though the four dimensions, as indicated by SPII, draw form a report of the SAHRC, it is also a restatement of key elements of rights that the CESCR has considered in assessing state's compliance with progressive realisation; some of which (such as access)[149] have also been considered by the Constitutional Court. SPII notes that the vision of transformation would be achieved if the four dimensions are taken together in assessing state compliance.[150] The proposed approach is still being developed, so does not provide much to enable one to undertake a proper analysis of its adequacy.

Notwithstanding this, if progressive realisation is to be effectively assessed in the South African context, one needs to go beyond accessibility, geography, adequacy and quality to look at other issues that have been highlighted in this article, including placing particular emphasis on assessing budgetary priorities in the light of human rights standards and international cooperation aid and its use, access to information and meaningful engagement in the provision of goods and services. Alternatively, an expansive understanding of these dimensions that allows for the inclusion of other aspects based on various contexts could be adopted.[151]

5 Conclusion

For decades now, there has been growing advocacy on the effective implementation and enforcement of socio-economic rights. These efforts are however undermined if there is ambiguity in relation to how the

148 Studies in Poverty and Inequality Institute *Measuring the Progressive Realisation of Socio-Economic Rights in South Africa* (2011) 22-25.

149 See *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2008 11 BCLR 1123 (CC) par 85, where the Court held that the content of the right to food comprises "availability" and "accessibility". Note that the case did not focus on the right to food *per se* as it was an appeal against a Supreme Court Appeal judgment concerning a proviso added to the definition of agricultural land in the Subdivision of Agriculture Land Act 70 of 1970.

150 Studies in Poverty and Inequality Institute (2011) 24-25.

151 A number of illustrative questions that can be considered are outlined in Chenwi "Monitoring the Progressive Realisation of Socio-Economic Rights: Lessons from the United Nations CESCR and the South African Constitutional Court" Research Paper written for Studies in Poverty and Inequality Institute (2010) 60-61 http://www.spii.org.za/agentfiles/434/file/Progressive%20realisation%20Research%20paper1.pdf (accessed 2012-07-07).

concept of progressive realisation should be understood and applied in socio-economic rights cases. This article has unpacked the concept of progressive realisation by first looking at the understanding of the concept in general and elaborating on three aspects stemming from that understanding. It is evident that a progressive realisation approach to socio-economic rights enforcement would add value to the concepts of "desperate need" and "reasonableness" developed by the South African Constitutional Court. Progressive realisation, however, goes further than desperate need as it places emphasis on improvements in access once those in desperate need have been granted access. If one takes *Mazibuko* for instance, if the Court had adopted a progressive realisation approach that is not restrictive, it would have not only focussed on the review of the relevant policies and the improvement of the policies but would have looked at the actual level of improvements of rights enjoyment; otherwise, the policies remain excellent in "paper" and not practice.

This article has also engaged with methodological considerations in assessing compliance with progressive realisation, which are useful in ascertaining whether sufficient steps have been taken to progressively realise socio-economic rights. Assessing compliance with progressive realisation is, however, a complex and demanding task, that even the courts, due to their often limited research capacity, would require assistance (through the placing of the relevant information before it) in terms of undertaking the assessment. The fact that there are many socio-economic rights with different dimensions and the relevant obligations of states have various dimensions adds to the complexity of such an exercise. Notwithstanding this, reviewing achievements and detecting failures and gaps, among others, could result in re-orienting state action when needed. For this to be done effectively, a comprehensive framework needs to be developed. The Constitutional Court would also have to take the bold step of going beyond measuring progressive realisation through, for instance access and constant review of policies, to actually develop the concept of appropriateness and adequacy over time. The Court also has to be more robust in its budget and expenditure analysis.

Acquisition of ownership inside virtual worlds*

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OPSOMMING

Verkryging van Eiendomsreg in Virtuele Wêrelde

Die artikel het ten doel om as kort inleiding te dien tot die manier waarop eiendom binne in 'n virtuele wêreld verkry kan word. Die Suid-Afrikaanse sakereg word as agtergrond gebruik om die nuwe veld van virtuele goederereg te bespreek en binne in die konteks van die reg in die regte wêreld te plaas. Ondersoek word ingestel om te bepaal of daar ooreenkomste is tussen die oordrag van eiendom in die regte en die virtuele wêrelde. In sommige gevalle blyk dit te wees dat eiendomsregte afgelei word deur middel van standaard kontraktuele bedinge wat deur die ontwikkelaar van 'n virtuele wêreld bepaal word. Soms is hierdie bloot gebruiksregte, maar in ander gevalle, en spesifiek binne-in virtuele wêrelde wat die regte wêreld simuleer, kan gebruikers eienaarskap verkry van hul virtuele goedere. Vanuit die voorbeelde is dit duidelik dat daar sterk ooreenkomste tussen eiendom in die regte en virtuele wêrelde is. Eiendom kan onder andere deur beide oorspronklike sowel as afgeleide wyses verkry kan word in die virtuele wêreld en eiendomsreg in 'n virtuele item kan onder andere gesedeer, verkoop of ge-erf word of selfs verlore gaan in 'n insolvente boedel.

1 Introduction

The field of virtual property[1] is still one that not many people are aware of.[2] Even if they have heard about it, their concept of it is often

* Paper presented at the International Property Law Conference 2010 hosted by the University of South Africa and held on 2010-10-27–29 in Pretoria.

1 For a concise introduction to the concept of virtual property see Erlank "Lecture: introduction to virtual property" 2009 *SSRN* available at http://ssrn.com/abstract=1491118 (accessed 2010-10-10); Erlank "Introducing property in virtual worlds" 2012 *Social Sciences Research Network (SSRN)* available at http://ssrn.com/abstract=2241030 (accessed 2012-10-31). See in general Fairfield "Virtual property" 2005 *Boston U LR* 1047 1102; Blazer "The five indicia of virtual property" 2006 *Pierce LR* 137 161; Deenihan "Leave those Orcs alone: property rights in virtual worlds" 2008 *SSRN* available at http://ssrn.com/abstract=1113402 (accessed 2009-05-22) 1 51; Lastowka & Hunter "The laws of the virtual worlds" 2004 *Calif LR* 1 74. For a more exhaustive discussion of how property inside virtual world functions in the real world legal system, see Erlank *Property in virtual worlds* (LLD dissertation 2012 Stell) available at http://ssrn.com/abstract=2216481 (accessed 2012-10-31).

2 This article is intended to be an exploratory and introductory article to the fields of virtual law, virtual property and virtual worlds. It is the first of a number of forthcoming articles dealing with both law and property regarding and inside of virtual worlds.

unformed, imprecise and mostly out-dated.[3] While virtual property includes well known intangibles like domain names and email addresses,[4] it also refers to property that only exists inside virtual worlds.[5] This type of virtual property is a common feature of modern multiplayer internet based virtual worlds.[6] The virtual property found in virtual worlds is usually created from computer code[7] that is implemented to fulfil the same function in the virtual world as it would in the real world.[8] For example, a virtual chair would be used to seat a virtual person.[9]

For the purpose of this article, the term virtual property will be used to refer to the objects of virtual property as found inside a virtual world.[10] These objects are the items that players encounter and use by means of interaction between themselves, their avatars[11] and the virtual world. One category of the objects of virtual property would refer to things, or rather movable (in)tangible virtual items.[12] Other categories include (amongst others) virtual immovable property or things like houses, castles and land. In certain virtual worlds there are even slaves that are

3 This is possibly due to the changing understanding of the virtual property concept and the constant development of the virtual world phenomenon.

4 See Van Erp "Servitudes: the borderline between contract and (virtual) property" in *Towards a unified system of land burdens* (eds Van Erp & Akkermans) (2006) 4; Fairfield 2005 *Boston U LR* 1047 1049 1055.

5 Fairfield 2005 *Boston U LR* 1047 1058 1064; Lastowka & Hunter 2004 *Calif LR* 1 29.

6 For a discussion about the interconnected and multiplayer elements of virtual worlds see Castronova "Virtual worlds: a first-hand account of market and society on the cyberian frontier" (2001) *No 618 CESifo Working Paper* available at http://papers.ssrn.com/abstract = 294828 (accessed 2009-05-20) 6; Blazer 2006 *Pierce LR* 145 146; Fairfield 2005 *Boston U LR* 1047 1050 1054.

7 Fairfield 2005 *Boston U LR* 1047 1049; Grimmelmann "Virtual worlds as comparative law" 2004 *NY Law Sch LR* 147 150. For a general discussion about code-as-law see: Lessig *Code and other laws of cyberspace* (1999) as well as Lessig *Code: and other laws of cyberspace, version 2.0* (2006).

8 Fairfield 2005 *Boston U LR* 1047 1049. See in general Erlank (2009).

9 This example can be enhanced by visualizing a virtual folding chair that is placed next to a virtual wrestling ring. This virtual chair would then be used by one virtual wrestler, to hit his opponent over the head. Hence form follows function.

10 As mentioned above the term "virtual property" has many other meanings as well. Examples of other objects of virtual property include uniform resource locators (URL's); domain names; email addresses; bank accounts; the player's account in a virtual world (ie the player's complete virtual world patrimony in that specific world); intellectual property interests held by both players and developers in the objects that they create, import and use in virtual worlds etc. See in general the discussion about various objects of virtual property Fairfield 2005 *Boston U LR* 1047 1049, 1052; Lastowka & Hunter 2004 *California LR* 1 29.

11 An avatar is the player's corporeal representation inside the virtual world, otherwise also known as the player's character. See Castronova (2001) 3.

12 These would include objects such as chairs, sneakers, clothing, cars and almost any other type of object that one would find as a virtual (in)tangible object to its real world counterpart. In order to appreciate the diversity of virtually tangible objects that are created, used, traded and sold in virtual

deemed to be the property of the player.[13] Even more challenging from a real world property perspective, is the fact that a player's avatar could also be defined as an object of a property right.[14]

Although there are various levels in which one can perceive virtual property,[15] the focus in this article will be on the intra-virtual world level. In other words, the cross-border transactions that occur between the real and virtual worlds will be ignored. This article will specifically not deal with the player's virtual world account as an object of virtual property. Acquisition of ownership inside the boundaries of the virtual world will be illustrated by a number of virtual world examples. Because of these exclusions, a number of assumptions will be necessary.[16] These assumptions are that a player can have possession of a thing in a virtual world and that the concept of ownership is also taken for granted inside the virtual world.

worlds, see the online marketplace in *Second Life* Linden Lab "Second Life marketplace" 2011 *Second Life Marketplace* available at https://marketplace.secondlife.com (accessed 2011-10-10).

13 For example *Second Life* contains an area called Calana Mount where players can (amongst the usual available occupations) act as slaves or slavers: Hsu "Virtual world, real college class" 2008 *Las Vegas Sun* at http://www.lasvegassun.com/news/2008/apr/07/virtual-world-real-college-class/ (accessed 2011-10-10). There are also players participating as willing sex-slaves for other player's in *Second Life*: Wagner "Sex in Second Life" 2007 *InformationWeek* at http://www.informationweek.com/news/199701944 (accessed 2011-10-10).

14 See Lastowka & Hunter 2004 *California LR* 1 51-71 where they deal with the issue of recognition of personal rights of avatars as cyborgs in both the virtual and real worlds.

15 Such as intra-virtual world, extra-virtual world or cross-border between the virtual and real worlds.

16 These assumptions form the base of a number of heated debates in the virtual property law society. The relevance of the assumptions can be seen from this brief example. At the moment virtual world developers are actively trying to prevent the vesting of any real world property rights in players. They do this by means of making access to the virtual worlds dependant on the acceptance of an End User Licence Agreement (EULA) stating that a player only acquires a limited licence to interact with the virtual world, and that the licence is revocable at any time, for any or no reasons at all. Additionally to this, the contractual agreement also invariable contains strong clauses that explicitly state that a player does not acquire any ownership or property rights in anything inside the virtual world. In spite of this, players are actively ignoring these stipulations and using both their accounts, as well as the objects that they possess via their avatars inside the virtual worlds as objects of property that they sell, barter and trade with in the real world. This has led to a multi-billion dollar trade in virtual property that takes place in spite of the developer's contractual stipulations to the contrary. For more on this topic see Castronova (2001). Also see Lawrence "It really is just a game: the impracticability of common law property rights in virtual property" 2008 *Washburn LJ* 505 549; Nelson "The virtual property problem" 2009 *SSRN* available at http://ssrn.com/abstract=1469299 (accessed 2009-08-11) 1 33.

The aim of this paper is to take an introductory look at acquisition of ownership inside a virtual world. A brief summary of the methods of acquisition of property in South African property law will provide the background against which to discuss the new field of virtual property and give it some real world context. In most instances ownership will be derived from the terms of a contract, where a developer gives a user a right to use or own an object of virtual property.[17] Sometimes this is just a right of use,[18] but at other times, and specifically in virtual worlds that emulate the real-world,[19] users are able to acquire ownership in these items.[20] There are also a number of other methods of acquisition that closely resemble those found in the real world. Ownership in a virtual

17 The issue of the allocation and regulation of virtual property rights falls outside the scope of this article. For a discussion about the intellectual property and real world contractual implications of property in virtual worlds see Fairfield 2005 *Boston U LR* 1047 1049; Deenihan 9; Adrian "Intellectual property or intangible chattel?" 2006 *J Int Comm Law & Tech* 52 61. See in general: Chheda "Intellectual property implications in a virtual reality environment" 2005 *The John Marshall R IP Law* 483 508; Dibbell "Owned! Intellectual property in the age of dupers, gold farmers, eBayers, and other enemies of the virtual state" 2003 available at http://www.nyls.edu/docs/dibbell.pdf (accessed 2008-03-12); Eriksson & Grill "Who owns my avatar? – Rights in virtual property" 2005 *Proceedings of DiGRA 2005 Conference: Changing Views – Worlds in Play* available at http://www.digra.org/dl/db/06276.23429.pdf (accessed 2009-10-02); Kunze "Regulating virtual worlds optimally: *the model end user license agreement"* 2008 *North Western J Tech & IP* 101 118; Miller "Determining ownership in virtual worlds: copyright and licence agreements" 22 *Rev Litig* 435 471; Reuveni "On virtual worlds: copyright and contract law at the dawn of the virtual age" 2007 *Indiana LR* 261 308; Westbrook "Owned: finding a place for virtual world property rights" 2006 *Michigan State LR* 779 812.

18 For example, *World of Warcraft's (WoW)* EULA states that "(t)his software is licensed, not sold. By installing, copying or otherwise using the game (defined below), you agree to be bound by the terms of this agreement." See Blizzard "World of Warcraft – End User License Agreement" 2009 *World of Warcraft* available at http://www.worldofwarcraft.com/legal/eula.html (accessed 2009-11-04).

19 As an example, one of the private islands in *Second Life* is called "Brigadoon." This is a safe, virtual environment where people with Asperger's syndrome and their care-givers can interact. See Silverstein "A world where anything is possible" 2005 *abc NEWS* available at http://abcnews.go.com/Technology/FutureTech/story?id = 1019818 (accessed 2009-12-01); Fairfield 2005 *Boston U LR* 1047 1049 nn 51, 52.

20 For example in the virtual world of *Second Life* ownership of land is an essential part of the gameplay. For an illustration of how this works see the discussion about estates versus private regions in *Second Life* where Linden Labs (the developer of *Second Life*) describes an estate as follows: "An estate is a term for a group of one or more Private Regions that belong to one Resident. See Linden Lab "Private regions: about land" 2011 *Second Life English Knowledge Base* available at http://community.secondlife.com/t5/English-Knowledge-Base/Private-Regions/ta-p/700133 (accessed 2011-10-12).

item can be ceded, sold, inherited or lost in an insolvent estate.[21] It can even be acquired in an original form.[22]

The relevance of this field of property law becomes apparent when one realises that virtual property ownership has far-reaching consequences from both an economic and social viewpoint.[23] Because of this importance of virtual property from an economic perspective,[24] it follows that whoever has ownership[25] of these virtual assets are able to exert control over and derive financial interest from them.[26] Due to this fact, knowledge of how ownership in virtual property can be acquired and what the corresponding rights should be, quickly become relevant to the practice of the law of property.

2 Acquisition of Real World Property

Before investigating the ways in which virtual property is most often acquired, it would be good to take a brief look at the ways in which one is able to obtain ownership of things in South African private law. This

21 For a discussion about the problems associated with ownership of digital information and virtual property after someone's death see: Miller "Virtual inheritance" 2008 *Economics of Virtual Worlds* available at http://economicsofvirtualworlds.blogspot.com/2008/09/virtual-inheritance.html (accessed 2011-10-20); Cha "After death, a struggle for their digital memories" 2005 *Washingtonpost.com* available at http://www.washingtonpost.com/wp-dyn/articles/A58836-2005Feb2.html (accessed 2011-10-19); Staff Writer "Digital privacy after death – What will happen to your online profile when you're gone?" *lifeinsurancefinder.com.au* available at http://www.lifeinsurancefinder.com.au/infographics/what-happens-online-when-you-die/ (accessed 2011-10-19).

22 This is discussed in more detail below.

23 See in general Lastowka & Hunter 2004 *California LR* 1 74.

24 This issue has been discussed quite extensively in the literature about virtual property. See in general: Castronova "On virtual economies" 2003 *Int J Comp Gaming Res* available at http://www.gamestudies.org/0302/castronova/ (accessed 2009-05-22). See also: Castronova "Real products in imaginary worlds" 2005 *Harv Bus R* 20 22; Castronova "The right to play" 2004 *NY Law Sch LR* 185 210; Castronova "Virtual world economy: it's Namibia, basically" *TerraNova* 2004 available at http://www.terranova.blogs.com/terra_nova/2004/08/virtual_world_e.html (accessed 2008-08-24); Castronova (2001) 40; Lastowka & Hunter 2004 *California LR* 1 9; Grimmelmann 2004 *NY Law Sch LR* 147 149; Pollitzer "Serious business: when virtual items gain real world value" 2007 *SSRN* available at http://ssrn.com/abstract = 1090048 (accessed 2009-10-10) 1 51.

25 Vacca discusses two models of ownership used in virtual worlds, the first refers to the so-called traditional model of ownership where the developer of a virtual world automatically becomes or stays the owner of all property inside the virtual world. The second model he calls "user-retained ownership" which leaves ownership of user-created content in the hands of the player and not the developer. See: Vacca "Viewing virtual property ownership through the lens of innovation" 2008 *Tenn LR* 42 44.

26 This correlates with the phenomenon that most of the largest virtual worlds that are commercially run tend to follow the model of ownership where the developer retains all ownership inside the virtual world. See in general Vacca 2008 *Tenn LR* 42 44.

will provide a real world frame of reference when discussing acquisition of ownership inside a virtual world. In the real world, acquisition of ownership is usually divided into two broad categories, being either original or derivative. The main difference between the two relate to the question of whether the ownership is acquired independently or in the alternative, derived from and dependent on the ownership of a predecessor.[27] Hence, original acquisition of ownership is usually said to occur when there was no predecessor,[28] and derivative acquisition takes place when ownership is derived from a predecessor. Original acquisition is the result of a unilateral act and a new right is created in respect of the property being acquired.[29] Derivative acquisition on the other hand, follows after a bilateral transaction requiring the co-operation of the predecessor in title.[30]

Some of the more prominent examples[31] of original acquisition of ownership (with similar counterparts in virtual worlds) are occupation; treasure trove; accession; specification; acquisition of fruits; expropriation; forfeiture to the state and appropriation of minerals.[32]

Examples of derivative acquisition of ownership[33] (with similar counterparts in the virtual worlds) are delivery[34] (in the case of movables) and registration in the case of immovables.[35]

3 Acquisition of Virtual Property

3 1 Introduction

In a virtual world there is no meaningful distinction between software and law. What the software does not allow, is impossible.[36] This leads to

27 Van der Merwe & De Waal *The law of things and servitudes* (1993) 116; Badenhorst, Pienaar & Mostert *Silberberg & Schoeman's The Law of Property* (2006) 71.

28 This is not always the case. An example of an exclusion being the case of expropriation when the ownership is acquired free from the characteristics, obligations and benefits of the right of a predecessor: Van der Merwe & De Waal 116.

29 Badenhorst, Pienaar & Mostert 71.

30 Van der Merwe & De Waal 116; Badenhorst, Pienaar & Mostert 72.

31 Van der Merwe & De Waal 116.

32 For a detailed discussion of original acquisition in South African Law see Badenhorst, Pienaar & Mostert *Silberberg & Schoeman's* 137, 174. Of all of these examples, the most important in virtual worlds is occupation.

33 Van der Merwe & De Waal 148.

34 Van der Merwe & De Waal 156. For a detailed discussion of transfer (delivery) as a mode of derivative acquisition of property in South African Law see: Badenhorst, Pienaar & Mostert 175, 200.

35 Van der Merwe & De Waal 165. For a detailed discussion of registration of land as a mode of derivative acquisition of property in South African Law see Badenhorst, Pienaar & Mostert 201, 239.

36 This is if the virtual law is derived from the computer code. It is also possible that players create legal norms between themselves that are not designed or enforced by the code-based legal norms. See Grimmelmann 2004 *NY Law*

an area of law in virtual worlds where "there is no room for mediation because any 'legal' mediation embodied in the software immediately becomes part of the 'natural' world."[37] This means that a player's property rights are guaranteed by the programming. As the "owner" of a virtual sword, an avatar is guaranteed that the rights that he or she has in the sword would be protected and enforced against any other player by means of the game-code.[38] While the player "owns" the sword, no other player can interfere with his right, or even make use of the sword. However, as in real life, no property rights are totally absolute or totally exclusionary in a virtual world. A player's property rights will be guaranteed to be protected only insofar as the software allows for it.[39] For example, in the virtual world *Ultima Online*, one of the features is that players are enabled by the software and game-design to "steal" from one another.[40] In other words in such virtual worlds the software explicitly makes allowances for the action of lawfully "stealing" the property of another player.

3 2 The Concept of Virtual World Ownership

The concept of "ownership" inside a virtual world is a problematic one and it is easier (and probably more correct) to describe players' property rights towards the things that they "own" in virtual worlds as being possessory.[41] The reason for this is that the concept of ownership is normally inferred from the factual question of possession. Because a player is not enabled by the game's code to possess an item "belonging" to another player, the mere fact of possession equates to ownership inside the virtual world. In many virtual worlds property rights attach to a holder of an object for as long as the item is carried around by the

Sch LR 147 150, 154; Edelmann "Framing virtual law" 2005 *Proceedings of DiGRA 2005 Conference: Changing Views – Worlds in Play* availbale at http://www.digra.org:8080/Plone/dl/db/06278.45351.pdf (accessed 2011-08-08) 5. See in general Lessig (1999).

37 Grimmelmann 2004 *NY Law Sch LR* 147 150. See also: Jankowich "Property and democracy in virtual worlds" 2005 *Boston U J Sci Tech* 177; Pollitzer 20; Lessig (2006); Lessig (1999).

38 Grimmelmann 2004 *NY Law Sch LR* 147 refers to this attribute of the property rights as "absolute". I would rather describe it as being automatically exclusionary.

39 Lessig "The law of the horse: what cyberlaw might teach" 1999 *Harv LR* 522, 531. See in general Lessig (1999).

40 Grimmelmann 2004 *NY Law Sch LR* 147 150 n 11; Lastowka & Hunter "Virtual crimes" 2004 *NY Law Sch LR* 309. Certain virtual worlds even include the class of "thief" as one of the types of avatar that a player can choose to create. For an in depth discussion of the "thief" class and attributes relating to thievery in some other classes like "rogues", "swashbucklers" and "assassins", see Forum Contributors "Thief-classes in MMOs" 2008 *The Pub at MMORPG.COM* available at http://www.mmorpg.com/discussion2.cfm/post/1895730#1895730 (accessed 2011-08-13).

41 Grimmelmann 2004 *NY Law Sch LR* 147 151.

avatar.[42] As soon as the avatar drops[43] the object, it constitutes abandonment and the item immediately becomes *res derelictae*. The next person to pick up the item will then become the new owner.[44] The example mentioned here is a very simplistic use of the ownership concept in a virtual world and many worlds are far more sophisticated in their approach to the ownership concept as well as in the implementation of it via code. This is due to the pressure on developers to implement more detailed code-based property rules and not only a simple "possession-is-all-rule".[45] An example of a more complex code-based property system may be found in the area of virtual homeownership.[46] The default rule in virtual worlds is that all players have access to all areas at all times. The next more developed rule is to allow only the owner of a house into his virtual home, which is counter-intuitive if a home-owner wishes to invite guests without giving them a full run of the house. To solve this dilemma, developers have created a nuanced system of levels of exclusionary capacity that they build into the code-based property system. Grimmelmann refers to this as a "virtual fee simple"[47] with a new estate carved out called the "right to visit".[48] This so-called "right of visit" is perpetual, non-transferable and subject to revocation by the owner of the house at any stage.

This right to visit has a measurable effect on the ability of both owner and visitor to interact with their own property as well as the property of others. In the example above about ownership being lost by the dropping of an item, the rules of the acquisition of the object in question was clear. However, if one was to integrate that example into the context of a virtual home in a virtual world, a number of problems arise. One such problem (and a main reason why players would wish to own a virtual home), would be to have a secure environment where they could store their collected virtual items without losing their property rights in it.[49] Apart

42 This is often referred to as "equipping" an item. See: Sony "EverQuest II Manual" *EverQuest II* available at http://everquest2.com/manual/EQII_Manual.pdf (2010-11-03) 16.

43 Or "unequips" the item.

44 Grimmelmann 2004 *NY Law Sch LR* 147 151. For example, Ultima Online's Playguide describes the procedure and consequences of dropping items as follows: "You can remove items from your inventory and drop them almost anywhere on the screen near your character. If, for some reason, the item can't be dropped in the location you've selected, either an error noise will sound or the item will return to your inventory. A dropped item will stay where it is until it deteriorates naturally or someone picks it up. Dropped items don't tend to stay around for long." Mythic "Ultima Online playguide: environment manipulation" (2010) *UO Herald* available at http://www.uoherald.com/node/115 (accessed 2010-11-03).

45 Grimmelmann 2004 *NY Law Sch LR* 147 151.

46 *Ibid*. For an example of how a developer deals with this issue, see: Sony "EverQuest II Manual" *EverQuest II* available at http://everquest2.com/manual /EQII_Manual.pdf (accessed 2010-11-03) 26.

47 Making use of feudal estate terminology.

48 Grimmelmann 2004 *NY Law Sch LR* 147 152.

49 Even if items are not taken by other players, they are subject to "decay" as is explained in the Ultima Online Playguide. "In Ultima Online, items that are

from this, homeowners would also like to have guests over for functions and other social visits. However, what would the consequences be of inviting visitors to a player's house? Would an item dropped by a guest become the property of the homeowner, or would any guest that picks up or uses an item in the house become the new owner of that item? It is clear that in this case the general rule of possession equating virtual ownership is not satisfactory. In order to solve this problem, the nuanced system of exclusion mentioned above incorporates a number of new options. A homeowner is able to choose between certain categories of access that he or she wishes to assign to a visitor. Depending on the category that a homeowner assigns to a visitor, that visitor will not only be able to access certain areas of the home, but the visitor's interaction with the items in the home will also be defined. For example, one visitor might have access to enter the house, but not to pick anything up, while another visitor might be given certain permissions to be able to carry off any items in the home.[50]

3 3 Original Acquisition Inside Virtual Worlds

From the discussion above it is clear that the most important form of acquisition of virtual property is derived from having possession of a virtual thing. How then does a player acquire possession and/or ownership of an object of virtual property? As mentioned above, the methods of acquisition would usually depend on the allowances made for transfer and possession by the code and by extension the laws of the virtual world itself.[51] Similarly to the real world, original acquisition is usually achieved by means of occupation of property (*occupatio*). In the virtual world occupation of property frequently happens by means of capture of wild animals or monsters.[52]

In most virtual worlds the best way to increase one's virtual patrimony is by occupation, or as it is commonly referred to in virtual worlds, as "the taking of wild monsters".[53] The capture and killing of wild animals or monsters inside virtual worlds often represent the best way of

placed on the ground (i.e. not locked down or secured in a house, or placed in your bank box) can decay. This means that after a period of time, the item will disappear from the game. There's no way to retrieve items that have decayed. To keep your items safe from decaying, you need to either lock them down or place them in a secure container in a house that you own, co-own, or are a friend of, or store them away in your bank box." See Ultima Online Playguide "Houses: housing security" 2010 *www.uoherald.com* available at http://www.uoherald.com /node/216 (accessed 2010-10-10).

50 The level of complexity with regard to rules of access can become extremely complex. For a good example of how such rules work, see Ultima Online Playguide "Houses: housing security" 2010 *www.uoherald.com* available at http://www.uoherald.com/node/216 (accessed 2010-10-10) and also Dark Age of Camelot Manual "Chapter 4: accessibility" 2010 *www.camelot herald.com* available at http://www.camelotherald.com/housing/manual/chapter4.php (accessed 2010-10-10).

51 See in general: Lessig (1999).

52 Grimmelmann 2004 *NY Law Sch LR* 147 154.

53 *Idem*.

acquiring treasure or "loot". Although it is legally significant to be the player who slays a monster, the possession of the monster's corpse is only of legal significance for a short time because it is not the monster's corpse that is important, but rather the perceived value of the objects that these monsters drop when they are killed.[54] Grimmelman notes that

> [i]n the large crop of quasi-medieval games, with their strongly fantastic overtones, the capture of wild animals is nothing less than the principal source of wealth. The single most profitable 'industry' is hunting monsters and looting their corpses.[55]

In the case of capture and killing of the monsters, the property rules contained in the game-code are highly worked out, but do not provide for all the available circumstances that presents itself in the game. For example, a game like *EverQuest* automatically awards experience points[56] to the player who kills a monster. If a group of players work together to slay a monster, the experience points are distributed by the game amongst the players, usually in proportion to their contribution to the killing. However, the loot that the monster drops when killed is not automatically assigned to any specific players and becomes *res nullius* as soon as it is dropped.[57] The first player to pick up the treasure then becomes the owner of it. Although the game-code would seem to create certainty as to the ownership of the picked-up treasure, the player community has developed a set a normatively binding rules relating to who is allowed the pick up the treasure.[58] Players will often deviate from the code-based rules to follow rules based on their own social understandings.[59]

Apart from the capture and killing of wild beasts as a method of obtaining virtual property, certain other interesting methods are available to the player. Mining and farming are given as examples of how

54 See the discussion about the automatic awarding of experience points below.

55 Grimmelmann 2004 *NY Law Sch LR* 147 155.

56 These experience points are valuable because they contribute to the development of the player's avatar, from a vulnerable inexperienced weakling in the beginning of the game, to a superior character with enhanced abilities at the higher levels of the game. One of the aims of most virtual worlds is that the player's avatar should be able to proceed to the next level (called levelling up). This is achieved by the acquisition of property and experience points.

57 DaCunha "Virtual property, real concerns" 2010 *Akron IP J* 40. For a discussion about how this allocation of experience points function and their part in the virtual world economy see: Malone "Dragon kill points: the economics of power gamers" 2007 *Games and Culture* forthcoming available at http://ssrn.com/abstract = 1008035 (accessed 2009-05-18).

58 If one player picks up the treasure that appears from another player's efforts, it is considered as "kill stealing". Even though the game-code would not penalise this action, the other players will take action against a perpetrator. For more info see Grimmelmann 2004 *NY Law Sch LR* 147 155-156.

