DE JURE

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Editorial/Redaksioneel

Welcome to the first issue of *De Jure,* 2014. You will notice that the *De Jure* has a new editor and editorial assistant in the person of myself and Mr Robert Steenkamp respectively. In resuming the role as editor after a three year hiatus during which Professor Steve Cornelius assumed the responsibility, I would like to thank Professor Cornelius for his loyal and dedicated service to the journal and to congratulate him on the bumper year, 2013, in which four issues appeared. Sadly, budgetary constraints will not allow this feat to be repeated on a regular basis. Thank you also to the members of the Editorial Board and Advisory Committee for your continuing support and guidance. Those unsung many who serve as peer reviewers, who are essential to the maintenance of the outstanding quality of the journal, must also be acknowledged for your vital inputs. Finally, thank you to each and every one of you who contribute to, and read the journal regularly. Without you there could be no journal.

2014 is set to be a legal extravaganza! What with the legal challenges to the Gauteng e-tolls, SABC's refusal to air certain political party advertising prior to the elections, the Platinum mine- worker's strike, the Nkandla Report, the Oscar Pistorius trial and the anticipated Dewani trial, at local level, the situation in the Crimea, the loss of Malaysian Airlines Flight MH 370 and the ferry disaster in South Korea, amongst others, at international level, there is certainly grist for the legal mill aplenty.

The media's interest in Pistorius and Dewani has certainly fired up a new enthusiasm for the law. There can be no doubt about the influence the media has on the stories that attract public attention! Criminal matters that receive widespread coverage present parties to the case with unique challenges. The presence of television cameras in the courtroom may influence the behaviour of the witnesses and other role players. That said, as with the OJ Simpson trial and the trial of Conrad Murray for the death of Michael Jackson, the public seems unable to get enough of the Pistorius trial.

Law students, certainly those at the University of Pretoria, have had their noses glued to the television, studying the trial at every opportunity. Lecturers have taken advantage of the opportunity to teach burden of proof, role players in court cases, aspects of criminal law and procedure, evidence and court practice. Examination in chief, cross examination and re-examination, the use of expert witnesses, and the value of forensic evidence has been made real through the television coverage. The impact of crime on the victim and her family, the accused and his family and the wider community is writ large for all to see.

Personally, I am sceptical about such broad media coverage of one high-profile case, coverage which, at times, displaced other, more important news. There were times when South Africans could have been oblivious to Syria, the Crimea, the death of 16 on Everest on 18 April

2014, and the like. Pistorius took centre stage. That said, however, it seems that this approach to high-profile and controversial legal matters is here to stay.

It appears that, like television, social media may also have an effect on court cases. Facebook, twitter, the Internet and the like, make it possible to spread news, rumour, opinion and conjecture instantaneously to huge numbers of people. The challenges that these media constitute for court processes would make for interesting research. So too, the law regulating journalistic ethics could benefit from further research. Certainly, there can be no question that the Pistorius trial will inspire journal articles, class discussions and conference papers in the future. Such opportunities to engage with relevant, current and topical legal issues should not be overlooked. It is thus an exciting time to be editing a legal journal and *De Jure* looks forward to your forthcoming contributions with excitement and enthusiasm.

Caroline Nicholson
Editor

Legal issues involving student cyber speech in the United States

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OPSOMMING

Regskwessies met Betrekking op Kuber-Spraak in die Verenigde State

Sake wat oor leerders se vryheid van uitdrukking handel het oor die afgelope vier dekades die federale- en staatshowe se aandag geëis. Tot en met die laaste dekade was hierdie kwessies se fokus op leerder-uitdrukking by skole of by skoolaktiwiteite. Meer onlangs het die howe egter 'n stryd begin voer met leerder-uitdrukking wat nie op die skoolperseel geskep of gelewer is nie, liewer, kuber-spraak wat buite die skoolterrein geskep is maar toegang daarna word by die skool verkry. 'n Uitdaging vir die aanspreek van kuber-spraak is dat die persoon wat toegang tot die kuber-spraak verkry iemand anders kan wees as die persoon wat die inhoud daarvan geskep het. staats- en federale howe moes hierdie kuber-spraak uitdaging met konstitusionele vryheid van uitdrukking toetse aanspreek wat vir uitdrukking direk op die skoolperseel of by skoolaktiwiteite ontwerp is. Die gevolglike vonnise het tot 'n verwarrende waterval van interpretasie gelei, waar die uitkoms kan afhang van watter Hoogeregshof leerder-uitdrukking sake op gesteun word as presedent. Die implikasies van interpretasies van grondwetlikereg aangaande vrye spraak het 'n impak op die gesag van skooldistrikte om gedragskodes neer te lê en af te dwing, leerder-uitdrukking regte, en die reg van ouers om hul kinders se opvoeding rigting te gee.

1 Introduction

Student expression cases have become a mainstay of federal and state courts over the past four decades. Until the past decade the issues have focused on student speech at school or school activities. However, more recently courts have had to struggle with student speech not created or delivered on school premises, but rather cyber speech created off campus and accessed through computers at school. Complicating the challenge of addressing cyber speech is that the person accessing the cyber speech may be someone different from the person who created the speech content.

State and federal courts have had to address this cyber speech challenge with constitutional free expression tests designed for expressive conduct directly on school premises or at school activities. The resulting case law has produced a confusing cascade of interpretations where the outcome can depend on which of the Supreme

* Address delivered at a graduation ceremony hosted by the University of Pretoria 2013-12-10.

Court student free-speech cases are relied upon as precedent. The implications of judicial interpretations of constitutional law involving free expression impacts the authority of school districts to impose and enforce codes of conduct, the expressive rights of students, and the right of parents to direct the education of their children. The purposes of this article are to assess the multiple legal standards created by the Supreme Court and analyze the legal implications of those standards on the rights of schools, students, and parents.

2 Supreme Court Student Free Expression Tests

The United States (US) Supreme Court's declaration in *Tinker v Des Moines Independent Community School District*,[1] that "students … [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[2] has become the constitutional benchmark for determining the extent to which school officials can restrict student expression. In upholding the right of students to wear black armbands to protest the war in Vietnam as a form of passive speech, the Court set a fairly high standard of limiting school restriction of student expression to that which would "materially and substantially disrupt the work and discipline of the school"[3] for restricting student speech. *Tinker* produced yet a second less publicized test, namely that schools can prohibit expression that "intrudes upon … the rights of other students".[4] To date, this second Tinker test has had minimal impact on court decisions,[5] despite some indication that "the right to be let alone"[6] as a broad reading of the second Tinker test, applies regardless of whether student expression that causes "young people to question their self-worth and their rightful place in society"[7] has had no disruptive impact on a school or its programs.

The notion that *Tinker* confers constitutional rights on students (under either test) has not been without its critics. In a belated critique of *Tinker*,

1 393 U.S. 503 (1969).
2 *Idem* 506.
3 *Idem* 513.
4 *Idem* 508. This second test was referenced by the Ninth Circuit in *Harper v Poway Unified School District*, 445 F.3d 1166, 1175 [208 Ed. Law Rep. 164] (9th Cir. 2008) to prohibit a student from wearing a T-shirt with a religious message in opposition to sexual orientation; however, the *Harper* Court of Appeals also found the religious message inconsistent with the *Fraser* standard regarding "fundamental values of habits and manners of civility essential to a democratic society," [*Harper*, 445 F.3d at 1185, citing *Fraser*, 478 U.S. at 681] so the second *Tinker* standard does not have a clear record of standing on its own as does the *Tinker* disruption standard.
5 For an analysis of the second *Tinker* test suggesting that it should be the basis for restricting student speech, see Martha McCarthy, 240 *Ed. Law Rep.* 1, 15 ("school authorities should prohibit harassing and demeaning student expression even if it does not threaten a disruption of the educational process.").
6 *Harper*, 445 F.3d at 1178.
7 *Ibid*

Justice Thomas asserted that the Court's awarding of constitutional rights to students in *Tinker* "[was] without basis in the Constitution"[8] and that the Court should return to the common-law doctrine of *in loco parentis* under which "the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order".[9] Despite such criticism, the *Tinker* decision has demonstrated remarkable resilience.

In three post-*Tinker* decisions, *Bethel School District v Fraser*,[10] *Hazelwood School District v Kuhlmeier*,[11] and *Morse v Frederick*,[12] the Supreme Court sought to broaden the control of school personnel over students. Thus, in *Fraser*, the Supreme Court, in refusing to grant free speech protection to a lewd and vulgar campaign speech delivered to students in an assembly, invoked a school's responsibility to instill "the habits and manners of civility".[13] In *Hazelwood*, the Court, in refusing to award free speech protection to the school newspaper articles of a student editor, emphasized a reasonableness standard for school control over the school curriculum where the school's actions were "reasonably related to legitimate pedagogical concerns",[14] and where students, parents, and members of the public might reasonably perceive student expressive activities "to bear the imprimatur of the school".[15] Finally, in upholding the suspension of a student who had displayed a banner expressing support for marijuana, ("BONG HiTS 4 JESUS"),[16] the *Morse* Court underscored the substantial interest that a school has in safeguarding "those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use"[17] in violation of an "established school's policy"[18] against student use of illegal drugs.

The challenge for courts has been applying the student free expression case law from the *Tinker*, *Fraser*, *Hazelwood*, and *Morse* decisions to new sets of facts. In *Morse*, the Supreme Court's observations regarding *Tinker*, *Fraser*, and *Hazelwood* reflected some of the uncertainty as to how the legal principles of each case can be influenced by the facts of each case. *Morse* perceived *Tinker* as dealing with "political speech" where the school's only interests in that case had been the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint", or "an urgent wish to avoid the controversy which

8 *Morse v Frederick*, 551 U.S. 393, 410 [220 Ed. Law Rep. 50] (2007) (Thomas J concurring).
9 *Safford Unified School Dist. No. 1 v Redding*, 129 S.Ct. 2633, 2646 (2009) (Thomas J concurring in the judgment in part and dissenting in part).
10 478 U.S. 675 (1986).
11 484 U.S. 260 (1988).
12 551 U.S. 393 (2007).
13 *Fraser*, 478 U.S. at 681.
14 *Hazelwood*, 484 U.S. at 273.
15 *Idem* 271.
16 *Morse*, 551 U.S. at 397.
17 *Ibid*.
18 *Idem* 408.

might result from the expression".[19] *Fraser*, according to *Morse*, would have been decided differently if the student had "delivered the same speech in a public forum outside the school context".[20] Finally, the Court in *Morse* found *Hazelwood* inapplicable to its set of facts because "no one would reasonably believe that Frederick's banner bore the school's imprimatur".[21]

Further complicating the picture of student expressive rights has been a wide range of cases concerning free speech protection for the messages on student T-shirts[22] that has not yet reached the Supreme Court, as well as cases arguing protection for student religious expression which has.[23] In a pre-*Morse* Second Circuit decision involving a T-shirt, *Guiles v Marineau*,[24] the Court of Appeals suggested that *Tinker* was the default standard for student free expression cases in the absence of evidence that student T-shirt expression explicitly violated the *Fraser* or *Hazelwood* standards. *Morse*, with its new standard of refusing to protect student support of drugs in violation of established school policy, arguably has done nothing to challenge this default theory.

In religious expression cases, religious speech claims, trumped by the Establishment Clause, have afforded reduced protection for student expression. In the Supreme Court's decision, *Santa Fe Independent School District v Doe*,[25] the Court invoked *Hazelwood* to reject a student religious speech claim and to strike down student prayer prior to football games. More recently, the Supreme Court, in *Christian Legal Society v Martinez*,[26] referenced both *Tinker*[27] and *Hazelwood*[28] in rejecting a law school student religious organization's free speech claim that a law school non-discrimination policy prohibiting discrimination on the basis of sexual orientation violated the organization's free speech right to determine the

19 *Idem* 403-04, citing *Virginia v Black*, 538 U.S. 343, 365 (2003); and *Tinker*, 393 U.S. at 509 - 510.
20 *Morse*, 551 U.S. at 405.
21 *Ibid.*
22 Mawdsley "The Uncertain Currents of T Shirt Expression in the U.S., 2007 (12) *Australia and New Zealand Journal of Law and Education* 69.
23 Mawdsley, "The Rise and Fall of Constitutionally Protected Religious Speech in the United States," 2009 (14) *International Journal of Law and Education* 71.
24 461 F.3d 320 [212 Ed. Law Rep. 143] (2d Cir. 2006).
25 530 U.S. 290 [145 Ed. Law Rep. 21] (2000).
26 130 S.Ct. 2971(2010).
27 *Idem* 2988. ("[T]his Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.'" *Tinker*, 393 U.S. at 507 (1969)).
28 *Idem* 2988 referencing the Court's "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Hazelwood,* 484 U.S. at 273.

religious requirements for its members.[29] In *Harper v Poway Unified School District*,[30] the Ninth Circuit upheld, against a student's religious expression claim, a school district's ban on a T-shirt with phrases that degraded homosexuality.[31] The Court of Appeals reasoned that "school officials' statements and any other school activity intended to teach Harper the virtues of tolerance constitute a proper exercise of a school's educational function".[32]

In the past decade, a new genre of student cyber expression case law involving the use of webpages and the Internet has captured the attention of school officials and the courts. This case law affords far more subtle expressive issues than the positions of student organizations on social issues[33] or student messages on T-shirts.[34] Courts are called upon to apply student expression standards designed in the context of physical symbols and signs (*Tinker*, *Morse*), direct face-to-face student expression (*Fraser*), and school-sponsored curriculum (*Hazelwood*) to student-generated electronic cyber expression accessed in schools where the person who originated the message may not be the person who accesses or distributes it within the school setting. In cyber expression, the authority of schools to punish students may be contingent on such issues as the place or origin of the expression (on or off school premises), the place of access to the expression (on or off school premises), the person(s) who accesses the expression (staff or other students), the content of the electronic expression, and the impact of the expression on the school. The analysis of student cyber expression in this article will begin with two cases, one punishing a student and a second refusing to punish a student.

3 Punishing Student Cyber Expression

In *J.S. v Bethlehem Area School District* (*Bethlehem*),[35] the Supreme Court of Pennsylvania upheld expulsion of an eighth grade student resulting

29 For a pre-*CLS v Martinez* analysis of protected speech for religious organizations, see Mawdsley & Mawdsley, "Balancing a University's Non-discrimination Policy Regarding Sexual Orientation with the Expressive Rights of Student Religious Organizations: A USA Perspective" 2007 (12) *Australia & New Zealand Journal of Law and Education* 47.

30 445 F.3d 1166 [208 Ed. Law Rep. 164] (9th Cir. 2006).

31 *Idem* 1171. The language on the T-shirt stated that "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED", was handwritten on the front and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" on the back.

32 *Idem* 1189-90, citing *Tinker,* 393 U.S. 508.

33 *Bannon v School District of Palm Beach County*, 387 F.3d 1208 [193 Ed. Law Rep. 78] (11th Cir. 2004) (citing *Hazelwood* in permitting the school to delete religious murals that had been painted by the Fellowship of Christian Athletes on hallway panels where the murals were considered by the Court of Appeals to be school sponsored speech).

34 *Guiles*, 461 F.3d at 327-28 where a student T-shirt worn for two weeks at school with pictures of martinis and drugs was considered to be acceptable political speech in opposition to the President of the United States.

35 807 A.2d 847 [170 Ed. Law Rep. 302] (Pa. 2002).

from his home-generated website containing threatening and derogatory comments about a teacher. The student in this case, J.S., apparently did not care for his algebra teacher and created a website at home entitled "Teacher Sux", which contained among other items, a picture of the teacher that morphed into a picture of Adolph Hitler and a hand-drawn picture of the teacher in a witch's costume. More serious, though, was a webpage regarding the teacher with the caption, "Why Should She Die?", with a request from the reader to give him "$20 to help pay the hitman".[36] Another page contained a small drawing of the teacher "with her head cut off and blood dripping from her neck".[37] The website was viewed by student members at the middle school, at least one of whom was directed to the site by J.S.. One of the school's instructors brought the webpage to the attention of the middle school principal who notified the local police and the Federal Bureau of Investigation (FBI), both of which declined to file charges against J.S.. The principal also informed the algebra teacher about the webpage. After viewing the webpage the teacher:

> testified she was frightened, fearing someone would try to kill her, [and] suffered stress, anxiety, loss of sleep, loss of weight, a general sense of loss of well-being, short term memory loss, inability to go out of the house and mingle with crowds and headaches requir[ing] her to take anti-anxiety/anti-depressant medication.[38]

In addition, she was unable to finish the 1997-98 school year and "applied for and was granted a medical leave for the 1998-99 school year because of her inability to return to teaching".[39] As a result, the school was required to utilize three substitute teachers for the 1998-99 school year "which disrupted the educational process of the students".[40]

The parents of J.S. enrolled him in an out-of-state school which prevented his attending one of the two dates for the school board expulsion hearing.[41] In expelling J.S., the board characterized J.S.' webpages as "a threat", "harassment", and "disrespect to the teacher… resulting in actual harm to the… school community [and] to the teacher".[42] J.S.' parents appealed the expulsion to a Pennsylvania state trial and appeals court, both of which upheld the expulsion. The State Appeals Court, in language reminiscent of *Tinker*, held that the school was justified in taking student threats seriously "where the conduct materially and substantially interferes with the educational process".[43]

On appeal to the Supreme Court of Pennsylvania, the court affirmed the expulsion but only after carefully parsing the nature of the student's

36 *Idem* 851.
37 *Ibid.*
38 *Idem* 852.
39 *Ibid.*
40 *Ibid.*
41 *Idem* 853. J.S. was able to attend the hearing on Aug 19 but not on Aug 26.
42 *Ibid.*
43 *Ibid.*

speech and the protection of the Free Speech Clause of the First Amendment. The State Supreme Court determined that J.S.' speech did not fit within a category known as "true threats" which the US Supreme Court has ruled has no free speech protection.[44] In comparing J.S.' threats to other cases in which courts had found "a true threat",[45] the Supreme Court of Pennsylvania, in assessing the context in which J.S.' statements were made, the reaction of listeners, and the nature of the comments, determined that the statements did not constitute true threats.[46] Thus, the Pennsylvania Supreme Court had to weigh whether J.S.' constitutional free expression rights had been abridged by the school board's expulsion.

Citing *Tinker*, *Hazelwood*, and *Fraser,* the Supreme Court of Pennsylvania determined that the relevant criteria were the location of the speech (on or off-campus), the form of the speech (political, lewd, vulgar, offensive), the effect of the speech (level of disruption), the setting in which the speech is communicated (school assembly, classroom), and the speech as part of a school sponsored expressive activity (newspaper, play).[47] While finding that the website was created off-campus, the State Supreme Court noted that J.S. had "facilitated the on-campus nature of the speech by accessing the website on a school computer in a classroom, showing the site to another student, and by informing other students at school of the existence of the website".[48] Although finding that J.S.' website was not the "political message" of *Tinker*, nor was it the "lewd, vulgar and offensive speech" of *Fraser* or the school sponsored speech of *Hazelwood,*[49] the Pennsylvania Supreme Court, nonetheless, decided that either *Fraser* or *Tinker* might be able to support the school board's expulsion of J.S.. However, while the court opined that "the 'Teacher Sux' website [was] no less lewd, vulgar or plainly offensive than the speech expressed at the school assembly"[50] it ruled that, ultimately,

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44 *Watts v U.S.*, 394 U.S. 705 (1969) (holding that a Vietnam protestor stating that he would get L.B.J. in his sights was "political hyperbole," not a violation of a federal statute prohibiting threats against the President).

45 *Lovell v Poway Unified School District*, 90 F.3d 367 [111 Ed. Law Rep. 116] (9th cir. 1996) (finding that, against a backdrop of violence in schools, a student's threat to kill her guidance counselor if she did not make changes in the student's schedule, a reasonable person in the student's position would interpret the statement as a serious expression of intent to harm or assault); *In the Interest of A.S.*, 626 N.W.2d 712 (Wis. 2001) (finding a true threat in a 13-year-old student's detailed descriptions of violence to a police officer, middle school principal, social studies teacher, and a fellow student where an objective, reasonable person would interpret the statement as a serious expression of a purpose to inflict harm).

46 *J.S.*, 807 A.2d at 858-59 (finding that the threatening statements were not made conditionally since no address was given to collect money for a hit man, that the threatening statements had not been made directly to the teacher, that J.S. had made no prior statements to the teacher, and that the teacher had no reason to believe J.S. had the propensity for violence).

47 *J.S.,* 807 A.2d 864.

48 *Idem* 865.

49 *Idem* 865-66.

50 *Idem* 868.

"it is the issue of disruption, potential or actual, that dissemination of 'Teacher Sux' caused to the work of the school"[51] that had to be considered. In rejecting the claims of J.S.' parents that the disruption was minimal, the supreme court found disruption in "the direct and indirect impact of the emotional and physical injuries to [the teacher]", the anxiety of certain students "for their safety", and concerns voiced by parents "for school safety and the delivery of instruction by substitute teachers".[52]

The opposite result was reached in *Layshock v Heritage School District*[53] where the Third Circuit held that the school district had violated a 17-year-old student's free speech rights by punishing him for creating a parody web profile of his principal on MySpace.[54] Using his grandmother's computer at her home, Layshock's profile of his high school principal was formed from bogus answers to phony questions that indicated in part the principal's use of drugs and steroids, as well as theft of items. Word of the profile spread throughout the school and was accessed at school by Layshock and other students, in addition to spawning several other unflattering profiles prepared by other students. The principal, while not being concerned for his life, found the profiles to be "degrading", "demeaning", "demoralizing", and "shocking".[55] Although the principal considered the profiles to constitute harassment, defamation or slander, no civil claims or criminal charges were filed against Layshock or other creators of profiles. Approximately a week after creating the profile, Layshock apologized orally to the principal, followed by a written apology. Notwithstanding these apologies, Layshock was determined by the school to have violated the school's disciplinary code[56] and, in addition to a ten-day suspension, was placed in the Alternative Education Program, was banned from extracurricular activities, and was not allowed to participate in graduation.[57] In upholding summary judgment for Layshock, the Third Circuit, after discussing *Tinker*, *Kuhlmeier*, and *Fraser*, relied on *Morse* for the controlling principle that, had the student's expression occurred in a public forum outside a school-sponsored activity, "it would have been protected".[58] Relying on this reasoning, the Third Circuit in *Layshock* observed that:

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51 *Ibid.*
52 *Idem* 869.
53 593 F.3d 249 [253 Ed. Law Rep. 31] (3d Cir. 2010).
54 MySpace is a popular social-networking website that "allows its members to create online 'profiles,' which are individual webpages on which members post photographs, videos, and information about their lives and interests". *Doe v MySpace, Inc.,* 474 F.Supp.2d 843, 845 (W.D.Tex.2007).
55 *Layshock*, 593 F.3d 253.
56 *Idem* 254. The language of the Discipline Code cited was: "Disruption of the normal school process; Disrespect; Harassment of a school administrator via computer/internet with remarks that have demeaning implications; Gross misbehavior; Obscene, vulgar and profane language; Computer Policy violations (use of school pictures without authorization)".
57 *Ibid.*
58 *Idem* 260, citing *Morse*, 551 U.S. 404.

> It would be an unseemly and dangerous precedent to allow the state in the guise of school authorities to reach into a child's home and control his/her actions there to the same extent that they can control that child when he/she participates in school sponsored activities. Allowing the District to punish Justin for conduct he engaged in using his grandmother's computer while at his grandmother's house would create just such a precedent and we therefore conclude that the district court correctly ruled that the District's response to Justin's expressive conduct violated the First Amendment guarantee of free expression.[59]

While the defendant school district did not dispute that the *Tinker* disruption standard did not apply, it did argue that the MySpace profile of the school principal was "vulgar, lewd, and offensive" under *Fraser*.[60] In examining other cases that had addressed cyber messages, including *Bethlehem*,[61] the Third Circuit could find no authority "support[ing] punishment for creating such a profile unless it results in foreseeable and substantial disruption of school".[62]

The Third Circuit refused to address whether the school could have punished the student under defamation or whether the webpage was a parody protected by free speech, limiting itself to a determination that the school could not, under the First Amendment, punish Layshock for expressive conduct outside of school that the school considered was lewd and offensive.[63] Worth noting is that, while the student in Layshock had a protected First Amendment right in his webpage created off-campus, his parents did not have a protected right under the Fourteenth Amendment Liberty Clause to direct the upbringing of their son,[64] the Third Circuit observed that "they [had been] able to take the action they

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59 *Ibid.*

60 *Idem* 261.

61 For two other cases discussed by the Third Circuit, see *Wisniewski v Board of Education of the Weedsport Central School District*, 494 F.3d 34 [223 Ed. Law Rep. 34] (2d Cir. 2007) (upholding a one semester suspension of a student who had shared a crude drawing suggesting that a named teacher should be shot and killed with his friends); *Doninger v Niehoff*, 527F.3d 41 [233 Ed. Law Rep. 30] (2d Cir. 2008) (upholding the school district's disqualification of a student's eligibility to run for an elective office, finding the student's use of mass mailing in protest to an administration decision inappropriate).

62 *Layshock*, 593 F.3d 263.

63 *Ibid.* Parodies are entitled to First Amendment protection when the speech cannot "reasonably be understood as describing actual facts [about the subject of the parody]". *Hustler Magazine, Inc. v Falwell*, 485 U.S. 46, 57(1988). In commercial speech areas, expression may be entitled to free speech protection where a product is not likely to create confusion under the Copyright or Trademark Acts between the parodies and the goods being parodied. See *Cardtoons v Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996) (finding a free speech protected parody by Cardtoons of baseball player cards published by the MLBA).

64 For a discussion of legal changes in the right of parents to direct the education of their children in the face of the development of students' constitutional rights, see Mawdsley, "The Changing Face of Parents' Rights", (2003) *Brigham Young University Education and LJ* 165.

thought necessary to communicate their displeasure with their son's actions and the inappropriateness of his behavior".[65]

4 Sorting Out the Legal Theories

Both *Bethlehem* and *J.S.* reflect the difficulty in applying the Supreme Court's student discipline standards to student expression that originates off-campus. Although the Supreme Court of Pennsylvania in *Bethlehem* did not find the student's message to be a "true threat", the case does suggest a starting point for analysis in determining whether student expression is either a "true threat" for which no free protection exists, or is a threat that violates one or more of the student discipline standards. Thus, in *Wisniewski v Board of Education of the Weedsport Central School District* (*Wisniewski*),[66] the Second Circuit found that an American Online (AOL) Instant Messaging icon, showing a pistol firing a bullet at a person's head with dots representing spattered blood and the words, "Kill Mr. Van der Molen" (the student's English teacher), below the icon, fell within *Tinker*. The Court of Appeals refused to address whether the icon, which had been sent to other students but not to the teacher, was a "true threat", finding instead, that under *Tinker*, "school officials have significantly broader authority to sanction student speech".[67] In upholding suspension of the student, the Second Circuit concluded that the student's icon "cross[ed] the boundary of protected speech and constitute[d] student conduct that pose[d] a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school".[68] Thus, unlike *Bethlehem* where the student's message was read by the teacher, the message in *Wisniewski*, sent to other students, had not come to the attention of the teacher. Nonetheless, the Second Circuit found that because the "risk" that the icon distributed to students "would come to the attention of school authorities and the teacher whom the icon depicted being shot"[69] was "at least foreseeable to a reasonable person, if not inevitable", the icon represented "a risk of substantial disruption within the school environment".[70]

The notion that off-campus speech that "causes or reasonably threatens to cause a substantial disruption of or material interference with a school" can be regulated was reinforced by the Third Circuit in *J.S. v Blue Mountain School District* (*Blue Mountain*).[71] In *Blue Mountain*, two

65 *Layshock*, 593 F.3d 264. The case notes that the parents "were understandably upset over Justin's behavior, … discussed the matter with him, expressed their extreme disappointment, grounded him, and prohibited him from using their home computer." *Idem* 254.
66 494 F.3d 34 (2d Cir. 2007).
67 *Idem* 38.
68 *Idem* 38-39, citing *Tinker*, 393 U.S. 513.
69 *Idem* 39.
70 *Idem* 40.
71 593 F.3d 286, 301 [253 Ed. Law Rep. 48] (3d Cir. 2010).

students created a fictitious profile on MySpace of one of their middle school principals that included in the profile's Uniform Resource Locator (URL) the phrase, "kidsrockmybed", identified his interests as "hitting on students and their parents", and "mainly watching the playboy channel on directv", described himself in an "about me" section as a "sex addict", "I have come to MySpace so I can pervert the principal's [sic] to be just like me", and declared that "I love children [and] sex of (any kind)".[72] J.S. and her colleague, K.L., when confronted by the teacher, admitted to creating the webpage, apologized in his office, and later wrote letters of apology, but were still punished with a ten-day suspension. The principal considered criminal harassment charges but elected not to pursue them when informed by police that the charges would ultimately be dropped. The disruption to the school was limited: A teacher had to silence seven or eight students who wanted to talk about the profile in class, some eighth grade girls approached another teacher expressing concern about comments regarding the principal and his family, and several girls were reprimanded for decorating the lockers of J.S. and K.L. on the day they returned from their ten-day suspension.[73] In upholding the suspensions, the Third Circuit, in applying *Tinker* to this set of facts, refused to limit off-campus speech to "any geographical technicality"[74] in terms of the authority of the school to control such expression. The Court of Appeals examined the motives of the two girls ("they created the profile not as a personal, private, or anonymous expression of frustration or anger, but as a public means of humiliating [the principal]"),[75] the immediate effect on the school ("at least twenty-two members of the Middle School community … discussed the profile in-school and undoubtedly talked about it out-of-school as well"),[76] and the reasonable future impact of the profile ("students and parents inevitably would have begun to question [the principal's] demeanor and conduct at school, the scope and nature of his personal interests, and his character and fitness to occupy a position of trust with adolescent children").[77] The Third Circuit refused to limit the disciplinary reach of school authorities to off-campus generated speech only if it "satisfied the elements of criminal harassment or defamation", holding instead, that "the potential impact of the profile's language alone is enough to satisfy the *Tinker* substantial disruption test".[78] Sweeping within *Tinker* both the profile's "level of vulgarity" and "reckless and damaging information",[79] the Third Circuit held that *Tinker*'s disruptive standard applied to the "undermin[ing] of the principal's authority within the school",[80] as well as the "potentially

72 *Idem* 300.
73 *Idem* 294 for full description of disruption and school discipline.
74 *Idem* 301.
75 *Ibid.*
76 *Ibid.*
77 *Ibid.*
78 *Idem* 302.
79 *Ibid.* The Third Circuit expressly applied *Tinker* to the set of facts and refused to apply *Fraser. Idem* 301 n 8.
80 *Idem* 302.

arous[ing] [of] suspicions among the school community about his character".[81]

It is worth noting that just as in *Layshock,* the Third Circuit in *Blue Mountain* refused to address the substantive question whether the rights of parents to direct the education of their children could be pursued independently from the student's free speech claim. As in *Layshock*, the Court of Appeals in *Blue Mountain* noted as a practical matter, that the school's discipline had not preempted that of the parents since "they [had] also punished her 'for a very long time' for creating the profile".[82]

The rejection of student free speech claims in the *Bethlehem*, *J.S.*, and *Blue Mountain* needs to be juxtaposed to a series of generally older Federal District Court decisions finding on behalf of students. In the earliest of the cases, *Beussink v Woodland R-IV School District*,[83] a Missouri Federal District Court granted a preliminary injunction against a ten-day suspension awarded to a student as a result of an off-campus created homepage that "was highly critical of the administration at Woodland High School [and] used vulgar language to convey his opinion regarding the teachers, the principal and the school's own homepage".[84] Even though the principal and the computer teacher "were upset by the homepage",[85] the teacher had nonetheless permitted students to access the homepage in class. Citing *Tinker*, the District Court found that "no significant disruption to school discipline [had] occurred"[86] and, indeed, in turning the case into one purely of free speech, the court pointedly declared that the student had not been disciplined "because he was disrespectful or disruptive in the classroom … [but] because he [had] expressed an opinion on the Internet which upset [the] Principal and [the computer teacher]".[87] In addition to enjoining the school district from using the ten-day suspension served by the plaintiff in any manner to adversely affect his grades, the District Court also enjoined the school district "from restricting [the student's] use of his home computer to repost that homepage".[88]

Three years later, a Pennsylvania Federal District Court, in *Killion v Franklin Regional School District*,[89] granted injunctive relief to a student suspended for webpage content created at his home that contained a list of uncomplimentary comments about the athletic director.[90] In

81 *Ibid.*
82 *Idem* 305.
83 30 F.Supp.2d 1175 [131 Ed. Law Rep. 1000] (E.D. Mo. 1998).
84 *Idem* 1177.
85 *Idem* 1178.
86 *Idem* 1181.
87 *Ibid.*
88 *Idem* 1182.
89 136 F.Supp.2d 446 [153 Ed. Law Rep. 90] (W.D. Pa. 2001).
90 *Idem* 448. Among the comments about the athletic director were that: "He is constantly tripping over his chins"; "The girls at the 900 #'s [sic] keep hanging up on him"; and, "He has to use a pencil to type and make phone calls because his fingers are unable to hit only one key at a time".

overturning the ten-day suspension awarded to the student because his list "contained offensive remarks about a school official",[91] the District Court limited *Fraser* and *Hazelwood* to their narrow set of facts[92] and applied *Tinker*. In addition to noting that the list was not "threatening", (even though it was "upsetting") to the athletic director, the school district adduced no evidence of "actual disruption";[93] there was "no evidence that teachers were incapable of teaching or controlling their classes because of the list, [and] indeed, the list [had been] on school grounds for several days before the administration became aware of its existence, and at least one week passed before the defendants took any action".[94] A copy of the list had been downloaded and appeared at school although the school district was not able to produce any credible evidence that the student who created the webpage had been the one responsible;[95] in any case, even if the student had brought a hard copy of the list to school, the absence of disruption would most likely have produced the same result.