59 *Ibid* 156.

things are taken raw out of "nature" and then transferred into useful and saleable things. Take this account of one player's labours for example:

> In addition to the four hours of clicking, Stolle had had to come up with the money for the deed. To get the money, he had to sell his old house. To get that house in the first place, he had to spend hours crafting virtual swords and plate mail to sell to a steady clientele of about three dozen fellow players. To attract and keep that clientele, he had to bring Nils Hansen's blacksmithing skills up to Grandmaster. To reach that level, Stolle spent six months doing nothing but smithing: He clicked on hillsides to mine ore, headed to a forge to click the ore into ingots, clicked again to turn the ingots into weapons and armor, and then headed back to the hills to start all over again, each time raising Nils' skill level some tiny fraction of a percentage point, inching him closer to the distant goal of 100 points and the illustrious title of Grandmaster Blacksmith.[60]

Certain games also provide mechanisms for combining already existing things into new things (accession),[61] and others have mechanisms for creating new things from a code level.[62] Apart from ownership of the virtual thing, in such a case the creator is sometimes given intellectual property rights in the newly created thing. This is such a prominent aspect of the virtual world *Second Life*, that there is even an intellectual property office in *Second Life*.[63]

3 4 Derivative Acquisition Inside Virtual Worlds

Apart from being able to pick up or take an item that is lying around as *res derelictae*, there is a thriving economy that operates inside most virtual worlds.[64] Players can make use of auction houses,[65] bazaars and other in-game trading facilities like shops, taverns and town commons to transfer property – and consequently ownership.[66] The benefit of using the in-game provided mechanisms for transferring property is that the code usually provides a secure transaction facility. The property is kept

60 Dibbell "The unreal estate boom: the 79th richest nation on earth doesn't exist" 2003 *Wired.com* available at http://www.wired.com/wired/archive/11.01/gaming_pr.html (accessed 2010-10-10).

61 For example, in *Ultima Online* players are sometimes required to combine items to produce new items. See Mythic "Ultima Online playguide: environment manipulation" (2010) *UO Herald* available at http://www.uoherald.com/node/115 (accessed 2010-11-03).

62 This is a prominent feature of *Second Life*. See in general Ondrejka "Escaping the gilded cage: user created content and building the metaverse" 2004 *NY Law Sch LR* 84.

63 Duranske "SLPTO offers Second Life content creators suite of intellectual property protection tools" 2007 available at http://www.virtuallyblind.com (accessed 2008-03-12)

64 Deenihan 5; Castronova 2003 *Int J Comp Gaming Res*.

65 Deenihan 5.

66 See for example the trading options employed in *World of Warcraft*: Blizzard "World of Warcraft game guide: trading" 2010 *World of Warcraft* available at http://www.worldofwarcraft.com/info/basics /trading.html (accessed 2010-10-10). Also see the trading and selling methods employed in *EverQuest*: Sony "EverQuest II Manual" *EverQuest II* available at http://everquest2.com/manual /EQII_Manual.pdf (accessed 2010-11-03) 22 24.

by the game-code and only transferred to the buyer as and when funds are transferred. An example of this is found in the World of Warcraft game-guide:

> Select a character, and then right-click on its portrait/name. You can also do this for player portraits. This will launch the trade screen with another player. Place your items in the top portion of the screen. Once you are satisfied with the other player's trade, hit "Trade" button. To trade money, open up your backpack and hold down shift while clicking on the money amount. You can then select the amount of money and drag it over to the trade window. You can also drag an item or money from your bags and drop it on another player to initiate a trade window. Make sure the other player gives the correct type of coin in the trade. When you have a trade window open, you can right-click an item to move it to the trade window.[67]

Similar to the real world, immovable property such as houses and virtual land are also tradable in virtual worlds and ownership of virtual real estate frequently changes hands. Most virtual worlds that provide for individual ownership of virtual immovable property also provide some type of registration system that emulates a real world deeds registry.[68] Take for example this extract from the Dark Age of Camelot Manual:

> Please note that only Personal Homes can be sold, not Guild homes. Should you decide to sell your home to a fellow player, there are a few steps to follow. The first thing you need to do is to get the title to your home. You can purchase the house title to your home in the housing market area from the deed NPC. Once you have the house title, it works just like any other item transaction. Hand the house title to the player you wish to sell it to, decide on the price, and then both of you hit accept. You can only sell a house to someone who doesn't already own a home. Once you have the house title, it works just like any other item transaction. You must stand on the lot where the house is [, t]hen hand the house title to the player you wish to sell it to[.] Decide on the price[, t]hen both of you hit accept[.] Please note: you can only sell a house to someone who doesn't already own a home.[69]

The example above mentions that the house title is transferred from player to player. This might look like a normal "physical" transfer of a document, but it must be noted that the game-code arbitrates the transaction and immediately records the details of the transaction as well

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67 Blizzard "World of Warcraft game guide: trading with another player" 2010 *World of Warcraft* available at http://www.worldofwarcraft.com/info/basics/trading.html (accessed 2010-10-10). A similar function exists in EverQuest. See: Sony "EverQuest II Manual" *EverQuest II* at http://everquest2.com/manual /EQII_Manual.pdf (accessed 2010-11-03) 23 24.

68 See for example the mechanism facilitated by the game-code in Ultima Online: Mythic "Ultima Online Playguide: houses: selling your house to another player" (2010) *UO Herald* available at http://www.uoherald.com/node/213 (accessed 2010-11-03).

69 Dark Age of Camelot manual "Chapter 3: maintenance and management: selling your home" 2010 *www.camelotherald.com* available at http://www.camelotherald.com/housing/manual/chapter3.php#5 (accessed 2010-10-10).

as that of the new owner in a central database.[70] Therefore, it would seem as if derivative acquisition of property occurs in much the same way in the virtual world as in the real one.

4 Conclusion

In this paper I discussed a number of ways in which ownership of virtual property can be acquired inside of a virtual world and illustrated these with a number of examples from virtual worlds. In order to understand the procedure of acquisition of virtual property I briefly discussed how virtual world property based systems operate when they deal with the concept of ownership. The purpose of the paper was to take a brief exploratory look at virtual world acquisition of ownership. This was done against the background of South African property law. It is clear that there are similarities between acquisition of ownership in the real world and that of acquisition inside of a virtual world. Even from the limited examples discussed above it has transpired that one can obtain ownership of property inside of a virtual world via either original or derivative means. The most prominent method of obtaining original acquisition of virtual property is by occupation of a thing that is *res nullius*, while the most prominent method of obtaining derivate acquisition is through transfer of ownership by means of delivery.

70 See Mythic "Ultima Online Playguide: houses: selling your house to another player" (2010) *UO Herald* available at http://www.uoherald.com/node/213 (accessed 2010-11-03).

Let false light (publicity) shine forth in South African law

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OPSOMMING

Laat Valse Lig (Privaatheidskending) Voortskyn in die Suid-Afrikaanse Reg

Die reg aangaande privaatheidskending het die afgelope aantal jare drastiese ontwikkeling ondergaan in alle opsigte, behalwe met betrekking tot vals lig publikasie. Die onlangse saak van *Le Roux v Dey* 2011 3 SA 274 (CC) het egter 'n hewige debat ontketen oor die vraag of 'n gemanipuleerde foto wat 'n skoolhoof en adjunk-skoolhoof in 'n seksueel-suggestiewe posisie uitbeeld, sou neerkom op laster. Die Konstitusionele Hof het in 'n meerderheidsuitspraak bevind dat dit inderdaad lasterlik was. Twee aparte minderheidsuitsprake het egter bevind dat die foto nóg belasterend was, nóg die menswaardigheid van die betrokke individue geskend het. Die standpunte van die minderheid was hoofsaaklik gegrond op omsigtigheid om in stryd met artikel 9 van die Grondwet, wat diskriminasie op grond van seksuele oriëntasie verbied, op te tree. Meeste van die kritiek wat op die meerderheidsuitspraak gelewer is, deel hierdie sentiment. Dit is glad nie vergesog nie dat die howe uiteindelik in die toekoms kan weier om hulp te verleen waar moontlike skending van artikel 9 ter sprake mag kom. Dit laat egter die vraag ontstaan of die tyd nie ryp is om die reg aangaande vals lig privaatheidskending te ontwikkel nie, om in sodanige gevalle inderdaad 'n remedie te verleen.

1 Introduction

A common law right to privacy under the *actio iniuriarum* has been recognised in South Africa as an independent right for many years. It was first recognised in the case of *O'Keeffe v Argus Printing and Publishing Co Ltd*,[1] and it is now accorded protection in section 14 of the Constitution.[2] Though privacy is protected under *dignitas*, it is regarded as a separate right from dignity, as the Constitution specifically protects dignity in section 10.[3] In common law, there are four forms of invasion of privacy: (1) intrusions; (2) publication of private facts; (3) appropriation; and (4) placing someone in a false light.[4] Intrusions and

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1 1954 3 SA 244 C. See also Neethling, Potgieter & Visser *Neethling's Law of Personality* (2004) 217.

2 Constitution of the Republic of South Africa, 1996. See also McQuoid-Mason "Invasion of privacy: common law v constitutional delict – does it make a difference?" 2000 *Acta Juridica* 227 227-228.

3 See also McQuoid-Mason 2000 *Acta Juridica* 227 229; Neethling *et al* 218-219.

4 McQuoid-Mason 2000 *Acta Juridica* 227 229-231.

publication of private facts are common forms of invasion of privacy in South Africa, whereas appropriation has only gained popularity in recent years.[5] On the other hand, the false light form of invasion of privacy has remained under-developed. This article only considers whether there is a place for the law of false light invasion of privacy in South Africa, and hence its development in the light of *Le Roux v Dey*.[6] The article commences by considering the general nature of an action for false light privacy under South African Law and the law of the United States of America (US). Before concluding, the article considers why protection of privacy through an action for false light may be ideal for South Africa.

2 The Nature of False Light

Generally, false light action for invasion of privacy can be defined as a liability for spreading information about the plaintiff that is false and offensive.[7] It may also refer to the making of statements that create unreasonable and highly-objectionable publicity, by attributing to the plaintiff characteristics, conduct or beliefs that are false – such that the defendant presented these statements to the public.[8] Examples include an engaged or married nurse "needing" a boyfriend,[9] publishing a photograph of a couple in an article critical of love at first sight,[10] or the police keeping a photo of a man in their "rouges" gallery' despite his acquittal for charges of committing a crime.[11] This is distinguishable from, for example, where a court held that publication of a book on the life and work of a photographer did not violate the rights of a group of Navajo whose photos appeared in the book,[12] and where publishing a photo of a student with a history of drug abuse next to a report on drug use on local university campuses was held not to be unlawful.[13]

As with the violation of a person's right to identity, under false light the violation lies in the publication or use of attributes of a person without their permission in a way which cannot be reconciled with the true image

5 *Grütter v Lombard* [2007] ZASCA 2; *Kumalo v Cycle Lab (Pty) Ltd* [2011] ZAGPJHC 56. In the two cases, the SCA and High Court recognised the right of identity as worthy of protection. The plaintiff needs to prove that appropriation of his name by another for personal advantage has occurred. He must satisfy three requisites to succeed with action: a factual violation of one's identity that was wrongful and intentional.

6 *Le Roux v Dey* 2011 3 SA 274 (CC).

7 McQuoid-Mason 2000 *Acta Juridica* 227 229-231.

8 McQuoid-Mason 2000 *Acta Juridica* 227 229-231.

9 *Kidson v South African Associated Newspapers Ltd* 1957 3 SA 461 (W).

10 *Gill v Curtis Publishing Co* 239 P 2d 630.

11 *Mavity v Tyndall* 66 NE 2d 755.

12 *Banally v Hundred Arrows Press Inc* 614 F Supp 969.

13 *Martinez v Democrat-Herald Publishing Co* 669 P 2d 818; Cornelius "Image rights" in *Research Handbook on International Sports Law* (eds Nafziger & Ross) (2011) 506.

of that person.[14] Misrepresentation concerning the individual is also inherent in this type of infringement.[15]

2 1 False Light in South Africa

Invasion of privacy, in the form of false light, has lagged behind in South Africa. *Kidson v South African Associated Newspapers Ltd*[16] is the only case law authority that is widely quoted as supporting the proposition that an action for invasion of privacy, in the form of false light, exists under South African law. It seems to be the only known case that deals with false light in South Africa. The case is therefore examined briefly below. The *Kidson*[17] case dealt with the publication of pictures of three female nurses under the heading "97 Lonely Nurses Want Boyfriends".[18] One of the three nurses in the pictures, Calitz, was engaged to be married and subsequently got married before the article was published.[19] Kuper J had to determine whether the article published "constituted an intentional infringement of the right of [Calitz] to personal privacy and was an unjustified aggression upon her dignity".[20] While Kuper sought to decide the matter in the light of invasion of privacy, he does not seem to have separated privacy from dignity. He held:

> I have come to the conclusion that the publication of the alleged desire to meet persons of the opposite sex (and this was stressed in the headlines) because she was lonely when off duty, was an insult or *contumelia* to the young married plaintiff. It would not only cause her embarrassment, but the happiness of her married life would be thrown into doubt.

What is apparent from this quotation is that there was very little distinction drawn by the court between the two causes of action. This is understandable, as this area of law was at its developmental stage. However, it is now settled that invasion of privacy is distinct from *iniuria* (impairment of dignity) and that *contumelia* or insult is not a requirement for invasion of privacy.[21] Clearly, *contumelia* or insult should not be a requisite for invasion of privacy given that only natural persons can feel insulted.[22] Nevertheless, the *Kidson* case – which is largely associated with invasion of privacy – was decided on the basis of *iniuria*.[23] I submit that the only inference linking it to placing someone in a false light in this case, are the facts of the case and not the reasoning of the court. It was implied that Calitz was "lonely and wanted a boyfriend". This was false, as Calitz was engaged at the time of the interview and a married person at the time of publication of the picture and the story. However, from the

14 Cornelius 506.
15 *Ibid.*
16 *Kidson v South African Associated Newspapers Ltd* 1957 3 SA 461 (W).
17 *Ibid.*
18 *Idem* 461H.
19 *Idem* 467F-H.
20 *Idem* 468H-469A.
21 Neethling *et al* 218-219.
22 *Ibid.*
23 *Ibid.*

court's reasoning and conclusion, the defendants were liable for *iniuria* and not for false light invasion of privacy. It is also of particular interest that Neethling and others do not classify this area of law (together with appropriation) as other forms of invasion of privacy.[24] Instead, they categorise these under the right to identity.[25] On the other hand, McQuoid-Mason regards false light and appropriation as forms of violation of the right to privacy.[26] Undoubtedly, this false light privacy is still in its infancy in South African law. Moreover, it is somehow confusing, as it does not clearly distinguish itself from impairment of dignity (or *iniuria*). Hence, it needs further development – especially given the changing *boni mores* (legal convictions) of South African society, which have increased with the advent of the constitutional era with emphasis on the value of human dignity. Vital lessons on how this development could be done can be learned from US jurisprudence on false light invasion of privacy. The following section therefore considers the legal position in the US.

2 2 False Light in the United States

The tort of false light is well developed in the US – although it is somehow controversial. False light differs from defamation primarily in being intended "to protect the plaintiff's mental or emotional well-being", rather than protecting a plaintiff's reputation and also in being about the impression created – rather than about being true or false.[27] In that respect, false light has a narrower scope than defamation. Despite some notable overlap between the elements of the two torts, certain elements differ. For example – on the publication element – the communication need not necessarily be technically false for false light, but it is sufficient if it is misleading. This is where the tort of false light specifically applies. Another difference is the damage or harm required for an action. False light privacy claims often arise under the same facts as defamation cases. However, as stated above, false light cases are about damage to a person's personal feelings or dignity, whereas defamation is about damage to a person's reputation. The principal element of actual damages for false light claims is typically mental anguish.[28] At some point physical illness and harm to the plaintiff's commercial interests have also been recognised.[29] This is unlike defamation, where the harm manifests in damage to reputation – that is, exposure to contempt, ridicule, impugned character or standing. The harm or wrong done to the plaintiff under false light does not necessarily have to involve injured feelings. Instead, the feeling or embarrassment associated with wrongful portrayal (placing in false light) is sufficient. In the contemporary world,

24 *Idem* 33, 221.
25 *Idem* 255-256.
26 McQuoid-Mason 229-231.
27 Martin "False Light" available at http://netlaw.samford.edu/Martin/AdvancedTorts/falselight.htm (accessed 2013-02-13).
28 *Cain v Hearst Corp* 878 SW 2d 577.
29 *Ibid*.

one's image is a personality right, and thus placing the personality in false light is a violation of that right, and a legal remedy is warranted.

False light action in the US and the extent of protection varies from state to state. States that recognise false light tort include California, the District of Columbia, Florida, Georgia, Alabama, Ohio and Pennsylvania.[30] States such as New York and Texas do not recognise false light claims, for reasons of free speech protection.[31] The common law position of the tort of invasion of privacy was succinctly summarised by Judge Kravitch of the Federal Appeals Court for the Eleventh Circuit in *Allison v Vintage Sports Plaques,*[32] who held that the tort of invasion of privacy can be committed in any one of four ways: (1) through access to the plaintiff's physical and intimate secludedness, (2) through publication in conflict with generally accepted norms of decency, (3) through publication which places the plaintiff in a false light, and (4) through unauthorised use of the plaintiff's image for commercial gain. The third category is also known as the "tort of false light publicity".[33] Interestingly, most states that allow action based on false light and those that do not recognise it, regard the action as similar to a tort for defamation.[34] Only a few states such as Ohio and Florida are the exception, since they regard false light as an invasion of privacy.[35] The privacy laws in the US include a non-public person's right to privacy from publicity which puts them in a false light to the public – which is balanced against the First Amendment right of free speech.[36] Insight into the nature of this tort can be gained by examining some of the states that recognise false light.[37]

In California, false light is different from defamation, in that it is about false implications, while defamation concerns statements that are actually false**.** The leading case that established false light in this state is *Gill v Curtis Publishing Co*.[38] In *Gill*, a couple succeeded in the action by proving that a magazine created a false impression of them through an article featuring a photo of the couple – with the caption criticising "love at first sight" as being based on nothing more than sexual attraction. California has well-established elements of false light. These are: falsehood, offensiveness, identification of plaintiff, public disclosure and fault. Offensiveness means that the statement must not just create a false impression, but such impression must also be "highly offensive to a reasonable person".[39] It must be reasonable to take offense. It is not

30 Digital Media Law Project "False Light" available at http://www.dmlp.org/legal-guide/state-law-false-light (accessed 2013-02-10).
31 *Ibid*.
32 *Allison v Vintage Sports Plaques* 136 F 3d 1443.
33 Cornelius 504.
34 *Ibid*.
35 *Ibid*.
36 Digital Media Law Project *op cit*.
37 *Ibid*.
38 *Gill v Curtis Publishing Co* 239 P 2d 630.
39 *Fellow v National Enquirer Inc* 32 Cal 3d 234 238 (quoting Restatement 2d of Torts § 652E).

necessarily a requirement in this state that the plaintiff be identified by name. Cases such as *Gill*[40] have shown that photographs of plaintiffs are sufficient for identifying them. Public disclosure refers to publication, but the courts are not clear on how many people must receive the information for it to be "publicly disclosed".[41] Lastly, the plaintiff must also show that the false implication was the defendant's fault. If the defendant is a public figure, then the plaintiff must show that the defendant acted with actual malice.[42] In response to a claim, the defendant can raise the defences of opinion and parody. A false light claim must be based on the implication of a false *fact* and o*pinions* are constitutionally protected. Thus one cannot be held liable under a false light claim for a negative opinion, nor for casting a plaintiff in a false light if the false statement of fact in question is in a context the average reader would understand is a parody.[43]

Arizona is another state that recognises the tort of false light, and plaintiffs can sue for false light when offensive and false information or innuendo about them is spread publicly. Although the false light law in Arizona is somewhat similar to defamation, there are several differences. These include that statements need to be publicised more widely for false light than defamation; that defamation requires harm to reputation or other social consequences, while false light does not; and false light in Arizona protects against not only false statements, but also false implications and innuendo. The material must also be offensive for false light, while it need not be for defamation. The Supreme Court of Arizona has specified that "there can be no false light invasion of privacy action for matters involving official acts or duties of public officers" – because of public officials' more limited privacy rights.[44] As a result, a plaintiff cannot sue for false light invasion of privacy if he or she is a public official and the publication relates to performance of his or her public life or duties.[45] Unlike in some other states, Arizona has not limited this protection to only media defendants.

In the District of Columbia, the false light publicity action overlaps significantly with defamation.[46] Here, defamation and false light both protect against the same wrongs – offensive false statements. The key difference between defamation and false light is that they protect against different harms flowing from such statements. "The false light ... action

40 *Gill v Curtis Publishing Co* 239 P 2d 630.
41 Digital Media Law Project *op cit*.
42 *Readers's Digest Association v Superior Court* 37 Cal 3d 244 265; *Solano v Playgirl Inc* 292 F 3d 1078; California lower courts require that plaintiffs must show that defendants acted "negligently" (see eg *MG v Time Warner Inc* 89 Cal App 4th 623 636).
43 See *San Francisco Bay Guardian Inc v Superior Court* 17 Cal App 4th 655.
44 *Godbehere v Phoenix Newspapers* 162 Ariz 335 783 P 2d 781.
45 For South Africa's position in this regard, compare with *Tshabalala-Msimang v Makhanya* [2007] ZAGPHC 161 parr 30, 31, 39, 45 – where it was held that public figures surrender a measure of privacy when they enter public life.
46 Digital Media Law Project "Defamation" http://www.dmlp.org/legal-guide/defamation (accessed 2013-03-12).

differs from an action for defamation because a defamation tort redresses damage to reputation while a false light privacy tort redresses mental distress from having been exposed to public view."[47] In other words, defamation protects a person's public reputation, while false light protects a person's internal mental tranquillity. False light in the District of Columbia compensates the plaintiff for mental distress and anguish. One federal district court in the District held that because corporations cannot be offended, they cannot sue for false light.[48] The defences, privileges and burdens of proof that protect defendants in defamation cases – such as opinion and fair comment – are equally applicable to false light publicity cases.[49]

In Illinois, false light is applied in essentially the same way as in the District of Columbia. It overlaps significantly with defamation, and the key difference between defamation and false light is that they protect against different harms flowing from such statements. However, false light in Illinois is broader than defamation. While everything that is defamation is also false light, false light reaches some things that defamation does not. For instance, in *Douglass*, a woman who had posed nude in Playboy sued Hustler because it published nude photos of her without her consent.[50] The court held that she had a right to sue for false light because Hustler insinuated that she was willing to appear nude in a "degrading setting".[51] Despite their overlap, a plaintiff can sue for both false light and defamation, and potentially recover damages based on both claims. In some states, this is not the case.

As in the District of Columbia, and to some extent Illinois, false light in New Jersey is similar to defamation. Both protect against the same wrongs – offensive false statements. The key difference between defamation and false light in this state is that they protect against different harms flowing from such statements. Defamation protects a person's public reputation, while false light protects a person's internal mental tranquillity.[52] In order to satisfy the element of fault, the plaintiff must show that the defendant acted with actual malice, if the defendant is a public figure. However, New Jersey courts have not made a ruling on what level of fault must be shown when the plaintiff is a private figure. They could either require the plaintiff to show that the defendant acted with actual malice, as for public figures, or could require the plaintiff to show that the defendant acted negligently.

47 *White v Fraternal Order of Police* 909 F 2d 512 518.
48 *Southern Air Transport Inc v American Broadcasting Companies Inc* 670 F Supp 38 42.
49 Digital Media Law Project *op cit*.
50 *Douglass v Hustler Magazine Inc* 769 F 2d 1128; For this case see also projectposner at http://www.projectposner.org/case/1985/769F2d1128.
51 *Douglass v Hustler Magazine Inc* 769 F 2d 1128.
52 *Romaine v Kallinger* 537 A 2d 284 290.

In Georgia, false light is essentially the same as defamation.[53] No reported decision in Georgia state courts has found a defendant liable for false light, without also finding the defendant liable for defamation.[54] Georgia courts readily acknowledge that "[t]he interest protected [by the tort of false light] is clearly that of reputation, with the same overtones of mental distress as in defamation".[55] What the overlap means is that if one were sued for false light, one will also probably be sued for defamation (and *vice versa*). Notably, absolute privileges that completely shield someone from liability for defamation also apply to claims for false light. Georgia courts have held that you cannot be sued for false light when you comment on an issue of public interest.

The State of Indiana also recognises the tort of false light publicity. The case that established false light in the state is *Mavity v Tyndall.*[56] In this case, the police took a mug shot of a man they were investigating for a crime. Charges against him were eventually dropped. However, the police maintained a photo of the man in their "rouges gallery". The man sued and was able to have his photo removed because the police were casting him in a false light – thereby implying that he was guilty of a crime. However, it is unclear when exactly someone can sue for false light, because Indiana courts have not heard many false light cases. Moreover, the exact elements of a false light claim have not been authoritatively established in the state.

In Michigan, false light is similar to defamation.[57] Both involve false statements that harm someone's public image.[58] One can be sued for both defamation and false light for the same statements.[59] However, a plaintiff can only obtain money for one or the other violation based on the same statements.[60] The plaintiff thus has a choice to raise either of the two possible actions.[61]

Meanwhile, the Ohio Supreme Court has only as recently as June 2007 recognised the tort of false light publicity in Ohio, in the case of *Welling.*[62] In this case, the Supreme Court held that

> [i]n Ohio, one who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had

53 Digital Media Law Project *op cit*.
54 *Ibid.*
55 *Association Services v Smith* 549 SE 2d 454 459.
56 *Mavity v Tyndall* 66 NE 2d 755.
57 Digital Media Law Project *op cit*.
58 *Ibid.*
59 *Ibid.*
60 *Ibid.*
61 *Ibid.*
62 *Welling v Weinfeld* 866 NE 2d 1051; see also http://www.sconet.state.oh.us/rod/docs/pdf/0/2007/2007-ohio-2451.pdf.

> knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[63]

In Pennsylvania, false light is similar to defamation, but there are several differences.[64] Firstly, statements need to be publicised more widely for false light than defamation. Secondly, defamation requires harm to reputation or other social consequences, while false light does not. Thirdly, material must be offensive for false light, while it need not be so for defamation. It is also noteworthy that as a defence, the media is insulated from liability for false light when they report on issues of public concern related to public officials.[65] The courts deem public officials as having "relinquish[ed] ... insulation of scrutiny of [their] public affairs."[66] For example, in *Masson v New Yorker Magazine Inc*,[67] the court ruled that a public figure cannot recover for a false light claim, unless he proves by clear and convincing evidence that the defendant published the false portrayal with actual malice – that is, with "knowledge that it was false or with reckless disregard of whether it was false or not". Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author "in fact entertained serious doubts as to the truth of his publication" or acted with a "high degree of awareness of ... [its] falsity".[68] Most significantly, the US Federal Supreme Court has, to a considerable extent, made it difficult for plaintiffs to recover damages through the tort of false light, by incorporating constitutional defences and limitations.[69] The Federal Supreme Court places a high premium of freedom of expression, which militates against unrestrained use of the existing defences such as parody.[70]

There are, however, states that do not recognise the false light tort. These are Virginia, Texas, Massachusetts, New York, Florida and North Carolina.[71] Florida failed to recognise the tort of false light invasion of privacy in the judgment of *Jews for Jesus Inc*.[72] The Florida Supreme Court held that this tort has a chilling effect on protected speech, which outweighed its potential to create a new remedy for a narrow class of wrongs.[73] It concluded that false light largely duplicates existing torts. Instead, the court decided to develop the law of defamation and

63 *Welling v Weinfeld* 866 NE 2d 1051.
64 Digital Media Law Project *op cit*.
65 *Neish v Beaver Newspapers Inc* 581 A 2d 619 624-625.
66 *Ibid*. South Africa has a similar position in the area of defamation where public officials can only sue if the defamatory material related to their individual capacity (see in this regard *Mthembi-Mahanyele v Mail & Guardian* [2004] 3 All SA 511 (SCA) parr 34-43)
67 *Masson v New Yorker Magazine Inc* 501 US 496 510.
68 See also *Seale v Gramercy Pictures* 964 F Supp 918 924.
69 See Page "American Tort Law and the Right to Privacy" in *Personality Rights in European Tort Law* (eds Brüggemeier, Colombi, Ciacchi & O'Callaghan) (2010) 68-69.
70 Cornelius 506.
71 The list of states dealt with here is not exhaustive. There are likely others that do not recognise the tort.
72 *Jews for Jesus Inc v Edith Rapp sc06-2491* (Fla Oct 23, 2008).
73 *Ibid*.

recognised a cause of action for defamation by implication. It also held that a communication can be considered defamatory if it "prejudices" the plaintiff in the eyes of a "substantial and respectable minority of the community," as set forth in the Restatement (Second) of Torts comment.[74] They regarded it as a duplication of actions, as false light somehow overlaps with defamation. On the other hand, Washington courts have not explicitly recognised the tort of false light. However, Washington has also not explicitly rejected the tort of false light either. In one case, the Washington Supreme Court appeared sceptical about whether allowing false light claims would be a good idea, due to its similarity to defamation.[75]

Notwithstanding divergence with regard to the nature and practice among different states that recognise the tort of false light invasion of privacy in the US, its elements are essentially settled. They are: publication, the information must be highly offensive, false information (on conduct, beliefs, practices or utterings); attributing falsity to the plaintiff; and malice. As in any delictual action, unlawfulness is a requirement.[76] These are discussed in detail below.

2 2 1 Publication

Publication involves spreading or disseminating information about the plaintiff. This is the conduct element of the action, and the defendant must have communicated the false information to at least one other person other than the plaintiff. The publicised information must reach third parties, for the act of publication to be fulfilled for the purposes of this action.

2 2 2 The Information must be Highly Offensive

The information is highly offensive if it is embarrassing and causes emotional or mental distress to reasonable persons. The damage/harm element of this action constitutes mental anguish. On some occasions, however, physical illness and harm to the plaintiff's commercial interests have also been recognised. The threshold of offensiveness here is that of the reasonable person. Particular sensitivities are not used as the measure of offensiveness. It must be such that the reasonable person would take offence under the circumstances.

2 2 3 False Information on Conduct, Beliefs, Practices or Utterings

There must be information that has no truth in it. The information need not necessarily be technically false, but it must be misleading. Such information must be such that its divulgence places the plaintiff in false light – that is, deviant from the actual state of affairs.

74 *Restatement (Second) of Torts* § 559 (1972).
75 *Eastwood v Cascade Broad Co* 722 P 2d 1295 1298-1299.
76 Cornelius 509.

2 2 4 Attributing to the Plaintiff

The publication must attribute a falsity to a particular plaintiff. This establishes the causal link between the words of the defendant and the harm suffered by the plaintiff. One can therefore not raise the action when there is nothing specifically or impliedly linking him or her to the publication in question.

2 2 5 Malice

The publication of the material must be actuated by ill-will or malice. This will in part satisfy the intention element of the enquiry. It requires that the actor had knowledge of or acted in reckless disregard as to the falsity of the publicised matter and the false light in which the other would be placed.[77]

With any action due to infringement of a subjective right, a variety of conflicting interests must be weighed against each other. In this context, it means that the publication and use of a person's attributes must be weighed against the user's right to freedom of expression.[78] This means that the protection afforded by the false light tort is not absolute and is susceptible to acceptable defences, among them consent, truth and public interest, fair comment, jest and parody, as has been discussed under the various states above.

3 Substantiation for False Light in South Africa

Primarily there are four main reasons why an action for false light publicity is necessary in South African and why it needs further development – notwithstanding some controversies in the US.

Firstly, dignity is a right and a foundational principle in South Africa. It is submitted that a call for developing the false light tort in South Africa has constitutional backing. Dignity is a highly-prized right in the Constitution. It is not only a right provided for in section 10, but it is also a foundational principle provided for in section 1(a). This provides the philosophical backing to the protection of a person's character and personality, from being placed in false light in the public eye. Allowing people to unrestrainedly publicise otherwise undesired information about a person because the information does not damage the person's reputation, is to take too narrow a view and interpretation of the all-important right to dignity in the Constitution. A false light action would thus apply not as a remedy to violation of dignity directly (this is covered by the action for dignity) – but as a separate action, albeit meant to

77 The element explained in *Cain v Hearst Corp* 878 SW 2d 577 does not, however, recognise false light torts. See also s 652E (Publicity Placing Person in False Light) of the Restatement (Second) of Torts).

78 Cornelius 509.

achieve the protection of the plaintiff's dignity on the basis of it being a constitutional principle.

Secondly, there is a constitutional imperative to protect and promote personality rights in our law. Whereas appropriation as a form of invasion of privacy, protect control over the use of one's name and image, false light, on the other hand, is warranted by the need to protect a person's individual image and character. Personal image and character are also important personality rights. Whilst the portrayal of a person in false light may not necessarily be defamatory, it may cause embarrassment to the plaintiff, and that may cause emotional hurt. This is a sound legal basis to allow for an action on false light.