One year later, two Federal District Courts, one in Michigan, *Mahaffey v Aldrich* (*Mahaffey*),[96] and the other in Ohio, *Coy v Board of Education of the North Canton City Schools* (*Coy*),[97] relied on *Tinker* to address suspensions related to student-created websites. In *Mahaffey*, a high school suspended a student who had contributed the following content to a website he had created:

> SATAN'S MISSION FOR YOU THIS WEEK: stab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face. Killing people is wrong don't do It [sic]. Unless [sic] Im [sic] there to watch. ___ Or just go to Detroit. Hell is right in the middle. Drop by and say hi.
>
> PS: NOW THAT YOU'VE READ MY WEB PAGE PLEASE DON'T GO KILLING PEOPLE AND STUFF THEN BLAMING IT ON ME. OK? [98]

The District Court in *Mahaffey* found the comments did not constitute a threat because "there was no evidence that [the student] communicated the statements on the website to anyone".[99] More importantly, in granting summary judgment to the student, the court

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91 *Idem* 449.
92 *Idem* 454 (The expression in *Killion* "was not at a school assembly" [*Fraser*] and "was not in a school sponsored newspaper [*Hazelwood*]").
93 *Idem* 455.
94 *Ibid.*
95 *Idem* 458 n2.
96 236 F.Supp.2d 779 (E.D. Mich. 2002).
97 205 F.Supp.2d 791 [166 Ed. Law Rep. 535] (N.D. Ohio 2002).
98 *Mahaffey*, 236 F.Supp.2d at 782. The Federal District Court inserted the "sic" references.
99 *Idem* 785. The court accepted the student's assertion on the website that it had been created "for laughs" and viewed the last sentence as a disclaimer that no reasonable person would interpret as "an intent to harm or kill anyone listed on the website". *Idem* 786.

observed that the school district had produced "[no] proof of disruption to the school or on-campus activity".[100]

Coy differed from *Mahaffey* in that the school district alleged that it had expelled a student, not for the content of his webpage, but for violating a school rule prohibiting use of school computers to visit unauthorized sites. The Federal District Court in *Coy* found sufficient evidence to warrant a middle school student going to trial on a free speech claim following his suspension for four days after creating a webpage that contained: "a few insulting sentences written under each picture [of three other middle school students]", "two pictures of boys giving the 'finger'", "some profanity", "and a depressingly high number of spelling and grammatical errors".[101] Although the District Court refused to grant summary judgment to the student (Coy), it did determine that the case should be resolved under a *Tinker* rather than a *Fraser* or *Hazelwood* standard. Even though the website was "crude", it did not contain the "elaborate, graphic, and explicit sexual metaphor" in *Fraser*[102] nor had Coy been "speaking or attempting to speak in front of a captive student audience".[103] Likewise, *Hazelwood* was not applicable because Coy's "activity was not sanctioned by the school nor did the school knowingly provide any materials to support the expression".[104] In sending the case back for trial, the District Court established two key benchmarks: (1) "If the school disciplined Coy purely because they did not like what was contained in his personal website, the plaintiff will prevail";[105] and, (2) even if the school established that it punished the student, not because of website content, but because he had violated a school policy prohibiting accessing non-approved websites using school computers, the school would still have to demonstrate under *Tinker*, that accessing the website had an "effect upon the school district's ability to maintain discipline in the school".[106]

5 Analysis and Implications

The dominating force of *Tinker* in addressing student creation of, and access to, webpages created off-campus, limits the disciplinary authority of school districts. *Coy* casts doubt as to whether school suspensions would be possible simply because a student has used a school computer to access a student-created website, although disciplinary sanctions restricting or prohibiting student access to school computers would seem to be plausible since students would not be excluded from the school setting. However, much seems to depend on the language of school disciplinary codes. The district court in *Coy* held that a school conduct

100 *Idem* 786.
101 *Coy*, 205 F.Supp.2d 795.
102 *Idem* 799, citing *Fraser*, 478 U.S. 678.
103 *Idem* 800.
104 *Ibid.*
105 *Idem* 801.
106 *Ibid.*

provision prohibiting the use of "obscenity, profanity, any form of racial slur or ethnic slurs, or other patently offensive language or gesture",[107] was unconstitutionally overbroad,[108] since "it reached language, distasteful as it might be, that is protected under the First Amendment".[109] Nonetheless, the court upheld the language as not being unconstitutionally vague, and thus could be enforced by the school, because it applied only to "school property, at school-sponsored events off school grounds, or during travel to and from school".[110] In effect, schools have discretion in formulating discipline policies defining inappropriate language as long as students are afforded sufficiently clear notice.

The second *Tinker* standard, "intrudes upon ... the rights of other students" or "colli[des] with the rights of other students to be secure and to be let alone",[111] has supported school district discipline where students have worn T-shirts with messages expressing hostility or lack of tolerance for persons representing protected category viewpoints,[112] but one can question whether it applies with the same force to website messages created off-campus. In many of the cases discussed in this article, the students who created their webpages also accessed the website at school for their friends. Arguably, the student creator accessing his/her own webpage could be compared to a student choosing a T-shirt with a vulgar or offensive message to be worn at school, but the comparison breaks down when the person accessing the webpage at school is not the creator of the website. At some point, regardless how distasteful or vulgar, the school should not be able to reach into a student's home to punish him or her for the message created there. Indeed, at some point one returns to the facts of *Tinker* where the students who wore the black armbands were simply following the example of their parents,[113] although none of the webpage cases suggest that student vulgar comments on the Internet merely reflected the parents' views of school personnel. Nonetheless, in the absence of the kind of disruption required under *Tinker*, one can argue that the function of education should not be to engage in a kind of mind control to

107 *Idem* 803.
108 A law or regulation is overbroad under the First Amendment if it "reaches a substantial number of impermissible applications" relative to the law's legitimate sweep, *Coy*, 205 F.3d at 801, citing to *Déjà Vu of Nashville, Inc. v Metro Gov't*, 274 F.3d 377, 389 (6th Cir. 2001), or "imposes restrictions so broad that it chills speech outside its legitimate regulatory purpose." *Coy*, 205 F.3d 801, citing *Deja Yu*, 274 F.3d 377.
109 *Coy* 205 F.Supp.2d 802.
110 *Idem* 803.
111 *Tinker*, 393 U.S. 508.
112 *Harper*, 445 F.3d 1178 (finding that a student's handwritten message on a T-shirt, "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" violated the second *Tinker* standard because "[p]ublic school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses.").
113 *Tinker*, 393 U.S. 504.

eradicate the personally or politically unacceptable student views of the moment.[114] As the Second Circuit observed in the post-*Tinker*, but pre-*Fraser*, case, *Thomas v Board of Education* (*Thomas*),[115] student activity in creating a satirical publication for distribution in school which "was deliberately designed to take place beyond the schoolhouse gate"[116] could not, in the absence of disruption, be the subject of school discipline. The Second Circuit opined in *Thomas* that "our willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate".[117]

None of the courts deciding cases discussed in this article addressed the substantive question whether the disciplinary reach of school officials into the home violates not only the free speech rights of the student, but the constitutional rights of the parents to direct the education of their children. Clearly, as the US Supreme Court noted in *Troxel v Granville*,[118] "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children".[119] While the Third Circuit in *Layshock* observed that it could envision situations "where a school's reaction to student's conduct could interfere with the parents' ability to exercise appropriate control and authority over their child and his/her upbringing and education",[120] the Court of Appeals provided no insights into what those situations might be. As far as the case before the Third Circuit was concerned, the court observed that the parents had communicated their displeasure with their son and "the school's inappropriate response to [their son's] actions in no way interfered with [the parents'] liberty interest in raising their son".[121] At the very least, *Layshock* is indicative of current legal developments where "a child's constitutional rights will not always be coterminous with his/her parents' liberty interests",[122] and children are recognized as possessing

114 See e.g., *Beussink*, 30 F.Supp.2d 1177 where the student "did not intend the [his] homepage to be accessed or viewed at [his high school]; he just wanted to voice his opinion".
115 607 F.2d 1043 (2d Cir. 1979).
116 *Idem* 1050. The articles in the publication included such topics as masturbation and prostitution, as well as more standard fare such as "school lunches, cheerleaders, classmates, and teachers". *Idem* 1045.
117 *Idem* 1045.
118 530 U.S. 57 (2000) (invalidating a state statute granting grandparents visitation rights where those rights would be contrary to the custodial parent's rights).
119 *Idem* 67 (relying for support on the seminal Supreme Court decisions recognizing parent rights protected under the Liberty Clause, *Meyer v Nebraska*, 262 U.S. 390 (1923) and *Pierce v Society of Sisters*, 268 U.S. 510 (1925)).
120 *Layshock*, 593 F.3d 264.
121 *Ibid.*
122 *Ibid*.

constitutional rights even if parents have no constitutional claims.[123]

No one, certainly not the courts, is suggesting that students who create offensive websites should go unpunished, but, in the absence of *Tinker* disruption, school suspensions or expulsions should not be the appropriate means of punishment.[124] In several of the cases, school officials contemplated civil or criminal action, but then, whether dissuaded by the attendant publicity or the school board, decided not to proceed.[125] Should they decide to go forward with a judicial proceeding, school officials would probably have a difficult task in prevailing in civil damages or criminal claims,[126] but such difficulty should not become the proof text for bringing the full force of the school district to bear against the student.

Unlike the *Harper* T-shirt message or the *Morse* sign that requires some advance planning and materials, the Internet is instantaneous. What students could accomplish fifty years ago by writing and passing notes to only one or two students in class can now be readily accessible to a wide number of students almost at the moment of creation by punching a few keys on a keyboard. Contrary to the notes passed in schools in the past, most of the objectionable Internet webpages have originated in the students' own homes.

Perhaps Justice Thomas was correct that in granting constitutional rights for students we have opened a Pandora's Box of legal interpretation and enforcement of free expression that has served to separate the enforcement rights of schools from the role and responsibility of parents to direct the education of their children. It is worth noting that in the cases discussed in this article, some students not only apologized for their webpages, but were also punished by their parents.[127] By setting up school officials as the final arbiters of what is distasteful or inappropriate in student, home-generated webpages,

123 See e.g., *The Circle Schools v Pappert*, 381 F.3d 172 [191Ed. Law Rep. 629] (3d cir. 2004) (invalidating a state statute requiring that parents be notified if their children failed to participate in the Pledge of Allegiance pursuant to student's right of privacy, but refusing to reach the merits of parents' Liberty Clause claim). See generally, Mawdsley (2003) *Brigham Young University Education and LJ* 179-183.

124 For an example of a creative alternative not involving suspension or expulsion, see *Doninger v Niehoff*, 527 F.3d 41 [233 Ed. Law Rep. 30] (2d Cir. 2008) where the Second Circuit upheld denial of a preliminary injunction to a student disqualified by her high school from running for Senior Class Secretary after she posted a vulgar and misleading message, referring to school administrators as "douchebags," about the supposed cancellation of an upcoming school event; the Court of Appeals found that the language was not only "plainly offensive", but "foreseeably create[d] a risk of substantial disruption within the school environment" by being "hardly conducive to cooperative conflict resolution". *Idem* 50-51.

125 See e.g., *Coy*, 205 F.Supp.2d 796.

126 *Blue Mountain*, 593 F.3d 293 (a state police officer, after reviewing a student's webpage, told the principal he could press criminal charges "but they would likely be dropped").

127 See e.g., *Layshock*, 593 F.3d 254.

schools have not only made adversaries of parents but, have made certain that the webpage content that was probably accessed by only a relatively few students will now be memorialized in West Publishing Company's Reporter series.

6 Conclusion

Student, web-based cyber speech presents multi-layered constitutional issues. At the very core of these issues is the protected privacy right of students to express their views in websites created off school premises. In terms of the authority of school districts to punish objectionable webpages, much depends on the nexus between the person creating the webpage and the school. After all, no school district could seriously argue that it had authority to punish a person who waited until the day after graduation to create an objectionable webpage. The reality in the cyber speech debate is that cyber speech content has a ready audience only when the person creating the webpage and those accessing it do so in the context of their mutual participation in an educational setting. Cyber speech presents an enforcement dilemma for schools simply because the nature of the speech content assures that an audience exists that can identify with, and be responsive to, the speech content. Thus, student claims of privacy where webpages are created off campus need to be assessed, not just in terms of their place of creation but also, in terms of the accessibility of that webpage content at school. As a result, once student cyber speech expression reaches some part of the school audience within the school, the privacy notion that a person has a right "to be left alone" becomes subject to result-oriented and content-based free speech tests. Whether the motive of the person creating a webpage should be considered in terms of student accessibility has received little attention from courts, but one can argue that placing content in a webpage format is considerably different from a word document stored on one's computer at home. Once a student has entered the Internet world through a webpage, he/she has chosen, in effect, *not* "to be left alone".

Layered on top of the student's right to privacy to create a webpage is the right of a student to express the views of his/her parents. While many of the cases to date have involved cyber speech that parents found objectionable, little attention has been accorded to student cyber speech that mirrors the views of parents in the home. The legal issue raised thus far as to whether school punishment of a student deprives a parent of the right of punishment under the Liberty Clause to direct the education of their child falls short of the key *Tinker*-type set of facts where a student's expression modeled the parental views on a social or political issue. School officials would have no jurisdiction to sanction parents who created webpages outrageously critical of school programs, but would they be able to punish a student whose name appears, along with those of the parents, as the creator of an objectionable webpage?

Ultimately, the overarching layer to the analysis of student cyber speech is the legal standard to be applied to student expression. The notion that the *Tinker* disruption test is the default standard does little to quiet concerns as to how that standard should be applied where student expression was never accessed at school or the extent to which *Tinker* can be superseded by the second *Tinker*, the *Fraser*, the *Kuhlmeier*, or the *Morse* tests. Justice Thomas' concern about the reach of schools in punishing the expression of students, one can argue, is not misplaced. What the Supreme Court has produced, Justice Thomas suggests, has not been a clarification of a student's expressive rights but an obfuscation of the balance between schools and homes. Arguably, by creating multiple legal touch points that schools can use to punish students for their expression, courts have permitted schools to assume the role of monitoring what is socially acceptable expression, even where a school's determination is contrary to other constitutional rights such as parental control of their children's education or the religious views of students and their parents.[128]

128 See e.g., *Harper*, 445 F.3d 1173 (a student's T-shirt critical of homosexuality, worn during a tolerance day, expressed the views of the parent, even though the school's assistant principal met with the parent to express the school's purpose in creating tolerance day).

Approaches to pregnancy under the law: a relational response to the current South African position and recent academic trends*

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OPSOMMING

Geregtelike benaderings tot swangerskap: 'n Relasionele respons op die huidige Suid-Afrikaanse posisie en onlangse akademiese denkrigtings

Hierdie artikel neem drie verskillende geregtelike benaderings tot swangerskap in oënskou en oorweeg die onderskeie aansprake om ongeborenes tot geboorte te beskerm. Die benaderings wat ondersoek word is die enkel-entiteitbenadering, die aparte-entiteite benadering en die nie-een-nie-maar-nie-twee-nie benadering. Daar is tekortkominge in beide die enkel-entiteit en die aparte-entiteite benaderings. Beide benaderings faal daarin om die relasionele karakter van swangerskap te akkommodeer aangesien ongeborenes beskou word as nie-entiteite tot voordeel van swanger vrouens of swanger vrouens se belange opsy geskuif word tot voordeel van ongeborenes. Die artikel gaan verder om die nadelige implikasies van hierdie twee benaderings te beklemtoon en voor te stel dat 'n relasionele benadering tot swangerskap opgeneem en gevolg word. Hierdie benadering word beliggaam in die nie-een-nie-maar-nie-twee-nie benadering en steun op die verhouding tussen swanger vrouens en ongeborenes om sodoende die waarde van beide die entiteite wat 'n swangerskap opmaak, te erken. Die nie-een-nie-maar-nie-twee-nie benadering lê tussen die twee uiterste benaderings van die enkel-entiteit benadering en die aparte-entiteite benadering. Die voorstel beliggaam in hierdie benadering is dat die waarde van ongeborenes erken moet word maar wel in verhouding tot swanger vrouens wat die ongeborenes dra. Die artikel bekyk die definisie van die nie-een-nie-maar-nie-twee-nie benadering, die skakels met relasionele feminisme en die moontlike toepassing daarvan in 'n Suid-Afrikaanse konteks. Die artikel benadruk dat regsprobleme wat ten opsigte van swangerskap, swanger vrouens of ongeborenes ontstaan, benader behoort te word vanuit die vertrekpunt van die geleefde en beliggaamde ervarings van swangerskap om sodoende die pad vorentoe te bepaal.

* The present article is based on, and is an adaption of, an unpublished paper, Pickles & Labuschagne "Pregnancy, foetal individuation, and claims to another's body: A relational response", Conference of the Society of Law Teachers of Southern Africa, Johannesburg Jan 2013.

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1 Introduction

This article identifies and examines three approaches that can be adopted in law when dealing with issues relevant to pregnancy, pregnant women and the unborn, and considers the appropriateness of each approach in respect of its aim of securing positive pregnancy outcomes and specifically protection of the unborn until birth. The three approaches discussed are the single-entity approach, the separate-entities approach, and the not-one-but-not-two approach (not one/not two). The article recognises that all authors referred to herein, as well as the author of the present article, seek to develop a model that can accommodate legitimate protection of the unborn in law. However, while the intentions of all concerned are the same, the approaches differ. Contrary to the approaches adopted by the authors discussed herein, this article seeks to emphasise that any issue in law that relates to pregnancy, pregnant women and the unborn must be approached in such a way that the reality of pregnancy, being one of embodied relationship, informs the debates going forward.

What the article shows is that South African law primarily adopts the single-entity approach to pregnancy. This approach entails viewing pregnant women as single entities, thus making the unborn non-entities under the law. However, this article highlights that there has been a noticeable trend in academic publications towards distinguishing the unborn from the pregnant women who carry them, and the unborn are singled out as entities in need of the law's direct protection. On the basis of scientific evidence, the unborn are individuated from pregnant women, thus justifying the call for the law's recognition of their independent status, either as legal persons or as a subcategory of legal subjects. Academics whose work is considered in this article maintain that the law's independent recognition of the unborn will better equip the law to protect them, thereby securing more positive pregnancy outcomes. These arguments speak to a separate-entities approach to pregnancy.

It is shown that the separate-entities approach is continuously being advanced despite the fact that the unborn exist and live entirely in and off pregnant women's bodies. The bodies that the unborn live off of belong to other legal persons, being pregnant women who are legal subjects with vested constitutional rights and duties of their own. This article takes the stance that both the single-entity and separate-entities approaches are an inadequate response to pregnancy under the law. In this respect, the article thus proceeds to consider, with approval, the not-one/-not-two approach to pregnancy. It is demonstrated that this approach is rooted in relational feminism and is context-driven, in that it draws on women's perspectives of pregnancy. The not one/not two approach recognises the relationship that exists between pregnant women and foetuses during pregnancy, thus allowing space to value the

unborn – but only in relation to the pregnant women carrying them and only in so far as this recognition advances women's rights.