Thirdly, the net of individual protection of privacy has to be widened in order to bridge a gap that may exist in the protection of fundamental rights. There is then the need to bridge the gap of legal protection between the defamed (protected through the defamation action) and the injured in feeling (protected through the dignity action), and the one whose portrayal causes harm that is not necessarily defamatory and is not protected by the dignity action. The person in this last scenario may most appropriately be protected under invasion of privacy through the false light action.

Perhaps no South African case best illustrates the need for the development of false light privacy than *Le Roux v Dey*.[79] The *Le Roux v Dey*[80] judgment followed publication of a computer-manipulated image by three learners, aged 15½ to 17 years at the time.[81] The image that had been created by one of the three learners, Le Roux, was circulated among a circle of peers using cell phones, and eventually an A4 size of the image was placed on the school notice board.[82] It had been made by electronically superimposing the facial images of the school principal and of his deputy, Dey, on the bodies of two naked men. The two naked bodybuilders were seated close each other on a couch. In a sexually suggestive manner (apparently masturbating), the legs were apart and their hands were in the genital areas. However, the learners had strategically covered both the hands and the genitals with the school crest. Dey sued the three learners in the High Court for defamation and injured feelings or *iniuria*,[83] and also pressed criminal charges against them.[84] The High Court upheld both of Dey's claims and awarded a composite award of R45,000 in damages.[85] The three learners unsuccessfully appealed to the SCA. By majority, the SCA held that the learners were liable for defamation for publication of a defamatory image bearing Dey's face. However, the SCA held that awarding the damages

79 *Le Roux v Dey* 2011 3 SA 274 (CC).
80 *Ibid.*
81 Par 12.
82 Par 17.
83 Par 4.
84 Parr 18, 19.
85 Par 4.

for the impairment of dignity claim was "an impermissible accumulation of actions on the part of the High Court".[86] Nonetheless, it upheld the amount of the damages that the High Court awarded Dey.[87] The learners then successfully applied to the Constitutional Court for leave to appeal against the decision of the SCA. However, their overall appeal was unsuccessful.

The Constitutional Court (by a six-member majority as per Brand AJ) affirmed the finding of the SCA that the image was defamatory of Dey. Nevertheless, Froneman J and Cameron J (in a joint minority judgement) held that the image was not defamatory of Dey, but that it amounted to an *iniuria* (an injury to his feelings).[88] The majority were also acquiescent to the view that the image amounted to an injury to his feelings (impairment of dignity) even if it were not defamatory of him.[89] However, in two separate, dissenting minority judgements, Yacoob J and Skweyiya J held that the image was neither defamatory nor did it amount to an injury to Dey's feelings.[90] Therefore, *Le Roux v Dey* [91] was one of a kind and had several outcomes. Not only did it divide the High Court and the SCA, but it also left the Constitutional Court ranging between three options. Even legal minds were left confused regarding the appropriate cause of action that Dey ought to have pursued under the circumstances. As mentioned earlier, his claim was based on defamation of character and impairment of his dignity. However, it is not implausible to argue that he could well have sued for invasion of privacy in the form of false light, in addition to defamation and *iniuria*.

Neither Dey nor any of the three courts entertained invasion of privacy as a possible cause of action for Dey. While most critics of the CC judgement felt that it was insensible to the rights of children, some considered that the court's finding that the superimposed image was defamatory would offend the constitutional guarantee of equality and non-discrimination based on, *inter alia*, sexual orientation.[92] The critics regarded the judgement as a perpetuation of the stigma associated with the gay and lesbian community.[93] I do not necessarily agree with this view. The court did not find the image defamatory because of the gender of the body-builders.[94] The finding was based on the obscene nature of the image.[95] Moreover, objectively viewed, the ruling does not propagate stigmatisation of gay people. Be that as it may, the concerns raised by

86 Par 4.
87 Par 4.
88 Par 6.
89 Par5.
90 Par 6.
91 *Le Roux v Dey* 2011 3SA 274 (CC).
92 Barnard-Naude & de Vos "The heteronormative observer: The constitutional Court's decision in *Le Roux v Dey*" 2011 *SALJ* 407.
93 *Idem* 407-410.
94 See parr 103, 107; Buthelezi "In Dissent: A critical Review of the Minority Judgment of Yacoob J – *Le Roux v Dey 2011 3 SA 274 (CC)"* 2012 *Obiter* 719 720-722.
95 *Ibid*.

authors, such as Barnard-Naude and de Vos,[96] and other advocates of gay rights, are not to be ignored. They add to the controversy and confusion that perplexed the three levels of our judiciary.

There may, however, be genuine issues of sexual orientation in an action for defamation, especially in the context of ever-changing morality. The court will be faced with a difficult task of balancing the interests of individual human dignity[97] (inherent in privacy) and equality and non-discrimination on the basis of sexual orientation.[98] Even if one were to accept the minority judgements of Yacoob J and Skweyiya J that the image was neither defamatory nor did it cause any injury to the Dey – clearly he was affected by embarrassment and an altered public view of himself, owing to his presentation in false light. However, this liberal view may leave the plaintiff without any remedy in law.[99] It is then when the action for false light may come to the aid of the court, and afford relief to the plaintiff who may be aggrieved for being labelled 'gay'. Essentially, where the dissemination of false information causes damage to reputation, the defamation action would be pursued. Where the errant publication does not harm reputation, the false light action would be applicable. Where the overlap is more pronounced in specific cases such that a case of false light and of defamation can be made based on the same set of facts, one would then not be allowed to make concurrent claims – but will have a choice between the two. Thus, in view of the foregoing, it is conceded that whilst the material in *Le Roux v Dey* may not have been defamatory, by portraying the appellant as gay there are merits for concluding that the superimposed picture placed Dey in a false light. The matter remains that he was placed in false light and that fact constitutes the harm suffered by the appellant that calls for compensation. It is a matter of wrongful, undesirable and undesired depiction, as opposed to *prima facie* harmful depiction.

Finally, there is a pressing need to maintain the balance between freedom of expression and privacy, in the same way that actions for defamation and dignity keep freedom of expression under control. Constitutionally-protected freedom of speech does not imply unrestrained licence to hurt the interests of other people. It does not qualify one to falsely place others in positions or situations that misrepresent them. Thus, the freedom of speech cannot single-handedly be used to counter the introduction of a false light tort. Instead, the pressing need to keep freedom of expression in check, especially in a highly-sensitive society such as South Africa, in the light of its historical legacy, informs the rationality of an action for false light. Freedom of expression is relatively strong is South Africa. This justifies the need to ensure that people do not portray others in ways they want to – with impunity.

96 S10 Constitution of the Republic of South Africa, 1996.
97 S10 Constitution.
98 S 9 Constitution.
99 Par 6.

4 Concluding Remarks

The time for the development of false light invasion of privacy in South Africa has come, notwithstanding the controversy associated with it in the US. This area of law has lagged behind, even though there is a great need for it in South African Law. It must be noted that the South African environment differs in many respects from the American one in terms of history and constitutional fundamentals. The arguments furthered in some US states against the false light tort, thus do not necessarily apply in South Africa. For instance, America's history has no fresh legacy of sensitivity, as is currently the case in South Africa. The dimension of free speech is thus somewhat different from that in South Africa. The US Constitution primarily promotes free speech, while the South African Constitution is founded on the value of human dignity.[100] This is more than a human right – it is a pillar of South African constitutional democracy. Dignity in the American Constitution does not carry the same weight that it does in the South African constitution. Thus, whilst in the US the sole argument advanced against false light tort by some states is that it has a chilling effect on freedom of expression, the argument in South Africa in favour of it has a philosophical backing founded on constitutional principles. Primarily, it is necessary given the outcry about the decision of the court in *Le Roux v Dey*.[101] There is a marked need for the development of privacy protection in the form of false light. Moreover, as has been indicated above, the action will not amount to a duplication of a defamation action (nor will it be a duplication of an action for *iniuria*), as the interests protected are different. Defamation protects reputation, whereas false light action protects privacy and individual dignity.

100 *Mthembi-Mahanyele v Mail & Guardian Ltd* [2004] 3 All SA 511 (SCA) par 41.
101 *Le Roux v Dey* 2011 3 SA 274 (CC).

The nature of a headquarter company: a comparative analysis*

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OPSOMMING

Die Aard van 'n Hoofkwartiermaatskappy: Die Onderskeid tussen 'n Hoofkwartiermaatskappy en Soortgelyke Entiteite Werksaam in die Internasionale Sfeer

Ten einde Suid-Afrika as 'n poort vir belegging in Afrika te bevorder, het die Suid-Afrikaanse Nasionale Tesourie in 2011 die hoofkwartiermaatskappy reguleering bekendgestel. Dit behels dat, kragtens wysigings van belastingswetgewing, die bepaalde struikelblokke wat verhoed dat hoofkwartiermaatskappye na Suid Afrika gelok word, verwyder word. Maatskappye met sekere kwalifiserende strukturele eienskappe geniet spesiale belastingbehandeling ten einde belegging in die vorm van hoofkwartiermaatskappye te bevorder. Verskeie internasionale maatskappye se strukture stem egter ooreen met die eienskappe van hoofkwartiermaatskappye. In sommige gevalle word die funksies wat deur hierdie entiteite verrig word, gekombineer wat tot gevolg het dat dit die hoofkwartiermaatskappy-funksies van ander entiteite verrig en andersom. Dit skep die geleentheid vir sommige maatskappye, wat nie hoofkwartiermaatskappye is nie, om onbewustelik of bewustelik die voordele wat gemik is op hoofkwartiermaatskappye te verkry. 'n Hoofkwartiermaatskappy is onderskeibaar van verskeie ander vorme van maatskappye wat besigheid in die internasionale sfeer bedryf. Hierdie artikel bespreek die aard van 'n hoofkwartiermaatskappy en onderskei dit van ander soortgelyke entiteite. Dit dui aan dat, alhoewel daar verskeie en verskillende ooreenkomste tussen hoofkwartiermaatskappye en hierdie entiteite is, die funksie en struktuur van hoofkwartiermaatskappye hulle onderskei van die ander entiteite. Dit is belangrik dat die aard van 'n hoofkwartiermaatskappy nie met die van die ander entiteite verwar moet word nie. Indien die hoofkwartiermaatskappy met ander entiteite verwar word sal dit lei tot oningeligte besluite en dat eienskappe daaraan toegedig word wat tot belastingaanslae of verwagtinge in verskillende jurisdiksies kan lei.

1 Introduction

A company is a common vehicle for investors to conduct business operations. It is common cause that companies are used in both national and international business operations by investors to operate within or

* This article is an adapted version of part of the research done and submitted by the author in part fulfilment of the requirements for the degree of Doctor of Laws at the University of Pretoria.

outside the country where the investor is resident. Various forms of companies can be formed to perform various functions. Investors choose the company variation that would best suit their interests both nationally or internationally. At an international level, an investor that seeks to centralise administrative and management functions of a group of companies would generally set up a headquarter company that would perform those functions. Headquarter companies are a common feature in international commerce and business operations. Their operations and successes are influenced by a myriad of frameworks, including the legal, regulatory and tax.

The South African National Treasury announced in the 2010 Budget review,[1] and reiterated in the 2011 Budget Review,[2] that it intends to promote South Africa as a gateway to investment into Africa. Furthermore legislation has been amended in order to remove any identified impediments to attracting headquarter companies to South Africa.[3] The 2011 tax laws amendments contain adjustments to the corporate tax laws and exchange control regulations that would enable South Africa to host headquarter companies.[4]

Companies with certain specific structural characteristics ("qualifying companies") qualify for special tax treatment afforded for purposes of attracting investment in the form of headquarter companies. Various international companies' structures have similar characteristics with headquarter companies. This makes it possible for some companies that are not headquarter companies to inadvertently or purposefully access the benefits aimed at headquarter companies. A headquarter company is distinguishable from various forms of companies conducting business in the international space. The main distinction relates to the characteristic functions of the companies. A headquarter company is a holding company designed for specific (management and administrative) purposes in a group of companies. Therefore this article starts off by outlining the nature of a holding company and its functions.

2 Holding Company

A holding company is generally defined as a company whose main purpose is to hold shareholdings in other companies.[5] "The term is

1 National Treasury *Budget Review* (2010) 78-79

2 National Treasury *Budget Review* (2011) 73, 78-79. See also Lermer "2010 Budget Attracts SA Based Headquarter Companies" *Moneyweb* available at http://www.moneyweb.co.za/mw/view/mw/en/page302588?oid=347864&sn=2009%20Detail (accessed 2012-04-01); Legwaila "The Tax Treatment of Holding Companies in Mauritius: Lessons for South Africa" 2011 *SA Merc LJ* 1

3 See Taxation Laws Amendment Act 7 of 2010; ss 9I, 10B ITA.

4 Ss 26, 27 Taxation Laws Amendment Act 24 of 2011. See also ss 1, 9I, 9D, 10(1)(k)(ii), 20C, 31(3), 41(1), par 64B ITA.

5 See International Bureau for Fiscal Documentation (IBFD) *International tax Glossary* (2005) definition of "holding company".

sometimes used more loosely to refer to companies holding other assets, such as a patent, licence or similar investments."[6] Holding companies typically hold substantial majority shareholdings in other companies to ensure control of the management, business and capital of the companies they hold.

There are many business-driven motives for establishing a holding company. A holding company can provide a means to own and manage a group of affiliates or subsidiaries in a particular region. The setting up of a holding company can also result in operational and financial efficiencies, in particular when bundled with other business functions, including broader regional headquarter and management functions, group shared services, financing, cash management, and/or intellectual property (IP) ownership and management.[7]

The reasons often cited for the formation of a holding company include[8] (i) the desire to consolidate the company's current (and future) foreign subsidiaries under one foreign holding company structure for management and reporting purposes; (ii) the creation of a platform for future business acquisitions, joint ventures and other business opportunities; (iii) to act as a gateway for growth and expanding business operations in new markets and regions; increased financial flexibility and the creation of an efficient vehicle for the redeployment of cash among foreign operations, thereby facilitating the use of internal funding of operations and expansion; (iv) improved treasury efficiency and financial risk management, by permitting foreign cash, foreign currency receipts and disbursements, and inter-company loans and other transactions to be consolidated, netted and managed within the holding and financing structure; (v) facilitation of raising capital offshore thereby enhancing the enterprise's capital structure; (vi) positioning the company to more effectively reduce foreign income taxes through, for example internal financing and leveraging; (vii) to better manage and exploit IP; (viii) enabling access to the European Community (EC) Directives and/or tax treaty networks reducing withholding taxes on dividend, interest and royalty flows; and (ix) facilitation of the preparation of a sub-consolidation of the combined foreign operations of the company for financial reporting purposes.[9]

As can be seen, a holding company can fulfil a wide variety of functions. The concept of a holding company covers such a wide range

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6 *Ibid*.

7 See IBFD "Introduction to Holding Activities" http://online2.ibfd.org/collections/hold/html/hold_introduction.html (accessed 2012-09-22) par 1.1.

8 *Ibid*.

9 For a further discussion of the functions of a headquarter company in different country structures see Pfaar "Inbound Investment from a European Perspective" (2003) *Int Tax R* http://www.internationaltaxreview.com/Default.asp?Page=17&PUBID=211&ISS=13163&SID=488044&SM=&SearchStr=%22intermediary%20holding%20company%22 (accessed 2012-10-28); see also Legwaila "Intermediary Holding Companies and Group Taxation" 2010 *De Jure* 308 313.

of attributes that it lacks specificity. This general nature makes it such that it can combine a host of characters of various holding companies established for specific functions. A headquarter company is a holding company established and discharging some of the specific functions outlined above.

3 Defining a Headquarter Company

3 1 Headquarter Company in General

International headquarter companies are often formed where multinational groups of companies have significant economic interests in a region which is distant from its head office to oversee and co-ordinate the group's business interests in a particular region.

> Such centres will usually provide the full range of administrative and management functions associated with a head office; for example, treasury and tax management, internal audit, public relations, market research and marketing, insurance and accounting.[10]

It is, therefore, not infrequent that a group of companies would have multiple international headquarters each serving group companies in contiguous countries within a particular region.

3 2 South African Headquarter Company

For South African purposes a company qualifies as a headquarter company if it satisfies the five main requirements, four of which are substantive and one is administrative.[11] The four main substantive requirements are as follows:

Firstly, the company must be a South African resident company.[12] For South African tax purposes a company is tax resident if it is incorporated, established or formed in the Republic or has its place of effective management in the Republic.[13] However, the definition excludes a company which is deemed to be exclusively a resident of another country for purposes of the application of any agreement entered into between the governments of the Republic and that other country for the avoidance of double taxation.[14]

Secondly, each shareholder in the company must have held at least 10 per cent of the equity shares and voting rights in that company for the duration of that year of assessment and of all previous years of assessment of the company. The 10 per cent holding can be either alone

10 Ogley *Principles of International Tax: A Multinational Perspective* (1993) 137.
11 S 9I ITA.
12 S 9I(1)(a) ITA.
13 Par (b) s 1 ITA definition of "resident".
14 Proviso to s 1 ITA definition of "resident".

or together with any other company forming part of the same group of companies as that shareholder.[15]

Thirdly, at the end of the year of assessment and of all previous years of assessment of that company, 80 per cent or more of the cost of the total assets of the company must be and must have been attributable to one or more of the following: (i) interest in equity shares in; (ii) an amount loaned or advanced to; or (iii) an IP as that is licensed by that company to, a foreign company.[16] The foreign company must hold at least 10 per cent of the equity shares and voting rights (whether alone or together with any other company forming part of the same group of companies as that company). In determining the total assets of the company, any amount in cash or in the form of a bank deposit payable on demand is not taken into account.[17]

Fourthly, where the gross income of that company for that year of assessment exceeds R5 million, 50 per cent or more of that gross income must have consisted of amounts in the form of one or both of: (i) rental, dividend, interest, royalty or service fee paid or payable by any foreign company or (ii) proceeds from the disposal of any interest or of any IP.[18]

Fifthly, from an administrative point of view, in order to be a headquarter company, a qualifying company has to make an election to be treated as such for tax purposes for the year of assessment of that company. An election has to be made in a form and manner determined by the Commissioner.[19]

4 Distinction between a Headquarter Company and Other Similar Entities

As has been stated above, various international companies' structures have similar characteristics with headquarter companies. However, a headquarter company is distinguishable from various forms of companies conducting business in the international space. In the discussion that follows, corporate forms that have substantially similar structural or functional characteristics with headquarter companies at an international level are examined in order to draw clear distinctions between these corporate forms and headquarter companies.

4 1 Intermediary Holding Company

The primary functions of an intermediary holding company are to acquire, manage and sell investments in group companies, mainly its subsidiaries and in general to provide transactional and organisational

15 S 9I(2)(a) ITA.
16 S 9I(2)(b) ITA.
17 Proviso to s 9I(2)(b) ITA.
18 S 9I(2)(c) ITA.
19 S 9I(1)(b) ITA.

flexibility in a group of companies.[20] In the context of a group's business, an intermediary holding company in an appropriate jurisdiction enhances the group's transactional flexibility and assists in establishing a robust offshore group structure. The intermediary holding company also serves to provide a means to centralise and manage international cash flows. It serves as a focal point to deploy one entity's earnings to other entities within the global enterprise.[21]

These functions are not tax-related. The tax is an element that is considered and provided for in order to ensure that it does not make the achievement of the group's economic purpose more expensive than it should be. As a result, in practice, the decision to form an intermediary holding company is made by financial managers rather than tax managers.

Enhanced flexibility within a group caters for acquisitions, reorganisations, disposals, offshore listing, reducing the impact of exchange control rules and free flow of funds. As an addition to these benefits, the intermediary holding company can also offer a maximisation of after-tax fund flows. However, it should be noted that the goals of the group may necessitate the interposition of an intermediary holding company even if that would result in an increased tax liability for the group. In this case the benefit of interposing an intermediary holding company will be weighed against the additional tax liability. Depending on the specific functions required to be performed by the intermediary holding company, it is often beneficial to the group to incorporate the intermediary holding company in a jurisdiction where the operations of the group take place.

Generally, intermediary holding companies are not engaged in commercial trade or business. Where their functions are extended, they would normally be for the purposes of reinvesting excess dividends at the level of the intermediary holding company to obviate the need to remit the dividends to the ultimate holding company or shareholders, where such action has tax and exchange control disadvantages.[22]

The main difference between a headquarter company and an intermediary holding company is that the purpose of the intermediary holding company is not to provide management and administrative services to the group. Its role is limited to financial and structural

20 The basis of the discussion on the functions of a holding company emanates from a discussion on this topic with Mr Serge de Reus, Partner/Director of Corporate International Tax at PriceWaterhouseCoopers on 2008-09-19 in Sunninghill, Johannesburg.

21 Global Strategies (Supplement – Energy 2002) *Int Tax R* http://www.internationaltaxreview.com/?Page=17&PUBID=211&ISS=13174&SID=487921&SM=&SearchStr=%22intermediary%20holding%20company%22 (accessed 2012-11-12).

22 Olivier & Honiball *International Tax – A South African Perspective* (2011) 690.

functions. However, its functions can be combined with those of an international headquarter company. As Ogley[23] states,

> [w]here a multinational holds overseas investments through an intermediate holding company, it makes good commercial sense to arrange for any regional co-ordination function to be undertaken by that company as this will lend substance and help demonstrate that it is indeed resident in that country.

Following Ogley, the fact that an intermediary holding company may undertake the regional co-ordination functions of a headquarter company demonstrates that the two are distinct entities.

4 2 International Holding Company

An international holding company is a company that controls one or more companies in jurisdictions other than the jurisdiction in which it is resident.[24] Such company is generally accepted to be resident in a country where it is tax-resident in terms of the laws of that country after taking into account any treaties applicable.[25] Where such company is incorporated in a country which has no tax treaties, or has no tax treaties with the investor's country and its subsidiaries' countries, double taxation problems may arise.[26] Similarly, where a headquarter company is not regarded as a resident in a country from which it operates and therefore cannot access tax treaty benefits, double taxation problems exist.

A pure international holding company is confined to managing and holding investments while a mixed international holding company also engages in other commercial activities.[27] The latter helps global tax planning and may help defer payment of dividends to the home country.[28]

The fundamental and foremost distinction between an international holding company and a headquarter company is that an international holding company can be an ultimate holding company of a group of companies whereas a headquarter company is interposed between operating subsidiaries and a company normally based in the investor's jurisdiction. A headquarter company could also only be held indirectly and ultimately by a company in the investor's jurisdiction.

International holding companies are mostly used within multinational company groups to centralise the management of the group companies

23 Ogley 137.
24 Holmes *International Tax Policy and Double Tax Treaties* (2007) 23
25 *Ibid*. See also Importer's Database *Holding Companies* http://www.export-import-companies.com/holding_company_-_definition.htm (Accessed 2012-06-14).
26 Holmes 23.
27 Rohatgi *Basic International Taxation* (2001) 238.
28 *Ibid*.

in a certain geographical area. In such cases they take the form of international management companies.[29]

4 3 Offshore Holding Company

An offshore holding company is almost identical to an international holding company. The essential difference between the two is that the emphasis of an offshore holding company is that it is located outside the country of residence of the investor.[30] It is not focused on holding controlling rights in companies in other jurisdictions. It also lacks the central location of control of multinationals that is a feature of headquarter companies.[31]

Olivier and Honiball submit that "[t]he term 'offshore holding company' is usually used for holding companies incorporated in a tax haven".[32] In this form, the main reason for removing the control of the company would be to benefit from the often lax tax system in the tax haven. Such use of the offshore holding company is probably minimal and limited as countries generally relentlessly enact provisions to combat the erosion of their tax bases in this way. Furthermore, countries heed to put international pressure not to conduct business with companies located in tax havens. Controlled foreign companies legislation, transfer pricing rules and the United States' recently introduced Foreign Account Tax Compliance Act[33] are examples of such provisions.

4 4 Foreign Financial Instrument Holding Company

A foreign financial instrument holding company is a purely South African domestic tax system creation. It is compared to a headquarter company in this article due to the fact that the headquarter company that forms the subject of this article is expected to operate within South Africa. It is therefore important to distinguish the headquarter company from a foreign financial instrument holding company.

A foreign financial instrument holding company is defined in the Act for the purposes of the foreign business establishment exemption[34] in section 9D(1) and in section 41(1) for group reorganisation rules in section 42 to 47 of the Act.[35]

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29 http://www.b2bfreezone.com/product-search/international-management-company.htm (accessed 2013-01-16).
30 Olivier & Honiball 297
31 Olivier & Honiball 297.
32 See also Olivier & Honiball 689. See also "Why Choose an Offshore Company?" http://www.icsl.com/pages/why.html (accessed 2012-07-31).
33 See details of the Foreign Account Tax Compliance Act on http://www.irs.gov/businesses/corporations/article/0,,id = 236667,00.html (accessed 2012-10-20).
34 The business establishment exemption has been replaced by the foreign business establishment exemption by s 9(1)(a) Revenue Laws Amendment Act of 2006.
35 The s 9D(1) ITA definition refers to a foreign financial instrument holding company as defined in s 41 ITA.

A foreign financial instrument holding company is defined as

> a foreign company where more than the prescribed portion of all the assets of that company, together with the assets of all its influenced companies in relation to that foreign company, consists of financial instruments …[36]

Simply put, it is a foreign company where more than 50 % of the market value or two-thirds of the actual cost of the company and all controlled group companies consist of financial instruments[37] (subject to certain exclusions).[38] Thus, a foreign company would be a foreign financial instrument holding company if in aggregate all its assets together with those of all influenced companies consist of financial instruments.[39]

In determining whether the prescribed portion consists of financial instruments the following are not taken into account:

(a) Firstly, financial instruments that consist of debts due to the foreign company, or to any controlled group company in relation to the foreign company, in respect of goods sold or services rendered by that foreign or controlled group company, as the case may be, where (a) the amount of the debt is or was included in either the foreign company or controlled group company; and (b) the debt is an integral part of a business conducted as a going concern by the foreign company or controlled group company.[40]

(b) Secondly, any financial instrument arising from the principal activities of the foreign company or of a controlled group company in relation to the foreign company which is a bank, insurer, dealer or broker with a licence or registration that allows the foreign company or the controlled group company to operate in the same manner as a company that mainly conducts business with clients who are residents in the same country of residence as the foreign company. To qualify for the exemption, the foreign company or controlled group company has to either regularly accept deposits or premiums for the general public or effect transactions with the general public or derive more than 50 % of its income or gains arising from principal trading activities with persons who are connected persons to the foreign company.[41]

36 See s 41(1) ITA.
37 See the definition of "Foreign Financial Instrument Holding Company" in s 41 ITA.
38 See definition of "prescribed portion" in s 41(1) ITA.
39 This allows the foreign holding company to escape the foreign financial instrument holding company tag even if it has assets that consist only of financial instruments, provided, when aggregated with those of its subsidiaries, the prescribed portion does not consist of financial instruments.
40 Par (a) definition of "Foreign Financial Instrument Holding Company" in s 41 ITA.
41 Par (b) definition of "Foreign Financial Instrument Holding Company" in s 41 ITA.

(c) Thirdly, any financial instrument held by a controlled group company in relation to the foreign company if the foreign company is a specified controlled group company.[42]

In the calculation of the market value or actual cost of the assets, shares held in another company in the same group and inter-group financial instruments consisting of a loan, advance or debt are disregarded.

The foreign financial instrument holding company rules have been designed to curb tax avoidance. The tax treatment of a foreign financial instrument holding company excludes it from deriving the tax benefits that ordinary companies derive. Two disadvantages of qualifying as a foreign financial instrument holding company are worth mentioning. Firstly, paragraph 64B of the Eighth Schedule to the Act, which provides for an exclusion of gains (or losses) from the disposal of any interest in the equity share capital of a foreign company where the disposing company holds more than 20% of the shares in the foreign company whose shares are disposed, does not apply where the company whose shares are disposed is a foreign financial instrument holding company.[43] Secondly, the net income of a foreign financial instrument holding company is not eligible for the foreign business establishment exemption in the hands of its South African resident shareholders in terms of section 9D(9)(b)(iii) of the Act.

A significant feature of a foreign financial instrument holding company that distinguishes it from a headquarter company is that while the assets of a foreign financial instrument holding company and its subsidiaries consist of financial instruments, the assets of a headquarter company's subsidiaries do not primarily consist of financial instruments. Subsidiaries of a headquarter company are mainly operating companies that carry on business other than holding and trading in financial instruments. Therefore, its assets would generally consist of tangible assets, such as plant and machinery.

4 5 Foreign Base Holding Company

The notion of a foreign base company emanates from the idea or existence of base countries. A foreign base company is an element in the concept of a base country.[44] An ideal foreign base of incorporation is a country which imposes only negligible income or capital tax, or no taxes at all, on income or certain of the income of its domestic corporations derived from sources outside the base country.[45] The purpose of such

42 Par (c) definition of "Foreign Financial Instrument Holding Company" in s 41 ITA.

43 The exemption is subject to certain further requirements which are beyond the scope of this article.

44 "Foreign Holding Company Income Changes (International Taxation)" http://www.nysscpa.org/cpajournal/old/07950850.htm (accessed 2012-07-28).

45 See De Broe *International Tax Planning and Prevention of Abuse* (2008) 41–46; Gibbons "Tax Effects of Basing International Business Abroad" 1956 *Harv LR* 1207.

base companies is to conduct third-country operations. Third-country operations include conducting business through agents or branches with holding companies deriving passive income from foreign subsidiaries.[46]

The essential element of a foreign base company is that it is used as a shareholder of companies conducting businesses outside the base country.

> This business may either be outside the 'home country' where the shareholders or other beneficial owners live or are resident (in third countries other than the home country), or it may even be business within the home country[47]

of the shareholders or the beneficial owners.

The essential characteristics of a base company are as follows:[48]

(a) Two or more interstate relationships;

(b) Legal or factual control; this can be control by two or more persons together;

(c) The economic interests lie wholly or mainly outside the base country. The (economic) function of the base is that of a circuit or at least a roundabout;

(d) A (very) advantageous fiscal climate;

(e) The tax factor dominates the choice of location;

(f) The base enterprise must have either a legal personality, or, at least, the capacity of being the owner of rights, like a *Liechtenstein Ansalt*, which may not have legal personality;

(g) Base enterprises should be a separate taxable subject. They must not be subjected to the worldwide taxation basis of another (high) tax jurisdiction; and

(h) In principle, only those functions can be attributed to a base enterprise which could in an economic sense be a separate division or part, in country A, of a firm having its residence in the same country A.

In German literature a distinction is drawn between typical base companies (*typische Basisgesellschaften*), where foreign investment is involved, and atypical base companies (*atypische Basisgesellschaften*), where only home country investment is involved.[49] For South African purposes this distinction might have a serious effect on whether the income of the base company is attributable in terms of the Controlled Foreign Companies (CFCs) diversionary rules, if the base company is a CFC.[50]

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46 Rotterdam Institute for Fiscal Studies (RIFS) *International Tax Avoidance, Volume A, General and Conceptual Material* (1979) 50.
47 *Ibid*.
48 *Idem* 51–52. See also De Broe 41–50
49 RIFS 51.
50 The diversionary rules are contained in s 9D(9) ITA.

The Rotterdam Institute for Fiscal Studies states that

> [t]he general conclusion is that, under the heading of these broad definitions, there are many possible kinds of base companies, some with a single function, some with several functions, and some which combine base-company functions with 'normal' industrial or commercial activities.[51]

The essential requirements of low tax and the fact that the tax factor dominates the choice of location might pose problems in many jurisdictions. Furthermore, the fact that the base country levies no or minimal taxes on the income of the base companies may result in the country being regarded as a tax haven and thus disadvantage the position of the base country. Such are not essential elements of a headquarter company and are central to the distinction between base companies and headquarter companies. Furthermore, the headquarter company does not conduct its primary business through agents.