The article first examines the current position with regard to pregnancy under South African law. Thereafter, a number of South African authors' positions will be considered in so far as they argue for a revised approach to pregnancy. Their revised approach will be tested against relevant legal principles in order to determine whether such an approach in fact offers the protection envisaged. Finally, the article will draw on the not one/not two approach as a preferred approach to pregnancy.

2 Current Position of the Unborn in South Africa: The Single-entity Approach to Pregnancy

There is no known legislation that explicitly recognises the unborn as independent entities in South African law. In most instances, a child is defined as being below the age of majority, without specifying when that age begins. An example of this approach is to be found in section 28(3) of the Constitution of the Republic of South Africa, 1996, which states that a "child", for purposes of section 28, means a person under the age of eighteen years.[1] Neither "age" nor "person" is defined, particularly in respect of when either begins or comes into being. While legislation does not expressly deny the unborn independent status, the common law does. Presently, the common law "born-alive" rule denies the unborn legal status and the title of "person".[2] Unless legislation specifically trumps the common law position or the common law is developed through judicial precedent, any law applicable to persons therefore excludes those not yet born.[3]

The extent of the unborn's status as a non-entity in view of the born-alive rule is significantly obvious when one considers the recent criminal law decision in *S v Makhakha*.[4] In this case, a woman who was about seven months' pregnant was one of the victims of a brutal rape and murder. While the accused was found guilty of the pregnant victim's rape

1 The Children's Act 38 of 2005 takes the same approach: see s 1(1) definitions.

2 Boezaart "Child law, the child and South African private law" in Boezaart (ed) *Child Law in South Africa* (ed Boezaart) (2009) 4. Here "person" is used in terms of its legal construction, rather than its social construction. The distinction between the two constructions can be found in Lupton *The Social Worlds of the Unborn* (2013).

3 Botha explains that it is presumed that legislation does not alter the common law more than is necessary, where it does, legislation will trump the common law. However, where there is no legislation dealing with the issue specifically, the common law position stands. See Botha *Statutory Interpretation: An Introduction for Students* (2012) 43.

4 2013 JDR 1934 (WCC).

and murder, the fact that a viable foetus was lost during the commission of the crime was not regarded as an issue worthy of the High Court's attention.[5]

Makhakha is noteworthy for purposes of this article because it demonstrates how deep-rooted South African law's perception is of pregnancy, that is, the law views pregnancy as a representation of pregnant women embodying a single entity. Seymour, with reference to the United States of America (USA), Canada and Australia, explains that this is the "body-part model" of pregnancy under the law.[6] The single-entity approach means that "the fetus is simply part of the woman's body" and thus denies the unborn its "distinctiveness".[7] The unborn is seen to be part of a woman's body in the same way that a room is part of a house; hence it is merely something akin to an organ that belongs to the body of a pregnant woman.[8] Consequently, the single-entity approach withholds any vested and protectable interests or rights for as long as foetuses remain unborn. [9]

Succinctly stated, the South African legal position is that a person is one who is born alive and in whom legal subjectivity vests only at this moment.[10] Boezaart defines a legal subject as "any entity that can have rights, duties and competencies".[11] Further, "legal subjectivity" is defined as "the characteristic of being a legal subject in legal interaction".[12] Consequently, as our law stands in respect of legal status, it appears that foetuses are distinguishable from the women carrying them (and all other live-born persons) in that they lack legal subjectivity. However, as will appear below, this position is now being challenged, because it is progressively being accepted that the unborn are not mere maternal tissue or non-entities.

3 Towards a Separate-entities Approach Emphasising Foetal Individuation

One way to emphasise that something "more" than only a woman is present during pregnancy is to rely on science and medical technology.

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5 The judgment as reported does not include the sentence imposed and it is therefore not clear if the loss of foetal life even contributed to an increased sentence as a possible aggravating factor.
6 Seymour *Childbirth and the Law* (2000) 189.
7 *Idem* 190.
8 *Ibid*.
9 This position has been confirmed in a number of decided cases: *Pinchin v Santam Insurance* 1963 2 SA 254 (W); *Christian League of Southern Africa v Rall* 1981 2 SA 821 (O); *Van Heerden v Joubert* 1994 4 739 (A); *Friedman v Glicksman* 1996 1 SA 1134 (W); *Christian Lawyers of SA v Minister of Health* 1998 4 SA 1113 (T); *Road Accident Fund v Mtati* 2005 6 SA 215 (SCA) and *S v Mshumpa* 2008 1 SACR 126 (E).
10 Boezaart 4.
11 *Ibid*.
12 Kruger & Skelton (eds) *The Law of Persons in South Africa* (2010) 13.

Science tells us that there is life before birth and that this life, even though in the process of development, is genetically unique and constitutes more than mere maternal tissue.[13] The separate-entities approach draws on these findings and emphasises that the unborn are distinct entities.

In this respect, the single-entity approach can be contrasted with the separate-entities approach. Seymour explains that the separate-entities approach to pregnancy views women and foetuses as if they were separate individuals of distinctive value with separable needs.[14] In their separate existence, pregnant women and the unborn are seen to possess a range of enforceable rights or interests,[15] ultimately leading to an understanding that the foetus is able to engage directly in legal relations for its own account, obviously not in its personal capacity but through third parties. It is generally contended that this approach is necessary to allow the law to better protect the unborn.

The separate-entities approach is viewed favourably by a number of South African academics.[16] In some instances, authors adopt a separate-entities approach as a mechanism to extend personhood and rights,[17] while others avoid a rights approach and develop a form of quasi-legal subject in respect of the unborn.[18] "Quasi-legal subject" is used here because, even though some authors denounce a rights approach to protecting the unborn, they still argue for direct application of legal principles to the unborn.[19] If one considers the meaning of legal subjectivity as including an element of legal interaction with a subject,[20] these authors have essentially gone on to argue for a subcategory of legal subjectivity.

13 Seymour 194; Palmer "Seeing and knowing: Ultrasound images in the contemporary abortion debate" 2009 *Feminist Theory* 173; Duden "The fetus on the 'farther shore': Toward a history of the unborn" in Morgan & Michaels (eds) *Fetal Subjects, Feminist Positions* (1999) 13; Casper "Operation to the rescue: Feminist encounters with fetal surgery" in *Fetal Subjects, Feminist Positions* 101 (Morgan & Michaels).

14 Seymour 190, 194.

15 *Idem* 194.

16 Du Plessis "Feticide: Creating a statutory crime in South African law" 2013 *Stel LR* 73; Jordaan "The legal validity of an advance refusal of medical treatment in South African law (Part 1)" 2011 44(1) *De Jure* 32; Ovens "A criminological perspective on the prenatal abuse of substances during pregnancy and the link to child abuse in South Africa" 2010 *Child Abuse Research: A South African Journal* 38; Pillay "The beginning of human personhood: Is South African law outdated?" 2010 *Stel LR* 230; De Freitas & Myburgh "The relevance of science for the protection of the unborn" 2009 *Journal for Christian Scholarship* 61; & Kruuse "Fetal 'rights'? The need for a unified approach to the fetus in the context of feticide" 2009 *THRHR* 126.

17 Ovens 2010 *Child Abuse Research: A South African Journal* 38 & Pillay 2010 *Stel LR* 230.

18 Du Plessis 2013 *Stel LR* 73; Jordaan 2011 44(1) *De Jure* 32; De Freitas & Myburgh 2009 *Journal for Christian Scholarship* 61 & Kruuse 2009 *THRHR* 126.

19 *Ibid*. The authors' arguments will be discussed further in para 3 1.

20 Boezaart 4.

In essence, the separate-entities approach is used as a means to justify the call for individualised legal protection. Some authors call for protection from third parties,[21] while others call for protection from the pregnant women who carry the unborn.[22] The relevant issue, however, is to understand the approach adopted by the various authors rather than focusing on the individual arguments necessitating this approach. Therefore, the merits of the arguments mentioned will not be engaged.

This article will consider both the issue of advancing personhood and of developing quasi-legal subjectivity. However, the main focus will fall on those positions that employ the separate-entities approach as a ground to extend personhood and rights, the intention being to determine whether this reframed approach to pregnancy effectively offers the protection that the authors concerned expect. The article will then go on to reject the separate-entities approach in its entirety and, in that discussion, also dismiss the issue of quasi-legal subjectivity.

3 1 Separate-entities Approach as a Basis for Quasi-Legal Subjectivity

According to *S v Mshumpa*, the common law crime of murder does not extend to the unborn.[23] The court thus confirmed that the victim must have been a living person at the time of the murder.[24] It further found that, where a pregnancy is terminated as a result of third-party violence, it is not the murder of the foetus that is at issue, but rather, as a result of their "unique togetherness", an assault on or attempted murder of the pregnant woman.[25]

There are two academic responses to this case. In each, the authors grapple with the idea of criminalising the termination of a pregnancy as a result of the infliction of violence by a third party. Du Plessis, interprets *Mshumpa* as offering indirect protection to the unborn and rejects such an approach as being insufficient.[26] Instead, Du Plessis advocates for a statutory crime of feticide and calls for the recognition of the unborn, from conception onwards, as potential victims of violent crime in their own right.[27] She discredits personhood as being necessary for protection in law and suggests moving beyond a rights discourse when debating

21 Du Plessis 2013 *Stel LR* 73 & Kruuse 2009 *THRHR* 126.
22 Jordaan 2011 44(1) *De Jure* 32 & Ovens 2010 *Child Abuse Research: A South African Journal* 38; Pillay 2010 *Stel LR* 230 & De Freitas & Myburgh 2009 *Journal for Christian Scholarship* 61.
23 *Op cit* 149 D-F.
24 In this case, a woman's late-term pregnancy was terminated as a result of the infliction of violence against her body. As the law stands, there is no criminal offence of third-party foetal violence that results in the termination of a pregnancy. See Pickles "The introduction of a statutory crime to address third-party foetal violence" 2011 *THRHR* 546.
25 151 I.
26 Du Plessis 2013 *Stel LR* 73 74-75.
27 *Ibid*.

issues involving the unborn.[28] The core element of her argument is protection of the unborn "irrespective and independent of its location or relationship to the mother".[29]

Kruuse, also expressing dissatisfaction with the outcome in *Mshumpa*, rejects the single-entity approach and calls for the introduction of the crime of feticide, being a crime that can be perpetrated against the unborn only.[30] This approach is justified on the grounds that the unborn are something distinct from the pregnant women who carry them, and that the value of human dignity, symbolising inherent human worth, warrants this approach.[31] In this respect, Kruuse states:[32]

> The issue here is that, despite the 'me-but-not-me' image … the fetus is a distinct organism from the mother and cannot be treated as a bit of human tissue of the mother comparable to her kidney, one of her appendages or her appendix. It is a separate living organism, whose destruction is something to be regretted in itself regardless of what has happened to the mother carrying it.

Turning to private law, in the context of termination of pregnancy, De Freitas and Myburgh argue for the legal protection of the unborn from "abortion".[33] They advocate a non-rights approach, thereby asserting that the right-to-life argument is not necessary when seeking to develop grounds to justify legal protection of the unborn from the women who carry them.[34] The authors unequivocally draw on the separate-entities approach by using science to demonstrate that the unborn are more than mere maternal "tissue" and embody a distinct human life which has independent value, characteristics that are present from the moment of conception.[35] Throughout, they refrain from making any reference to or engaging in a discussion that recognises the unborn in relation to the pregnant women who carry them.

The separate-entities approach also presents itself in the context of medical treatment of pregnant women, specifically concerning contemporaneous or advanced refusal of medical treatment.[36] Jordaan considers the legal status of advanced medical directives and

28 Du Plessis 2013 *Stel LR* 76, 87-90.
29 *Idem* 77.
30 Kruuse 2009 *THRHR* 126.
31 Kruuse 2009 *THRHR* 134-136.
32 *Ibid*.
33 De Freitas & Myburgh 2009 *Journal for Christian Scholarship* 61.
34 *Idem* 65-70.
35 *Idem* 74-81.
36 Advanced refusals to submit to life-sustaining medical treatment can take the form of a living will where a person expresses their wishes concerning future medical treatment. This document will then be considered in cases where medical treatment is necessary, but the patient is unable to communicate his or her preferences regarding the impending medical treatment. Advanced directives are helpful in cases where patients are in a persistent vegetative state. For more on this, and on the current legal status of living wills, see Carstens & Pearmain *Foundational Principles of South African Medical Law* (2007) 208-210.

convincingly argues that the right to make a decision to refuse medical treatment is a constitutionally informed right.[37] She therefore argues for the legal recognition of advanced directives on the same grounds, since the same constitutional principles are at play.[38] In this context, Jordaan approvingly refers to the situation in other jurisdictions and states: [39]

> [T]he 'potential interests' of the foetus to be born alive should be considered before giving effect to the wishes of a pregnant patient to refuse medical treatment, irrespective of whether such wishes were expressed in a contemporaneous decision by a competent patient or at a previous stage in an advanced directive.

In all the examples considered thus far there has been a call for direct and individual protection of the unborn, but without going so far as founding this call on the rights of the unborn or by extending legal subjectivity. However, there are two examples where foetal individuation has led to the call for the extension of rights to the unborn. As will be discussed below, one of these examples advocates for the extension of personhood, and therefore for the protection of the unborn as legal persons.

3 2 Separate-entities Approach as a Basis for Personhood

In the context of criminal law, Ovens calls for the protection of the unborn from drug-dependent pregnant women by extending the definition of child abuse to include "damage" caused to the unborn in the case of the prenatal use of drugs by pregnant women.[40] Ovens' approach can be interpreted as bestowing on the unborn an enforceable right, as against the pregnant women carrying them, to be born in a healthy (specifically, non-drug exposed) condition. Where this right is not respected, Ovens proposes that the women concerned be held criminally liable, since their conduct would amount to child abuse.[41] Ovens' work derives from a criminological perspective and she therefore engages with the legal meaning of rights. She only briefly mentions applicable legal principles and it is therefore not clear whether her intention is to extend personhood and advocate for foetal rights generally. While Ovens does use the term "rights" in respect of the unborn, it is not obviously clear whether she is using that term in a technical legal sense.

Pillay argues that advances in medical science and technology have rendered the born-alive rule redundant, in that these advances prove the presence of life before birth.[42] The author maintains that the concept of personhood should adequately reflect medical knowledge of prenatal life

37 Jordaan 2011 44(1) *De Jure* 32.
38 *Ibid*.
39 *Idem* 44.
40 Ovens 2010 *Child Abuse Research: A South African Journal* 38.
41 *Idem* 45-46.
42 Pillay 2010 *Stel LR* 230-236.

and, in so doing, include viable foetuses within its conceptual framework.[43] Pillay's argument is as follows:[44]

> In the abortion context, the attribution of foetal rights would constitute a radical departure from the prevailing legal position which focuses solely on the rights of pregnant women. As this unequal power relationship is challenged, both the judiciary and the medical profession will have the opportunity to adopt a more transparent, principled and balanced approach in resolving maternal-foetal conflicts. In the non-abortion context relating to third party criminal acts directed against pregnant women, the attribution of foetal rights would give expression to the legal convictions of the community which demand *separate* protection of the foetus through laws proscribing murder and assault of the foetus.

All the authors considered here, in respect of quasi-legal subjectivity and personhood, adopt an approach to pregnancy that clearly follows the separate-entities approach, thereby highlighting a trend towards preferring this approach to the single-entity approach. Each example individuates the unborn from the pregnant women carrying them, assigns independent value in their separateness and, from there, proceeds to justify individualised, foetal-specific legal protection to the exclusion of pregnant women. A consequence of this approach is that women are side-lined or turned into obscure non-entities. In doing so, all the authors fail to understand women as an indispensable element for prenatal existence and, ultimately, the reality of pregnancy as embodying connection is wholly ignored.

4 Personhood as Offering Sufficient Protection for the Unborn: An Examination of Thomson's "Defense of Abortion"

Clearly, there are varying degrees of consequence stemming from the application of the separate-entities approach to pregnancy, the more extreme being the extension of personhood and foetal rights and the less extreme being merely developing a quasi-legal subject. While there is concern with the general application of the separate-entities approach to pregnancy, the more pressing issue is to consider whether employing the separate-entities approach as a ground for foetal rights in fact protects the unborn and gives it legal leverage over third parties, specifically pregnant women.[45] Further, it needs to be considered whether giving heed[46] to this suggested approach quashes "maternal–foetal conflicts" and simplifies the issue of pregnancy under South African law generally.

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43 *Idem* 236.
44 *Idem* 236-237. Footnotes omitted from the quotation.
45 As envisaged by Pillay 2010 *Stel LR* 230 and possibly by Ovens 2010 *Child Abuse Research: A South African Journal* 38.
46 It must be noted that the phrase "giving heed" is used because, in *Christian*

Concerning the notion of rights providing legal leverage for the unborn, both Kruuse and McCreath J adopt the stance that granting rights to the unborn will certainly offer the unborn protection, particularly against unfavourable maternal conduct.[47] In *Christian Lawyers* (1998) per McCreath J, it was found that *if* the right to life in section 11 of the Constitution were to be interpreted as applying to foetuses, foetuses would have separate claims to life and lawful termination of pregnancies would ultimately constitute murder – even if the termination of pregnancies were medically indicated to preserve the lives of the pregnant women concerned.[48] Kruuse adopts a more nuanced approach and asserts that, if the unborn are vested with legal subjectivity and thus the right to life, it would mean that the right to terminate a pregnancy would be impossible to justify, except where the pregnant woman's life is in danger.[49] Later, Kruuse explains that the unborn's right to life is a right that is not capable of being outweighed by a woman's rights generally, meaning that the unborn's right to life will always take preference over a woman's rights, aside from her right to life.[50] The separate-entities approach, applied in this way, seems to create a situation where Pillay's "maternal–foetal conflicts" are done away with, because the right to life will always hold more weight than rights vested in others, including those of pregnant women, as emphasised by Kruuse and McCreath J. Therefore, the positions of Pillay, Kruuse and McCreath J all complement the premise that a rights-based approach could possibly serve as a workable method for protection of the unborn. However, further reflection on this issue reveals a different perspective.