4 6 Foreign Group Finance Company

A foreign group finance company is a company located in a foreign jurisdiction for the purpose of controlling the finances of the group of companies.[52] It can be referred to as the treasury of the group or the finance house. The main assets of the foreign group finance company are finances and financial instruments. This company can provide the group with finances from its own capital or may borrow and lend on the finances to group companies.[53] In this way it intermediates between lenders and borrowers. It also serves for the transmission of loans from one country to another. Mostly foreign group finance companies have higher credibility to borrow and are located in jurisdictions where lending practices are not strictly regulated.[54]

Referring to the foreign group finance company, Honiball and Olivier state that:

> [t]he fiscal purposes here are the payment of little or no tax on the interest receipts, entitlement of tax deductibility for interest paid in high-tax jurisdictions, and the reduction or annihilation of withholding taxes on interest through the operation of tax treaties.[55]

The authors furthermore state as follows:

> Reasons for having such a centralised finance entity include funding and monitoring the fixed and floating capital requirements of group companies, providing centralised exchange rate and interest rate risk, financial management services to group companies, managing group liquidation

51 RIFS 52.
52 *Idem* 84.
53 *Ibid.*
54 *Ibid.*
55 Olivier & Honiball 672.

> through the use of specialised products like bonds, and managing the repatriation of funds throughout the group.[56]

A foreign group finance company may be established as a fellow subsidiary to the group companies to which it provides treasury support or it can be the holding company of those companies. Where it is the holding company of some group companies (the foreign group holding finance company) some of its activities may resemble those of an intermediary holding company and/or a headquarter company. However, the foreign group finance company does not have the purpose of providing transactional and organisational flexibility in a group of companies, something that is key to the functions of the intermediary holding company. It also does not provide the full range of administrative and management functions associated with a head office as does a headquarter company.[57]

There are considerable similarities between a foreign group finance company and a foreign base holding company and a foreign financial service centre company.

4 7 Foreign Financial Services Centre Companies

Foreign financial services centre companies derive their name from the jurisdictions that provide for such entities, the foreign financial services centres. The objective of these centres is mostly to provide global financial services with tax benefits for transactions undertaken outside the country of residence of the financial services centre company.[58] Rohatgi[59] states that

> [f]or example, [these centres] permit international investors to form tax-beneficial entities in their jurisdictions for various business objectives. These entities may act as holding companies managing overseas investments and activities of a multinational enterprise, or they may accumulate capital lawfully for reinvestment abroad.

Within the Southern African Development Community (SADC), Mauritius and Botswana are the most commonly used financial services centres. In Mauritius the concept of Global Business Licence (GBL) has been adopted to allow resident companies to conduct offshore business with non-residents of Mauritius and in currencies other than the Mauritian rupee. The GBL holders are taxable at the tax-incentive rate of 15% which, coupled with the deemed or presumed foreign tax credit of 80%, reduces the effective tax rate to 3% for these companies.[60]

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56 *Ibid*. See also Spitz *International Tax Havens Guide* (1999) 37.
57 See Ogley 137.
58 Rohatgi 4.
59 *Ibid*.
60 "Category 1 Global Business Company" http://www.alliance-mauritius.com/gbl1.php (accessed 2012-06-22).

In Botswana, the Income Tax Act provides the Botswana Minister of Finance with the powers to provide for the establishment, marketing and operation of an international financial services centre company.[61] This empowers the Minister to issue a tax certificate certifying that the activities of a company are approved financial operations. The approved financial operations include banking and financing operations transacted in foreign currency, the broking and trading of securities denominated in foreign currency, investment advice, and accounting and financial administration.[62]

The tax incentives available to the international financial services centre company are *inter alia* the following:[63]

(a) Dividends received by the international financial services centre company in respect of qualifying foreign participation are exempt;

(b) An international financial services centre company is entitled to deduct interest on any loan including debentures or debenture stock;

(c) An international financial services centre company is entitled to deduct the amount of certain foreign exchange losses;

(d) An international financial services centre company is granted foreign tax credit on taxes paid in any other countries on income sourced outside Botswana against tax chargeable under the Botswana Income Tax Act; and

(e) There are no withholding taxes on any payment of interest, royalty or management or consulting fee by an international financial services centre company or dividends to a non-resident of Botswana.

The defining characteristics of these companies are that their countries modify their tax laws to create a fertile environment for an international financial services centre company to operate. Furthermore, these companies' main operations are financial services. This may coincide with other headquarter company operations and result in the headquarter company being a "mixed" headquarter company where such operations are undertaken by the headquarter company. However, it is the above defining characteristics that distinguish the foreign financial services centre companies from headquarter companies.

61 S 137(1) Botswana Income Tax Act 12 of 1995.

62 S 137(2) Botswana Income Tax Act 12 of 1995. The other operations are management and custodial functions in relation to collective investment schemes, insurance and related services, registrars and transfer agency services, exploitation of intellectual property, and other operations that the minister may declare by order from time to time to be approved financial operations for the purposes of s 137. See also http://www.kpmg.co.za/content (accessed 2012-03-16).

63 "International Financial Services Centre Companies in Botswana Tax Law" http://www.armstrongs.bw//publications/docs/international_financial_services_centre.doc (accessed 2012-03-17).

4 8 Intellectual Property Holding Company

The simplest way of defining an IP holding company is that it is a holding company in which IP or rights thereto are held. These are also often referred to as patent holding companies.

> These companies have as their purpose and activity the acquisition, exploitation, licensing or sublicensing of patents, trademarks, copyrights, brand names, or other industrial property rights, like 'know-how' on technical or administrative matters.[64]

The purpose of an IP holding company is mainly to minimise or avoid the tax liability on royalty payments by usage of tax treaties and/or low rates in tax havens.[65] Centralised ownership of IP assets offers many advantages which include: Centralised strategic planning; the ability to manage legal, marketing and administrative matters through a single team; co-ordinated policies; around protection and enforcement and cost savings on administrative and maintenance functions.[66]

The essence of an intellectual property holding company is not to hold shares or controlling power in other group companies, but to hold intellectual property normally beneficial to the other group companies. In this guise it is therefore not a holding company in accordance with the use of the term in this article. It must be noted, however, that these functions could be combined with headquarter company functions in a group of companies to achieve the ultimate tax savings.[67]

4 9 Personal Holding Company

A personal holding company is generally a company owned by natural persons, normally a small number of individuals. It engages in investment activities in that it owns shares in other companies.[68] It is used to defer tax by trapping dividends interest, rent and royalties where the tax burden for companies is less than that of individuals on receipt of such payment. It can either be resident in the country of residence of its shareholders or outside such country depending on the origin of the amounts on which tax is to be avoided.[69]

What immediately distinguishes a personal holding company from a headquarter company is that a personal holding company is owned by individuals. Furthermore, a personal holding company does not form

64 Rohatgi 87.
65 *Ibid*.
66 *Intellectual Property Holding Companies and R&D Credits* http://www.polity.org.za/article/intellectual-property-holding-companies-and-rdtax-credits-2012-06-05 (accessed 2012-06-22).
67 Fairbairn *Intellectual Property Holding Companies can Create Significant Tax Savings and Protect Valuable Assets* http://www.fredlaw.com/articles/ip/inte_0304_kks.html (accessed 2012--0622).
68 *IBFD* definition of "Personal Holding Company".
69 See http://www.allbusiness.com/glossaries/foreign-personal-holding-company/4951392-1.html (accessed 2012-06-14).

part of a group of companies with any other companies. On the other hand a headquarter company is owned by an ultimate holding company in a group of companies.

5 Conclusion

There are numerous similarities between headquarter companies and other forms of corporations as discussed above. The essential characteristic of a headquarter company is that it owns a substantial participation in the shares of other companies, usually operating subsidiaries, established outside the country in which the headquarter company is established even though the headquarter company may perform other functions and own other assets. Its main function is to provide the full range of administrative and management functions associated with a head office; for example, treasury and tax management, internal audit, public relations, market research and marketing, insurance and accounting. However, headquarter companies are more often formed to perform a conglomerate of functions – some of which are peculiar to certain of these other corporations. Still, the nature of a headquarter company should not be confused with these other entities. Confusing the headquarter company with other entities may result in misinformed decisions and attributions of the resulting tax assessments or expectations in different jurisdictions.

Legal framework for public private partnership in Nigeria

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OPSOMMING

Die Regsgrondslag vir Openbaar-Private Samewerking in Nigerië

Nigerië staar tans 'n infrastruktuur-tekort in die gesig, wat 'n beperking plaas op die land se vermoë om ekonomies te groei en te ontwikkel ter bereiking van die nasionale visie om deel van die top 20 wêreld ekonomie teen 2020 te wees. Om die land se infrastruktuur te verbeter en sodoende verbeterde ekonomiese groei en ontwikkeling te bevorder, moet daar belê word in die uitbreiding van die infrastruktuur en basiese dienslewering op 'n skaal wat tans vêr buite die bereik is van die regering se finansiële vermoëns. Dus is die Nigeriese regering afhanglik van privaat inisiatiewe en kapitaal om die land se infrastruktuur te onderhou en uit te brei. Die gebrek van finansiering noodsaak die regering om gebruik te maak van privaatsektor hulpbronne en –finansiering vir die voorsiening van infrastruktuur en dienslewering deur middel van openbaar-private vennootskappe. Hierdie artikel ondersoek die regsgrondslag vir privaat-sektor deelname in die voorsiening van infrastruktuur en dienslewering in Nigerië. Uiteindelik, bied dit 'n oorsig en lewer kritiek op sekere wetgewing wat die openbaar-private vennootskap raamwerk in die voorsiening van infrastruktuur, onderhoud en finansiering in Nigerië reël. Die artikel argumenteer dat wetgewing wat die grondslag van die raamwerk in Nigerië beheer ontoereikend is. Die ontoereikendheid van wetgewing is deels verantwoordelik vir die gebrek aan private belegging in Nigerië se openbare infrastruktuur en dienslewering. Dit lei daartoe dat die program nie daarin slaag om privaat beleggings vir die ontwikkeling van Nigeriese infrastruktuur te verseker nie. Gevolglik sal die regte wetgewing die privaatsektor aanmoedig om hulle beleggings te verhoog en die nodige finansiële hulpbronne beskikbaar te stel om kritiese ontwikkeling van openbare infrastruktuur en dienslewering te bewerkstellig.

1 Introduction

It is an established fact that infrastructure is an enabler. It acts as catalyst and is critical to human and economic development and also the general functioning of every modern society. It defines a country's business competitiveness and also creates jobs. It provides the sub-structure upon which a given society, the super-structure in this context, is built. It could be likened to a "jugular vein"[1] of an existing society. Without it, a society

1 This is one of the veins in the neck that drain blood from the head, brain, face and neck and convey it toward the heart. See Online Medical Dictionary-http://www.medterms.com/script/main/art.asp?articlekey = 987 (accessed 2011-07-28).

cannot function. A country's state of public infrastructure can be an indicator of the country's economic development and growth. Obviously, an efficient and reliable infrastructure is critical to attract the direct foreign investment and expansion of international trade which are so crucial to growth.

This explains why in every nation, provision of infrastructure assets has always remained on the front-burner of governments' agenda for development and policy. In Nigeria, the three tiers of government have come to appreciate the fact that provision of modern and functional infrastructure plays a vital role in the socio-economic lives of the people. Therefore, raising the bar for service delivery and tackling the lack of infrastructure have been integral components of successive governments' visions in Nigeria.

Analysing the state of infrastructure in Nigeria presents a spectacle of a crushing lack of infrastructure assets across the nation. This huge deficit in infrastructure is easily observed in the critical sectors of the nation's economy such as power, transportation, education, housing, water supply and healthcare. In every way, decades of underinvestment and general neglect in the area of maintenance have taken a toll on the country's public assets.

The *Global Competitiveness Report* of 2010-2011,[2] using infrastructure as one of the twelve indicators and as a factor very fundamental to a country's ability to compete, ranked Nigeria 127th overall out of the 139 economies covered and the country receives poor assessments for its decrepit infrastructure which on its own is ranked 135th amongst 139 economies. According to the report, Nigeria's poor infrastructure is reported to be the most problematic factor influencing trade in Nigeria. The report underscores the poor state of Nigeria's infrastructure in that in overall quality, Nigeria's infrastructure is ranked 134th; in the quality of roads, 128th; quality of railroad infrastructure, 104th; quality of transport infrastructure, 107th; to mention few.[3]

The Debt Management Office[4] has established the fact that Nigeria's current infrastructure deficit requires capital investments to the tune of

2 The World Economic Forum's Centre for Global Competitiveness and Performance publishes an annual *Global Competitiveness Report* and report series which aim to reflect "the business operating environment and competitiveness of over 130 economies worldwide". The report series identify advantages as well as impediments to national growth thereby offering a unique benchmarking tool to the public and private sectors as well as academia and civil society. http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport-pdf2010-11.

3 See the *Global Competitiveness Report 2010-2011* 260-261 http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport-pdf2010-11 (accessed 2011-07-28).

4 Established by the Debt Management Office (Establishment, etc.) Act 2003 to, among other functions, "maintain a reliable database of all loans taken or guaranteed by the Federal or State Governments or any of its agencies and also verify and service external debts guaranteed or directly taken by

US$100 billion to US$111 billion,[5] and this magnitude of financing required to bridge the country's infrastructure deficit, currently outstrips the supply of capital available from the public sector.[6]

So, given the scale of the nation's infrastructure requirements and the ever-widening investment deficit in provision of public assets and service delivery in an environment of budgetary constraints, lack of capacity, general incompetence and endemic corruption, the governments, at all levels in Nigeria, are drawing on private initiatives and capital to tackle the menace of infrastructure deficits and lack of financing. This entails leveraging private sector resources and capacity for provision of infrastructure assets and services to the public through public private partnerships (PPPs) to bridge the widening infrastructure financing gap and open up the country's vast economic potentials, fast-tracking the development process.[7]

However, it must be noted that, by implication, the legal framework includes the regulatory system, which itself is a subset of the legal framework.

As a run-up to the proposed discussion in this article, I will look at the framework for PPP as a financing technique or model in Nigeria.

2 Framework for Public-Private Partnership in Nigeria

PPP fundamentally about applying the private sector's skills in technical and financial risk management in ways that represent real value for the public sector. In the infrastructure projects landscape, PPPs are seen as financial models that enable the public sector to make use of private finance capital in a way that enhances the possibilities of both the government and the private company.[8]

Since the beginning of the fourth democratic experience in May 1999, the Federal Government of Nigeria has embarked on an extensive liberalisation and privatisation program to inject private sector money and expertise in order to ensure quality infrastructure service delivery to the teeming population.[9] The assumption is that private sector

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the Federal Government or by the State Governments and any of their agencies where such debts are guaranteed by the Federal Government". See s 6(1) Debt Management Office (Establishment, etc.) Act 2003.

5 The World Bank (2011) Project appraisal document 6.

6 *Ibid*.

7 Delaine E (2008) 39-40.

8 Hodge & Greve (eds) *The challenge of public-private partnership: Learning from international experience* (2005) 4.

9 Conference on Infrastructure Development in Nigeria *Report of the Nigerian Economic Summit Group International PPP and infrastructure development in Nigeria* (2004) 1.

investment in infrastructure is a key priority in moving Nigeria to the status of top 20 economies by the year 2020.[10]

However, over the years, at the central level, the government has taken serious steps in pursuit of its infrastructure targets. In 2007 specifically, the Federal Government of Nigeria articulated its Seven Point Agenda which outlined the seven key drivers for Nigerian development.[11] At the top this list of indicative parameters, is the adequate provision of critical infrastructure[12] as a means to catalyse economic growth with the transport sector as a high priority for PPP investment.[13] At the level of the states, the national infrastructure strategy has been endorsed and a commitment has been made towards the agenda for country-wide infrastructure development.

Pursuant to the above, the Federal Government inaugurated the Infrastructure Concession Regulatory Commission (Commission)[14] in late 2008 to drive the program in Nigeria. As a first step towards establishing the proper legal and regulatory environment to attract private sector investors, the Federal Executive Council approved the National Policy on Public Private Partnership, sponsored by the Commission after stakeholder consultations and technical inputs from, *inter alia*, the World Bank and the United Kingdom Department for International Development (DFID). The key PPP principles driven by the Commission are: Value for money; public interest; output requirements; transparency; risk allocation; competition; and capacity to deliver.

This policy sets forth the ways in which private investment could be leveraged in tackling the menace of poor infrastructure stocks and boosting delivery of services to the public in a manner that is sustainable. This is pursuant to sections 33 and 34 of the Infrastructure Concession Regulatory Commission Act (ICRCA) which empower the Commission to

10 *Ibid*.
11 Project Appraisal Document 46.
12 The critical infrastructure include: Power, transportation, national gas distribution and telecommunications. For electricity – to develop an integrated, lowest cost, expansion plan for the development of the Nigerian electricity industry in the medium and long-term; upgrade and reinforce distribution network; develop appropriate gas policy to encourage production and supply of gas for electricity generation; develop gas production and supply infrastructure; and develop a policy on IPPs. For transport – provide platforms for PPP, with capacity building in MDAs. For roads – explore mechanisms to ensure funding for maintenance investments. For railways – revive the system and involve the private sector. For aviation – the priority is to establish the National Civil Aviation Authority as the cornerstone of reform, including a recertification project.
13 Project Appraisal Document. Others are: the Niger Delta region; food security; human capital; land tenure changes and home ownership; national security; and wealth creation.
14 Established by s 14 ICRCA, to regulate, monitor and supervise the contracts for infrastructure or development projects. See particularly the Schedule to the ICRCA.

take directives from the President regarding matters of policy and power to make regulations, respectively.[15]

The entire PPP framework in Nigeria hinges on the principles of achieving better value and affordable services. As expressed in the National Policy Document, there are economic, social and environmental objectives for the adoption of PPP model as a strategy for infrastructure development.[16] It is the belief of the government that a private-sector led drive for infrastructure development through PPPs will open up the infrastructure and service delivery landscape in Nigeria to efficiency, inclusive access and overall improvement of the quality of public service delivery in a sustainable way.[17]

In pursuit of this lofty agenda, they came up with a supposed more investor-friendly legal and regulatory environment so that the provision of infrastructure assets and delivery of services to the public could be private-sector driven.

The ICRCA stands as the closest legislation in Nigeria that can easily be referred to as the infrastructure law. The apparent successes that came in the way of provision of telephone services and the global system of mobile telecommunication (GSM) really heightened the expectation that the private sector participation is a sure-footed path to better service delivery and procurement of high-grade and cost-effective public infrastructure stocks.[18]

3 Legislative and Regulatory Frameworks

Critical to the entrenchment of the PPP models is an enabling legal framework. This is rightly underscored in the UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects*,[19] which states that the existence "of an appropriate legal framework" is a prerequisite to creating an environment that fosters private investment in infrastructure and where it is in place, "it is important to ensure that the law is sufficiently flexible and responsive to keep pace with the developments in various infrastructure sectors"[20] in the economy.

Generally, the legislative framework provides the platform by which the governments regulate and ensure the provision of public services to the public and offers protection of rights for public service providers and

15 The World Bank (2011) Project appraisal document 6.
16 The Infrastructure Concession Regulatory Commission (ICRC) National Policy on PPP (2009) 1012.
17 *Ibid*.
18 Investments in telecommunications industry grew from US$50 million in 2000 to US$50 billion in 2010. See Ahmed *PPP for infrastructure development: The Nigerian experience* (2011) 1.
19 UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects* UN 2001 A/CN.9/SER.B/4 23.
20 *Ibid*.

the customers. That explains why the legislation needs to be not only transparent, but also fair. A fair legislative framework will incorporate the wide and varied interests of all parties – the government, the private investor who provide services for the public and the public at large – and seeks to achieve an equitable balance between all these wide and varied interests.[21]

Rules are therefore significant in defining the terms and the templates through which financial capital flows. It is the legal framework that breathes the "breath of life" into the entire gamut of the policy framework for private participation in procurement of public infrastructure.

On the other end of the spectrum is the regulatory system which is a sub-set of the legislative framework. The critical imperative of putting in place a regulatory environment that inspires confidence through "open and transparent processes and procedures and a level playing", is not misplaced. This will promote competition and enables the investors to earn fair returns for the risks taken.[22]

Typically, the regulatory environment embraces the rules of procedure governing the way and manner institutions saddled with regulatory functions exercise their powers. For a regulatory process to be credible it must be transparent and objective. Rules and procedures must be lucid and objective for the purposes of fairness, impartiality and prompt action from the regulatory body concerned.[23] A typically conducive regulatory environment will create a level playing field for all players on the PPP terrain. At minimum, there should be guarantees as to the protection of consumers through regulations that touch on minimum service requirements, coverage, pricing, etcetera, and generally to seek to prevent abuses of the rights of consumers.[24]

Pursuant to the signing into law of the ICRCA, the Federal Government of Nigeria inaugurated the Infrastructure Concession Regulatory Commission (the Commission) on the 27 November 2008, to provide the requisite regulatory and institutional framework within which all Ministries, Departments and Agencies (MDAs) of the Federal Government can effectively enter into partnership with the private sector in the financing, construction, operation and maintenance of infrastructure projects as provided for in the ICRCA.[25]

At this juncture, the review will now shift to related regulatory and industry specific laws relating to PPPs in Nigeria.

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21 *Ibid*.
22 Shonekan *National Policy on Public Private Partnership* (2011) 1.
23 UNCITRAL *Legislative Guide* 35.
24 Tanyi *Infrastructure finance in emerging markets: lessons from recent experience* (2009) 3.
25 ICRC National Policy on PPP (2009) 10.

3 1 Legal, Regulatory and Industry Specific Laws

In this section, I analyse the relevant laws touching on public and private sectors involvement in procurement of public infrastructure and service delivery in Nigeria, starting with the oldest law – the Highways Act of 1971.

3 1 1 Highways Act 1971

The Highways Act[26] empowers the Minister of Transport to construct and operate toll gates and collect tolls on the Federal Highways. What this means is that in concessions of federal roads that require tolling, the authority lies with the Minister in charge. Unfortunately, the main infrastructure legislation, the ICRCA, does not contain a saving provision with regard to this piece of legislation, nor does it make a reference to the Highways Act.

3 1 2 Utilities Charges Commission Act 1992

Utilities Charges Commission Act 1992 established the Utilities Charges Commission that regulates tariff charged by public utilities in Nigeria. The implication of this is that the approval of the Commission may be required in fixing the tariffs between the private investor (concessionaire) and the Government. Like the law discussed above, the ICRCA does not contain a saving clause nor does it make a reference to the Utilities Charges Commission Act.

3 1 3 Bureau of Public Enterprises (Privatisation and Commercialisation) Act 1999

This Act provides the legal framework for the privatisation programme in Nigeria and establishes the National Council on Privatisation (NCP) and the Bureau of Public Enterprises (BPE) as the supervisory and implementing agencies respectively for privatisation transactions. It however, repeals the Bureau of Public Enterprises Decree.[27]

Under the Privatisation and Commercialisation Act, 1999, the National Council on Privatisation is saddled with the responsibility for determining which public assets the government should divest from. Under the provisions of this Act, concessions have been used severally as a means of commercialisation of existing government-owned enterprises.

Section 9 (1) of the Privatisation and Commercialisation Act establishes the National Council on Privatisation (the Council). Section 11 however provides for the functions and powers of the Council which among others include: Approving policies on privatisation and commercialisation, public enterprises to be privatised or

26 See s 2 Highway Act
27 78 of 1993.

commercialised, and the legal and regulatory framework for the public enterprises to be privatised.

In the same vein, section 12 (1) establishes the Bureau of Public Enterprises. The functions of the Bureau with respect to privatisation include implementing the Council's policy on privatisation; prepare public enterprises approved by the Council for privatisation; advise the Council on further public enterprises that may be privatised; and advise the Council on the capital restructuring needs of the public enterprises to be privatised, among others.[28]

The Act only applies to the privatisation and commercialisation of the list of public enterprises set out in the Act. The Act does not apply to the primarily "greenfield" kinds of PPP transactions.

However in practice, the agreement between the two regulatory agencies – Commission and BPE – is that all assets mentioned in the Privatisation and Commercialisation Act that are to be developed into PPP will be led by the MDAs with the Commission coordinating and the BPE providing technical advice.[29]

The BPE as an agency has driven the privatisation process of many state-owned business enterprises in Nigeria since 1999. It holds the public assets in trust for the Ministry of Finance until successfully sold or commercialised. Over the years, the BPE has gained experience, skills and capacity through the concession method used during the privatisation of state-owned business enterprises. This institutional expertise and experience could be made available in implementing the PPP projects under the new PPP policy, while the Commission drives the process. The synergy could be well deployed, without conflict between the two institutions. For an instance, the BPE may serve as advisors to the MDA PPP project teams in conjunction with external transaction advisors whose services may be secured by the Commission. They could work together to expand the space and opportunities for private sector participation in the procurement of infrastructure and service delivery.[30]

3 1 4 Debt Management Office

The Debt Management Office (Establishment, Etc) Act[31] was enacted to establish the debt management office[32] (DMA) which is responsible, among other things, for the preparation and implementation of a plan for the efficient management of Nigeria's external and domestic debt obligations at sustainable levels compatible with desired activities for

28 *Idem*. See s 13 Highway Act.
29 The World Bank (2011) Project appraisal document 56.
30 ICRC National Policy on PPP (2009) 74; The World Bank (2011) Project appraisal document 55.
31 18 of 2003.
32 See s4 Debt Management Office Act 2003.

growth, development and participation in negotiations aimed at realising the objectives.[33]

It has specific responsibilities with respect to all loans and borrowings of the Federal Government and empowers the Minister of Finance to give guarantees for such borrowings and to approve loans from financial institutions to the Federal, State or Local Governments or any of their agencies. Since all PPP processes may involve Federal Government borrowings and guarantees and other long-term contingent liabilities, by virtue of section 6 of the Act, the DMO's approval will be required.[34]

The DMO supervises the money and capital markets by ensuring that the two segments of the financial sector work perfectly together and develop the range of appropriate instruments that are needed to hedge financial risks in the PPP projects. An example of this is developing the secondary market for government bonds in both liquidity and depth and this will ultimately provide a reference interest rate for PPP financing.[35]

Part of the DMO's mandate is to be satisfied that any contingent liabilities are manageable within the government's economic and fiscal forecast.[36] To this end, the DMO advises the FEC as part of the approval process for individual projects. The project teams consult the DMO for approvals before involving the multilateral agencies such as International Finance Corporation (IFC), Multilateral Investments Guarantee Agency (MIGA) or International Development Agency (IDA) for provision of guarantees or other financial instruments.[37]

3 1 5 Electric Power Sector Reforms Act, 2005

The Electric Power Sector Reforms Act 2005 was signed into law on 11 March 2005. Generally, it provides the statutory framework for participation of private companies in electricity generation, transmission, and distribution. Specifically, the Act provides for the formation of companies to take over the functions, assets, liabilities and staff of the defunct National Electric Power Authority (NEPA).[38] It also provides for development of competitive electricity markets and the establishment of the Nigerian Electricity Regulatory Commission (NERC). Besides, the Act also makes provision for the licensing and regulation of the generation, transmission, distribution and supply of electricity. Regulatory issues in respect of enforcement of matters like performance standards, consumer rights and obligations and determination of tariffs are also governed by the Act.[39]

33 See the Explanatory Memorandum to the Debt Management Office Act. See also ss 1, 8 Debt Management Office Act.
34 The World Bank (2011) Project appraisal document 56.
35 *Idem* 75.
36 *Ibid*.
37 *Ibid*.
38 Onogoruwa (2009) www.sec.gov.ng/files (accessed 2011-07-28).
39 See the Explanatory Memorandum to the Electric Power Sector Reform Act 2005.

Section 1 of the Act provides for the transformation of the defunct NEPA to the Power Holding Company of Nigeria (PHCN) which was then unbundled into autonomous companies comprising of: One transmission company, seven generation companies and eleven distribution companies. Part of the reforms which was provided for in the Act was the establishment of the NERC, the Rural Electrification Agency (REA) and the National Electricity Liability Management Company (NELCO) – a special purpose vehicle expected to take over and manage the residual assets and liabilities of the defunct NEPA, after privatisation of the unbundled companies. Section 83 empowers the Commission to set up and administer a fund under the name: "Power Consumer Assistance Fund" to be used to subsidise under-privileged power consumers as may be specified by the appropriate minister.[40]

3 1 6 Infrastructure Concession Regulatory Commission Act 2005

The ICRCA was signed into law on the 10 November 2005. The Act provides for the participation of the private sector in financing the construction, development, operation, or maintenance of infrastructure or development projects of the Federal Government through concession or contractual arrangements; and the establishment of the Commission to regulate, monitor and supervise the contracts on infrastructure or development projects.[41]

The Act has two distinct points of focus set out in Part I and Part II. Part I provides that Federal Government entities can enter into agreements with the private sector for the provision of infrastructure. Part II establishes the Commission and provides that its functions are to: Take custody of every concession agreement made under the ICRCA and monitor compliance with the terms and conditions of such agreement; ensure efficient execution of any concession agreement or contract entered into by the government; ensure compliance with the ICRCA; and perform such other duties as may be directed by the President.[42]

The ICRCA provides for the granting of the PPP contracts or concessions by the government or any of its ministries, agencies, corporations, or bodies. Under the ICRCA, the term "concession" does not imply that the rights to any revenue stream from user charges are also transferred to the private sector entity involved in its operation, but include an obligation to finance the infrastructure. In the schedule to the ICRCA, there is a list of infrastructure assets to which the provisions of the ICRCA apply but requires the Federal Executive Council (FEC) to approve any other form of infrastructure and development project.[43]

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40 See the Transmission Company of Nigeria's Website http://www.tcnng.or/org/StatusOfPower.aspx (accessed 2011-07-28).
41 See the Explanatory Memorandum and the Schedule to the ICRCA.
42 See ss 1, 14, 19, 20 of the ICRC Act, 2005; The World Bank (2011) Project appraisal document 53.
43 The World Bank (2011) Project appraisal document 53.

Under the ICRCA, however, there is an obligation on the part of each Federal Ministry to prioritise its infrastructure projects and secure the formal approval of the investment decision from the FEC as required in the National Policy Statement. The ICRCA also makes it mandatory that the approved projects should follow a transparent competitive procurement process which is openly advertised. It also requires that any subsequent guarantees, letter of comfort or undertaking given by the ministry may only be given with the prior consent of the FEC. Hence, the ICRCA provides the legislative basis for the procedures set out in the National Policy for PPP.[44]

The Commission is the statutory regulatory body established by the ICRCA with a mandate to evolve and issue guidelines on PPP policies, processes and procedures (including those for concessions), and to act as a national centre of expertise in PPP. It is expected to, in conjunction with the relevant MDAs, identify potentially "bankable" PPP projects, "and will act as the interface with the private sector to promote communication on national policies and programmes".[45] The communication envisaged "will be continuous, clear, timely, and accurate".[46]

The Commission is empowered to grant PPP type contracts or concessions by any of the Federal Government ministries, agencies, corporations or bodies.[47] The Commission is expected to incorporate a PPP Resource Centre which is to play an important aspect in the institutional framework.[48]

As part of the regulatory functions, the Commission will see to the smooth implementation of the Government's policies and processes and give advice to the Federal Executive Council (FEC) on the national policy on PPP. This will include giving advice to "FEC on whether projects submitted to it for approval meet the requirements of the regulations".[49] The Contract Monitoring Unit within the Commission framework will be responsible for monitoring of compliance with the terms and conditions of the contracts between the contracting parties arising from the PPP processes.[50]

However, there are some of the provisions of the ICRCA which still need more details and clarifications.[51] Besides, there are some observed lacunae in the legal framework that would need to be plugged to make significant strides in the implementation of the infrastructure law and the PPP policies.[52]

44 *Ibid*.
45 *Idem* 15.
46 *Ibid*.
47 *Ibid*.
48 *Ibid*.
49 *Ibid*.
50 *Ibid*.
51 *Idem* 53.
52 *Ibid*.