4 1 Thomson's "Defense of Abortion" and Supporting South African Principles

Thomson[51] offers a thought-provoking, if extreme, counter-argument to

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Lawyers of SA v Minister of Health 1998 4 SA 1113 (T) (*Christian Lawyers* (1998)), the separate-entities approach was unequivocally rejected when the court found that the provisions of the Constitution did not apply to the unborn.

47 Although it must be noted that both suggest not taking a rights-based approach. See respectively Kruuse 2009 *THRHR* 133-135 and *Christian Lawyers* 1998 1122 I-1123 C.

48 1122 I. Here, the court understood that, where a foetus is granted rights, it could use those rights as a means to protect itself from termination of pregnancy for any reason whatsoever. However, it must be recognised that this position is unfounded, since principles of private defence (if a fatal pregnancy is construed as an attack on a woman's body) or necessity justify the termination of a pregnancy in cases where continued pregnancy poses a threat to a woman's life. See Snyman *Criminal Law* (2009) 103-123 for a detailed discussion of private defence and necessity as grounds of justification.

49 Kruuse 2009 *THRHR* 133.

50 *Idem* 135.

51 Thomson "A defense of abortion" 1971 *Philosophy & Public Affairs* 47. While this article does not focus on justifying termination of pregnancies, Thomson's argument transcends the abortion debate and has application

the above. Her work is so well known[52] that it is not clear why her publication has not been considered by those contemplating the consequences of foetal rights.[53] Thomson uses the example of waking up to find that a violinist has been attached to your body in order to gain the benefit of the function of your kidneys, and this attachment was necessary for purposes of keeping the violinist alive. The crux of the issue is that the violinist was attached to your body without your consent. Thompson's entire article revolves round this hypothetical anecdote and she raises challenging questions as to whether anything can be done to remove the attachment, even though removal would result in the violinist's death.

In this context, Thomson goes on to suggest that we imagine the unborn as legal persons with the right to life, like the violinist, and further suggests that, generally, the right to life includes the right to be given at least the bare minimum that one needs for continued life.[54] She then poses the following question: What would the situation be where the bare minimum that one needs to sustain life turns out to be something that one does not have a right to?[55]

This question becomes relevant when, for purposes of sustaining life, one needs the continued use of another's body. The problem is that the mere presence of need does not create an enforceable right against another. Thomson contends that:[56]

> … nobody has the right to use your kidneys unless you give him such a right; and nobody has the right against you that you shall give him this right – if you do allow him to go on using your kidneys, this is a kindness on your part, and

in any argument that attempts to accord rights to the unborn. This will become apparent as the argument against the separate-entities approach develops.

52 According to Google Scholar, and as at 20 Dec 2013, Thomson's article had been cited 1 119 times, and her book of the same title had been cited 67 times. See http://scholar.google.co.za/scholar?hl=en&q=Thomson+%22&btnG=&as_sdtp (accessed 2013-12-20). Also see Kaczor *The Ethics of Abortion: Women's Rights, Human Life, and the Question of Justice* (2010) 145 who cites Thomson's article as "the most famous article ever written about the subject of abortion". This is not to say that her work is unquestionably accepted, for instance see Boonin *A Defense of Abortion* (2003) 133-276. Boonin, while defending Thomson's position, cites and discusses sixteen different objections to Thomson's argument. There are sure to be more though.

53 The only authors cited in this article who refer to Thomson are De Freitas & Myburgh 2009 *Journal for Christian Scholarship* 69-70 and Du Plessis 2013 *Stel LR* 88 – although these authors only cite authority that takes a stand against Thomson's position. The authors are in opposition to Thomson, because they are attempting to justify protection of the unborn without adopting a rights approach. Their approach could possibly have been motivated by Thomson's convincing argument that a rights approach may be legally problematic and overly complex for anyone seeking to protect the unborn on that basis.

54 Thomson 1971 *Philosophy & Public Affairs* 55.

55 *Ibid*.

56 1971 *Philosophy & Public Affairs* 55.

> not something he can claim from you as his due. Nor has he any right against anybody else that *they* should give him continued use of your kidneys.

Ultimately, Thomson's argument is that having the right to life does not guarantee the use of that right.[57] Where right of use is provided, it is done because one is a "good Samaritan".[58] She views continued pregnancy as a case of women acting as good Samaritans, in that there is no legal obligation on them to make the sacrifices that are necessary in order for the unborn to sustain prenatal life.[59] In this respect, Thomson questions whether engaging in voluntary sexual intercourse is an indication of consent to a resulting pregnancy, thus giving rise to an obligation, and she answers this in the negative.[60] She convincingly states:[61]

> If the room is stuffy, and I therefore open a window to air it, and a burglar climbs in, it would be absurd to say, 'Ah, now he can stay, she's given him a right to the use of her house – for she is partially responsible for his presence there, having voluntarily done what enabled him to get in, in full knowledge that there are such things as burglars, and that burglars burgle.

Similarly, Karnein argues that, although women may be partly responsible for conception, given that contraception is readily available in this day and age, there is a limit to the amount of responsibility that can accrue for something that women would have to go out of their way to prevent, especially if what is being prevented is a natural process of reproduction.[62] She explains:[63]

> [W]hile persons can be asked to make significant sacrifices to save those they have deliberately pushed into the water, women cannot be asked to provide a substantial amount of assistance to someone who came into existence because they did not prevent a 'natural' process from occurring.

Thomson's argument holds true in South Africa and is of particular importance in the context where personhood is extended to the unborn. There is no known South African case law or legislation that compels another to forsake their bodies, or portions thereof, in order for another to sustain his or her life. Labuschagne,[64] drawing from laws regulating donation,[65] argues that, generally, no one has a claim to another's body without that person's informed consent, and she demonstrates this to be

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57 56.
58 Generally, Thomson's argument is cited as the "Good Samaritan Argument": see Boonin 133.
59 Thomson 1971 *Philosophy & Public Affairs* 63.
60 *Idem* 57-58.
61 *Idem* 58-59.
62 Karnein *A Theory of Unborn Life: From Aabortion to Genetic Manipulation* (2012) 24.
63 *Ibid*.
64 Pickles & Labuschagne *supra*. The argument presented here is Labuschagne's portion of the paper that she researched and later presented.
65 Specifically, the National Health Act 61 of 2003, and case law and common law principles relevant to informed consent.

a well-established principle under South African law. On that note, Labuschagne warns that this principle acts to the detriment of any aims to protect the unborn as legal persons.

Labuschagne further contends that, since the unborn live off the bodies of pregnant women and gain the benefit of pregnant women's bodily functions, a pregnancy can be understood as representing a relationship of donation, because one person is using another person's body to sustain life.[66] Accordingly, if the unborn were persons, they would need pregnant women's informed consent to continue gestating.[67] However, Labuschagne explains that the principle of informed consent requires that, in order for the consent to be informed, the person must have a knowledge and appreciation of what is being consented to prior to the donation. Given that pregnancy is fairly unpredictable in terms of what resulting procedures may be necessitated by deciding to be pregnant, it is Labuschagne's contention that no true informed consent can ever actually be obtained. Where informed consent is lacking, as would be the case for all pregnancies, even planned ones, the person whose body is being used is essentially being assaulted.[68]

Labuschagne thus affirms that no one can be compelled to make a donation, even where it would amount to life-saving treatment.[69] These principles therefore support Thomson's premise that continued gestation is an act that only good Samaritans would perform, since, technically, there is no obligation on them to make the sacrifices necessary for the unborn to sustain life.

4 2 Implications of Foetal Individuation and the Extension of Rights Based on the Separate-entities Approach

The separate-entities approach, despite going so far as to create the foundation for foetal rights, does not in fact provide the intended protection. If applied in a strict, uncompromising sense, it actually serves as a ground to justify the termination of pregnancies for reasons beyond the threat to life of pregnant women.[70] Terminations could take place at any time during gestation, because there is absolutely no obligation on anyone to be a good Samaritan for any designated period of time.

66 See s56 of the National Health Act, which makes provision for the donation and use of living persons' tissue, being blood, blood products and gametes.

67 As required in terms of ss6 & 7, read together with ss55 & 66 of the National Health Act.

68 For the consequences of not having obtained informed consent, see Carstens & Pearmain 890-891.

69 Here, Labuschagne refers to *Palmer v Palmer* 1955 3 SA 56 (O); *S v Goliath* 1972 3 All SA 69 (A); *Castell v de Greef* 1994 4 SA 408 (C).

70 Thomson does not adopt such an extreme approach, but tones down her argument by referring to and considering issues such as "justifiable killing". Moreover, she recognises that, at times, there are things that one "ought to do" or that some things are "morally unacceptable".

It is submitted that this approach can be taken to absolute extremes. For instance, where women permit the continued pregnancy, out of "kindness", there is no known authority in law that would compel a woman to conduct herself in a way that would increase the quality of her kind act. In other words, the right to life may not guarantee that, when kindness prevails, one will have an enforceable authority pertaining to the quality of that kindness. Placing this in the context of pregnancy, the unborn will not have a right to dictate the condition in which the body is kept. These assertions speak specifically to concerns that substance abuse during pregnancy constitutes child abuse. Should a ground be developed to provide the unborn with an enforceable claim to optimal quality of the kindness it receives, another extreme position can be taken, namely that, where a charge of child abuse looms as a result of substance abuse while pregnant, pregnant women could very simply terminate their pregnancies.

Ultimately, this approach creates the space to voluntarily terminate viable but pre-term pregnancies, and this cannot be seen as serving important developmental needs of foetuses. Pre-term deliveries pose a number of health issues, and long-term medical and social risks,[71] and can hardly be seen as a positive outcome associated with foetal rights.

The potential outcomes of this approach are rather offensive. A separate-entities approach to pregnancy blatantly introduces conflicts and creates an environment for head-on adversarialism between pregnant women and their foetuses and, ultimately, strikes at the core of the relationship that pregnancy represents. Further, this stance towards pregnancy does not foster optimal health for the foetus.

71 For instance, see Pignotti & Donzelli "Perinatal care at the threshold of viability: An international comparison of practical guidelines for the treatment of extremely preterm births" 2008 *Pediatrics* 193. The authors point out that extremely premature neonates will usually die during or very soon after birth and, for those who do survive, childhood death is very likely. Also see Moster, Lie & Markestad "Long-term medical and social consequences of preterm birth" 2008 *New England Journal of Medicine* 262. If premature neonates survive, the authors highlight that medical and social disabilities increase in relation to neonates' decreasing gestational age at birth. In the long term, premature infants are likely to progress through adulthood suffering medical disabilities (being cerebral palsy, mental retardation or other neurological disorders), behavioural and psychological problems (being autism and schizophrenia), and may experience learning disabilities.

5 Rejecting the Single-entity and Separate-entities Approaches: Pregnancy as a Relational Construction and the Not-One-But-Not-Two Approach

Seymour,[72] and all the other South African authors referred to in this article, correctly reject the single-entity approach as irreconcilable with scientific fact. The single-entity approach denies the distinctive existence, the "extra-ness", that the foetus embodies during a continued pregnancy. The unborn are biologically and genetically distinct from the pregnant women who carry them, and women are "whole" with or without the presence of prenatal life.[73] In this respect, the current South African approach to pregnancy is flawed, and the existence of the foetus cannot continue to be overlooked for much longer.

Flaws inherent in the single-entity approach must be understood beyond what science tells us. Seymour explains that some argue for the retention of this approach because it secures female autonomy during pregnancy, that is, if the foetus is considered as merely constituting part of a body, women will still enjoy the space for freedom of choice – in other words, whether or not to terminate the pregnancy.[74] However, this is a very superficial and one-sided understanding of female autonomy during pregnancy.

Female autonomy must also recognise women's vested interests in their unborn. Therefore, female autonomy must be understood as including the decision to continue with a pregnancy, as well as decisions on *how* to progress through pregnancy. This manifestation of autonomy must be protected in law in order for it to have any meaningful effect for women who want children. Consequently, the single-entity approach only speaks to one side of female autonomy and fails to assist those women who plan to continue with their pregnancies and to adequately protect such decisions. For instance, Seymour refers to an example where a pregnant woman is unlawfully attacked and, as a result miscarries,[75] a situation similar to that in *Mshumpa*. Here, the single-entity approach prevents the law from responding to her loss of a

72 Seymour 191.
73 *Ibid*. Seymour refers to, and quotes from, MacKinnon's work: See MacKinnon "Reflections on sex equality under law" 1991 *Yale LJ* 1281, 1313-1316. MacKinnon at 1314, also rejects the separate-entities approach to pregnancy under the law and describes the foetus as a separate organism comparable to a parasite. However, the foetus's dependence does not make it a body-part belonging to the pregnant woman.
74 Seymour 193.
75 193-194.

pregnancy that she had an interest in, because the foetus is not recognised in law.[76]

Ultimately, the single-entity approach fails not only to speak to scientific fact, but also to comprehensively engage female experiences and expectations of pregnancy, feminine issues related to pregnancy continuation, and the resulting consequences of pregnancy for parenthood.

That said, South African authors referred to in this article go on to suggest adopting the separate-entities approach to allow the law to be true to scientific revelations about prenatal life.[77] Yet, Seymour explains that, while the single-entity approach forecloses the possibility for intervention on behalf of the unborn, the separate-entities approach invites intervention and conflict.[78] However, it should be remembered that the discussion of Thomson's "good Samaritan" argument demonstrated that the extent of conflict will obviously depend on whether the separate-entities approach is adopted to justify personhood before birth or whether it is used to develop a quasi-legal subject for the unborn.[79]

Earlier in the article, it was established that the separate-entities approach, which accords rights to the unborn, in fact fails to protect the unborn.[80] However, the attribution of quasi-legal subjectivity also fails because it is founded on the separate-entities approach more generally. The separate-entities approach strikes at the core of the embodied reality of pregnancy. It denies pregnancy's very nature, being one of relationship and factual connectedness, by directly engaging with the unborn through the application of legal principles. The central issue as regards the separate-entities approach is that it almost completely negates the significance of the existence of women.[81] Women and their bodies cannot be bypassed, ignored or made invisible: They are

76 Through the infliction of violence, a woman's decision to have a child was interfered with, but no one can be held accountable for that interference because, prior to birth, the foetus does not exist. The same issue arises in the case where, as a result of medical negligence, a woman who continues with a pregnancy and intends to give birth to a live child, delivers a stillborn child. The single-entity approach precludes any recourse, because the foetus, as a non-entity, never acquired legal personality owing to medical negligence preventing live birth. Also, if the existence of the unborn is denied in law, it is not clear how pregnant women can claim extra medical attention or state support that is needed in order to progress safely through wanted pregnancies.

77 De Freitas & Myburgh 2009 *Journal for Christian Scholarship* 61; Kruuse 2009 *THRHR* 126; Ovens 2010 *Child Abuse Research: A South African Journal* 38; Pillay 2010 *Stel LR* 230; Jordaan 2011 *De Jure* 32; Du Plessis 2013 *Stel LR* 73.

78 Seymour 200.

79 See para 4 *supra*.

80 *Ibid*.

81 Karpin "Legislating the female body: Reproductive technology and the reconstructed woman" 1992 *Colum J Gender & L* 325-327.

essentially a *sine qua non* for the existence of prenatal life. Seymour further points out that the more the separate-entities approach individuates the unborn, the less the individuality of women is recognised.[82]

Thus, while science does demonstrate the unique genetic character of the unborn, Karpin convincingly argues as follows:[83]

> There is no scientifically verifiable 'fact' that designates woman and fetus as separate. There are only scientific descriptions that hypothesize the notions of separateness, and certain descriptions are being privileged over others. For example, the scientific 'fact' that the fetus and mother are genetically different does not answer the question of whether the description of them as separate is appropriate.[84]

It is submitted that the separate-entities approach to pregnancy can only ever be justified in the abstract and in the context of hypothetical anecdotes. This is especially true where foetal separateness leads to direct engagement with the unborn in the context of law, being direct application of rights and legal doctrines or principles. Thomson's hypothetical application of rights to the unborn, while viewed as the correct use of legal principles in the context of competing rights bearers, must ultimately be rejected for its underlying reliance on the separate-entities approach and thus for its failure to encompass a proper reflection of pregnancy.[85] The reality of pregnancy does not speak to an approach based on separateness. One cannot ever, regardless of the designation of separateness, directly engage with the unborn in any tangible way, since the unborn exist in a factually non-permeable[86] environment, that is, within the body of a woman. It is this embodied connection that must be acknowledged, since this connection absolutely prevents direct contact

82 Seymour 195.
83 Karpin 1992 *Colum J Gender & L* 326.
84 To emphasise this point, it is worthwhile referring to Herring & Chau "My body, your body, our bodies" 2007 *Medical LR* 34, 45-47. The authors, in debating whether one owns one's body, turn to medical science to *prove* the interconnection of bodies. In fact, they start off with pregnancy and define it as a relationship of shared space and fluids. They justify their position by referring to scientific studies pertaining to the development of the placenta and its role in ensuring optimal foetal development through its connection to the body of pregnant women.
85 After highlighting the weakness in the foetal rights arguments, Thomson (1971) *Philosophy & Public Affairs* 58 suggests that we focus on the unique dependency of the unborn on pregnant women, and view this dependency as a source of a "special kind of responsibility" a pregnant woman will have towards the unborn she carries. This responsibility is special because it is not something that can be claimed by other independent persons. This approach is founded on the relationship shared between the unborn and pregnant women.
86 Karpin (1992) *Colum J Gender & L* 333 states that technology, for instance ultrasonography, has led to the impression that the female body is permeable and flexible to outside curiosities, and argues that pregnant women are viewed as passive foetal containers in the sense that they are denied the capacity to carry the unborn and determine their boundaries.

or interaction between the unborn and others. Here, "others" must be understood to include third parties, such as the outside community and the medical profession, and the law with its legal principles.