First, the ICRCA empowers the ministries, departments and agencies of the Federal Government of Nigeria to enter into PPP related agreements after the approvals of the Federal Executive Council without mentioning or considering the other government establishments that may be affected by such agreements or other relevant laws. Besides, no mention is made of the need to take into account the effect of the proposed PPP transactions on the finances of the Federal Government.[53]

The ICRCA makes no mention of the ownership of infrastructure assets by the private sector, nor does it provide for the stream of income through users' fees to be collected by private sector operators from the general public for the use of infrastructure assets, nor does the Act provide for the possible acquisition of land.[54]

It should also be noted that the provisions of the ICRCA are cloudy concerning the approval process for PPP projects and, in particular, the granting of a concession.[55]

In the same vein, the powers conferred on the Commission are minimal and restricted to taking custody of already signed agreements and monitoring them. No specific responsibilities are given to the Commission in the evaluation and tendering process for PPP projects and there are no provisions on the relationship and coordination between the Commission and other MDAs of the Federal Government regarding the monitoring of the PPP contracts.[56]

Similarly, the ICRCA makes no reference to the scale of projects to be considered for private sector participation and does not provide a mechanism for dealing with unsolicited proposals.[57] Also, no provision is made for a fair, efficient appeals process for illegal amends or aggrieved parties.[58]

The ICRCA does not provide for a proper audit/review of processes and outcomes or for the need for proper public financial management.[59]

Unfortunately also, no provisions are made in the ICRCA for alternative dispute resolution mechanisms.[60] Misunderstandings and disputes are inevitable between parties involved in PPP transactions and alternative dispute resolution mechanisms would have offered several ways of settling such misunderstanding and disputes in business in a less

53 *Ibid*.
54 *Ibid*.
55 *Ibid*.
56 *Ibid*.
57 *Ibid*.
58 *Ibid*.
59 *Idem*.
60 Ahmed "Infrastructure development for Nigeria-the PPP imperative" ICRC website-http://www.icrc.gov.ng/ (accessed 2011-07-30).

painful and more accommodating manner than the adversarial way of settling issues through the judicial process or litigation in a court of law.[61]

In order to make the regulatory functions of the Commission more effective, the ICRCA should have contained a provision that any PPP transactions done without compliance with the ICRCA would be unlawful.[62]

In relation to the functions, the legislation lacks the regulatory and enforcement provisions that are vital in delivering the Commission's mandate.[63] The statutory functions are somewhat restricted in scope in a number of instances.

One instance relates to the role of the Commission which is restricted to monitoring and ensuring compliance of post-transaction activities. Ordinarily, the Commission should be allowed to have oversight functions over the pre-financial close arrangements so as to ensure that the contractual arrangements are legally sound.

The ICRCA does not provide for the role of the Commission as it relates to evaluating or approving of proposals, and says nothing in reference to processes for preparing or analysing projects or for deciding which projects should be privatised by federal agencies. The inclusion of the word "regulatory" in the title of the ICRCA and in the name of the Commission is not reflected in the statutory powers conferred on the Commission in the ICRCA regarding industry regulation and it seems it is not intended to have such powers.

There is no specific link to other related laws[64] that touch on

61 *Ibid*. ADR is an acronym for "Alternative Dispute Resolution" a generic name for resolution of disputes outside the judicial process or litigation in a court of law and include the following methods: Negotiation, mediation, conciliation, arbitration, expert determination and what is sometimes called the multi-door approach. Out of these options, arbitration seems to be the most developed and the commonest. Generally, one of the reasons for ADR is the undue delay suffered by litigants in the normal courts. Justice Adam (Alternative Dispute Resolution and Canadian Courts: a time for change, 1989, p. 14), identified the following reasons as the basis for the adoption of ADR: lower caseloads and related public expenses; more accessible for people with disputes; reduced expenditure of time and more for parties; speedy and informal settlement of disputes otherwise disruptive of the community or lives of the parties to the disputes and their families; tailored resolution to the parties' needs; increased satisfaction and compliance with resolutions in which the parties have directly participated; restoration of neighbourhood and community values which are more cohesive; enhanced public satisfaction with the justice system, among others.

62 *Ibid*.

63 The World Bank (2011) Project appraisal document 53.

64 For example: the Privatisation and Commercialisation Act 1999; the Fiscal Responsibility Act 2007; Public Procurement Act 2007. These legal instruments especially the Public Procurement Act might impact on the PPP procurement processes in the country.

infrastructure procurement processes[65] and no provision in the Act shields the Commission from all forms of interference, given the peculiarity of the prevailing political environment in Nigeria. To this end, the Commission needs to be insulated from executive and political interference and given the necessary tools to fulfil its functions.[66]

The Commission ought to be given primacy on issues regarding the PPP processes touching on the Federal Government-sponsored infrastructure projects. A typical example is the conflicts between the Commission and the BPE in relation to the PPP processes. It is obvious that while the BPE is mainly saddled with the mandate for the privatisation of public enterprises, the Commission is concerned with superintending and moving the PPP processes forward, especially the concession transactions. The ICRCA ought to have empowered the Commission to impose sanctions on those who contravene the provisions of the ICRCA. There is also the need to include the provision that MDAs may receive and consider unsolicited bids subject to guidelines issued by the Commission from time to time.[67]

Section 20 of the ICRCA, however, empowers the Commission to "perform such other duties as may be directed by the President from time to time, as are necessary or expedient to ensure the efficient performance of the functions of the Commission ...".[68] However, pursuant to the provisions of section 34, the Commission may, with the approval of the President, "make such regulations as in its opinion are necessary or expedient for giving full effect to the provisions of this Act and for the due administration of its provisions".

The relevant stakeholders have agreed to the fact that there are many lacunae and cloudy areas in the ICRCA and the urgent need for a modern, comprehensive PPP law that would provide answers to so many questions in the ICRCA and also create a platform for consistency across all infrastructure sectors and clarify the decision-making processes. However, the Commission has articulated the argument that quite a number of the observed lacunae

> [c]an be resolved or mitigated through the issuance of detailed regulations under the Commission Act, developed in consultation with the MDAs and other interested agencies, and through operational guidelines, PPP Regulations and, where necessary, amendments to other applicable legislation.[69]

This argument will not be in the interest of the private sector players in the PPP processes given the successive Nigerian governments' penchant for policy reversal or "summersaults". The Act should be amended to capture all these perceived lacunae for the sake of predictability and

65 Ahmed *op cit*.
66 *Ibid*.
67 Ahmed *op cit* 4.
68 See subsection (d).
69 The World Bank (2011) Project appraisal document 54.

protection of private investments in procurement of public infrastructure and delivery of services to the public. Leaving all these observed legal gaps to be corrected through the operational guidelines and regulations will be tantamount to leaving it to the whims and caprices of public officers and the political class and it will surely not be in the interest of private investors. As a matter of priority and urgency, the ICRCA must be amended to address all these gaps and controversies pointed out above if the purpose for its enactment is to be accomplished.

The transitional arrangements apply to PPP projects which started the procurement process before June 2007[70] but where FEC approval is required under the ICRCA. They apply to projects based on unsolicited proposals by a private sector party as well as projects which are financially free-standing (that is, which do not require funding from the Federal budget) but which involve the transfer of rights to exploit public assets and/or to charge users of an unregulated service through a concession.[71]

The *Operational Guidelines* address procedures which will apply to all new infrastructure facilities selected for implementation as PPP projects. Specifically, the *Guidelines* spell out the roles of the different MDAs within the Federal Government with regard to the identification, selection, appraisal, procurement, negotiation and monitoring of PPP projects. The authority of these arrangements and guidelines needs to be reinforced by issuing them in the form of regulations approved by the President.[72]

The proposed Commission regulations will strengthen the role of the Commission and seek to provide clarity and consistency for all aspects of a PPP transaction. A preliminary review of the arrangements and guidelines indicates, however, that there are areas of overlap with procurement regulations. To avoid uncertainty and inconsistency, the proposed Commission regulations will be limited to those matters that are outside the present Procurement regulations and these regulations will be incorporated by reference or appropriately cross-referenced.[73]

In agreement with the Document,[74] many variances could be seen between the provisions of the ICRCA and the procurement regulations on the one hand and the PPP Policy on the other hand. A typical example is

> the conduct of due diligence by third party investors, the potential renegotiation of terms over the life of a project, financing by third party investors, the use of variant bids and the right of the Federal Government to step-in in the event that the contractor fails to perform, are all matters that are specific to PPP projects and not contemplated by the Procurement Act or the Regulations.

70 The date of enactment of the Public Procurement Act 2007.
71 The World Bank (2011) Project appraisal document 56.
72 *Ibid*.
73 *Ibid*.
74 *Ibid*.

This reinforces the conclusion that the Act does not apply on all fours to privately financed infrastructure development.

The argument is that there is a compelling need for the appropriate authorities to rapidly move to enact new legislation that will address all these grey areas concerning procurement of infrastructure assets through the private sector. Pursuant to broad-based consultations amongst the top government functionaries and the stake-holders, a comprehensive set of regulations for infrastructure procurement through the PPP should be drafted to move the PPP process in the country forward. Clarity of rules will, without doubt, enhance the confidence of prospective investors and attract the right kind of capital needed to fix the infrastructure financing gaps.

3 1 7 Public Procurement Act 2007

The Public Procurement Act 2007 (PPA)[75] established the National Council on Public Procurement and the Bureau Public Procurement (BPP) as the regulatory authorities responsible for the monitoring and oversight of public procurement, harmonising the existing government policies and practices by regulating, setting standards and developing the legal framework and professional capacity for public procurement in Nigeria, and other related matters.[76]

It is applicable to all forms of procurement of goods, works and services carried out by the Federal Government of Nigeria and all "procuring agencies" and all other entities which derive at least 35% of the funds appropriated, or proposed to be appropriated, for any type of procurement from the Federal share of the budget.[77]

Section 60 of the PPA defines a procuring entity as any public body engaged in procurement and includes a ministry, extra-ministerial office, government agencies, parastatals and corporations, while the term "procurement" is defined tersely as "acquisition". The PPA does not apply to procurement by the states except to the extent that such procurement falls within (b) above.[78]

A careful perusal of the PPA reveals that the PPA applies to traditional public procurement of goods, works and services. No exact reference is made to infrastructure procurement or to PPPs. However, where the procurement of goods, works and services necessary for infrastructure projects is involved, the PPA will apply but it is silent on the non-tender or concession aspects of PPP transactions;[79] and there is no reference to

75 No.14. Signed into law on 2007-06-04.
76 See the Explanatory Memorandum and the Schedule PPA.
77 See s 15 PPA.
78 The World Bank (2011) Project appraisal document 55.
79 In other words, the Act does not apply directly to privately financed infrastructure assets.

unsolicited bids or to the interaction between procurement under the PPA and multilateral donor procurement rules.[80]

The BPP was established by the PPA which also established the National Council on Public Procurement. The BPP serves as the regulatory body responsible for the monitoring and oversight of public procurement, harmonising the existing government policies and practices by regulating, setting standards and developing the legal framework and professional capacity for public procurement in Nigeria, and other related matters. It drives the process of entrenchment of due process in the procurement of public works and services. In discharge of this function, it puts into use the techniques such as benchmarking in ensuring that the prices paid for goods and services are fair and reasonable. Part of its functions is the constituting of Tender Boards in each procuring entity in the Federal Government bureaucracy. It is also statutorily empowered to issue a certificate of no objection before a procurement process can be concluded and the required funds disbursed by the Accountant General of the Federation. This procedure is subsumed into the procedure of Government approval of a Final Business Case through the FEC.[81]

The whole idea of the BPP is to entrench best practice in public procurement in the overall interest of national development. Unfortunately, that vision is far from being realised in that there is currently an increasing wave of corruption moving through the procurement process MDAs at the three levels – local, state and federal. This has in no small measure compounded the infrastructure and service delivery woes in the nation.[82]

4 At Sub-Sovereign Level

Out of all the federal states in Nigeria, only Lagos State[83] has infrastructure-related laws that apply within the state. This is against the backdrop of its pro-active approach to infrastructure development which has been quite commendable.

Due to the ever-increasing influx of people from the rural areas and the fact that Lagos State is the commercial and financial capital of Nigeria

80 See the Explanatory Memorandum and the Schedule PPA.
81 *Ibid*.
82 See "BPP laments rising corruption in public procurement process" *The Punch* 2011-07-20. Recently, the Bureau uncovered and stopped the payment of an astonishing N216 million, being the inflation from a contract resulting from the implementation of 2010 federal budget. The uncovered amount was as a result of over-invoicing by the contractors for jobs claimed to have been done. This underscores "the revolving doors of corruption and collusion that exist between contractors and government Ministries, Departments and Agencies".
83 It is one of the smallest federal states but has a population that is put in the region of 17 million with an annual growth rate of 8% per annum.

and almost becoming a city state, there has been tremendous pressure on the existing infrastructure assets. This has translated into an urgent and compelling need to upgrade, expand and build new infrastructure. It is in an attempt to address this deficit that the Lagos State Government decided to rely on the PPP approach to generate power, manage waste disposal and maintain the highways and streets, to mention a few. It has also been used to develop, upgrade, rehabilitate, operate and manage state roads, bridges and highways within its geographical and constitutional jurisdiction.

The main infrastructure law in Lagos State is the Lagos State Public Private Partnership Law (LSPPP Law) which was enacted and signed into law on the 24 June 2011. The LSPPP Law, in the main, encompasses in one document the framework for PPPs capturing the entire infrastructure spectrum in all facets of the economy, compared to its predecessor which was limited to roads, bridges and highways as suggested by the title of the law.

Other infrastructure-related laws in Lagos State are: the Lagos State Roads, Bridges and Highway Infrastructure (Private Sector Participation) Development Board Law; the Lagos State Water Sector Law 2004; the Lagos State Metropolitan Area Transport Authority Law 2007; and the Lagos State Waterways Authority Law 2008.

The Lagos State Roads (PSP) Law, 2007 has been expressly repealed by the new and main Infrastructure Law in Lagos State.[84]

5 Conclusion

This article has been both descriptive and critical in nature in that it reviews and critiques the applicable laws in Nigeria regarding infrastructure procurement and the private sector engagement in provision, maintenance and operations of public infrastructure assets and service delivery. It takes a critical look at the legal framework that underlies procurement of infrastructure and the engagement of private sector capital in infrastructure provision, maintenance and financing in Nigeria. The legal framework necessarily includes the related regulatory and industry specific legislation and the regulatory mechanism as a whole. It also articulates the critical imperative of putting in place a regulatory environment that inspires confidence through "open and transparent processes and procedures and a level playing field".

The legal infrastructure which underpins the PPP framework in Nigeria is inadequate and the inadequacy of the legal and regulatory environment is partly responsible for the lack of appetite for engagement on the part of the private sector – especially foreign investors in the nation's public infrastructure assets and service delivery – and the overall

84 See "Lagos State, Nigeria's PPP gateway" *Business Day* 2011-08-11.

failure of the PPP mechanism in attracting the required private investment into infrastructure sector.

The conclusion then is that with the right legal and regulatory environment, the private sector appetite for private investment will increase and the required financial resources to upgrade critical public infrastructure and services would flow into the infrastructure market in Nigeria.

Aantekeninge/Notes

"Quad motorcycle" qualified as a motor vehicle in terms of the RAF Act 56 of 1996 – requirements relaxed in *Jeffrey v Road Accident Fund* 2012 4 SA 475 (GSJ)

1 Introduction

A claimant can only be successful with a claim against the Road Accident Fund (RAF) if the claimant was in fact injured by the negligent driving of a "motor vehicle" or "other unlawful" act connected to a "motor vehicle or the driving thereof" (Klopper *Third Party Compensation* (2012) 64). Thus the definition of a "motor vehicle" is of paramount importance. If the injury or death of a person was caused by something other than the driving of a "motor vehicle" or "other unlawful act" then the claimant would not be able to claim from the RAF (Klopper 56). Section 1 of the Road Accident Fund Act 56 of 1996 (the Act) defines a "motor vehicle" as:

> [a]ny vehicle designed or adapted for propulsion or haulage on a road by means of fuel, gas or electricity, including a trailer, a caravan, an agricultural or any other implement designed or adapted to be drawn by such motor vehicle. (our emphasis)

From the definition it is apparent that in order for a vehicle to qualify as a "motor vehicle", what must be established is: how the vehicle is propelled, in other words is it propelled by gas, fuel or electricity (also referred to as the "propulsion test"); and was the vehicle designed or adapted for use on a road (also referred to as the "design test" – see Klopper 57-63). Most "motor vehicles" pass the "propulsion test" but some have failed the "design test". In the following cases the vehicles were not considered "motor vehicles" due to them failing the design test (see further Klopper 61): a forklift (see *Chauke v Santam Ltd* 1997 1 SA 178 (A); *Mutual and Federal Insurance Co Ltd v Day* 2001 3 SA 775 (SCA)), a ride-on lawnmower (see *Matsiba v Santam Versekeringsmaatskappy Bpk* 1997 4 SA 832 (SCA)), a midget racing car, a go-kart and self-propelled vehicle designed to provide power to a jet (see *Road Accident Fund v Vogel* 2004 5 SA 1 (SCA)). Of importance in the "design test" is the special features of the vehicle (lights, brakes, indicators, rear and side mirrors, reflectors, etc) and in particular whether it will be safe to use the vehicle on a road. The concept of a "road" is these days not at issue anymore since Olivier JA in *Chauke v Santam Ltd* (*supra* 181G) pronounced that a road is "a line of communication, especially a specially prepared track between places for use by pedestrians, riders and vehicles". More recently in *Road Accident Fund v Mbendera* (2004 4 All SA 25 (SCA) par 9)

Lewis JA indicated that the concept of a "road" should not be narrowly defined to mean only a "public road". In *Bell v Road Accident Fund* (2007 6 SA 48 (SCA) 51D-H) it was held that the Act is applicable throughout the Republic and not just on public roads and in *Prinsloo v Santam Insurance Ltd* (1996 3 All SA 221 (E) 225C-E) it was held that the natural meaning of a road should be referred to as "a prepared surface having a determined path leading from one place to another and to which a number of people and vehicles may have access at any given time". In *Berry v SPE Security Patrol Experts* (2011 4 SA 520 (GNP)) the court held that the parking area at the hospital used by pedestrians and cars falls within the definition of a road (524B-C, 529H). In light of recent decisions it seems as if any pathway being used by pedestrians, even a footpath on a public park (*Jeffrey v Road Accident Fund* 2012 4 SA 475 (GSJ) 480E), would be regarded as a "road" for purposes of the Act.

In *Jeffrey* the court had to decide whether a "quad motorcycle" was a "motor vehicle" for purposes of claiming from the RAF. The claim was founded on a hit-and-run collision and the plaintiff was unable to recall in detail the salient features of the vehicle. The court found the "quad motorcycle" to be a "motor vehicle" (483I-J) thereby entitling the plaintiff to claim compensation from the RAF and in so doing seemed to have relaxed the requirements pertaining to what qualifies as a "motor vehicle".

In this contribution the arguments of the parties and the courts' interpretation of a motor vehicle will be discussed, as well as the unique circumstances in hit-and-run cases that could justify relaxing the requirements. In conclusion a prediction will be made on what the future holds for hit-and-run claims if the decision in *Jeffrey* is followed by other courts.

2 Facts and Arguments Raised by the Defendant and Plaintiff

The plaintiff was involved in a hit-and-run collision. At the time of the collision the plaintiff was walking along a footpath in a public park when the unidentified "quad motorcycle" collided with him. As a result of the collision, the plaintiff sustained a bilateral fracture of the tibia, fibula and suffered abdominal trauma (476F-G). He claimed compensation from the RAF in respect of the bodily injuries sustained. The plaintiff (477A-B) could not recall whether the "quad motorcycle" had been fitted with side mirrors or indicators, but described the quad motorcycle as a vehicle with "(a) four large wheels with treads; (b) a headlight in front; (c) emitted a sound like a motorcycle; (d) travelled at a considerable speed; (e) being about a metre high from the ground; and (f) being blue and white in colour" (476I-J).

In an attempt to release the RAF of liability with regard to the plaintiff's claim, the defendant argued that the "quad motorcycle" could not be considered a motor vehicle as per section 1 of the Act and, further, that

there was no evidence supplied by the plaintiff showing that the "quad motorcycle" had been adapted for "propulsion on the road" (479D-E).

According to the defendant's expert witness, in general, a "quad motorcycle" is designed "primarily for off-road use" (477F; 478H-I; 481A-B). Motor vehicles are generally required to conform to the requirements as set out in the Road Traffic Act 93 of 1996 and regulations thereto, some of which include that a motor vehicle should have rear lights or break lights, rear view mirrors, red retro-reflectors to the rear as well as white retro reflectors to the front and indicator lights. However, the plaintiff could not recall whether the quad motorcycle was fitted with these features (477F-478B). Turning to the definition of a "motor vehicle" as per section 1 of the Act, the expert witness of the defendant stated that the "quad motorcycle" would probably comply with the "propulsion test" (478B; 478G) but was unsure whether it would comply with the "design test" due to the lack of information in respect of the fitted features required (478B-D; 478H-479B; 481A-B). The expert witness stated (478C-D):

> With regards to the use thereof, a quad motorcycle is generally able to be used on roads (gravel and tarmac) and, in general, is used on roads in some instances though it is primarily designed to be used in an off-road environment. It cannot however be confirmed or rejected whether the quad motorcycle in question was adapted to be used on a road by providing it with indicator lights as well as rear view mirrors and it therefore cannot be confirmed or rejected that the quad motorcycle can be considered to be a motor vehicle as strictly defined in the RAF Act.

Based on this statement of the expert witness for the defendant not being contested by the plaintiff, and the fact that the plaintiff (on whom the burden of proof rests) admitted that he could not remember all the features of the quad motorcycle, the court should have come to the conclusion that the plaintiff did not prove on a balance of probabilities that the said motorcycle qualifies as a motor vehicle for purposes of the Act.

3 Decision

On the contrary Mokgoatlheng J was satisfied that the plaintiff had proven his case in that he proved that he collided with a "quad motorcycle" and that there was no evidence provided in rebuttal of this allegation (480I-J). The judge went further to state that "a court should not place an unfair onerous burden of proof on a plaintiff regarding technical details relating to a vehicle whose existence is not disputed" (480H-I).

The judge (481D-E) acknowledged the remark by Olivier JA in *Chauke v Santam Ltd* (*supra* 183A) that "just because a vehicle can be used on a road does not mean that it was 'designed' for propulsion thereon", furthermore just because it is capable of being driven on a road is not sufficient to conclude that it is a vehicle (see *Matsiba v Santam Versekeringsmaatskappy Bpk* (*supra* 834H). He (481E) stated that "the

overriding consideration should be the purpose for which the quad motorcycle was designed, and its suitability for travelling on a road as envisaged by s 1 of the Act".

Mokgoatlheng J (481I-J) reasoned that even though the quad motorcycle's primary design was for "off-road" use its secondary purpose could well be for use on a road and "the quad motorcycle's use on a road would not be seen by a reasonable person as fanciful, and neither would such reasonable person perceive the driving of it on a road used by pedestrians and other vehicles as extraordinarily hazardous" (482C). He (482G-H) referred to the requirement of indicator lights and rear view mirrors as "superficial non-mechanical adaptions" even though these features are required in terms of the Road Traffic Act and regulations thereto (see 478A-B, 477I-J). In support of his findings Mokgoatlheng J (482J-483H) referred to the unreported judgment in *Road Accident Fund v Coleman* (case no A3045/2009) where the vehicle the plaintiff was driving collided with a "quad motorcycle". The RAF raised a special plea that the vehicle was not a "motor vehicle" as defined in the Act but the appeal court referred to *Chauke* (*supra*) and held that "a quad motorcycle can be used on a road … It has the features of a motor vehicle and is a motor vehicle as defined in the Act. It has four wheels, a steering wheel, headlights, brakes, forward and rear gears, is propelled by fuel and can go to speeds of up to 75 kilometres an hour". The court in *Coleman* came to the conclusion that the "quad motorcycle" qualified as a "motor vehicle" for purposes of the Act.

Mokgoatlheng J went a step further from that of *Coleman* by holding in *Jeffrey* that "a quad motorcycle is a motor vehicle as defined in the Act" (483I) and that the specific features required in terms of the Road Traffic Act do not apply, leading to the logical conclusion that all "quad motorcycles" should be regarded as "motor vehicles" for purposes of the Act, irrespective of any special features.

4 Comments

4 1 Definition of a Motor Vehicle as Interpreted by the Courts

Olivier JA in the well-known decision of *Chauke v Santam Ltd* (*supra* 183A-D) pronounced the test to be used to establish whether a vehicle falls within the definition of a motor vehicle as per section 1 of the Act. He applied an "objective, common sense meaning" to the word "designed" (see *Jeffrey v Road Accident Fund* (*supra* 479G-I) which:

> [c]onveys the notion of the ordinary, everyday and general purpose for which the vehicle in question was conceived and constructed and how the reasonable person would see its ordinary, and not some fanciful, use on a road. If the ordinary, reasonable person would perceive that the driving of the vehicle in question on a road used by pedestrians and other vehicles would be extraordinarily difficult and hazardous unless special precautions or adaption

were effected, the vehicle would not be regarded as a 'motor vehicle' for the purposes of the Act.

Leach J in *Prinsloo v Santam Insurance Ltd* (*supra* 225E-H) agreed with Olivier JA's objective test and held that the "mere fact that a designer of a motor vehicle may well subjectively have intended it to be used on a road cannot mean that the vehicle is in fact one as defined by the Act if, objectively viewed, it is wholly unsuitable or unfit for such purposes". Thus the judge confirmed that the forklift was not a "motor vehicle". In *Mutual and Federal Insurance Co Ltd v Day* 2001 3 SA 775 (SCA) Navsa JA (779E-F) followed Olivier JA in confirming that the particular forklift (Komatsu which had a number of features additional to the Clark model and able to travel at a top speed of 32 kilometres an hour) was not a motor vehicle based on the fact that it "poses a hazard to other road users and steering it in traffic … should … be considered extraordinarily difficult and hazardous" (782C-D). There was uncontested evidence led that the Komatsu travelled on public roads to reach destinations to fulfil its primary purpose of lifting and moving goods (779G-H). Navsa JA (780J-781A) also stated that in spite of the Komatsu's primary purpose it "does not mean that it could not have been designed for a secondary purpose such as for use on public roads" thereby falling within the definition of a "motor vehicle". Although there was no reference in the Komatsu's manual for its use on public roads (781B), regulation 436 of the Road Traffic Regulations provided for the use of forklifts on public roads (781E-F). In spite of all these findings the forklift was nevertheless not regarded to be a motor vehicle. The judge acknowledged that this decision would be harsh on a claimant but stated that she was not without remedies and could have chosen to sue others (782D-E).

Marais JA in *Road Accident Fund v Vogel* 2004 5 SA 1 (SCA) 5G-I, viewed Olivier JA's test as having two components and referred to a subjective as well as objective test. He construed Olivier JA's phrase "the ordinary, everyday and general purpose for which the vehicle was conceived and constructed" as the subjective test and the phrase "how the reasonable person would see its ordinary, and not some fanciful, use on a road" as the objective test. Thus in this particular case the forklift (Clark model) which had four wheels, diesel engine, steering wheel, open driver's seat, gear box, hooter, forward and reverse gear, footbrake, and capable of travelling at a maximum speed of 8 kilometres an hour was confirmed not to be a "motor vehicle" designed for use on a road. The vehicle did not have lights, indicators, speedometer or brake lights (183D-H). Thus its use on a road would be "extraordinary and hazardous" (183I-J).

In *Bell v Road Accident Fund* (*supra*) a flatbed transporter designed to transport baggage and cargo (used at airports) was found to be a "motor vehicle" for purposes of the Act. The vehicle in question did not have rear view mirrors, side mirrors or seatbelts but had forward and reverse functions, brakes and could attain a speed of 50 kilometres per hour.

However, Streicher JA in *Road Accident Fund v Van den Berg* (2006 2 SA 250 (SCA) 253B-E) disagreed with this interpretation of Olivier JA's decision and stated that in his view the judge was referring "to the general purpose for which the vehicle, *objectively determined*, was conceived and constructed". In this case a pneumatic tyre roller primarily used to compact road surfaces but also used to travel safely on public roads (253E-F, 255C) was considered a "motor vehicle". This particular vehicle had pneumatic tyres, headlights, rear lights, parking lights, hazard lights, a rotating beacon, a hooter, two side view mirrors, indicators reflectors, footbrakes and a handbrake (252E-G).

In *Berry v SPE Security Patrol Experts* (*supra*) Goodey AJ found a six-seat golf cart "shuttle" carrying passengers to and fro in a parking lot of the hospital to be a "motor vehicle" for purposes of the Act. The brochure relating to the vehicle stated that the "shuttle" was ideal for use in a resort, hotel, park or shopping mall (523A). The vehicle was petrol driven, had a steering wheel, lights, hooter, parking brakes, forward and reverse gears but no side mirrors or rear mirrors (524E). The judge (529I-H) stated that if he confined himself strictly to the brochure pertaining to the vehicle in that "it has not been *designed* or *adapted* for use by and at hospitals in their parking lots, let alone for *public roads*" then he would not consider it a "motor vehicle". Goodey AJ argued (530B-D) that these types of vehicles are commonly used in increasing numbers and he therefore came to the conclusion that "[c]ommon sense and the reality of the situation call for these 'shuttles' to be classified as 'motor vehicles'". His opinion was further based on the belief that a claimant would otherwise be left without recourse against the RAF.

Only one other case (apart from the unreported *Coleman* case referred to in the *Jeffrey* case – see below in 4 2) could be found in which a quad motorcycle was involved in an accident leading to a claim against the RAF, *Ferreira v Road Accident Fund* [2010] ZAGPJHC 166. This was also a hit-and-run case, but the RAF agreed on liability which means that no mention was made in the report on whether the specific features of the quad motorcycle was in dispute or not.

4 2 Unique Circumstances in Hit-and-run Cases that Could Justify Relaxing the Requirements

Mokgoatlheng J (in *Jeffrey supra*) held that the plaintiff's submission that he collided with a "quad motorcycle" was uncontested and even though the burden of proof is upon the plaintiff to prove that he was injured by a motor vehicle, it will be illogical and unreasonable to expect the plaintiff to remember and be able to describe mechanical details of the motorcycle which collided with him in an instantaneous moment (480F-H). Mokgoatlheng J (480H-J) continued to hold that a "court is not going to burden a plaintiff with a level of proof that is impossible to discharge ... [and] should not place an unfair onerous burden of proof on a plaintiff regarding technical details relating to a vehicle whose existence is not disputed".

It can be said that there is logic in his argument, but the consequences of such a line of thought is that one should then never expect of a plaintiff in a hit-and-run accident to remember the details of the vehicle that collided with him or her. This will mean that if there is no rebuttal in the evidence produced by the plaintiff, no matter the detail of it, the plaintiff will be relieved of proving that the collision was caused by a "motor vehicle" as technically required by the Act. This surely could not have been the intention of the legislature, otherwise it would have used language clearly indicating such an intention.

The legislature clearly and unequivocally distinguished between identified claims and hit-and-run claims by providing for different prescription periods and specific requirements relating to submission of hit-and-run claims. If the legislature wanted to do the same with the burden of proof in respect of whether the vehicle causing the accident can be regarded as a "motor vehicle", it could have done so in clear language in the Act or the regulations thereto, but chose not to do so. It is therefore stated that the unique circumstances surrounding a hit-and-run case should not be regarded by the courts as a justification to relax the requirements clearly set out in the Act and in the Road Traffic Act.

5 Conclusion

Recently the courts have been liberal with regard to the interpretation of a "motor vehicle" (as seen above) and the concept of a "road" which now in essence refers to any road in South Africa whether tarred or gravel, public or private. Even though the courts have subjectively referred to what the vehicle was designed for (as per the manufacturer's guidelines) they have religiously relied on the objective approach based on whether the particular "motor vehicle" was designed for use on a road. However, it is ironic that a "road" refers to any road whether it is a footpath in a park or a parking lot, yet strictly speaking if a road is regarded as any road within the Republic, the question of whether a "motor vehicle" is designed for use on a road becomes irrelevant as any or all vehicles could then qualify as "motor vehicles", because all vehicles are designed to move somewhere.

Klopper (62) correctly submits that

> [d]espite the judgments handed down by the SCA, it is difficult to derive clear objective principles from these judgments and it remains unpredictable when a vehicle will be deemed to be a 'motor vehicle' in terms of the Act. A feature of theses judgements is that there is no concerted attempt to fully interpret the word 'road' [which] … seems to be the key problem of identifying vehicles in terms of the Act.

According to him (62 fn 260) the golf cart shuttle is not a motor vehicle as defined by section 1 of the Act and in the same breath it is submitted that the "quad motorcycle" in *Jeffrey* should also not have been considered a motor vehicle.

Even though the object of the Act is to provide wider protection to road users, the liability of the RAF should be limited at some point and the clear unambiguous words of the Act did exactly that, until the courts interpreted the words too liberally to presumably widen the liability of the RAF. In light of the courts liberal approach as to what constitutes a "motor vehicle" it will be of no surprise if the two-wheeler "personal transporters" (such as those manufactured by Segway Inc) currently used in shopping malls and parking lots will also be considered a "motor vehicle" in the near future.

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Huurooreenkomste waarop die Nasionale Kredietwet 34 van 2005 moontlik toepassing vind

1 Inleiding

In teenstelling met sy voorgangers (die Wet op Kredietooreenkomste 75 van 1980 en die Woekerwet 73 van 1968) omskryf die Nasionale Kredietwet 34 van 2005 (hierna die NKW) 'n huurooreenkoms ("*lease*") as 'n ooreenkoms ingevolge waarvan die eienaarskap van die goedere ter sprake aan die einde van die ooreenkoms oorgedra word aan die huurder (a 1 NKW). Deur slegs die omskrywing van 'n "*lease*" in ag te neem blyk dit dat die NKW nie op ooreenkomste van toepassing is waar die huurder aan die einde van die termyn die goedere gehuur aan die verhuurder moet terugbesorg nie.

Die vraag ontstaan of 'n huurooreenkoms wat nie eienaarskap aan die huurder aan die einde van die ooreenkoms verleen nie, enigsins onder die toepassingsgebied van die NKW kan val. Artikel 8(4)(f) van die NKW bepaal dat 'n ooreenkoms, ongeag die vorm daarvan, 'n kredietooreenkoms sal wees indien betaling van die bedrag verskuldig uitgestel word en indien enige rente, fooie of heffings ten opsigte van die ooreenkoms of die uitgestelde bedrag aan die kredietverskaffer betaalbaar is. Indien 'n hof gevolglik bevind dat rente wel ten opsigte van 'n ooreenkoms gevra is (ongeag of die rente uitdruklik vermeld is of stilswyend in die huurbedrag inbereken is) en dat die bedrag verskuldig uitgestel is, behoort so 'n ooreenkoms dus teoreties onder die NKW se toepassingsgebied te kan val.

Hierdie aantekening sal die bogemelde aangeleentheid, in die lig van die onlangse regspraak *Absa Technology Finance Solutions v Pabi's Guesthouse* CC 2011 6 SA 606 (FB); *Absa Technology Finance Solutions v Viljoen t/a Wonderhoek Enterprises* 2012 3 SA 149 (GNP) en *Absa Technolgy Finance Solutions v Michael's Bid House* CC [2013] ZASCA 10 ondersoek.

2 Relevante Bepalings van die Nasionale Kredietwet 34 van 2005

Die NKW het 'n breër toepassingsgebied as enige van sy voorgangers (Kelly-Louw *Consumer Credit Regulation in South Africa* (2012) 28) en vind, behoudens enkele uitsonderings (sien aa 4(1)(a), (b), (c), (d), 5, 6 NKW vir uitsonderings; Van Zyl "The scope of application of the National Credit Act" in Guide to the National Credit Act (red Scholtz) (2008) hfst 4 par 4.3), toepassing op alle kredietooreenkomste tussen partye wat op 'n armlengte-grondslag met mekaar kontrakteer en wat binne die Republiek van Suid-Afrika aangegaan of van krag is (a 4(1) NKW; sien Renke, Roestoff & Haupt "The National Credit Act: new parameters for the granting of credit in South Africa" 2007 *Obiter* 229 230; Kelly-Louw 28; Otto "Die toepaslikheid (al dan nie) van die Nasionale Kredietwet op rentevrye kontrakte" 2012 *De Jure* 161 162; sien ook vir 'n volledige bespreking van die toepassingsgebied van die NKW Van Zyl hfst 4 par 4.2). Kredietooreenkomste kan een van vier vorme aanneem, naamlik 'n kredietfasiliteit (soos omskryf in a 8(3) NKW); 'n krediettransaksie (soos omskryf in a 8(4) NKW); 'n kredietwaarborg (soos omskryf in a 8(5) NKW) of 'n kombinasie van die voorafgaande drie ooreenkomste (a 8(1) NKW). Van belang vir hierdie bespreking is die krediettransaksie, wat op sy beurt agt verskyningsvorme kan aanneem (a 8(4) NKW; Otto 2012 *De Jure* 161 162-163; Nagel *Kommersiële Reg* (2006) 253-255). Hierdie agt verskyningsvorme sluit onder andere 'n huurkontrak van roerende sake in (a 8(4)(e)), asook enige ander ooreenkoms, behalwe 'n kredietfasiliteit of kredietwaarborg, ingevolge waarvan betaling van 'n bedrag deur een persoon verskuldig aan 'n ander uitgestel word en enige heffing, gelde of rente aan die kredietverskaffer betaalbaar is ten opsigte van die ooreenkoms of die bedrag uitgestel (a 8(4)(f) NKW).

'n Huurooreenkoms word in die NKW omskryf as 'n ooreenkoms ingevolge waarvan:

(a) tydelike besit van enige roerende eiendom aan die verbruiker gelewer is of die reg om sodanige eiendom te gebruik aan die verbruiker verleen is;

(b) betaling vir die besit of gebruik van daardie eiendom geskied volgens 'n ooreengekome of vasgestelde periodieke grondslag, of ten volle of gedeeltelik uitgestel word vir enige tydperk terwyl die ooreenkoms geldig is;

(c) rente, gelde of ander heffings aan die kredietverskaffer betaalbaar is ten opsigte van die ooreenkoms of van die bedrag wat uitgestel is; en

(d) eiendomsreg op daardie eiendom aan die einde van die ooreenkoms óf absoluut óf by nakoming van spesifieke voorwaardes uiteengesit in die ooreenkoms op die verbruiker oorgaan (a 1 NKW; Kelly-Louw 75).

Ongeag die vorm van die ooreenkoms sal 'n huurkontrak van onroerende eiendom nie 'n kredietooreenkoms daarstel nie (a 8(2)(b) NKW; Kelly-Louw 75).

Die definisie van "*lease*" ingevolge die NKW verskil van huur ingevolge die gemenereg, aangesien die gemenereg nie daarvoor voorsiening maak dat eiendomsreg aan die verhuurder oorgedra word in 'n huurooreenkoms nie (Kelly-Louw 75; *Absa Technology Finance Solutions (Pty) Ltd v Viljoen t/a Wonderhoek Enterprises* (2012 3 SA 149 (GNP) par 32-34)). Die NKW se definisie van "*lease*" verskil ook van dié van sy voorgangers, die Woekerwet en die Wet op Kredietooreenkomste. Die Woekerwet omskryf "huurtransaksie" as 'n transaksie waar 'n verhuurder roerende eiendom aan 'n huurder verhuur en waarvan betaling in die toekoms geskied (a 1 Woekerwet). Eienaarskap, ingevolge laasgenoemde omskrywing, word nie aan die huurder oorgedra nie (Stoop "Kritiese evaluasie van die toepassingsveld van die 'National Credit Act'" 2008 *De Jure* 352 361; Otto "'Interest free' rentals, section 8(4)(f) of the National Credit Act and the meaning of 'deferred' payments - Absa Technology Finance Solutions Ltd v Pabi's Guest House CC 2001 6 SA 606 (FB)" 2012 *THRHR* 492 494). Ingevolge artikel 1 van die Wet op Kredietooreenkomste word 'n ooreenkoms waar eienaarskap ter enige tyd op die huurder oorgaan nie geag 'n huurooreenkoms te wees nie (Otto 1991 *Credit law service* par 7; Renke, Roestoff & Haupt 2007 *Obiter* 229 234; Kelly-Louw 75).

Die omskrywing van "*lease*" in die NKW word deur Otto gekritiseer, juis omdat dit soveel van die gemeenregtelike konsep van huur verskil en aangesien die tydelike besit van roerende eiendom, soos vermeld in die definisie, teenstrydig is met die vereiste dat eiendomsreg aan die verhuurder oorgedra moet word alvorens daar sprake van 'n huurooreenkoms is (a 1 NKW; Otto & Otto *The National Credit Act explained* (2010) 23; Otto "Types of credit areements" in *Guide to the National Credit Act* (red Scholtz) (2008) hfst 8 par 8 2 3 7).

'n Huurooreenkoms wat nie eienaarskap aan die huurder aan die einde van die ooreenkoms verleen nie behoort steeds teoreties onder die toepassingsgebied van die NKW te ressorteer, indien betaling van die bedrag verskuldig uitgestel word en indien enige rente, fooie of heffings ten opsigte van die ooreenkoms of die uitgestelde bedrag aan die kredietverskaffer betaalbaar is (a 8(4)(f) NKW; Otto & Otto 23).

3 Regspraak

In *Absa Technology Finance Solutions Ltd v Pabi's Guest House* 2011 6 SA 606 (FB) was die vraag of 'n ooreenkoms vir die huur van kantoortoerusting onderworpe aan die bepalings van die NKW was, met spesifieke verwysing na die omskrywing van huur in die NKW, asook

met verwysing na die omskrywing van ander ooreenkomste soos uiteengesit in artikel 8(4)(f).

In die betrokke saak is kantoortoerusting deur 'n derde party aan die eerste verweerder (Pabi's Guest House) verhuur (par 2). Die huur was betaalbaar by wyse van 60 maandelikse paaiemente van R4,560.00 elk (par 2). Daar was egter geen voorsiening vir die betaling van enige rente, gelde of heffings ten opsigte van die ooreenkoms gemaak nie (par 2), behalwe vir 'n vorm van rente wat as boete betaalbaar was in die geval van kontrakbreuk deur die huurder (par 3). Hierdie boete was gelykstaande aan die prima koers plus 4% per jaar (par 3). 'n Verdere bepaling in die ooreenkoms was dat die goedere ter sprake die eiendom van die verhuurder sou bly (par 3). Die regte soos vervat in die ooreenkoms was vanaf die derde party aan die eiser (TechnoFin (Pty) Ltd) gesedeer (par 2), welke eiser die bedrag van R275,591.31 as uitstaande betaling asook rente soos hierbo bespreek eis (par 6). TechnoFin het geargumenteer dat, as gevolg van die omskrywing van 'n huurooreenkoms, asook die omskrywing van ander ooreenkomste in artikel 8(4)(f) van die NKW, die bepalings van die NKW nie op die ooreenkoms van toepassing is nie (par 1). Gevolglik was die eiser ook van mening dat die skuldinvorderingsprosedure, soos voorgeskryf deur die NKW, nie op die ooreenkoms van toepassing was nie (par 1). Dit sou beteken dat die eiser nie nodig gehad het om eers 'n aanmaningsbrief ingevolge artikel 129(1)(a) aan die huurder te stuur voordat die kontrak afgedwing kon word nie.

Indien die omskrywing van huur in die NKW in oënskou geneem word, blyk dit duidelik dat ten einde as 'n huurooreenkoms te kwalifiseer, eienaarskap in die huurgoedere aan die einde van die ooreenkoms aan die huurder oorgedra moet word (par 19; a 1 NKW). Dit was nie die geval in die betrokke saak nie en gevolglik het die hof tereg bevind dat die kontrak tussen die partye nie 'n huurooreenkoms vir doeleindes van die NKW daar stel nie (par 19).

Die hof het 'n verdere vraag, naamlik of die betrokke ooreenkoms onder die bepalings van artikel 8(4)(f) van die NKW tuisgebring kon word, in oorweging geneem (par 21). Artikel 8(4)(f) bepaal dat die NKW van toepassing sal wees op ooreenkomste waarvan betaling van 'n bedrag deur een persoon verskuldig aan 'n ander uitgestel word en enige heffing, gelde of rente aan die kredietverskaffer betaalbaar is ten opsigte van die ooreenkoms of die bedrag uitgestel. In hierdie verband het die eiser beweer dat daar geen uitstel ten opsigte van die bedrag betaalbaar was nie aangesien huur maandeliks vir 'n bepaalde periode betaalbaar was (par 4). Die hof het nie hierdie argument aangespreek nie. Die eiser het voorts beweer dat daar geen sprake van enige koste, gelde of rente ten opsigte van die ooreenkoms of 'n uitgestelde bedrag was nie (par 4). Otto waarsku egter dat dit dikwels gebeur dat verhuurders huur vra wat op die oog af geen rente insluit nie, maar dat indien sodanige kontrakte van nader ondersoek word, dit duidelik blyk dat die totale huur nie net die kostes van die produk insluit nie, maar ook voorsiening maak vir

rente wat in die huurbedrag inbereken is (Otto (2006) 20; Otto & Otto 23; Otto (2008) hfst 8 par 8 2 3 7). Kontrakte maak ook dikwels vir die moontlikheid voorsiening dat die huurbedrag gedurende die verloop van die huurtermyn onderhewig aan verandering is. Hierdie verandering is gewoonlik in ooreenstemming met die prima uitleenkoers soos weergegee deur 'n sekere bank en dui dikwels ingeslote rente in die huurbedrag aan (Otto 2012 *THRHR* 492 494). Howe sal uiting gee aan die ware bedoeling van die partye deur te kyk na die inhoud van die kontrak eerder as om mislei te word deur die vorm daarvan (Kelly-Louw 77; Otto (2006) 20)). Dit kan daartoe aanleiding gee dat sogenaamde rentevrye ooreenkomste wel as kredietooreenkomste ingevolge die NKW geag sal word. Die vraag of daar enige koste, gelde of rente betaalbaar is moet bepaal word deur na die klousules in die kontrak te kyk (par 22; Kelly-Louw 77). Die hof in die onderhawige saak was van mening dat indien rente nie uitdruklik gehef word nie, getuienis aangebied moet word ten einde versteekte rente te bewys (par 22). Die hof het gevolglik beslis dat hy nie uit eie beweging anders kan beslis as wat uit die ooreenkoms tussen die partye blyk nie (par 22). Waar rente nie uitdruklik gehef word nie en geen getuienis tot die teendeel aangebied word nie, sal so 'n ooreenkoms nie onderhewig aan die bepalings van die NKW wees nie en sal die skuldinvorderingsprosedure soos in die NKW voorgeskryf ook nie op die ooreenkoms toepassing vind nie.

Met verwysing na die *Pabi's Guest House*-beslissing kan daar geargumenteer word dat ooreenkomste waar die verhuurder steeds aan die einde van die huurtermyn eienaarskap van die goedere behou, maar waar getuienis aangebied word wat bewys van versteekte rentes lewer, wel onderhewig aan die NKW kan wees synde 'n ooreenkoms soos in artikel 8(4)(f) van die NKW omskryf (Otto 2012 *THRHR* 492 498). Dit sou beteken dat die verhuurder die skuldinvorderingsprosedure kragtens die NKW moet navolg (Otto 2012 *THRHR* 492 498).

In *Absa Technology Finance Solutions (Pty) Ltd Ltd v Viljoen t/a Wonderhoek Enterprises* 2012 3 SA 149 (GNP) het die hof 'n teenoorgestelde gevolgtrekking, naamlik dat 'n gemeenregtelike huurooreenkoms nie onder ander ooreenkomste soos in artikel 8(4)(f) van die NKW vervat ressorteer nie, bereik. In die betrokke saak het die eiser 'n digitale bord aan die verweerder vir 60 maande teen 'n ooreengekome onveranderlike maandelikse huurbedrag verhuur (par 1). Die eiser het beweer dat die verweerder versuim het om die huurgeld op die ooreengekome tyd te betaal en het daarom agterstallige huur, skadevergoeding en ook teruggawe van die digitale bord geëis (par 2). Die enigste verweer relevant vir hierdie bespreking behels dat die ooreenkoms onderhewig aan die NKW was en dat die eiser nie aan die relevante skuldinvorderingsprosedure, soos in artikel 129(1)(a) van die NKW vervat, voldoen het nie (par 4).

Die verweerder was van mening dat die ooreenkoms 'n krediettransaksie ingevolge artikel 8(4)(f) van die NKW daar stel. Soortgelyk aan *Pabi's Guest House* was die ooreenkoms nie 'n

huurooreenkoms soos omskryf in artikel 1 van die NKW nie, aangesien eienaarskap nie aan die verhuurder aan die einde van die huurtermyn oorgedra sou word nie (par 12). Ten einde te kwalifiseer as 'n kredietooreenkoms ingevolge artikel 8(4)(f) van die NKW, moet die ooreenkoms betaling uitstel en moet daar heffings, gelde of rente ten opsigte van die uitgestelde bedrag of ten opsigte van die ooreenkoms self gehef word.

'n Klousule in die kontrak in die onderhawige saak het vir die betaal van rente voorsiening gemaak sou die verweerder versuim om sy verpligting ten opsigte van die betaal van die huurbedrag, na te kom (par 18). Hierdie rente was egter net betaalbaar indien die verweerder in versuim sou wees en nie ten opsigte van die uitgestelde bedrag of die ooreenkoms self nie (par 21). Ten opsigte van rente wat moontlik in die huurbedrag inbereken was, verwys die hof na *Pabi's Guest House* en beslis dat in die afwesigheid van bewyse voor die hof wat op ingeslote rente dui, die hof nie uit eie beweging anders kan beslis as wat uit die ooreenkoms tussen die partye blyk nie (par 25 en 26). Die hof beslis verder dat die ooreenkoms nie een is in terme waarvan enige betaling van 'n bedrag verskuldig uitgestel is nie (par 20). Die verweerder was verplig om die maandelikse huur vooruit te betaal (par 20). Uitstel van betaling sou egter slegs geskied indien daar 'n voorafgaande verpligting om te betaal bestaan en waar hierdie verpligting (na ontstaan daarvan) tot 'n toekomstige datum uitgestel word (par 20). Die verweerder het aangevoer dat die maandelikse huurgeld vir die tweede tot die sestigste maand tot die aanbreek van elk van die onderskeie maande uitgestel was (par 22). Die hof was egter van mening dat die huurder nie 'n reeds bestaande betalingsverpligting vir die hele huurtermyn opgedoen het wat uitgestel was nie, maar dat die betalingsverpligting ten opsigte van elke nuwe maand eers aan die begin van elke nuwe maand ontstaan (par 23; Otto verskil van laasgenoemde stelling van die hof en argumenteer dat betaling van huur wat maandeliks in paaiemente betaalbaar is (soortgelyk aan die geval waar 'n bank 'n langtermyn lening vir die aankoop van eiendom voorskiet) uitgestel word (sien Otto 2012 *THRHR* 492 499). Laastens bevind die hof dat indien die wetgewer die gemeenregtelike vorm van huur onder die toepassingsgebied van die NKW wou bring hy dit in duidelike en ondubbelsinnige taal kon bewerkstellig en dat dit hoogs onwaarskynlik is dat die wetgewer bedoel het om die gemeenregtelike vorm van huur onder artikel 8(4)(f) van die NKW tuis te bring (par 32; sien ook Otto 2012 *THRHR* 492 499-500).

In *Absa Technology Finance Solutions (Pty) Ltd v Michael's Bid a House CC and Another* 2013 3 SA 426 (SCA) was die vraag of 'n ooreenkoms vir die huur van roerende goedere onder die NKW val (par 1). Michael Rose (tweede respondent) was 'n eiendomsagent wat besigheid deur die beslote korporasie, Michael's Bid a House CC, gedoen het (par 2). Rose wou 'n gesofistikeerde kleur druk masjien vir gebruik deur die beslote korporasie, asook om pamflette en materiaal vir ander eiendomsagente in die betrokke omgewing in kleur te druk, aanskaf (par 2). Aangesien Rose nie die drukker kon bekostig nie het ene Meneer Vosloo van

Westrand Office Equipment voorgestel dat die huur van die drukker gefinansier word deur Sapor Rentals (Pty) Ltd, wat Michael's Bid a House dan in maandelikse paaiemente van R2,878 per maand oor 'n tydperk van 3 jaar sou terugbetaal (par 3). Hierdie bedrag sou die onderhoud van die drukker, asook die verskaffing van ink vir die volle drie jaar se gebruik insluit (par 2). Sapor het sy regte ingevolge die ooreenkoms aan Absa Technology Finance Solutions (Pty) Ltd gesedeer (par 4). Na betaling van die eerste maand se huur het Rose skriftelik aan Sapor kennis gegee dat hy ontevrede was oor die feit dat daar versuim was om ink aan hom te verskaf; dat hy mislei was in die sluit van die ooreenkoms en dat hy derhalwe die ooreenkoms kanselleer (par 4). Die tweede en laaste betaling is op 8 Augustus 2008 gemaak (par 4). Absa Technology het 'n eis vir uitstaande huur, rente, regskostes en teruggawe van die drukker teen Michael's Bid a House CC en teen Rose (as borg van die beslote korporasie se skuld) ingestel (par 5).

Die Hoë Hof het die verweer op meriete, naamlik dat Sapor kontrakbreuk gepleeg het vanweë Westrand Office Equipment se versuim om ink vir die drukker te verskaf, verwerp (par 6). Die Hoë Hof het voorts bepaal dat enige verbreking van bepalings wat tussen Michael's Bid a House en Westrand Office Equipment gegeld het nie die aanspreeklikheid van Michael's Bid a House teenoor Sapor en later Absa Technology ophef nie, aangesien laasgenoemde partye nie as agente van Westrand Office Equipment opgetree het nie (par 7). Westrand Office Equipment was later van tyd gelikwideer en enige remedie wat teen hulle sou bestaan was van geen waarde (par 6).

Die Hoë Hof was verder van mening dat die ware aard van die ooreenkoms tussen Absa Technology en Michael's Bid a House nie 'n gemeenregtelike huurooreenkoms was nie (par 8), maar eerder 'n huurooreenkoms ingevolge die NKW (par 15; sien par 2 hierbo vir die omskrywing van huurooreenkoms ingevolge die NKW). Dit sou tot gevolg hê dat Absa Technology ingevolge artikel 129 van die NKW aan Michael's Bid a House kennis moes gee alvorens die kontrak afgedwing kon word (par 8). Die Hoë Hof het ekstrinsieke getuienis toegelaat om die ware bedoeling van die partye, ten opsigte van die oordrag van eiendomsreg en gevolglik die aard van die ooreenkoms, vas te stel (parr 15, 18). Hierdie getuienis, wat daarop neergekom het dat eiendomsreg aan die einde van die huurtermyn aan die huurder oorgedra sou word, was teenstrydig met die uitdruklike bepalings van die geskrewe ooreenkoms (parr 16, 17).

Op Appél meen die hof dat, alhoewel ekstrinsieke getuienis toelaatbaar is ten einde die ware aard van die kontrak te bepaal, ekstrinsieke getuienis nie die uitdruklike bepalings van die skriftelike ooreenkoms kan wysig nie (par 20; *Johnson v Leal* 1980 3 SA 927 (A) 943B). Die Hoogste Hof van Appél het, op grond van die uitdruklike bepaling dat eienaarskap nie aan die huurder oorgedra sou word nie, beslis dat die ooreenkoms nie 'n huurooreenkoms vir doeleindes van die NKW was nie (par 23).

Michael's Bid a House en Rose het in die alternatief in die Hoë Hof geargumenteer dat die ooreenkoms ingevolge artikel 8(4)(f) onder die toepassingsgebied van die NKW kan ressorteer (par 24). Ingevolge artikel 8(4)(f) sal die NKW van toepassing wees op ooreenkomste waarvan betaling van 'n bedrag deur een persoon verskuldig aan 'n ander uitgestel word en waar enige heffing, gelde of rente aan die kredietverskaffer betaalbaar is ten opsigte van die ooreenkoms of die bedrag uitgestel. Michael's Bid a House en Rose se argument was daarop gebaseer dat betaling van die huur uitgestel was (par 24). Die Hoë Hof verwerp hierdie argument, aangesien huur vooruitbetaalbaar was en geen voorafbestaande verpligting om te betaal tot 'n latere datum uitgestel was nie (par 24). Die hof verskil dus van Otto, wat van mening is dat die verpligting om te betaal vir maande twee tot 60 uitgestel is tot die aanbreek van daardie maand (par 25; Scholtz *et al* (ed) *Guide to the National Credit Act* (2008) 8-10; Otto 2012 *THRHR* 492 499). Laastens was geen heffing, gelde of rente betaalbaar ten opsigte van die ooreenkoms of 'n uitgestelde bedrag nie (par 24).

Die hof stem saam met die volgende gevolgtrekking in *Absa Technology Finance Solutions (Pty) Ltd v Viljoen t/a Wonderhoek Enterprises* 2012 (3) SA 149 (GNP):

(a) 'n Hof kan nie uit eie beweging rente aantoon indien bewyse tot die teendeel ontbreek nie (par 26).

(b) Die huurder het nie 'n reeds bestaande betalingsverpligting vir die hele huurtermyn opgedoen wat uitgestel was nie, maar die betalingsverpligting ten opsigte van elke nuwe maand ontstaan eers aan die begin van die betrokke maand (par 25).

(c) Sou die wetgewer die gemeenregtelike vorm van huur onder die toepassingsgebied van die NKW wou tuis bring, sou hy dit in duidelike en ondubbelsinnige taal bewerkstellig (par 27).

4 Die Invloed van die "*Draft National Credit Amendment Bill*"

Die Minister van Handel en Nywerheid het onlangs die *Draft National Credit Amendment Bill* (die Wetsontwerp) gepubliseer. Hierdie hersieningsdokument beoog om praktiese probleem-aspekte wat tans teenstrydig met die doel van die NKW is, aan te spreek. Een van die voorgestelde wysigings tot die NKW behels dat sekere omskrywings in die wet gewysig moet word. Dit sluit die omskrywing van "*lease*" in en maak nou voorsiening vir 'n definisie van "*lease*" waar oordrag van eienaarskap nie langer 'n vereiste is vir die bestaan van 'n huurooreenkoms nie (a 1 Wetsontwerp). By implikasie kan dit tot gevolg hê dat meer transaksies nou aan die NKW onderworpe sal wees. Ten einde 'n huurooreenkoms onder die nuwe voorgestelde omskrywing te wees behoort die ooreenkoms steeds aan die volgende vereistes te voldoen: Tydelike besit van enige roerende eiendom moet aan die verbruiker gelewer word of die reg om sodanige eiendom te gebruik moet aan die verbruiker verleen word; betaling vir die besit of gebruik

van sodanige eiendom moet geskied volgens 'n ooreengekome of vasgestelde periodieke grondslag, of moet ten volle of gedeeltelik uitgestel word vir enige tydperk terwyl die ooreenkoms geldig is; en rente, gelde of ander heffings moet aan die kredietverskaffer betaalbaar wees ten opsigte van die ooreenkoms of van die bedrag wat uitgestel is (a 1(a) Wetsontwerp gelees met a 1 NKW). Waar 'n hof bevind dat geen rente, heffings of gelde ten opsigte van die uitgestelde bedrag of ten opsigte van die ooreenkoms gehef is nie sou die NKW nie toepassing vind nie. Die voorgestelde wysiging sou nie bogenoemde uitsprake verander nie, aangesien daar telkens bevind was dat geen rente gehef was nie en dat die bedrag verskuldig nie uitgestel was nie (sien par 3 hierbo).

Indien 'n nuwe omskrywing bepaal dat huurooreenkomste sonder die oordrag van eiendomsreg onder die NKW kan ressorteer, ernstige oorweging geskenk behoort te word aan die vraag of betaling uitgestel word of nie. Indien huurooreenkomste, betaalbaar in paaiemente, nie betaling van die hoofskuld uitstel nie sal die voorgestelde nuwe omskrywing oorbodig wees, tensy vergunning verleen word om 'n spesifieke paaiement later te betaal as waarop aanvanklik ooreengekom is (sien ook Otto 2012 *THRHR* 492 499 vir Otto se standpunt dat huurooreenkomste wel betaling uitstel).

5 Evaluasie

In *Pabi's Guest House* bestaan die moontlikheid dat huurders bewys kan lewer van versteekte rentes en dat 'n skynbaar rentevrye ooreenkoms derhalwe aan die NKW onderhewig kan wees, synde 'n ooreenkoms soos in artikel 8(4)(f) van die NKW omskryf. Aangesien meer ooreenkomste op hierdie wyse onder die toepassingsgebied van die NKW sal ressorteer, is ek van mening dat meer verbruikers beskerming onder die NKW kan geniet. Dit sou egter ook inhou dat 'n groter aantal kredietverskaffers aan die skuldinvorderingsprosedure kragtens die NKW moet voldoen (Deel C hfst 6 NKW) en dat 'n groter aantal kredietverskaffers as sodanig moet registreer (aa 40(4), 89(2)(d) NKW). Na my mening kan dit lei tot onnodige administrasie en onkostes vir kredietverskaffers. Die onsekerheid wat ontstaan het vanweë die teenoorgestelde gevolgtrekking, naamlik dat 'n gemeenregtelike huurooreenkoms nie onder artikel 8(4)(f) van die NKW ressorteer nie, wat die hof in *Wonderhoek Enterprises* bereik het is nou opgeklaar deur die Hoogste Hof van Appél in *Michael's Bid a House*. Hierin bevestig die hof die gevolgtrekking in *Wonderhoek Enterprises*, naamlik dat 'n gemeenregtelike huurooreenkoms nie onder die toepassingsgebied van die NKW, synde 'n artikel 8(4)(f) ooreenkoms, val nie. Die Hoogste Hof van Appél het beslis dat betaling nie in 'n huurooreenkoms (betaalbaar in paaiemente en waarvan die verhuurder eiendomsreg behou) uitgestel word nie (sien bespreking van hierdie saak in par 3 hierbo).

Betaling kan wel uitgestel word in ooreenkomste waar 'n finansiële instelling, as kredietgewer, volle betaling vir 'n vasgestelde huurtermyn aan die verhuurder gelewer het. Die huurder het 'n betalingsverpligting

ten opsigte van die volle bedrag en 'n ooreenkoms op maandelikse paaiemente is bloot 'n uitstel van betaling ten opsigte van die reeds bestaande betalingsverpligting van die hoofskuld (Flemming *Krediettransaksies* (1982) meen dat, ten opsigte van huurtransaksies, die volle huurprys of 'n ekwivalent daarvan en nie die ooreengekome huurgeld as basiese maatstaf van die hoofskuld dien). Dit sou verskil van huurooreenkomste waar 'n hoofskuld nie ter sprake is nie, maar waar 'n huurder enige tyd kennis kan gee ten einde die ooreenkoms te kanselleer en slegs maandelikse paaiemente betaal vir die maande waarin goedere gebruik word (sien ook Otto 2012 *THRHR* 492 499 vir 'n verdere mening oor waarom betaling as uitgestel geag behoort te word).

Die Hoogste Hof van Appél meen voorts dat sou die wetgewer die gemeenregtelike vorm van huur onder die toepassingsgebied van die NKW wou tuis bring, hy dit in duidelike en ondubbelsinnige taal sou bewerkstellig. Uit laasgenoemde standpunt blyk dit dat dit nie die wetgewer se aanvanklike bedoeling was om gemeenregtelike huurooreenkomste onder die toepassingsgebied van die NKW tuis te bring nie. Die blote poging om die omskrywing van "*lease*" te wysig (sien par 4 hierbo vir 'n bespreking oor die voorgestelde wysiging van "*lease*" in die Wetsontwerp) 'n aanduiding kan wees dat die wetgewer moontlik gemeenregtelike huurooreenkomste, waar eienaarskap nie oorgedra word aan die verhuurder nie, ook onder die NKW se toepassingsgebied wou tuisbring. Daar word gevolglik aan die hand gedoen dat die wetgewer stappe moet neem ten einde klarigheid te bewerkstellig.

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Wanneer vind artikel 7(7) van die Wet op Egskeiding, 70 van 1979, toepassing?

1 Inleiding

Artikel 7(7) van die Wet op Egskeiding 70 van 1979 (die Wet) maak voorsiening dat by die bepaling van die vermoënsregtelike voordele waarop partye in enige egskeidingsgeding geregtig is, word 'n party se pensioenbelang geag deel van sy bates te wees. Die titel van die aantekening vra die vraag wanneer hierdie bepaling toepassing vind. Daar is nie minder as drie antwoorde op hierdie vraag nie. Dit is die doel van hierdie aantekening om die antwoorde te stel en om ook die regsgeldigheid daarvan te beoordeel. Twee van die drie antwoorde is al 'n geruime tyd in ons midde. Die geldigheid daarvan is ook reeds vroeër deur regskenners beoordeel. In die lig van die nuutste antwoord op die

vraag word daar kortliks weer aandag aan elk van die onderskeie antwoorde gegee.