Rejecting both the single-entity and separate-entities approaches does not leave the issue of pregnancy under the law unresolved. Seymour suggests that there is a third approach that can be adopted when confronting pregnancy in law, namely the not one/not two approach.[87] This approach to pregnancy is seen to lie between the two extremes of the single-entity and the separate-entities approaches to pregnancy, thus offering a middle ground.[88] The not one/not two approach is defined as a female view of pregnancy.[89] MacKinnon provides a description of the unborn from a female perspective that validates this approach:[90]

> More than a body part but less than a person, where it is, is largely what it is. From the standpoint of pregnant women, it is both me and not me. It 'is' the pregnant woman, in the sense that it is in her and of her and is hers more than anyone's. It is 'not her' in the sense that she is not all that is there. In a legal system that views the individual as a unitary self, and that self as a bundle of rights, it is no wonder that the pregnant woman has eluded legal grasp, and her fetus with her.[91]

The focus on the relationship allows for the recognition of the following elements as stemming from the existence of a pregnancy: United needs; interconnectedness; mutuality; and reciprocity.[92] Essentially, it advocates a view and embeds understanding that pregnant women and foetuses cannot be viewed in isolation. The not one/not two approach allows a foetus to be recognised as a distinct entity, but it also expresses an unequivocal reminder of the relationship shared between a

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She understands this to be a technocultural phenomenon based on ultrasonography, with viewers of prenatal ultrasound scans coming to (mistakenly) understand the uterus as permeable as a result of being able to view the unborn prior to birth.

87 Seymour 199. Also see, generally, Karpin 1992 *Colum J Gender & L* 325.

88 Seymour 190, 202.

89 Seymour 199; MacKinnon 1991 *Yale LJ* 1281, 1309, 1313-1314. MacKinnon explains that the legal system has failed to adequately conceptualise pregnancy and the relationship between pregnant women and foetuses, because the interests, perceptions and experiences that have shaped the law on this topic are those of men and development has occurred to the exclusion of women. This is problematic, because pregnancy is a female experience, thus resulting in the development of principles from a disadvantaged outsider perspective.

90 MacKinnon 1991 *Yale LJ* 1316. Footnotes omitted from the quotation.

91 Lupton's studies support MacKinnon's position: See Lupton 53-56. Lupton recognises that some women do understand their pregnancies as housing a separate individual. However, even within the perception of foetal individuation, all women understood the foetus to be in and somewhat part of their bodies, and thus not completely apart from them.

92 Seymour 190.

pregnant woman and her foetus.[93] Therefore, this approach acknowledges that foetuses have interests, but that these interests must be promoted in a way that acknowledges women's rights.[94]

In order to achieve the aim of advancing the unborn's interests in such a way that women's rights are promoted, the not one/not two approach to pregnancy is context-driven, meaning that the relationship between pregnant women and foetuses must be understood in terms of the context in which that relationship exists. It is only through the process of including context that one can determine if intervention in pregnancy is necessary and what the nature of such intervention should be. Where legal intervention is found to be necessary, context would assist in determining whether such an intervention would amount to an acknowledgment or infringement of women's rights.[95]

Seymour sees this approach as being flexible.[96] Firstly, it acknowledges value in the unborn, but denies them their separateness.[97] Secondly, it enables women's rights to be included and considered.[98] Thirdly, it sets the scene for the protection of the unborn when their interests are threatened by a third party, but may produce different results when the interests of the unborn are threatened by the pregnant women carrying them.[99]

On the issue of harm caused by pregnant women, Seymour argues that this approach does not provide absolute legal immunity for pregnant women.[100] While the author goes on to assert that female autonomy

93 *Idem* 200. This approach echoes the principles of relational feminism, thus supporting MacKinnon's premise that the not one/not two approach is a female perspective on pregnancy. Relational feminism understands individuals as constituting an intricate web of relationships, all of which are characterised by interdependence and mutuality. For more on the theory of relational feminism, see Van Marle & Bonthuys "Feminist theories and concepts" in Bonthuys & Albertyn (eds) *Gender, Law and Justice* (2007) 35-37. For examples of the practical application of relational feminism, see McConnell "Relational and liberal feminism: The 'ethic of care', fetal personhood and autonomy" 1996 *West Virginia LR* 291; Ordolis "Maternal substance abuse and the limits of the law: A relational challenge" 2008 *Alberta LR* 119; Laufer-Ukeles "Reproductive choices and informed consent: Fetal interests, women's identity, and relational autonomy" 2011 *American Journal of Law and Medicine* 567. Also see Pickles *S v Mshumpa: A Time for Law Reform* (LLM dissertation 2008 UP) 124-126, 133-134. It must be noted that Pickles does not use the term "relational feminism", but the adopted approach certainly ties in with the concept of relational feminism in the context of pregnancy.

94 Seymour 200.

95 *Ibid*.

96 *Idem* 201-202.

97 *Idem* 201.

98 *Ibid*.

99 *Ibid*.

100 *Idem* 202.

plays a crucial role in determining their immunity,[101] it is suggested that absolute freedom during pregnancy may never be in place, because this approach demands that the value of the unborn always play a part, not the central part, but certainly an important contributory one, in determining a way forward.

South Africa applies this approach in the context of the Choice on Termination of Pregnancy Act.[102] In *Christian Lawyers* (2005),[103] while dealing with the constitutionality of the Choice on Termination of Pregnancy Act, the court found that the right to terminate a pregnancy is not absolute and went on to acknowledge the state's interest in respecting reproductive decision-making processes. While recognising the importance of women's termination-of-pregnancy rights, the court found that this right, like all constitutional rights, is subject to the limitation clause.[104] Focusing on state interest, Mojapelo J explicitly recognised that "[t]he state has a legitimate role, in the protection of pre-natal life as an important value in our society, to regulate and limit the woman's right to choose in that regard".[105] Since the right to terminate a pregnancy is a fundamental constitutional right, state regulation cannot amount to an outright denial of the freedom to exercise the right.[106] Thus, the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as required in terms of section 36 of the Constitution.[107]

This case is squarely aligned with the not one/not two approach to pregnancy, because the value in prenatal life is acknowledged, indicating that pregnancy embodies more than one entity. However, the acknowledgement does not go so far as to confer on the unborn an

101 Seymour's discussion of autonomy (in the context of Canada and the USA) goes beyond the scope of this article. Briefly, he suggests that women will benefit from immunity where harm caused to the unborn is a result of women exercising their right to withhold consent to invasive bodily infringements. However, he refrains from answering the question as to whether a woman can be held legally accountable where harm is caused to the unborn by the woman engaging in harmful conduct such as drug abuse or alcoholism.

102 92 of 1996.

103 2005 1 SA 509 (T).

104 527D.

105 527D.

106 527E.

107 527E. *Christian Lawyers* (2005) can be distinguished from *S v Mshumpa*'s application of the not one/not two approach, in that Froneman J used the relationship between pregnant women and foetuses as a means to *deny* acting on the value of the unborn. Froneman J found that, since the unborn are uniquely connected to the pregnant women carrying them, addressing the harm caused to pregnant women will effectively address the harm caused to the unborn as well; thus there is no need to give legal credence to prenatal life. In contrast, in *Christian Lawyers* (2005), Mojapelo J used the not one/not two approach to recognise the value of the unborn and specifically act on that value, which is achieved in the judge's explanation as to why the right to terminate a pregnancy can be legitimately regulated and limited as pregnancies progress.

entirely separate status with enforceable rights. Rather, this judicial acknowledgement views the unborn in relation to pregnant women and their existing rights. *Christian Lawyers* (2005) can also be distinguished from the cases discussed under the single-entity approach,[108] in that the court not only acknowledged the existence of prenatal life, but also attached value thereto, which value is understood to demand state action for the benefit of the unborn in a qualified way that is respectful of women's rights. Finally, *Christian Lawyers* (2005) demonstrates that the not one/not two approach has every expectation of surviving constitutional muster.

6 Concluding remarks

This article has shown that neither the single-entity nor the separate-entities approaches adequately recognise or engage the connected nature of pregnancy as reflected on by MacKinnon and Lupton. The single-entity approach makes non-entities of the unborn and fails to give effective legal recognition to broader constructs of female reproductive autonomy. Application of the separate-entities approach to pregnancy goes on to make almost obscure non-entities of pregnant women and, where they are recognised, it is on a limited basis and focuses mainly on them as adversarial participants in a pregnancy. Furthermore, neither approach gives effective legal recognition to the values and interests of the unborn. It is therefore concluded that both approaches to pregnancy fail as a result of the very fact that each unsuccessfully grasps the lived experiences of pregnancy.

It is therefore proposed that, when considering pregnancy under the law, the value of the unborn must be recognised, but understood in relation to pregnant women. Understanding the togetherness that pregnancy represents allows the law to recognise both entities that constitute the pregnancy. Any calls for law reform regarding pregnancy, pregnant women or the unborn may essentially fail because their foundational approaches tend to exclude one of the constituent "parties" that forms a pregnancy. Without women, no pregnancies would exist – and the same can be said of the unborn.

The not one/not two approach employs the embodied connectedness of pregnancy as a point of departure, and seeks to advance an inclusive approach to issues stemming from pregnancy. It uses the pregnancy relationship and its context as an interpretative tool in determining a way forward. While this approach may not always place the unborn's interests above those of the pregnant women carrying them, it does require that their interests be considered with reference to the dictates of context. The very fact that South Africa already has the makings of this approach in the judicial interpretation in *Christian Lawyers* (2005) of the Choice on Termination of Pregnancy Act speaks volumes regarding its

108 *Op cit*.

appropriateness and constitutional soundness. It is recommended that the not one/not two approach should therefore receive proper consideration henceforth and, where reform is recommended, those recommendations should be tested against the demands of this approach.

Direct marketing and spam via electronic communications: An analysis of the regulatory framework in South Africa

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OPSOMMING

Direkte Bemarking en Spam Deur Middel van Elektroniese Kommunikasies: 'n Ontleding van die Regulerende Raamwerk in Suid-Afrika

Hierdie artikel weerlê die feit dat die reguleering van "spam" en direkte bemarking aanlyn nie holistiese aandag geniet nie en dat die gefragmenteerde benadering in terme van die Wet op Elektroniese Kommunikasies en Transaksies 25 van 2002, Wet op Verbruikers-beskerming 68 van 2008 en die Wet op Beskerming van Persoonlike Inligting 4 van 2013 ongewens is. Dit het die gevolg dat verbruikers onvoldoende beskerming geniet en 'n onvermoë van die reg om "spam" en direkte bemarking aanlyn effektief te beheer.

Terwyl aanlyn direkte bemarking en "spam" tot 'n mate oorvleuel is "spam" 'n wyer konsep as direkte bemarking. Dit is belangrik om in gedagte te hou dat nie alle direkte bemarking "spam" is nie, en nie alle "spam" direkte bemarking is nie. Die beperking van die regulering van "spam" tot kommersiële kommunikasies of selfs die meer noue konsep, kommunikasies wat met direkte bemarking betrekking het, is nie voldoende nie omdat daar dan steeds baie verskillende tipes "spam" is wat nog ongereguleerd sal bly.

Die artikel argumenteer dat hoewel onlangse regulatoriese veranderinge kan gesien word as 'n verbetering op die vorige posisie in sekere aspekte, is daar nog meer aspekte wat onaangeraak bly en daar is 'n paar bepalings wat nuwe probleme skep. Ten spyte van die onlangse veranderinge in die regulatoriese omgewing is dit waarskynlik dat verbruikers steeds blootgestel gaan word aan 'n deurlopende stroom van nuusbriewe, meningsopnames, godsdienstige boodskappe, politieke inhoud, virus waarskuwings en virus bedrog, nuus, ketting briewe, haat-pos en noukeurige vervaardigde elektroniese kommunikasies wat bedrieglike of misleidende inhoud bevat.

1 Introduction

From a consumer protection point of view, spam and direct marketing are regulated by certain industry-specific self-regulatory guidelines and

codes of conduct,[1] section 45 of the Electronic Communications and Transactions Act[2] (the ECT Act), as well as through newer legislation such as the Consumer Protection Act[3] (the CPA). Once it is fully in force, the Protection of Personal Information Act[4] (the PPI Act)[5] will repeal section 45 of the ECT Act and replace it with chapter 8, sections 69-71, entitled "The rights of data subjects regarding direct marketing by means of unsolicited electronic communications, directories and automated decision making."[6] Despite the PPI Act's intention to repeal section 45 of the ECT Act, on the 26th of October 2012 the Department of Communications published the proposed Electronic Communications and Transactions Amendment Bill[7] (the draft ECT Act Amendment Bill) wherein it is suggested that section 45 be retained, or re-enacted, albeit in an amended form.[8]

The purpose of this article is firstly, to present a brief cursory overview of the abovementioned changing legislative paradigm for spam and direct marketing via an electronic communication and secondly, to critically examine the changes that new legislation has or will introduce within that framework. The article builds on previous research published[9] but is distinguished due to the fact that the final version of the PPI Act differs materially to previous versions published[10] and takes into account the recently published draft ECT Act Amendment Bill [2012].

1 Such as The Code of Banking Practice available at http://bit.ly/1bxMKXQ; The Direct Marketing Association codes for Interactive and Direct Marketing available at http://bit.ly/169NdRK; and The Wireless Application Service Providers Association (WASPA) codes of conduct, advertising rules and a dispute resolution mechanism for members and consumers of the mobile services industry available at http://bit.ly/1gK1XJ9 (accessed 2013-08-27).
2 Act 25 of 2002.
3 Act 68 of 2008.
4 Act 4 of 2013.
5 The Protection of Personal Information Act 4 of 2013 was enacted in terms of GN 912 in GG 37067 of 26 November 2013. In accordance with s115, the PPI Act will commence on a date determined by the President by proclamation in the GG which has to date not transpired.
6 See the schedule to the PPI Act which will also repeal ss 50 & 51 of the ECT Act.
7 Electronic Communications and Transactions Amendment Bill [2012].
8 GN 888 in GG 35821 of 26 Oct 2012.
9 Papadopoulos "Are we about to cure the scourge of spam? A commentary on current and proposed South African legislative intervention" 2012 *THRHR* 223-240 and Papadopoulos and Snail (Ed) Cyberlaw@SA III: *The law of the internet in South Africa* (2012) 63-93.
10 The previous version of the PPI Bill [B9-2009] was published in GG 32495 of 14 Aug 2009.

2 Direct Marketing vs Spam

2 1 Introduction

Unsolicited electronic communications range from bothersome to destructive, irritating to offensive, they are an abuse of resources and they can be a threat to email and internet security.[11]

While online direct marketing and spam do overlap to some degree, there are notable differences. It will become evident to the reader that spam is a wider expression than direct marketing and therefore it is important to keep in mind that not all direct marketing is spam and not all spam is direct marketing. With this in mind, this article aims to focus on the current legislative trend, which has opted to regulate direct marketing only.

2 2 Direct Marketing

From a marketing perspective, direct marketing is a system of marketing where the marketer communicates directly with a customer with the goal that the interaction will exact a measurable response and/or transaction.[12]

From a legal perspective, South African legislation defines direct marketing in section 1 of the CPA and section 1 of the PPI Act, as an approach to a person (or data subject in the case of the PPI Act), either in person or by mail or electronic communication, for the direct or indirect purpose of promoting, offering to supply, in the ordinary course of business, any goods or services or to request a donation of any kind.[13]

Practically therefore, in terms of these definitions, any method that can be used to deliver an electronic communication to an existing or potential customer for the direct or indirect purpose of promoting, offering to supply in the ordinary course of business, any goods or services or to request a donation of any kind, would amount to direct marketing online, including but not limited to:

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11 Buys and Cronje (Eds) Cyberlaw@SA II: *The law of the internet in South Africa* (2004) 160; Van der Merwe, Roos, Pistorius & Eiselen Information and Communication Technology Law (2008) 190.

12 Yordaan "Factors motivating consumers to engage in direct purchasing" 2005 *South African Journal of Psychology* 346; Dibb, Simkin, Pride & Ferrell *Marketing concepts and strategies* (2012) 491.

13 The CPA refers to "an approach to a person" while the PPI relates to "an approach to a data subject". For the purposes of this article the definition of electronic communication is important. In section 1 of the CPA it is defined as "… a communication by means of electronic transmission, including by telephone, fax, SMS, wireless computer access, email or any similar technology or device" and in section 1 of the PPI Act as "… any text, voice, sound or image message sent over an electronic communications network which is stored in the network or in the recipient's terminal equipment until it is collected by the recipient".