2 *Sempapalele v Sempapalele*

In *Sempapalele v Sempapalele* (2001 2 SA 306 (O)) is die partye binne gemeenskap van goed getroud. Die huwelik word deur egskeiding ontbind. 'n Skikkingsakte is deel van die egskeidingsbevel gemaak. Die akte maak voorsiening vir verdeling van die gemeenskaplike boedel in algemene terme sonder om die bates te vermeld of hoe hulle verdeel moet word. Nadat die huwelik ontbind is, (maar voordat die gemeenskaplike boedel ten volle verdeel is) ontdek die applikante dat 'n substansiële bedrag geld in die bankrekening van die respondent inbetaal is. Die bedrag bestaan gedeeltelik uit 'n pensioenvoordeel wat aan die respondent uitbetaal is.

Die applikante bring nou 'n aansoek vir uitbetaling van helfte van die totale bedrag. Dit is die standpunt van die applikante dat die pensioenvoordeel wat uitbetaal is, 'n pensioenbelang is wat tydens egskeiding ingevolge artikel 7(7) van die Wet geag deel te wees van die gemeenskaplike boedel en ingevolge die skikkingsooreenkoms verdeel moet word. Hierdie standpunt bring die regsvraag na vore, wat die Hof in die volgende woorde formuleer (309I-310A):

> *This raises the legal question of whether the respondent's pension interest was at the time of dissolution of the marriage part of the joint estate so that it automatically fell within the terms of the blanket order for division or whether the applicant needed to obtain a Court order awarding her a share of such interest in terms of s 7 of the Divorce Act 70 of 1979.*

Die respondent doen 'n beroep op onder andere die verweer dat die applikante 'n bevel ingevolge artikel 7(8)(a) van die Wet moes verkry het en dat 'n hof 'n diskresie het om sodanige bevel te verleen (310E). Artikel 7(8)(a) bepaal dat die hof wat die egskeidingsbevel ten opsigte van 'n lid van so 'n fonds verleen, kan 'n bevel gee dat enige deel van die pensioenbelang van daardie lid wat die nie-lid-gade toekom deur die fonds aan die nie-lid-gade betaal moet word, wanneer enige pensioenvoordele ten opsigte van daardie lid toeval. (a 37D(1)(e) van die Wet op Pensioenfondse 24 van 1956 bepaal dat die pensioenvoordeel word geag die lid-gade ingevolge a 7(8)(a) van die Wet op Egskeiding, 70 van 1979, toe te val, wanneer die egskeidingsbevel verleen word.)

Die hof keur die aansoek af. Die *obiter dictum* (sien hieronder par 3), wat vir hierdie bespreking van belang is, word in die volgende woorde verwoord (312G):

> *To revert to the facts of the instant case, the applicant failed (for whatever reason) to obtain at the hearing of the divorce matter a Court order awarding her a share in the respondent's pension interest in terms of s 7 of the Divorce Act. She cannot now get such an order.*

Volgens hierdie beskouing vorm die pensioenbelang alleen deel van die gemeenskaplike boedel, indien 'n bevel ingevolge artikel 7 tydens die egskeidinggeding verkry is. Die hof kom tot hierdie beslissing op grond van twee redes.

As eerste rede verwys die hof na die bepalings van artikel 7(7)(b) van die Wet. Hierdie bepaling skryf voor dat sekere aftrekkings van die pensioenbelang gemaak mag word. Dit is volgens die hof se interpretasie van die bepaling, 'n aanduiding dat die pensioenbelang alleen by egskeiding bereken mag word en nie later nie (312A-B).

Tweedens, die koppeling in artikel 7(1) van bateverdelings- en onderhoudsooreenkomste is volgens die mening van die hof ook bekangrik (312D). Die hof vermeld dat dit algemeen aanvaarde reg is dat onderhoud net gedurende die egskeidingsgeding geëis kan word en nie daarna nie (312D-E):

> *Similarly, a spouse seeking a share in the pension interest of the other spouse must apply for and obtain an appropriate Court order during the divorce proceedings. This much is clear from the provisions of ss (7)(a) which states*:
>
> *'In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled …'*
>
> *The phrase 'any divorce action' must mean any pending divorce action. This conclusion is supported by the other provisions of the section in terms of which the various orders provided for must be applied for and granted by the Court hearing the divorce case. (Compare ss (2), (3), (4), (5), (6), (8) sic (6), (8)(a) and (9))* (312E-F).

In *YG v Executor, Estate Late CGM* (2013 4 SA 387 (WKK)) beslis die hof dat die bevel vir herverdeling van bates ingevolge a 7(3) van die Wet nie toepassing vind nie, indien die huwelik deur dood ontbind is voor of na *litis contestatio* in 'n egskeidingsgeding. Die aanhaling uit die *Sempapalele*-saak hierbo word na verwys, sonder om op die meriete daarvan in te gaan – par 14.)

Hierdie motiverings/redes vir die standpunt dat die aandeel aan die pensioenbelang, waarvan die ander gade 'n lid is, alleen deur 'n bevel tydens egskeiding en nie daarna nie deur die nie-lid-gade verkry word, is vatbaar vir kritiek. Die aftrekkings wat ingevolge artikel 7(7)(b) van die Wet toelaatbaar is, kan ook na egskeiding bereken word. Daar is geen rede om die berekeningsoomblik tot egskeiding te beperk nie. Die berekende waarde by egskeiding gaan nie verskil van die berekende waarde later nie.

Bykomstig hiertoe is die analogie met die bestaansduur van die eis vir onderhoud en dié van die aandeel in die pensioenbelang, ook aanvegbaar. Die analogie is om twee redes onaanvaarbaar.

Eerstens, artikel 7(1) en (2) verleen aan die hof 'n diskresie om die eis vir onderhoud goed of af te keur. Die eiser het geen reg op onderhoud nie. Daarteenoor verleen artikel 7(7) van die Wet nie aan die hof 'n

diskresie nie. Die pensioenbelang word statutêr deel van sy bates en geen diskresie vind hier toepassing nie en die nie-lid-gade het hierop 'n aanspraak, tensy die huwelik op of na 1 November 1984 gesluit is ingevolge huweliksvoorwaardes waardeur gemeenskap van goed, gemeenskap van wins en verlies en die aanwasbedeling uigesluit is (a 7(7)(c) van die Wet). Die beslissing van die hof, naamlik dat die nie-lid-gade slegs 'n aandeel aan die pensioenbelang deur 'n hofbevel verkry, weerspreek 'n vroeëre stelling wat die Hof maak, nadat die Hof op die gemeenregtelike posisie wys waar 'n pensioenbelang nie as 'n bate van die lid aanvaar is nie (311A). Die vroeëre stelling waarna verwys word, lees (311B):

> *It [s 7(7)] provides that the pension interest of a party shall be deemed to be an asset in his estate … This means that the interest is not ordinarily part of the joint estate but shall be such for purpose of the division upon divorce.*

Tweedens, is die uitwerking van die beslissing dat 'n pensioenbelang en 'n pensioenvoordeel/reg op pensioen verskillend behandel word. 'n Pensioenvoordeel is wanneer die reg om die pensioenbelang af te dwing, vestig. Met ander woorde die pensioenbelang word 'n pensioenvoordeel wanneer die reg om die pensioen op te eis, vestig. Die pensioenvoordeel is nie 'n pensioenbelang nie. A 7(7) van die Wet het slegs betrekking op 'n pensioenbelang en nie pensioenvoordeel nie. (Sien *De Kock v Jacobson* 1999 4 SA 346 (W) 348J-349B, 349F-G, 350G; *Sempapalele v Sempapalele* 311B-D; *Government Employees Pension Fund v Naidoo* 2006 6 SA 304 (HHA) 306A-B; *Elesang v PPC Lime Ltd* 2007 6 SA 328 (NKA) parr 17-18, 20.) Die pensioenbelang skep ook geen reg vir die lid nie, maar ten beste 'n *spes*. (*Cockcroft v Mine Employees Pension Fund* saaknommer PFA/WE/11234/06/LS par 30.) 'n Pensioenbelang word ingevolge artikel 7(7)(a) 'n bate van die lid geag, maar volgens *Sempapalele* verkry die nie-lid-gade eers aandeel daaraan deur die hofbevel tydens egskeiding. Word die pensioenbelang omskep in 'n pensioenvoordeel/reg op pensioen val dit ook in die gemeenskaplike boedel, maar die nie-lid-gade verkry hierop outomaties 'n aanspraak al was geen spesifieke bevel hieroor by egskeiding gemaak nie. (Sien bv *De Kock v Jacobson* 349G-J, 350F-G; *Sempapalele v Sempapalele and Another* 311C-D; *Government Employees Pension Fund v Naidoo* 306B; *Elesang v PPC Lime Ltd* parr [20], [21], [25].) Waarom moet daar so/op hierdie wyse tussen 'n pensioenvoordeel en 'n pensioenbelang onderskei word? Daar is myns insiens geen regverdiging hiervoor nie. (Vir nog kritiek teen hierdie beslissing sien ook Van Schalkwyk "*Sempapalele v Sempapalele* 2001 2 SA 306 (O) Egskeiding – moet 'n pensioenbelang verdeel word waar die skikkingsakte niks meld nie?" 2002 *De Jure* 170 veral 172 en gesag daar aangehaal.)

Daar is wel steun vir die siening van die hof dat die aandeel van die nie-lid alleen tydens egskeiding toegeken mag word en nie daarna nie. Artikel 7(8)(a), hierbo vermeld, mag steun hiervoor verleen. Artikel 7(8)(a) maak uitdruklik voorsiening vir 'n bevel wat die pensioenfonds of die griffier van die betrokke hof sekere opdragte oplê. Sonnekus ("Pensioenverwagtings en onderhoud na egskeiding in

versorgingsregtelike in plaas van vermoënsregtelike konteks" 1989 *TSAR* 326 329) vermeld oor die betekenis van die bepaling van artikel 7(8)(a) die volgende:

> Uit die subartikel is dit nie duidelik of die hof se diskresie ook daartoe strek om te gelas dat die waarde van die pensioenbelang dadelik tydens die egskeiding verreken word teen die waarde van ander bestaande bates nie. Indien dit naamlik moontlik is en hierdie bepaling nie dwingend beteken dat slegs ingevolge subartikel 7(8) oor die toegedeelde pensioendelingbelang beskik kan word nie, kan die maatskaplike bestemming van pensioenverwagtings totaal negeer word.

Bogenoemde aanhaling probeer waarskynlik sê dat die bepaling onduidelik is met verwysing na die "dwingendheid" daarvan al dan nie. Indien artikel 7(8)(a) "dwingend" of gebiedend is, *moet* 'n bevel aan die pensioenfonds verleen word en hierdie bevel moet deur die hof wat die egskeidingsbevel verleen, gegee word. Indien nie gebiedend nie, mag die hof by egskeiding, sonder om 'n bevel aan die fonds te gee, onmiddellik die verrekening maak en toedeel en die opdrag aan die fonds uitskakel. Indien die bepaling gebiedend is, ondersteun dit die siening van die hof dat daar tydens egskeiding, 'n bevel met betrekking tot die pensioenbelang gegee moes word en kan dit nie later verleen word nie. Indien die teenoorgestelde waar is, bied dit nie steun vir die siening van die hof nie. In die lig van die bewoording van artikel 7(8) verleen dit aan die hof 'n diskresie en is die bepaling waarskynlik nie "dwingend" en soos verduidelik, noodsaaklik nie. (Sien ook Van Schalkwyk 2002 *De Jure*170 174 en die gesag daar aangehaal. In *JW v SW* 2011 1 SA 545 (GNP) [36] vermeld die hof dat dit duidelik uit die bewoording van a 7(8)(a) is dat 'n diskresie aan die hof verleen word om 'n bevel ingevolge a 7(8)(a) te gee. Die hof bedoel hiermee dat die bevel op grond van billikheid geweier mag word en geen aandeel van die pensioenbelang aan die nie-lid-gade toegeken word nie. Sien veral par 38. Hierdie siening met verwysing na die diskresie is foutief, maar word vir doeleindes van hierdie bespreking nie verder geneem nie.)

Om terug te kom tot die vraag wat hierdie aantekening wil beantwoord, is die antwoord van die *Sempapalele*-beslissing dat artikel 7(7) van die Wet net toepassing vind, indien die hof by egskeiding 'n bevel in hierdie verband gemaak het. Verkry die nie-lid-gade nie sodanige bevel nie, word geen aandeel aan die pensioenbelang verkry nie. Met verwysing na bovermelde kritiek teen hierdie beslissing, is die antwoord, wat die beslissing gee, onaanvaarbaar.

3 *Maharaj v Maharaj*

Die applikante en die eerste respondent wat met mekaar binne gemeenskap van goed getroud was, is in Desember 1996 geskei. Die egskeidingsbevel het voorsiening vir die sorg van die minderjarige kinders en onderhoud gemaak, maar het nie met die gemeenskaplike boedel se verdeling gehandel nie en die boedel is tydens hierdie aansoek ook nog nie verdeel nie. Nadat die huwelik deur die egskeidingsbevel

ontbind is, bedank die eerste respondent uit sy werk. Die applikante bring 'n aansoek vir 'n dringende interdik wat tweede respondent, 'n bankinstelling, verbied om toe te laat dat eerste respondent met die pensioenvoordeel wat deur die fonds in sy bankrekening betaal staan te word, mag handel tot tyd en wyl 'n verklarende bevel met betrekking tot haar aandeel in die pensioenvoordeel beslis is. 'n Bevel *nisi* met die verlangde regshulp is toegestaan.

Op die keerdag voer die eerste respondent aan dat aangesien geen bevel ingevolge artikel 7(8)(a) van die Wet, tydens egskeiding verkry is nie, sy verhinder word om die eis nou te bring en steun op *Sempapalele* vir hierdie standpunt. Die hof in *Sempapalele* verwerp die applikante se aanspraak omdat sy nie 'n bevel tydens egskeiding verkry het, wat haar 'n aandeel in respondent se pensioenbelang toeken nie (*Sempapalele* 312G-H). Hierdie standpunt van *Sempapalele* is volgens *Maharaj v Maharaj* (2002 2 SA 648 (D) 650I) *obiter*. (Sien ook hierbo par 2.) Die hof in *Maharaj* keur egter hierdie *obiter* standpunt in die volgende woorde af (650I-651A):

> *But, if the learned Judge intended to hold that, if there is no reference to a spouse's pension benefit or interest in a divorce order, the other party to a marriage in community of property is forever precluded from claiming to be entitled, as his or her share of the joint estate, to half-share thereof, I am, with respect, unable to agree with that view.*

As rede vir hierdie siening wys die hof op die bepaling van artikel 7(7)(a) van die Wet wat na oordeel van die hof ondubbelsinnig vermeld dat 'n pensioenbelang geag word deel van 'n persoon se bates by egskeiding te wees.

Ingevolge hierdie beslissing is artikel 7(7)(a) van die Wet van toepassing selfs nadat die egskeidingsbevel verkry is en geen bevel met verwysing na die pensioenbelang ingevolge artikel 7(8)(a) verleen is nie.

4 *Fritz v Fundsatwork Umbrella Pension Fund*

Die applikante is in 1992 van haar man, mnr Fritz, met wie sy binne gemeenskap van goed getroud was, geskei. Die egskeidingsbevel het geen melding gemaak van enige pensioenbelang waarvan die oorledene 'n lid was nie. Die gemeenskaplike boedel is tussen hulle verdeel. Mnr Fritz sterf in 2009. Met sy afsterwe was hy lid van die Fundsatwork Umbrella Pension Fund. Die applikante doen nou aansoek vir 'n verklarende bevel dat sy geregtig is op die helfte van die pensioenbelang van die oorledene ten tye van die egskeiding en hiervoor steun die applikante op artikel 7(7) van die Wet.

Die hof (*Fritz v Fundsatwork Umbrella Pension Fund* 2013 4 SA 492 (OKP) par 16) wys op die beslissing van *Sempapalele* waar die Hof van oordeel is dat indien die hof by egskeiding nie 'n bevel met betrekking tot die pensioenbelang gemaak het nie, dit nie later opgeeis kan word

nie. Hiervan verskil die hof in *Maharaj* en die rede hiervoor verwoord die hof só (651E):

> *In my judgment, therefore, when the joint estate of spouses married in community of property is to be divided it is proper to take into account, as an asset in the joint estate, the value of a pension interest held by one of them as at the date of divorce.*

Die effek van hierdie woorde is volgens die hof in *Fritz*, die volgende (parr [21]-[29]):

> *[21] The effect of this passage is that an order may be sought in terms of ss (7) even if a divorce order has already been granted. There is however a very important qualification, as is apparent from the quoted passage itself. In the Maharaj matter the evidence indicated that, although there had been an order of divorce, division of the joint estate had, as a matter of fact, not yet occurred. In other words, the determination of what constituted the joint estate and its proper division between the parties, as required by the decree of divorce, still had to be undertaken, whether by agreement between the parties or by way of the appointment of a liquidator. In these circumstances it is not surprising that the court in Maharaj came to the conclusion that a party may, in respect of an estate yet to be divided, seek to give effect to ss (7) even after a decree of divorce has been granted.*
>
> …
>
> *[24] It follows therefore that I am in agreement with the view expressed by Magid J, namely that until the joint estate is in fact divided, whether by agreement or otherwise, it is open to a court to make an order as envisaged by s 7(7).*
>
> *[25] In this matter of course different considerations apply. … According to uncontested allegations put up by the respondents, a written settlement agreement pertaining to the joint estate was concluded between applicant and the deceased in 1995. The agreement is silent as to the pension interest but records agreement in respect of the division of certain movable and immovable assets held in the joint estate.*
>
> …
>
> *[27] Leaving aside for the moment the content of such an agreement and any disputes that may arise in relation thereto, it seems to me that when once a joint estate has, as a matter of fact, been divided …, a court cannot then grant an order in terms of s 7(7) of the Divorce Act. Where there is no longer a joint estate to be divided an order the effect of which is to 'deem' a pension interest to be part of the joint estate is not competent.*
>
> *[28] I need not consider what the effect would be of a challenge to the terms of an agreement regarding the manner of division of a joint estate on the basis of an alleged fraud …, since that is not at issue in this matter. Nor need I consider whether a division of a joint estate may be revisited on the basis of the failure (for whatever reason) to include certain assets in the division which ought to have been included. In any action or application brought on such basis the erstwhile spouse and any party to the division of the estate would of necessity need to be joined as a necessary party. Where the party is deceased the executor of the deceased estate would undoubtedly be a necessary party. In the circumstances of*

this matter the failure to join the executor would be an insuperable obstacle to the grant of the relief sought. I need, however, not take this aspect any further

[29] It follows from what I have found above that the applicant's application for declaratory relief cannot succeed. ...

Bovermelde siening en beslissing van die hof word met die kommentaar hieronder aangevul.

Die interpretasie wat regter Goosen in paragraaf 21 hierbo aan die woorde van regter Magid in *Maharaj* gee, is vatbaar vir kritiek. Regter Magid wil alleen aantoon dat artikel 7(7) van die Wet 'n pensioenbelang as bate erken en omdat die partye binne gemeenskap van goed getroud is, maak hy melding van die gemeenskaplike boedel. Hy wil nie daarmee enige besondere betekenis aan "*joint estate*" gee nie. Die doel van artikel 7(7)(a) is om 'n pensioenbelang, 'n bate te ag wat in die verlede nie as bate in ag geneem kon word nie. In *Maharaj* verwerp regter Magid die standpunt van regter Musi in *Sempapalele*, aangesien dit tot gevolg het dat "*…, the other party to a marriage in community of property is forever precluded from claiming to be entitled, …, I am, with respect, unable to agree with that view.*" Die effek van die interpretasie, wat regter Goosen aan die vermelde woorde van regter Magid gee, het presies die effek waarteen regter Magid beswaar maak. In paragraaf [27] hierbo aangehaal, pas regter Goosen sy interpretasie op die saak voor hande toe en is die effek dat artikel 7(7)(a) nie toepassing nie, omdat die boedel reeds verdeel is. In die woorde van regter Goosen "*[w]here there is no longer a joint estate to be divided an order the effect of which is to 'deem' a pension interest to be part of the joint estate is not competent.*" (497F-G.) Waarom kan dit nie na verdeling van die boedel as 'n bate geag word nie, is die vraag wat opkom. Beteken dit dat 'n skuldvordering wat byvoorbeeld aan 'n termyn vir afdwinging gekoppel is ook nie as 'n bate in ag geneem mag word nie, indien die huwelik voor die termynvervulling ontbind is? Dit is tog nie die regsposisie nie. Die skuldvordering is 'n bate en desnieteenstaande verdeling reeds plaasgevind het, het beide "gades" 'n halwe aandeel in die opbrengs daarvan, indien kompensasie vir 'n "gade'' nie plaasgevind het nie.

(a) In paragraaf 24 meld die hof dat, tot verdeling plaasvind, hetsy deur ooreenkoms hetsy andersins, is 'n hof bevoeg om 'n pensioenbelang as bate in ag te neem. Hierdie siening kan alleen ongekwalifiseerd met verwysing na die inhoud ooreenkoms toepassing vind, indien die ooreenkoms nie die pensioenbelang reeds verdiskonteer/gekompenseer (vgl hierbo par 2) of uitgesluit het nie. Sien ook die aantekening hieronder in paragraaf (c).

(b) In aansluiting tot paragraaf (b) hierbo verwys die hof in *Fritz* in paragraaf 25 na die *skikkingsooreenkoms* met betrekking tot die verdeling van die gemeenskaplike boedel. Geen melding van die pensioenbelang word gemaak nie, maar daar word oor die verdeling van sekere roerende en onroerende bates ooreengekom. Die *egskeidingsbevel* het bloot verdeling van die gemeenskaplike boedel beveel (par 1). In *Maharaj* was daar geen ooreenkoms of bevel met betrekking tot die verdeling van die gemeenskaplike boedel nie. In

Sempapalele maak die skikkingsooreenkoms alleen voorsiening dat al die bates van die partye tussen hulle verdeel moet word, sonder om die wyse van verdeling te voorsien. Die hof in *Fritz* vermeld dan in paragraaf 28 dat dit onnodig is om te oorweeg of die verdeling van die gemeenskaplike boedel heroorweeg mag word op grond van die gebrek om sekere bates nie vir verdeling te oorweeg of in te sluit nie. Dit is onnodig aangesien die hof reeds bevind het dat die pensioenbelang nie na verdeling van die gemeenskaplike boedel as bate oorweeg mag word nie. Hierdie punt verdien egter verdere bespreking. Sluit 'n skikkingsooreenkoms (en dan ook 'n egskeidingsbevel) wat alleen die verdeling van spesifieke bates vermeld, 'n pensioenbelang of ander onvermelde bates uit omdat dit nie vermeld is nie? Die vraag het ten minste twee antwoorde. Aan die een kant is daar die standpunt wat inhou dat onvermelde bates in voormelde geval uitgesluit is. (Sien Sonnekus 1994 *TSAR* 48 59-60; Genis *Onbillike Gevolge Voortspruitend uit die Verdeling van Pensioenverwagtinge by Egskeiding* (LLM-skripsie PU vir CHO 1999) 19.) Aan die ander kant is daar die siening dat onvermelde bates, tensy uitdruklik of by implikasie daarvan uitgesluit, ingesluit word en dat die reëlende reg gevolglik hierdie bates se verdeling beheer. (Sien Van Schalkwyk 2002 *De Jure* 170 175; Van Schalkwyk "*Maharaj v Maharaj* 2002 2 SA 648 (D): Egskeiding – pensioenbelang deel van gemeenskaplike bates by huwelik binne gemeenskap van goed" 2003 *De Jure* 454 457-458.) Laasgenoemde standpunt blyk korrek te wees, indien in gedagte gehou word dat waar partye nie oor die verdeling kan ooreenkom nie, die hof verdeling gelas of 'n likwidateur aanstel om die verdeling te bewerkstellig.

5 Slot

In paragraaf 1 is vermeld dat daar drie antwoorde bestaan met verwysing na wanneer artikel 7(7) van die Wet aanwending vind. Die antwoorde sien só daaruit:

(1) Die beslissing in *Sempapalele* dat die nie-lid-gade se aandeel in die pensioenbelang van die lid-gade slegs realiseer indien die egskeidingsbevel dit vermeld, word as verkeerd beskou. (Sien hierbo par 2.)

(2) *Maharaj* beslis egter dat artikel 7(7)(a) van die Wet toepassing vind selfs nadat die egskeidingsbevel verkry is en geen bevel met verwysing na die pensioenbelang ingevolge artikel 7(8)(a) verleen is nie. (Sien hierbo par 3.)

(3) Die uitspraak in *Fritz* wys op die uitlegverskille tussen die voormelde beslissings hierbo. Die hof in *Fritz* skaar hom by *Maharaj* en verwerp gevolglik die interpretasie van regter Musi in *Sempapalele* (hierbo). Regter Goosen in *Fritz* interpreteer *Maharaj* egter beperkend. Hierby word bedoel dat artikel 7(7) alleen toepassing vind indien die gemeenskaplike boedel nog nie verdeel is nie. Indien verdeling van die gemeenskaplike boedel egter reeds plaasgevind het, kan artikel 7(7) nie meer of verder toepassing vind nie. (Sien hierbo par 4.)

Beide *Maharaj* en *Fritz* beslis dat artikel 7(7) toepassing vind, indien die huwelik reeds ontbind is en geen bepaling met verwysing na die pensioenbelang in die egskeidingsbevel gemaak is nie. Daar kan dus met 'n redelike mate van sekerheid aangevoer word dat die uitleg van

Sempapalele in die toekoms nie navolgingswaardig sal wees nie. *Fritz* se beperkende interpretasie van *Maharaj* is egter soos hierbo (par 4) vermeld, onaanvaarbaar. Gemeenskaplik aan die kritiek teen *Sempapalele* en *Fritz* is die beperkende siening wat aan pensioenbelang as bate gegee word. Anders as ander onstoflike bates (van die gemeenskaplike boedel) word volgens *Sempapalele* en *Fritz*, pensioenbelang ingevolge artikel 7(7) somtyds as bate erken en somtyds nie as bate geag nie. Dit is duidelik nie die bedoeling van die wetgewer nie as die gemeenregtelike posisie met betrekking tot die nie-erkenning van pensioenbelang as bate nie uit die oog verloor word nie.

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Onlangse regspraak/Recent case law

Jerrier v Outsurance Insurance Company Ltd 2013 JDR 0562 (KZP)

The duty to disclose: An ongoing problem?

1 Introduction

The recent case of *Jerrier v Outsurance Insurance Company Ltd* 2013 JDR 0562 (KZP) highlights the fact that the duty to disclose is still problematic. This is so despite the cogent reasons put forward almost a decade ago by Van Niekerk for its farewell (Van Niekerk "Goodbye to the Duty of Disclosure in Insurance Law: Reasons to Rethink, Restrict, Reform or Repeal the Duty (Part 1) 2005 *SA Merc LJ* 150; Van Niekerk "Goodbye to the Duty of Disclosure in Insurance Law: Reasons to Rethink, Restrict, Reform or Repeal the Duty (Part 2) 2005 *SA Merc LJ* 323). Whether or not one agrees with the outcome of the case, the valid concern has been raised that short term insurers, rightly or wrongly, have interpreted the judgment to mean that "consumers are now obliged to report to their insurers every minor incident or scratch on their cars" failing which insurance claims might be rejected.

The concern voiced is that:

> Such interpretations seek to shift the onus onto customers away from the short-term insurers, who do need to examine whether these disclosure practices are fair to the consumer and not out of proportion to the risk-based approach that is necessary for the insurance industry to function efficiently.

(National Treasury "Treasury calls on the insurance sector to be fair to car owners" (2013) available at www.info.gov.za (accessed 2013-08-26)). As will be outlined below, measures have been taken in an attempt to address this concern. However the question arises as to whether these are adequate.

2 Facts and Judgment

The plaintiff, Sherwin Jerrier sued his insurer, Outsurance Insurance Company Ltd for R608,772.20, the sum necessary to restore his Audi R8 to its pre-accident condition. The action arose as a result of Outsurance repudiating Jerrier's claim for damages to his vehicle which in turn arose from a motor vehicle collision on 8 January 2010. The claim was founded on an insurance contract between the parties, which was concluded sometime between December 2008 and January 2009 and in terms of which, according to Jerrier, Outsurance was liable to indemnify him for his loss. Outsurance elected to avoid the insurance agreement, as it averred it was entitled to do, and to reject the claim made upon it by the

plaintiff, alternatively to avoid the insurance agreement coupled with tendering the return of the premium paid by the defendant in respect of the cover provided under the agreement. However, pursuant to the parties consent, an order was granted that the trial would proceed on the issue of liability only.

In this regard the insurer had ensured its protection against future liability on various fronts. First the policy contained a clause which read as follows:

> In order to have cover you need to:
>
> (i) pay your premiums
>
> (ii) provide us with true and complete information when you apply for cover, submit a claim or make changes to your facility. This also applies when anyone else acts on your behalf.
>
> (iii) inform us immediately of any changes to your circumstances that may influence whether we give you cover, the conditions of cover or the premium we charge.

The insured specifically had to report his claim or any incident that might lead to a claim to the insured, as soon as possible, but not later than 30 days, after any incident. This included incidents for which he did not want to claim but which might result in a claim in the future (par 5). In the result, besides the pre-contractual duty of disclosure, there was an additional duty of disclosure by incorporation in the contract and one which possibly extended, as Van Niekerk ("More on Insurance Misrepresentation, Materiality, Inducement and No-Claim Bonuses: *Mahadeo v Dial Direct Insurance Ltd*" 2008 *SA Merc LJ* 427 438) points out in another context, "beyond facts that are material in the pre-contractual situation". In other words in the *Jerrier* case, there was a contractual duty on Jerrier to notify Outsurance of any changes to the risk that Outsurance had taken over, that occurred during the duration of the policy.

Secondly, as is apparent from the defendant's pleadings, the plaintiff warranted that statements made and answers given during the application for insurance and at each renewal of the contract were true and correct (par 6).

As well as the defence embodied in the contract that Outsurance would not be liable where the insured was driving under the influence of alcohol or drugs, (par 5) the defence raised to deny liability for the claim was based on non-disclosure. The court referred to the latter defence as the "non-disclosure defence" and accepted that the non-disclosure related to two previous incidents involving Jerrier's motor vehicle, the first to a minor incident and the second to a more serious one (par 17).

The first occurred on 2 April 2008 when Jerrier damaged his motor vehicle when a wheel struck a pothole. The damage, which he self-funded, apparently amounted to R15,000. The second incident related to a collision with another vehicle on or about 11 April 2009, in Beach Road,

Amanzimtoti. The plaintiff testified that in the light of the amount of his excess payable, he did not think it would be worthwhile to claim and furthermore believed that as the damage caused was due to his fault he could not claim. Initially he thought that the damage would amount to R20,000. However, within two weeks of the accident he discovered that the damage in fact amounted to some R200,000. There was a dispute on the facts of how the Amanzimtoti collision had occurred and what it entailed. However the court accepted that it was not a minor accident and that the conduct of the plaintiff "suggests gross negligence, if not reckless driving and behaviour" (par 22).

In determining whether or not the defendant escaped liability, (that is in respect of the damage caused by the third and latest accident) the court referred first to the plaintiff's contractual obligation in terms of the relevant provision of the policy, to make disclosure at the time of claiming. On this score on the evidence before it, the court determined that it could not be found that the only reasonable inference to be drawn was that the plaintiff did not provide "true and complete information when submitting the claim" (par 27). The court did however find that the only contractual context in which the non-disclosure of the previous accidents could be raised to exclude liability, was in terms of the clause that provided "you need to ... inform us immediately of any changes to your circumstances that may influence whether we give you cover, the conditions of cover or the premium we charge ... this includes incidents for which you do not want to claim but which may result in a claim in the future" (par 28). In the view of the court both were incidents which might, in the sense that they could possibly, result in a future claim irrespective of whether or not they did result in such claim (par 29). Secondly, the court determined that, in the words of the judgment, "both incidents would cause a reasonable man to conclude that knowledge of their occurrence would indicate a change to the plaintiff's circumstances, at the very least from a claims history perspective, but also as a moral risk, that may (not necessarily would) influence whether the defendant would give the plaintiff cover, the conditions of cover or the premium they would charge" (par 30). Moreover the court determined that the expert evidence of the in-house actuary of the defendant, was consistent with what the court believed the view of a reasonable man would be in respect of the two incidents and the impact they would have had on the issue (par 32).