- Mobile cellular text and video messaging (SMS or MMS) which is sent directly to the user's device;
- Mobile device applications (Apps) often contain interactive advertisements that appear inside the app;
- Email marketing;
- Search engine optimisation, where meta-tags (keywords written in computer code, which are invisible to the end-user and describe the contents of websites that are recognised by search engines) are used to associate specific websites with specific keywords in order to target people searching for those keywords using search engines like Google. The more often a keyword appears in the hidden code of a website, the higher the search engine will rank the website in the displayed search results, that is, delivered as website or communication by electronic transmission;[14]
- Pay-per-click advertising is similar to search engine optimization in that this form of advertising also uses keywords that consumers are searching for to deliver the electronic communication (website) directly to the searcher. The difference is that with pay-per-click advertising, advertisers bid on certain keywords and the advertiser willing to pay the most for a keyword will ensure a prominent placement in the search result listings that will be displayed first. The advertiser only pays if the consumer clicks on the link;[15]
- Social media marketing;[16]
- Affiliate marketing;[17]
- Banner advertising (mobile and internet), includes static banners on websites and pop up adverts and are a form of interactive advertisement that appears next to or over existing website content;
- Voicemail marketing, that is, where an advertisement is recorded on a personal voice mailbox; and
- Couponing, where manufacturers and retailers make coupons/discounts available for online electronic orders which can be available on company websites, social media, texts or emails and a methodology which is gaining popularity in South Africa in the so-called "daily-deal" websites which offer online deals each day. Customers sign up to receive notices of discounted offers or to receive coupons.[18]

It is submitted that all of these amount, in one way or another, to direct marketing via an electronic communication as defined above.

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14 Papadopoulos *et al* 205.

15 For e.g. see Google Adwords. Google Adwords "See how it works". Available at http://bit.ly/1arOsNu (accessed 2013-11-05).

16 Stokes *eMarketing – The Essential Guide to Digital Marketing* (2011) 334, available at: http://bit.ly/173skTv (accessed 2013-10-16). Such as Facebook.com, Twitter.com & Pinterest.com. which provide platforms for direct marketers to communicate directly with potential customers by creating content to which customers can respond.

17 Stokes 224. Affiliates promote products and services for each other and get some form of payment upon the occurrence of a specified event.

18 For e.g. see www.groupon.co.za (accessed 2013-10-16).

However, in order for direct marketing to be successful, marketers need to address a target audience and, in order to accomplish that, they need information in the form of names, prospects and/or business leads, together with certain other relevant information such as contact details in the form of phone numbers, addresses and email addresses; demographic details and purchase habits/history or preferences.[19] This information is electronically compiled in a number of ways such as spoofing,[20] harvesting,[21] dictionary attacks,[22] spyware,[23] cookies[24] and

19 McDaniel, Lamb & Hair *Introduction to Marketing* (2013) 185-186, 275, 281; Dibb *et al* 25, 29.

20 Email spoofing may appear in different forms, but all have a similar result: i.e. a user receives email that appears to have originated from one source when it actually was sent from another source. Email spoofing is often an attempt to trick the user into making a damaging statement or releasing sensitive information such as passwords. Tladi "The regulation of unsolicited commercial communications (SPAM): is the opt-out mechanism effective?" 2006 *SAMLJ* 181.

21 Information can be harvested (collected) when people make their email addresses public by placing advertisements online, inquiring about offers, services or products, participating in news rooms, chat rooms and the like, or entering an email address for a legitimate transaction. This information is easily harvested, collated and sold as a database, mostly without an Internet user's knowledge or consent. Geissler *Bulk Unsolicited Electronic Messages* (SPAM): a South African perspective (LLD dissertation 2004 (UNISA)) 36.

22 Software is also available that can randomly generate millions of random addresses or numbers and messages are sent out *en masse*, entering the in-boxes of email addresses that are functional in a particular domain such as for e.g. "mweb.co.za". Many of these addresses have very slight variations such as joesoap@mweb.co.za, joesoap1@mweb.co.za, joesoap2@ mweb.co.za, etc. The software then records which addresses are functional or "live" and email lists are generated and sold. Papadopoulos *et al* 86; Tladi 2006 *SAMLJ* 181; Geissler 36-37.

23 Spyware is software that is surreptitiously installed on a computer that performs certain behaviors, generally without appropriately obtaining your consent first, such as: advertising; collecting personal information and changing the configuration of your computer. Spyware is often associated with software that displays advertisements (called adware) or software that tracks personal or sensitive information. Spyware programs can collect various types of personal information, but can also interfere with user control of the computer in other ways, such as installing additional software, redirecting Web-browser activity, or diverting advertising revenue to a third party. Tladi 2006 *SAMLJ* 181.

24 A cookie is a file that a website can store on an Internet user's computer's hard-drive. It allows a website to store information on a user's computer and later retrieve it. Cookies usually contain the name of the website that sent the cookie, an Internet Protocol (IP) address, an expiry date, a time and date when the cookie was created, a user's preference for language or preferred currency, and it may also contain information about the user's e-mail address, and general Internet browsing habits and even information on a user's common keystrokes and mouse movements, postal address (particularly when personal information is entered for the completion of an online order form). Ebersohn "Internet law: cookies, traffic data and direct advertising practices" (2004) *SAMLJ* 741, 742.

phishing.[25]

Whether or not our legislative framework is sufficient to regulate all the practices that are related to direct marketing and information collection or compilation falls outside the scope of this paper.

Direct marketing does have an important role in the economy. Marketing has the function of facilitating exchange by creating utility. Utility is created by matching the supply of a product or service with the demand for that product or service, and facilitating the conclusion of the transaction that benefits both the supplier and the consumer.[26] Responsible marketing and related advertising practices can therefore be a very useful tool for consumers.

2 3 Spam

Spam can be in the form of direct marketing, but it is wider than just direct marketing, as it may also take the form of solicitation for questionable products, or services, or contain fraudulent or deceptive content. It can also include hoaxes, virus warnings, urban legends, jokes, chain letters, newsletters, opinion surveys, requests for support or donations and hate mail, that is, non-commercial electronic communications. Spam has also been used to distribute viruses and malicious code.[27]

There are three main trends that can be identified in legislative descriptions for spam: Firstly, "unsolicited electronic messages" (UEM); secondly, "unsolicited commercial electronic messages" (UCE) and thirdly, "unsolicited bulk electronic messages" (UBE).[28]

The drafters of the ECT Act chose to regulate, not prohibit, the sending of UCE to consumers,[29] while the CPA and the PPI chose to limit their protection to direct marketing, arguably a more restrictive version of UCE.[30]

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25 Phishing is the name given to online identity theft implemented by sending an e-mail or other communication that deceptively claims, or appears to be, from an established and legitimate company (usually a bank). Its aim is to try and deceive users into disclosing their personal information, such as credit card numbers or banking passwords. Frequently these messages or the websites that they link to, also try to install malicious code. This information obtained by phishers is used to access bank accounts and withdraw money, or to open new bank or credit card accounts in the victim's name, causing major financial losses to those involved. OECD *Anti-spam toolkit of recommended policies and measures* (2006) 21-22.

26 McDaniel & Darden *Marketing* (1987) 4-5.

27 Papadopoulos *et al* 85; Geissler 18, 88-90.

28 Geissler 28-32.

29 ECT Act s45.

30 CPA s1 & PPI Act s1.

The unsolicited element of an UCE communication implies that there is no prior relationship between the sender and the recipient and that the recipient has not explicitly given consent to receive the communication.[31] It is also a communication that is commercial in nature that seems to relate to messages whose primary purpose is to advertise or promote goods or services.[32] Therefore, any communication that is classified as non-commercial would not be regulated under an UCE definition. This would include, but is not limited to, communications such as newsletters, opinion surveys, religious messages, political content, virus warnings and virus hoaxes, urban legends, news, chain letters and hate-mail.[33] More importantly, any carefully crafted electronic communication that contains fraudulent or deceptive content will, more than likely, fall through the regulatory net as a non-commercial communication.

An UCE definition therefore concentrates on message content rather than the sender's motivation for sending the message.[34] The main reasons advanced for using an UCE definition include: The fact there are no threshold numbers of messages that need to be sent before it qualifies as "spam" and non-commercial messages may be constitutionally protected under the right to freedom of expression and therefore using an UCE definition avoids legal issues that may arise in this arena.[35]

None of the legislation discussed in this article included the *bulk* requirement, as an alternative to commercial, as can be found in some foreign jurisdictions. Therefore, a single UCE communication may be classified as spam.[36]

Geissler argues that the real issue with spam is not about content but the method of delivery. Bulk implies that the message could be a single message sent to a very large number of recipients, or it could be separate but identical copies of a message that are sent to a large number of recipients. The main problem with a bulk requirement is determining the threshold for how many copies constitute a bulk mailing and within what time period they should all be sent.[37]

Geissler's arguments in favour of an UBE definition include that often the contents of an UCE communication are not objectionable and that the focus should be on the harm that is caused, that is, the fact that it is sent in large quantities rather that the motivation for sending the communication.[38] She finally concludes that legislation regulating or

31 Buys *et al* 160; Geissler 24-25.
32 The Federal Communications Commission Consumer Facts: CAN-SPAM Act "Unwanted text messages and e-mail on wireless phones and other mobile devices." Available at http://fcc.us/1fG1rur (accessed 2013-10-01).
33 Buys *et al* 160.
34 Geissler 25.
35 *Idem* 25, 29.
36 Buys *et al* 161.
37 Geissler 26-28.
38 *Idem* 30.

prohibiting spam should include the requirements of "unsolicited" and "bulk", that is, an UBE definition rather than an UCE definition. An argument the authors are in agreement with.

3 The Changing Landscape

3 1 The Electronic Communications and Transactions Act 25 of 2002

3 1 1 Application

The ECT Act applies to all electronic transactions and data messages except those excluded by the Act itself or its schedules.[39] Under the provisions of section 42 and the rest of chapter VII it is clear that section 45 will only apply to an "electronic transaction", where one party is a "consumer".[40]

An "electronic transaction" is not defined in the ECT Act, but a "transaction" is either of a commercial or non-commercial nature.[41] It is assumed, that "electronic transactions" include transactions where the use of data[42] is a basic component of the transaction.[43]

A consumer is defined as "… any natural person who enters or intends entering into an electronic transaction with a supplier, as the end-user of the goods or services offered by that supplier".[44]

This definition excludes the operation of the chapter VII consumer protection provisions in all business-to-business (B2B) transactions and some business-to-consumer (B2C) transactions where the consumer is a natural person but not the end-user of the goods or services acquired.[45]

It is recognised that juristic persons are often in the same practical position as a natural person consumer, and therefore a strong case could be made to include at least some of these parties in the definition of a "consumer" as is the case under the CPA.[46]

3 1 2 Regulation

Section 45 of the ECT Act states that senders can send any electronic communication provided that, if the communication is a commercial communication, the sender must give the person receiving the

39 ECT Act s4 & schs 1 & 2.
40 Papadopoulos *et al* 65.
41 ECT Act s1.
42 ECT Act s1 definition where data means electronic representations of information in any form.
43 Papadopoulos *et al* 65.
44 ECT Act s1.
45 Van der Merwe *et al* 182.
46 Papadopoulos *et al* 85. See par 3.2.1 (c) below.

communication, the option to opt-out of receiving further communications and, if a request is made by the consumer, the source where the contact details were obtained must be revealed. A failure to comply with these requirements is an offence in terms of section 89(1), with penalties that include fines and imprisonment of up to twelve months.[47] Finally, it confirms that no agreement is concluded where a consumer fails to respond to the unsolicited communication.

3 1 3 Commentary

It's pointed out that for the opt-out or unsubscribe mechanism to be effective, two things are necessary: Firstly, that the spammer respects the call to opt-out; and secondly, that the consumers have faith in using this function.[48] This is not a realistic viewpoint in the regulation of spam.[49]

Some of the further criticisms of section 45 include:[50]

(a) It's not stipulated how the opt-out mechanism should be made available, therefore most spam doesn't have an opt-out link or if it does, it's dysfunctional;

(b) Spammers disguise or falsify their headers, that part of an email that tells us who sent the email, the sender's email address, time, date, and etcetera, and a person cannot opt-out because they are unable to trace or identify the real spammer. This is problematic because this practice is not prohibited or penalised;

(c) If a person uses the opt-out mechanism or they request information on where the spammer obtained the address, the recipient confirms that the address is alive and functional, with the result that even more spam will be sent, often from a number of new sources;

(d) The onus is always on the consumer to request spammers to stop or to obtain information to lay a complaint which in turn means if the consumers don't exercise their rights, the spammers can continue to send the spam and remain unsanctioned; and

(e) Finally, most spam originates from outside of South African jurisdiction, which makes enforcement of these rights very difficult, and the result is that few, including under-resourced law enforcement offices, will take the time, effort or money to locate and litigate against an offender for a maximum penalty of twelve months in jail.

It is therefore clear that the opt-out mechanism and section 45 of the ECT Act is ineffective in dealing with the problems of spam.

47 ECT Act s89.
48 Papadopoulos *et al* 86; Tladi 2006 *SAMLJ* 186-187.
49 Papadopoulos *et al* 86; Van der Merwe *et al* 190-191; Tladi 2006 186-187; Geissler 121-131; Buys *et al* 165-166.
50 Tladi 2006 *SAMLJ* 186-187.

3 2 The Consumer Protection Act 68 of 2008

3 2 1 Application

The CPA applies to each transaction occurring in South Africa, unless it is exempted and includes the promotion, performance or supply of goods or services, the goods and services themselves as well as goods that are a part of certain exempted transactions.[51]

This means that most entities supplying goods or services in South Africa and the transactions that they enter into with the consumers will fall within the ambit of the Act. The supplier is defined as the person who markets (promotes or supplies) any goods or services, while a service provider is the person who promotes, supplies or offers to supply a service.[52] Therefore the CPA mainly regulates the marketing of goods and services to consumers.[53] The consumer includes both natural person consumers and small to medium-sized juristic person consumers whose asset value or annual turnover at the time of the transaction is less than the monetary threshold of two million rand, calculated in accordance with the schedule,[54] to whom goods or services are marketed, who have entered into transactions with suppliers, in the ordinary course of business of the supplier. It may also include a user, recipient or beneficiary of the goods or services and a franchisee.[55]

To get a precise delineation of the scope of application of this Act, it is necessary to define some of the other key concepts used in section 5(1), which include the terms "transaction", "goods" and "services":

(a) 'Transaction' refers to a transaction, in the ordinary course of business, which is an agreement between two or more persons for the supply or potential supply of goods or services, the supply of any goods to or at the direction of a consumer or the performance of any services by or at the direction of the consumer in exchange for consideration. Consideration would be anything of value, given and accepted, in exchange for the goods or services.[56] For the online consumer it could typically include electronic credit, tokens and tickets, money, property,

51 CPA s5(1). Under s5(1)(d) and s5(5) if any goods are supplied within the Republic to any person in terms of a transaction that is exempt from the application of the CPA, the goods and importer or producer, distributor or retailer are still subject to ss60 & 61 which relate to safety monitoring, recall and strict product liability. The exemptions are listed in s5(2) and relate to goods and services promoted to the state, where the consumer is an exempt juristic person, transactions exempted by the Minister, credit agreements under the NCA, services under an employment contract, etc..

52 CPA s1.

53 CPA s5(7). It also regulates the relationship between franchisors and franchisees.

54 See GN 294 in GG 34181 of 2011-04-01.

55 CPA s1 where a "juristic person" includes – (a) a body corporate; (b) a partnership or association; or (c) a trust as defined in the Trust Property Act, 1988 (Act No. 57 of 1988).

56 CPA s1.

awards, undertakings, loyalty credit and the rights to assert a claim.[57] Under section 5(6) there are certain arrangements that may also be considered 'transactions' between a 'supplier' and a 'consumer' under the Act. These 'deemed transactions' include the supply of goods or services in the ordinary course of the supplier's business, to any members of a club, trade union, association or society and this is true even if the service or goods are provided free of charge.[58]

(b) Goods and services include anything marketed for human consumption; any tangible object including any medium on which anything is or may be written or encoded; any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product; a legal interest in land or any other immovable property, other than an interest that falls within the definition of "service" in this section; and gas, water and electricity.[59] While services include work; undertakings; the provision of: Education, information, advice, transportation, accommodation, entertainment; access to electronic communication infrastructure, events, premises, activities, facilities; the use, rental, and right of occupancy, and etcetera.[60]

Despite the very wide-ranging and broad definitions discussed above, the CPA does not apply to everyone or everything. The exemptions to the Act are listed in sections 5(2)(a)-(g) and sections 5(3)-(4) and relate to goods and services promoted to the State where the consumer is an exempt juristic person, transactions exempted by the Minister, credit agreements under the NCA (the CPA does however still apply to the goods and services sold in terms of a such a credit agreement), services under an employment contract, and the provision of education, information, advice, consultations, banking services or related financial services that are regulated under the Financial Advisory and Intermediary Services Act,[61] the Long-term Insurance Act[62] and the Short-term Insurance Act.[63]

Finally, the CPA does not, in general, apply to pre-existing transactions and agreements except to the limited extent set out in item 3 of Schedule 2 to the Act.

57 CPA s1, where consideration also includes cheques, negotiable instruments, credits or debits, electronic chips, labour, barter, coupons, undertakings, promises or agreements.
58 S5(6) also regulates transactions that relate to franchising agreements. It is assumed by the authors that franchise agreements fall outside the typical scope of online consumer law or E-commerce law and, therefore, the provisions directly applicable to franchising have not been included in this discussion.
59 CPA s1.
60 *Ibid*.
61 37 of 2002.
62 52 of 1998.
63 53 of 1998.

3 2 2 Regulation

The CPA has placed a great deal of emphasis on honest, fair and responsible conduct when marketing goods and services.