It held that Jerrier should have reported the previous incidents within the time frames of the policy, even if he did not want to claim and that the failure amounted to a material non-disclosure or breach of the terms of the policy. As a result Outsurance was absolved from liability and the court did not deem it necessary to consider the "driving under the influence" defence.

3 Comment

At the outset it is unfortunate that Koen J remarked that "it is trite law that Insurance is a contract based on the utmost good faith" (par 9). Although the contract of insurance is often regarded as being a contract *uberrimae fidei*, it should be remembered that all contracts are based on good faith and as Joubert JA (writing for the majority) opined in the case of *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* (1985 1 SA 419 (A) 433)

> ... *uberrima fides* is an alien, vague, useless expression without any particular meaning in law … it cannot be used in our law for the purpose of explaining the juristic basis of the duty to disclose a material fact before the conclusion of a contract of insurance. Our insurance law has no need for *uberrima fides* and the time has come to jettison it.

Moreover, according to Joubert JA the duty to disclose does not flow from the requirement of *bona fides* but it is imposed *ex lege* (par 433; *cf* Van Niekerk "The Insured's Duties of Disclosure: Delictual and Contractual; Before the Conclusion and during the Currency of the Insurance Contract: Bruwer v Nova Risk Partners Ltd" 2011*SA Merc LJ* 135 who holds that the basis is delictual).

The duty to disclose is a pre-contractual duty, which as in the *Jerrier case*, becomes an additional or continuous duty when it is incorporated into the contract (Reinecke *et al General Principles of Insurance Law* (2002) par 196; Van Niekerk 2011*SA Merc LJ* 135).

Where there has been misrepresentation or failure to disclose information with regard to short term insurance, the insurer can avoid the insurance contract or deny liability and reject the insured's claim. In terms of section 53 of the Short-term Insurance Act 53 of 1998 (STIA), the information must however be material. In this context material information is that which is likely to have materially affected the assessment of the risk under the policy concerned or the premiums. Possibly where the duty of disclosure as contained in the contract calls for disclosure of specific facts, materiality as posited in the statute may be irrelevant. On the other hand where the contract determines that the insurer must disclose material facts generally, then arguably the insurer should be taken to have intended this to have the meaning assigned to materiality in terms of the statute (see the discussion by Van Niekerk 2011*SA Merc LJ* 135 144).

In terms of section 53(1) of the STIA the non-disclosure is regarded as material if a reasonable, prudent person would consider that the particular undisclosed information should have been correctly disclosed to the short-term insurer so that it could form its own view as to the effect of such information on the assessment of the relevant risk. It is clear that the provision embodies what may be termed a risk-based approach and the test of materiality is an objective test. As Boruchowitz J stated in *Mahadeo v Dial Direct Insurance Ltd* (2008 4 SA 80 (W)) the question

> whether the particular information ought to have been disclosed is judged not from the point of view of the insurer, or the insured, but from the point of view of the notional reasonable and prudent person

(par 17; see too *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A); Van Niekerk 2008 *SA Merc LJ* 427). However, as the judge further explained, the test is not whether the reasonable person would have disclosed the specific fact, but whether he or she would have considered that fact reasonably relevant to the risk and its assessment by an insurer (par 18). As further explained by the court, the reasonable person's assessment of whether the fact is material or not will often be influenced by the questions which the insurer may ask, and what the insured considers to be relevant will often depend upon the nature of the questions asked and the nature of these questions posed may indicate what a reasonable person would have regarded as material. Questions asked by an insurer may therefore affect the ambit of the proposer's duty of disclosure and moreover might in the circumstances, serve to determine what is material or not (par 19).

In the same way, the wording of the terms of the contract could serve to elucidate what the reasonable person would consider to be material in the specific circumstances. Clearly, as Van Niekerk points out although the test is an objective one, practically in its application, the reasonable person has to be placed in a particular context, here the situation of the insured. Respectively, in this regard, I would like to endorse Van Niekerk's suggestion:

> [t]hat the reasonable person test for materiality, on the face of it the ultimate in objective tests, may in the process of practical contextualisation have to be filtered through a subjective lens…

(Van Niekerk 2008 *SA Merc LJ* 427; *Mahadeo v Dial Direct Insurance Ltd* 2008 4 SA 80 (W)).This interpretation of the application of the test I believe would be fair to both parties.

The further question, also raised by Van Niekerk, is as to who the reasonable person would have had in mind as being the one who assesses or who is to assess the risk. As indicated above section 53(1)(b) of the STIA refers to *the* insurer as opposed to *an* insurer (emphasis supplied) and it is suggested that that person should be the particular insurer (see too *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika* 1989 1 SA 208 (A); but *cf Mahadeo v Dial Direct Insurance Ltd* 2008 4 SA 80 (W)). It would seem, (although not clear) that this was also the approach of the court in the *Jerrier* case when reference was made to the evidence adduced by Mr Luan Van Rooyen, an in-house actuary of the defendant. However, with regard to the evidence of the actuary, the following statement of the judge is open to criticism:

> [h]is evidence is simply consistent with the view … a reasonable man would have taken of the two incidents and the impact they would have, being the question decisive of the issue, namely that they amounted to a change to the

> plaintiff's circumstances that may influence whether cover is given (or continued), the conditions of such cover, or the premium charged. (par 32).

Surely it would not be equitable to liken a reasonable man's knowledge of risk to that of an expert actuary and to do so would place the insured in an invidious position.

The non-disclosure of a fact, driving into a pothole, for example, might be regarded as not being material in one case but material in another depending on the circumstances. As in the *Mahadeo* case, in the *Jerrier* case the question of non-disclosure related to damage suffered as a result *inter alia* of driving into a pothole. However, in the former case, the insured had not disclosed a previous claim in this regard because he had been asked to disclose prior "accidents" and the insured believed that driving into a pothole could not be classified as an accident or collision. This the court found accorded with the conclusion that a reasonable person would reach in the circumstances: Non-disclosure of this fact was therefore not material. However in *Jerrier* the court found that both the pothole incident and the Amanzimtoti collision

> would cause a reasonable man to conclude that knowledge of their occurrence would indicate a change to the plaintiff's circumstance, at the very least from a claims history perspective, but also as a moral risk, that *may* (not necessarily would) influence whether the defendant would give the plaintiff cover, the conditions of cover, or the premium they would charge (emphasis added).

Although it is debateable whether a reasonable prudent person would always consider the fact of damage caused by driving into a pothole to be likely to, in other words that it probably would, materially affect the insurer's own view on the assessment of the risk, it may well have been so in the specific circumstances of the *Jerrier* case. Here the insured was under a contractual obligation to report *all* changes that *might* influence the granting of cover, the conditions of cover or the premium charged (my emphasis). It may therefore be argued, that a reasonable person would consider such fact to be likely (that is that it probably would) to materially affect the insurer's own view on the assessment of the risk. The rationale for holding that this would be the view of the reasonable person, may be that, as informed by the contract, he or she would be alerted to the fact that *all* changes that *may* (as in possibly could) affect the granting of or conditions of cover or the premium charged must be reported since these may be relevant to the risk assessment.

This being so I believe the judge in *Jerrier* case did not formulate a general rule that all minor incidents would always be considered by the reasonable man to be material to the assessment of the risk. However, be that as it may, it seems strange that the court referred to the necessity to disclose the pothole incident at all. Although not specifically stated so in the facts, it is implied that there was a renewal of the contract. The current insurance contract, that is the one in terms of which the plaintiff was claiming, was concluded during or about December 2008 to early

January 2009. It appears from the pleadings of the defendant insurer that at the conclusion of this December/January 2009 insurance contract, the plaintiff had warranted that he had been involved in only one incident during the previous three years, and that was the pothole incident on 2 April 2008 (par 6).

Although there would have been a pre-contractual duty to disclose material facts, at the time of the conclusion of the contract, albeit a renewal, facts that the insurer was aware of need not have been disclosed (Reinecke *et al (*2002) par 195). Furthermore, because a new contract comes into existence at the renewal of the contract, the fact that the plaintiff had not reported the pothole incident at the time, in terms of the "old contract", is now irrelevant. In any event, the occurrence of this incident did not reflect changed circumstances as laid down in the contract since it occurred prior to the conclusion of the contract and at the time of the conclusion of the contract the insurer was aware of it. Clearly on the facts there is a distinction between the pre-contractual duty to disclose the pothole incident and the contractual obligation regarding the Amanzimtoti collision. However, in *Jerrier* the fact that there was a measure of confusion is reflected in that the court opined:

> The Plaintiff should have reported these previous incidents within the time frames required in terms of the policy, even if he did not want to claim. He failed to do so. This failure amounted to a material non-disclosure or breach of the terms of the policy, absolving the Defendant from liability (par 34).

However, the decision did not turn on the non-disclosure of the pothole incident alone, as there was a second incident, the Amanzimtoti collision, which was not a minor accident and which was not disclosed.

Despite this, as already indicated the pothole incident did raise concern in the short-term insurance industry when some insurers interpreted the *Jerrier* case to mean that an insured must disclose every minor incident and which led to a call by the National Treasury on the insurance sector to be fair to car owners. That it did so highlights the fact that the duty of disclosure is still problematic. While recognising that the insured has a duty to disclose material information honestly, Treasury, in the present culture of consumer protection, determined that the insurance industry, in an endeavour to avoid poor market conduct practices, needs to evaluate whether enough is being done by insurers to inform them of the importance of disclosing material risk-related information and to ensure that they understand the implications of not doing so.

Against the background of on-going discussions between the National Treasury, the Financial Services Board (FSB) and the South African Insurance Association (SAIA), aimed at the broad objective of improving the conduct of insurers towards their clients, the FSB initiated the establishment of what is known as the Treat Customers Fairly (TCF) framework. Although the framework is not yet fully implemented, Treasury has encouraged insurers to incorporate its principles into their

existing insurance contracts and business practices (National Treasury *op cit*). As a result of the interpretation of the *Jerrier* case by certain insurers, as mentioned above, Treasury specifically called upon the insurance sector "to be fair to motor car policy holders when considering insurance claims" and a meeting was subsequently held between Treasury, the FSB and the SAIA. The outcome was that SAIA declared that member companies (insurers) would not reject motor car claims on the grounds that the insured did not report minor incidents, but that customers

> are however encouraged to report any material information to their insurers in terms of the policy conditions, even if there is no intention to claim against the policy. Where vehicle damage is concerned, this would generally include damage above the excess or when a third party is involved.

The member companies then reaffirmed their commitment to embracing the TCF initiative (National Treasury FSB SAIA "Joint Media Statement: Treasury and SAIA agree on measures to enhance insurance disclosures to protect car owners" 2013-04-11 available at www.treasury.gov.za/comm_media/press/2013/2013041101.pdf (accessed 2013-08-26)).

Possibly this is a step in the right direction. However it is not sufficient. Not all insurance companies are members of SAIA and the agreement would therefore not be binding on those non-members and undesirable litigation might still follow. Moreover giving examples to serve as the guideline as to what would be material is not satisfactory. As correctly noted in *Jerrier* examples are not exhaustive (par 33) and merely positing a list of examples would not, I believe, resolve the problem.

The crux of the problem it seems to me is that an average insured person might not understand and appreciate the general principles embodied in the risk-based approach that underpins the insurer's decision to grant cover and at what premium.

Although it may be argued that in modern times the relationship between the insurer and insured is not a fiduciary one, it is certainly one that is informed by principles of fairness and good faith. One must agree with Treasury that where short-term insurers interpret the *Jerrier* case to mean that those insured are now obliged to report every minor incident or scratch on their cars to their insurer, failing which the contract may be avoided, this would not be fair to the insured and "out of proportion with the risk-based approach that is necessary for the insurance industry to function efficiently." Although Van Niekerk (2005 *SA Merc LJ* 150; 2005 *SA Merc LJ* 323) has in any case convincingly argued that the duty of disclosure should not form part our law, it currently does. As in previous cases the *Jerrier* case has shown how difficult it may be to determine what the reasonable person would have considered to be likely to have materially affected the risk to be taken by the insurer.

In modern times and specifically with regard to short-term insurance, where disclosure should take place within the context of the specific risk

and within the context of the practice and policy of a specific insurer, it ought to be incumbent on the insurer to explain the risk-basis to the insured. While it may be so that the insured and insurer are not on equal footing as far as information bearing on the risk is concerned, as possibly only the insured would be in possession of the relevant information, the insurer would be in a very good position to know how the risk is determined. The risks that the insured offers for insurance are very often assessed and the premium determined according to categories: All risks that fall into a certain profile are then rated in the same way. Especially with regard to certain types of policies, such as motor vehicle policies, the insurer would know what the categories are and what the risk and rating factors would be. The insurer therefore would be in the best position to explain the "workings" of the risk-based approach and to ask the relevant questions in order to alert the insured to the kind of information required. In the *Jerrier* case for example, the actuary's testimony as to what would result in an adjustment in premium and acceptance of the risk could be briefly summarised in one paragraph. A better informed insured person who is able to assist the insurer in its assessment of its risk, would surely serve the interest of both the insured and the insurer and minimise undesirable litigation. (This would obviously not affect the remedy of the insurer if non-disclosure were fraudulent.)

If the risk-based approach is clearly explained to the insured by the insurer in the contract, it would be easier in the first place for the insured to determine the kind of circumstances that would be likely to affect the risk and what information would be material to disclose and secondly where information was not disclosed it would be easier for the court to determine what a reasonable prudent person (as informed by the risk-based explanation) would consider as being likely to have materially affected the insurer's own view on the assessment of the risk.

Where the insured makes use of the services of a broker, it is to be expected that he or she would warn the insured to disclose all material information and to assist the latter in this regard (see too Reinecke *et al* (2002) par 474). However, in the present commercial climate the practice is becoming more and more prevalent to exclude an intermediary. This makes it even more urgent that the insurer should explain the risk-based approach to the insured. Moreover, often the contract is concluded telephonically and when procuring insurance, the proposer insured may deal with an employee of the insurer at a call centre who simply records answers in respect of questions asked in a questionnaire and who personally may not even understand the risk-based approach. In consequence the proposer insured and employee may end up speaking at cross purposes.

Since insurance legislation is in the offing to replace both the Long-term and Short-term Insurance Acts by 2015 (see the National Treasury Policy Document 2011-02-23) it might be an opportune time to revisit the duty of disclosure. If it is to be retained rather than discarded, at least the reform measures should serve to resolve the problems that have been

experienced in the past. While drafting should be left to those who are experts in this field, I suggest that a general legal rule which determines that the risk-based approach must be elucidated by the insurer to the insured should be incorporated in the relevant provision. The measures to implement this general rule could be left to the industry itself to fashion in the context of the general practice and policy of insurers.

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Banda v Van der Spuy 2013 4 SA 77 (SCA)

Quantifying a claim with the actio quanti minoris

1 Introduction

The *actio quanti minoris* is one of the so-called *Aedilitian* actions developed in Roman law to provide relief for a purchaser who discovered latent defects in a thing sold. The remedy is aimed at reclaiming a fair portion of the purchase price as redress for the fact that the thing sold is defective and consequently worth less than the price actually paid for it. To succeed with a claim based on the *actio quanti minoris*, a plaintiff must not only show that the thing sold was defective at the date of the sale, but also establish the exact amount by which the purchase price should be reduced. The question is, therefore, how a claim with the *actio quanti minoris* must be quantified. This was one of the issues which the court had to decide in the case of *Banda v Van der Spuy* 2013 4 SA 77 (SCA).

2 Facts

In June 2007, the appellants bought a house from the respondents. The house had a thatch roof that leaked prior to the sale of the house and which continued to leak after the sale (78G). The appellants instituted action in the South Gauteng High Court to claim a reduction in the purchase price with the *actio quanti minoris*. The appellants quantified their claim with reference to the cost of repairing the roof to cure the leaks (78H). However, the agreement of sale contained a *voetstoots* clause, which placed an additional burden on the appellants to prove not only the existence of the latent defects in the roof, but also that the respondents were aware of these defects which caused the roof to leak and fraudulently neglected to inform the appellants of their existence (78I).

The court *a quo* found that the defects in the roof were latent in nature, but upheld the defence of the respondents that they were excused from liability in terms of the *voetstoots* clause (79B).

On appeal, the main issue for determination was whether the appellants had proven knowledge on the part of the respondents with regard to the latent defects in the roof and that they had fraudulently concealed the defects from the appellants. Because the respondents had effected repairs to the roof before the sale, the court also had to decide whether, to the knowledge of the respondents, the repairs had adequately rectified the defects in the roof to prevent the roof from leaking.

The evidence presented by the expert witnesses clearly established that the cause of the leaks in the roof was twofold. Firstly, the wooden roof poles were inadequate to support the weight of the thatch roof and this led to the roof sagging downwards and moving laterally. As a consequence of the movement in the roof, openings had appeared between the flashing and the thatch, through which rainwater flowed down the internal walls of the house (79F-H).

Secondly the pitch of the roof was inadequate. While the recommended pitch for a thatch roof was 45 degrees, the roof of the house was less than 30 degrees in places and could not be regarded as functional, because the thatch fibres would have a negative gradient and water would not run off the roof, but into the thatch. As a consequence, the thatch would stay wet and would rot much more quickly than it was supposed to (79I *et seq*).

3 Judgment

In handing down the judgment of the court, Swain AJA held that the respondents had been aware of one of the causes for the leaking roof – the inadequate roof design – and the fact that they were unaware of the other cause of the leaking roof – the inadequate pitch of the roof – made no difference (83A-I). The respondent's conduct in concealing the existence of the defective, leaking roof meant that they could not rely on the protection of the *voetstoots* clause in respect of this latent defect. As a result, Swain AJA held that the appellants were entitled to the difference between the purchase price of the house and its value with the defective roof (83H-I). He then explained (84A-B):

> No evidence was led of the market price of the house with the defective roof at the time of the sale. It seems self-evident, however, that there would not be a market for a house where the whole roof has to be replaced. Where there is no market the court is entitled to fix the sum for which the house could have been restored ... The cost of repairs may be used as a measure of the award to be made where the actual value could not be determined, or is difficult to determine.

As a result, the court upheld the appeal and ordered the respondents to pay to the defendants an amount of R449,499.00, which the court found

would have been the cost to adequately repair the roof at the time when the sale was concluded in 2007.

4 Discussion

The question arises whether the cost of repair, calculated at the date when the sale was concluded, is the appropriate measure to determine the exact amount of the purchase price which should be refunded to the purchasers. Kerr and Glover (LAWSA (ed Joubert) 24 (2010) par 32) indicate that the:

> ... seller's obligation and the buyer's right [under the edict] arise *by operation of law*, and not by reference to the intention of the parties'. It follows that it is unnecessary for the buyer to try to fit his or her resultant right into the concept of a so-called implied warranty against latent defects and that the buyer does not need to aver any breach of contract. (Emphasis as per original text.)

(See also *Phame (Pty) Ltd v Paizes* 1973 3 SA 397 (A).) The *actio quanti minoris* is therefore clearly not a claim based on breach of contract and consequently also not a claim for contractual damages (*McDaid v De Villiers* 1942 CPD 220). Nor is it a claim in delict for negligent or fraudulent misrepresentation (*Truman v Leonard* 1994 4 SA 371 (SE) 373H).

This begs the question whether the actual cost of repair is the correct measure to apply when calculating the amount by which the purchase price must be reduced. In *McDaid*, Sutton J explained (240) that the:

> [p]urchaser, under the *actio quanti minoris*, ... has no claim, ordinarily, to the amount necessary to put him in the position he would have occupied had he bought an article without the defects in question.

Kerr and Glover (LAWSA 24 par 43) also emphasise that the "*actio quanti minoris* is an action 'for the return of portion of the purchase price'". A claim for contractual damages, on the other hand, is aimed at putting the prejudiced party in the position it would have been in had the contract been properly fulfilled. And awarding the actual cost to repair the roof of the house seems to do just that – it puts the purchasers in the position they would have been in, had the roof been fully functional to repel the rain. Or to put it differently, it seems to put the purchasers in the position they would have occupied had they bought the house without the defects in question, since the costs of repairs would then certainly not have been incurred. The purpose of this note is therefore to consider the appropriate manner in which a claim with the *actio quanti minoris* must be quantified.

5 Historical Analysis

Around the second century BC, the *curule aediles* in Rome issued an edict which imposed a duty on any seller of a slave to inform the purchaser of any disease or defect in the slave (Daube *Forms of Roman Legislation*

(1979) 95). Later, Ulpian indicated that the edict also applied to all kinds of sales (D 21 1 1; D 21 1 63).

If the thing sold was defective, the seller was liable to the extent that the purchaser would have paid less if the purchaser had been aware of the defects (D 19 1 13). Paul indicated that the seller then had to refund the excess paid by the purchaser (D 21 1 61). In other words, the purchaser could claim the difference between the actual purchase price paid and the hypothetical purchase price that would have been paid if the purchaser had been aware of the defect. However, according to Gaius (D 21 1 18) there was another way to determine the apportionment of the purchase price. Instead of the hypothetical purchase price the purchaser would have paid for the defective thing, the purchaser could recover the reduction in the value of the *merx* due to the defect.

A significant distinction was made by Ulpian (D 19 1 13). He stated that if the seller was ignorant of the defects, the purchaser could only recover a portion of the purchase price to the extent that the purchaser would have paid less if he had been aware of the defects. However, if the seller was aware of the defects, kept silent and deceived the purchaser, the seller was liable to compensate the purchaser for all the loss which the purchaser sustained from the sale. The seller, therefore, had to indemnify the purchaser to the extent of the interest which the purchaser had in the sale of the property in good condition. Ulpian referred to this as "the amount of the interest of the purchaser in not being deceived" ("*quanti emptoris interfuit non decipi*") (D 19 1 13 1). Consequently, it seems that even in Roman times, there was no single formula with which the reduction in the purchase price was quantified.

The *actio quanti minoris* was also received in Roman-Dutch law (Voet *Commentarius ad Pandectas* 19 1 1, 21 1 5; De Groot *Inleidinge tot de Hollandsche Rechts-geleertheid* 3 15 8). If the thing sold was defective, the purchaser could recover that portion of the purchase price by which the purchaser had overpaid for the defective thing. The purchaser had overpaid to the extent that the purchase price did not reflect the market value of the thing with its defects.

It is significant, though, that both De Groot (3 15 7) and Voet (21 1 10) also mentioned the same distinction that Ulpian had made in Roman law. If the seller had knowledge of the defect (or, according to Voet (*ibid*) was a skilled craftsman), the seller was liable for any damages which the purchaser suffered as a result of the defect. However, if the seller was ignorant of the defects, the purchaser only had a claim for the amount which he had overpaid for the thing sold, unless the seller was a skilled craftsman.

The *actio quanti minoris* was subsequently also received in the various colonies and republics that would eventually constitute South Africa (*Fry v Reynolds* (1828-1849) 2 Menz 161; *Irvine & Co v Berg* (1879) 9 Buch 183; *Ohlsson's Cape Breweries Ltd v Levison* 1905 TH 330; *Truter v Dunn* 1905 ORC 115; *Didcott v White* 32 NPD 269).

6 Current South African Law

In *SA Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd* 1916 AD 400 Innes CJ explained (413) that:

> [t]he *quanti minoris* action which has descended to us from the Civil Law, entitled the purchaser who after delivery became aware of redhibitory defects to claim back a proportionate share of the purchase price. The standard of relief approved by Roman lawyers in such a case was the difference between the price actually given and the price which the purchaser would have been given had he known of the defects. ... That was a standard not easy of application. The difficulty of deciding what a buyer, wise after the event, would have given for the defective article if he had known of its defects, must have been great. And the measure adopted by many Roman-Dutch writers was the difference between the purchase price and the actual value of the thing sold. ... That was a more satisfactory standard for the real worth of the defective article could be more accurately ascertained than the price which the buyer would have been willing to pay under circumstances with which he had never been actually confronted. That standard has been sanctioned by South African practice ... and should have been applied in the present case.

This principle has been followed in various cases since (See *Katzenellenbogen Ltd v Mullin* [1977] 4 All SA 818 (A). See also *Crawley v Frank Pepper (Pty) Ltd* [1970] 1 All SA 206 (N); *Grosvenor Motors (Border) Ltd v Visser* [1971] 3 All SA 398 (E); *Du Plessis v Semmelink* [1976] 3 All SA 60 (T); *Bloemfontein Market Garage (Edms) Bpk v Pieterse* [1991] 1 All SA 69 (O)).

SA Oil and Fat (above) seems to have provided a simple measure to quantify the amount that may be claimed with the *actio quanti minoris*. However, while the actual purchase price is fairly easily determined, the market value of the (defective) thing sold is not so clear-cut. It is trite that the market value is a question of fact which must be proven by adducing relevant evidence. But what exactly does the market value entail? Market value can only be determined with reference to a particular time, place and thing sold.

As far as the time and place is concerned, market value is generally determined with reference to the time and place of sale (*Wilson v Simon and Lazarus* 1921 OPD 32 37; *Katzoff v Glaser* 1948 4 SA 630 (T) 638; *Banda*). Market value must also be determined with regard to the thing sold. In *Didcott* Broome J explained that "[t]he object of the *actio quanti minoris* is the recovery of the excess of the agreed price over the real value of the thing after allowing for the defect". And in *Ranger v Wykerd* 1977 2 SA 976 (A) Trollip JA (although referring to a claim in delict) confirmed (999A) that "'the market value of the *merx*' ... means the [market value of the] *merx* in its deficient state".

Furthermore, where a number of items, such as a flock of sheep, were sold collectively for one price (as opposed to a number of items sold and billed individually), it is the collective market value of the collective items

which must be established, even if only one of those items is defective (*Malcolmess v Conradie* 1920 OPD 125).

All of this complicates the matter somewhat. The concept "market" usually conjures an image of willing buyers and willing sellers trading items that are intact, rather than defective. The sale of defective goods is the exception rather than the rule. Therefore, in *Katzenellenbogen* Wessels JA explained (878E *et seq*) that

> [w]hen one refers to a market or market value in the context of a claim for contractual damages, the reference is not necessarily to an organised market like a stock exchange or municipal produce market. ... It is a reference to any source to which the purchaser might reasonably have gone, in the circumstances, in order to replace the goods which ought to have been delivered to him ... [T]he phrase 'current value' instead of 'market value' [may be more appropriate] because the latter phrase is sometimes incorrectly interpreted 'to mean solely the value at the municipal market or the particular public market of the neighbourhood'. ... It follows, in my opinion, that if ordinarily any commodity is of a kind which, if offered for sale, is likely to attract potential purchasers who would be prepared to buy if agreement on the purchase price (the contract price) were to be reached, the commodity in question is in a commercial sense a marketable one and, as such, capable of having a determinable money value.

Kumleben JA mentioned further in *Sarembock v Medical Leasing Services (Pty) Ltd* (1991 1 SA 344 (A) 352B *et seq*) that

> [a]s a general rule the value of an article is to be determined with reference to the price it would fetch in the open market ... However ... [t]here may be cases where, owing to the nature of the property, or to the absence of transactions suitable for comparison, the valuator's difficulties are much increased. ... There being no concrete illustration ready to hand of the operation of all these considerations upon the mind of an actual buyer, he would have to employ his skill and experience in deciding what a purchaser, if one were to appear, would be likely to give. If the evidence proves or indicates that sales of such cars with grafted chassis take place with sufficient regularity for them, or certain of them, to serve as a guide to market value, it may well have been incumbent upon the appellant to produce such evidence. If not, the Court must do the best it can and, with reliance on some other legitimate method of valuation, make a fair and reasonable estimate on the evidence of the value of the car.

However, Dowling J cautioned in *Katzoff* (637 *et seq*) that

> [i]t will be seen that ... the value of anything is 'what it is worth', meaning thereby 'what it will fetch'. This has been a test of market value which has, necessarily, been widely used although it may not be the only or a conclusive test. ... In the case of sales out of hand where there is no immediate urgency to sell, a careful and shrewd campaign of advertising and sales promotion may also result in the realisation of prices which may be called 'high'. Still more is this likely to be the case when the advertisements put forward prognostications which may be over-optimistic though not fraudulent. Nevertheless, the fact that many people do buy at such prices is an important though not necessarily a reliable index of market value. In saying this I do not

> intend to subscribe to the contention ... that 'price' and 'value' are different conceptions; or that the true object of search in a case of this kind is for the 'permanent natural value to which the market value after every variation tends to return' ... [T]he real object of search is 'the temporary or market value' which may fluctuate to different levels at different times and vary as the mood of the general buying public is sanguine, pessimistic or apathetic.

As a result, market value can be described as the price which the defective product would reasonable have attained at the time and place when the actual sale was concluded, where a willing seller and willing buyer who was aware of the defects, entered into a putative contract of purchase and sale in respect of the defective thing.

The implication of this is that where the purchaser bought the thing at a price below the putative market value of the defective product, the purchaser would not have a claim for reduction of the purchase price (*Bloemfontein Market Garage*).

To quantify the market value, Wessels JA explained in *Katzenellenbogen* (825) that "[a] court ... must necessarily be furnished with an appropriate yardstick by which to measure the sum of money (if any) required".

The question, then, is: What is the "appropriate yardstick" that must be furnished to the court?

7 The Appropriate Yardstick

An analysis of the cases shows that the courts have made use of various yardsticks to quantify the market value of the thing at the time of the sale:

(i) Expert valuations (*Katzoff*; *Gannet Manufacturing Co (Pty) Ltd v Postaflex (Pty) Ltd* 1981 3 SA 216 (C); *Sarembock* 353C *et seq*).

(ii) Opinions of dealers experienced in the sale of the particular kind of thing (*Sarembock* 353C *et seq*).

(iii) Actual sales of similar things (*Bloemfontein Market Garage*; *Sarembock* 354A *et seq*). However, in *Grosvenor Motors* (216H), which dealt with the sale of a new 1968-model motor vehicle represented to be a 1969-model, the court held that evidence of trade-in or selling values of similar used motor vehicles, was irrelevant to prove the true value of the motor vehicle concerned at the time of the sale.

(iv) Actual disposal by the purchaser of the defective thing or similar things (*Didcott* 275).

(v) Industry standards or guides (such as the *Auto Dealer's Digest* in *Colt Motors (Edms) Bpk v Kenny* 1987 4 SA 378 (T)).

(vi) The value of the shortfall (*Rusteburg v Douglas* 1905 EDC 12).

The subjective evidence of the price the purchaser would have been willing to pay for the defective thing if he had known of the defect, cannot be considered (*Labuschagne Broers v Spring Farm (Pty) Ltd* 1976 2 SA 824 (T)).

The courts have only rarely used the cost to repair the thing sold as a yardstick to quantify the reduction of the purchase price. In *Maennel v Garage Continental Ltd* (1910 AD 137), the court indicated that the cost of repair could be considered if it was very difficult to ascertain the market value of the thing in its defective state or if it is clear that there is no market for the thing in its defective state (*Crawley*). However, the court will only apply this measure if the purchaser can prove that the market value of the thing in its defective state cannot be determined or that there is no market for the thing in its defective state (*Katzenellenbogen*).

8 Conclusion

It is clear that the court in *Banda* was justified in using the cost of repair as the yardstick to quantify the purchasers' claim with the *actio quanti minoris*. As Swain AJA indicated (84A) it would be very difficult indeed to imagine that there would a reasonable market for a house with a roof that is so defective that it would require substantial alterations to the structure of the house and an effective rebuild of the roof. On this basis, the only reasonable measure to quantify the reduction in the purchase price, would be the cost to repair the roof. However, this case also clearly involved a fraudulent concealment of the defective roof (82H *et seq*). Based on the common law as set out by both De Groot and Voet (*supra*), the purchasers would also have been entitled to claim from the sellers their actual damages (which would be the cost to repair the roof), as opposed to the difference between the purchase price and the market value of the thing in its defective state.

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