"Direct marketing" has the following pertinent elements:

- It is an approach to a person;
- either in person or by mail or electronic communication;
- with the direct or indirect purpose of promoting or offering to supply any goods or services;
- in the course of business;
- or to request a donation.[64]

An "electronic communication" for the purposes of "direct marketing" under the CPA is a communication by means of electronic transmission including telephone, fax, sms, wireless computer access, email or similar technology or device.[65]

To regulate direct marketing, section 11 of the CPA sets out the consumer's right to restrict unwanted direct marketing. Regulation 4 of the CPA Regulations sets out the practical rules for controlling direct marketing communications.[66]

In essence, the section relating to the consumer's right to restrict unwanted direct marketing is welcome relief and long overdue. It sets out that a consumer has the right to:

- Refuse to accept;
- require another person to discontinue; or
- pre-emptively block any approach or communication if the approach or communication is primarily for the purpose of direct marketing.[67]

In order to facilitate this, the National Consumer Commission,[68] will establish a registry where a person may register a pre-emptive block against direct marketing communications and any person authorizing, directing or conducting any direct marketing must implement appropriate procedures to facilitate demands to stop further communications.[69]

Once the registry is established, Regulation 4(3)(c), provides that a consumer may register:

64 See CPA s1 for definition of "direct marketing".
65 CPA s1.
66 See GN 293 in GG 34180 1 April 2011.
67 CPA s11(1) (a)-(c)A.
68 Established by CPA s85.
69 *Idem* s11(2)-(4).

(a) his or her name, identification number, passport number, telephone number, facsimile number, email address, postal address, physical address, a website uniform resource locator (URL);

(b) other global address for any website or web application or site on the World Wide Web;

(c) any combination of the media or addresses contemplated in paragraphs (i) and (ii) above;

(d) a pre-emptive block for any time of the day or any day of the year; or

(e) a comprehensive prohibition for any medium of communications, address or time whatsoever in his or her sole discretion, as the factor which triggers the pre-emptive block contemplated in section 11(3) of the CPA.

Most importantly, a direct marketer must, without exception, assume that a comprehensive pre-emptive block has been registered by a consumer unless the administrator of the registry has given written confirmation that the pre-emptive block has not been registered.[70]

Section 32(2) of the CPA contains a dire warning for direct marketers in that, when any person who has marketed goods and left these goods with the consumer without requiring or arranging for payment, those goods become unsolicited goods to which section 21 applies. Section 21 allows consumers under certain circumstances, to keep the goods without an obligation to pay.[71]

3 2 3 Commentary

The CPA's field of application is wider than that of the ECT Act's section 42 in that small to medium-sized juristic persons are protected and no distinction is made between natural persons whether end users or not.

The scope of the CPA's protection granted to consumers differs slightly from the ECT Act's section 45 because, with the CPA, the protection is granted for direct marketing via an electronic communication as well as requests for donations of any kind, whereas the ECT Act relates only to UCE. UCE is arguably slightly wider than just a direct marketing electronic communication.

The consumers' right to restrict unwanted direct marketing and to pre-emptively block any approach or communication if the approach or communication is primarily for the purpose of direct marketing is welcome relief and long overdue.

However, reflecting on the criticisms of section 45 of the ECT Act in paragraph 3.1.3 above, it is clear that a number of issues remain problematic, such as the limitation of the protection to the narrower

70 Reg 4(3)(g).
71 CPA s21.

concept of direct marketing and the fact that the problem of falsified headers is not addressed.

3 3 The Protection of Personal Information Act 4 of 2013

3 3 1 Application

South Africa has enacted its first comprehensive data protection legislation.[72] The PPI Act applies to the processing of personal information entered into a record by or for a responsible party by making use of automated or non-automated means; provided that when the recorded personal information is processed by non-automated means, it forms part of a filing system or is intended to form part thereof.[73] This Act applies to all public and private bodies.[74]

Of particular importance for the field of application of the Act are the definitions of "processing" and "personal information". Section 1 of the PPI Act defines "personal information" as:

> … information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to – (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person; (b) information relating to the education or the medical, financial, criminal or employment history of the person; (c) any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person; (d) the biometric information of the person; (e) the personal opinions, views or preferences of the person; (f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence; (g) the views or opinions of another individual about the person; and (h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person.

72 Which was first conceived of by the SALRC "Privacy and data protection" Discussion Paper 109, Project 124, available at www.doj.gov.za/salrc (accessed 2013-11-05). Available at http://bit.ly/1bxNLiC (accessed 2013-11-05). The commencement date has to still be announced in the GG.

73 PPI Act s3.

74 PPI Act s1 defines a "*private body*" as "… (a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity; (b) a partnership which carries or has carried on any trade, business or profession; or (c) any former or existing juristic person, but excludes a public body" and a "*public body*" as "… (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or (b) any other functionary or institution when – (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation".

Whilst "processing" is designated as any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including:

> … (a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use; (b) dissemination by means of transmission, distribution or making available in any other form; or (c) merging, linking, as well as restriction, degradation, erasure or destruction of information.[75]

Processing is so widely defined that it is clearly intended to cover any action that could possibly be executed in respect of personal information.

However, this Act will not apply to the processing of personal information that is done in the course of a purely personal or household activity; that has been de-identified to the extent that it cannot be re-identified again; processing by or on behalf of a public body for national security, including activities that are aimed at assisting in the identification of the financing of terrorist and related activities, defence or public safety; or the purpose of which is the prevention, detection, including assistance in the identification of the proceeds of unlawful activities and the combating of money laundering activities, investigation or proof of offences, the prosecution of offenders or the execution of sentences or security measures, to the extent that adequate safeguards have been established in legislation for the protection of such personal information.[76]

The Act is also not applicable where the processing takes place for exclusively journalistic, literary or artistic purposes to the extent that such exclusion is necessary to reconcile, as a matter of public interest, the right to privacy with the right to freedom of expression. Where a responsible party, who processes personal information for exclusively journalistic purposes is, by virtue of office, employment or profession, subject to a code of ethics that provides adequate safeguards for the protection of personal information, such code will apply to the processing concerned to the exclusion of the Act and, any alleged interference with the protection of the personal information of a data subject that may arise as a result of such processing must be adjudicated as provided for in terms of that code.[77]

Finally, the Regulator may exempt a responsible party from the application of the Act if satisfied that in the circumstances of the case, the public interest in the processing outweighs, to a substantial degree, any interference with the privacy of the data subject that could result from such processing; or the processing involves a clear benefit to the data subject or a third party that outweighs, to a substantial degree, any interference with the privacy of the data subject or third party that could

75 PPI Act s1 definition of "processing".
76 PPI Act s6.
77 *Idem* s7.

result from such processing.[78] The Regulator may however, impose reasonable conditions in respect of any exemption granted.[79]

3 3 2 Regulation

The PPI will repeal and replace amongst others, section 45 of the ECT Act.[80] This section will be replaced with Chapter 8, sections 69–71, setting out the rights of data subjects regarding direct marketing via unsolicited electronic communications, directories and automated decision making.

The PPI Act is an improvement on section 45 of the ECT Act, in-so-far as it prohibits the processing of personal information for direct marketing purposes unless the data subject has given consent to the processing (that is, an opt-in system); or is, subject to subsection (3), a customer of the responsible party.[81]

"Consent" is defined as any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information.[82]

In terms of section 69(3), a responsible party may therefore only process the personal information of a data subject who is a customer of the responsible party if the responsible party:

> … (a) has obtained the contact details of the data subject in the context of the sale of a product or service; (b) for the purpose of direct marketing of the responsible party's own similar products or services; and (c) if the data subject has been given a reasonable opportunity to object, free of charge and in a manner free of unnecessary formality, to such use of his, her or its electronic details either: (i) at the time when the information was collected; or (ii) on the occasion of each communication with the data subject for the purpose of marketing if the data subject has not initially refused such use.

Section 69(4) of the PPI Act also requires any communication for direct marketing to contain the details of the identity of the sender or the person on whose behalf the communication has been sent; and an address or other contact details to which the recipient may send a request that such communications cease.

The data subject who is a subscriber to a printed or electronic directory of subscribers that is available to the public or obtainable through

78 *Idem* s37(1). The public interest referred to includes: (a) the interests of national security; (b) the prevention, detection and prosecution of offences; (c) important economic and financial interests of a public body; (d) fostering compliance with legal provisions established in the interests referred to under paragraphs (b) and (c); (e) historical, statistical or research activity; or (f) the special importance of the interest in freedom of expression.
79 PPI Act s37(3).
80 PPI Act sch..
81 *Idem* s69(1).
82 *Idem* s1.

directory enquiry services, in which his, her or its personal information is included,

> … must be informed, free of charge and before the information is included in the directory –
>
> (a) About the purpose of the directory; and
>
> (b) about any further uses to which the directory may possibly be put, based on search functions embedded in electronic versions of the directory.[83]

The data subject must, furthermore, be given a reasonable opportunity to object to the use of the personal information or to request verification, confirmation or withdrawal of such information if he, she or it has not initially refused such use.[84]

A subscriber is any person who is party to a contract with the provider of publicly available electronic communications services for the supply of such services.[85]

On automated decision making, section 71 stipulates that no one may be subject to a decision that has legal consequences, or which affects them to a substantial degree, if it is taken solely on the basis of the automated processing of personal information intended to provide a profile of certain aspects of his or her personality or personal habits such as performance at work, credit worthiness, reliability, location, health, personal preferences or conduct.

The provisions of section 71(1) do not apply if the decision has been taken in connection with the conclusion or execution of a contract and:

- The request of the data subject in terms of the contract has been met;
- appropriate measures have been taken to protect the data subject's legitimate interests; or
- it is governed by a law or code in which appropriate measures are specified for protecting the legitimate interests of data subjects.[86]

The appropriate measures, referred to above must:

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83 PPI Act s70.

84 PPI Act s70(2), but, in terms of s70(3), ss (1) & (2) do not apply to editions of directories that were produced in printed or off-line electronic form prior to the commencement of this section and in terms of s70(4), if the personal information of data subjects who are subscribers to fixed or mobile public voice telephony services have been included in a public subscriber directory in conformity with the information protection principles prior to the commencement of this section, the personal information of such subscribers may remain included in this public directory in its printed or electronic versions, after having received the information required by ss1.

85 PPI Act s70(5).

86 PPI Act s71(2).

- Allow for an opportunity for a data subject to make representations about such a decision; and
- require a responsible party to provide a data subject with sufficient information about the underlying logic of the automated processing of the information relating to him or her so that representations in this respect can be made.[87]

3 3 3 Commentary

The opt-in model requiring prior consent before sending direct marketing material as adopted by the PPI Act, is definitely an improvement on the ECT Act opt-out model, as are the provisions on directories and automated decision making.

It is noted with disappointment however, that section 69(2) is included in the PPI Act. This section allows a responsible party to approach a data subject once, to request consent for the sending of direct marketing material, provided that consent has not previously been withheld.

This allowance is strongly opposed due to its scope for abuse and because, in essence, it reverts back to an opt-out model. In fact, by allowing a responsible party to process personal information "once" to make the approach to get consent, the prohibition in section 69(1) is reduced to a second level protection mechanism. That is, it only becomes relevant after the approach has been made. It is also contrary to the position established in the CPA where a direct marketer must, without exception, assume that a comprehensive pre-emptive block has been registered by a consumer.[88]

The definitional variances between the ECT Act,[89] the CPA[90] and PPI for electronic communication[91] should be carefully considered and harmonised as far as possible. One example will suffice to illustrate the point. The PPI limits its prohibition on the processing of personal information to an electronic communication for direct marketing in the form of text, voice, sound or image that is sent over an electronic communications network. Direct marketing online may not limit its activities to the sending of text, sound, voice or image. It also includes collecting data through software and cookies which are data files. This sort of processing is also not protected under the automated decision making provisions because they don't necessarily have a legal consequence attached to them. It is therefore suggested that

87 PPI Act s71(3).
88 Reg 4(3)(g).
89 ECT Act s1 "electronic communication" means a communication by means of data messages.
90 CPA s1 where an "electronic communication" means communication by means of electronic transmission, including by telephone, fax, SMS, wireless computer access, email or any similar technology or device.
91 PPI Act s1 where it is any text, voice, sound or image message sent over an electronic communications network which is stored in the network or in the recipient's terminal equipment until it is collected by the recipient.

the wider CPA or ECT Act definitions which would be sufficiently wide to include actions like data collection via software and the communication of data files be used instead.

A number of the criticisms of section 45 of the ECT Act have also not been adequately addressed in either the PPI or CPA. For example, section 69(4) does not stipulate what, how or where contact details should be displayed for the purposes of requesting a sender to cease sending any further communications. Neither the PPI nor the CPA outlaw the disguising of headers in electronic communications, as is the trend in other jurisdictions. Finally, consideration should be given to extraterritorial reach of national laws.

3 4 The Proposed Draft ECT Act Amendment Bill [2012]

3 4 1 Application

Essentially, the scope of application for the consumer protection provisions of the ECT Act remain unchanged with the exception of a welcome change to the definition of a "consumer" and a clarification on the definition of an "electronic transaction".

The first notable change contained in the ECT Act Amendment Bill is to change the definition of a "consumer" to resemble that in the CPA Act. Thus, in terms of the application of the consumer protection provisions of chapter 7 of the ECT Act, they would protect both natural person consumers and small to medium-sized juristic person consumers whose asset value or annual turnover, at the time of the transaction, is less than the monetary threshold of two million rand, calculated in accordance with the schedule,[92] to whom goods or services are marketed, who have entered into transactions with suppliers in the ordinary course of business of the supplier. It may also include a user, recipient or beneficiary of the goods or services and a franchisee.[93]

The amendment also introduces a definition for an "electronic transaction" which was previously undefined and left open to speculation. This definition confirms and clarifies the application of chapter 7.[94]

92 The determination of threshold in terms of the CPA of 2008 (Act no 68 of 2008) appeared, in the Government Gazette No 34181, GN No 294 on 2011-04-01. The CPA does not apply to a transaction where the consumer is a juristic person, whose annual turnover or asset value, at the time of the transaction, equals or exceeds the monetary threshold of two million rand calculated in accordance with the Schedule to the Regulation.

93 CPA s1 & Van Eeden (2009) 41.

94 An electronic transaction shall mean a transaction conducted using electronic communications.

3 4 2 Regulation

The ECT Act Amendment Bill proposes that section 45 be retained or re-enacted and amended to read as follows:

(1) No person may send unsolicited communications without the permission of the consumer to whom those unsolicited communications are to be sent or are in fact sent.

(2) No agreement is concluded where a consumer has failed to respond to an unsolicited communication.

(3) Any person who fails to comply with or contravenes subsection (1) is guilty of an offence and liable, on conviction, to a fine not exceeding R1 million or imprisonment for a period not exceeding 1 year.

The ECT Act Amendment Bill also defines an unsolicited communication, in relation to a data message regarding goods or services, to mean that the data message has been transmitted to a consumer by or on behalf of a supplier without the consumer having expressly or implicitly requested that data message.

3 4 3 Commentary

This "new" section 45 proposes to prohibit anyone from sending unsolicited data messages without consent. At first glance, such a wide definition may infringe on the constitutionally protected right to freedom of expression. However, if one reads the definition of "unsolicited communication" it becomes clear that it is only a data message regarding goods and services, which is essentially the same as an UCE, and therefore this does not materially alter the current position.

4 Conclusion

The authors submit that spam and direct marketing online have not been given holistic attention, hence the fragmented approach we find in the ECT Act, CPA, PPI and the ECT Act Amendment Bill. This will result in inadequate protection for consumers and an inability to effectively control spam or regulate online direct marketing.

In trying to enforce the regulatory framework in an online environment the enforcer will have to consider: The different fields of applications for each Act; the different definitions for terms like "electronic communication"; and more importantly, the overlapping and sometimes conflicting web of legislative provisions applicable to direct marketing or unsolicited commercial electronic communications.

While, for the rest, we have to just live with the continuous stream of newsletters, opinion surveys, religious messages, political content, virus warnings and virus hoaxes, urban legends, news, chain letters, hate-mail and any carefully crafted electronic communication that contains

fraudulent or deceptive content that will more than likely fall through the regulatory net as a non-commercial communication.

The judicial application of the "interest" requirement for standing in constitutional cases: "A radical and deliberate departure from common law"

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OPSOMMING

Die Geregtelike Toepassing van die Vereiste van "Belang" met Betrekking tot Verskyningsbevoegdheid in Grondwetlike Sake: "'n Radikale en Doelbewuste Afwyking van die Gemenereg"

Hierdie artikel ondersoek die geregtelike toepassing van die vereistes vir verskyningsbevoegdheid (*locus standi*) in grondwetlike aangeleenthede sedert die aanvang van die grondwetlike era in Suid-Afrika. In die lig van die parlement se betreurenswaardige versuim om die aanbevelings van die Suid-Afrikaanse Regskommissie met betrekking tot klas- en openbare aksies te implementeer, moes die land se howe stapsgewys hul eie sekerheid rakende die vereistes en vertolking van verskyningsbevoegdheid skep. In die vorige Westminster-staatsmodel is verskyningsbevoegdheid beperk tot litigante wat 'n direkte, beduidende belang by die saak en by die gewenste regsverligting kon toon. Hierdie streng benadering tot verskyningsbevoegdheid was gegrond op vrese dat 'n liberaler aanslag die sluise van litigasie sou ooptrek, wat op sy beurt openbare administrasie sou bemoeilik. Die aanvaarding van die Grondwet van 1996, en artikel 38 in die besonder, het egter 'n era van groot verandering in die bepalings oor verskyningsbevoegdheid ingelui. Dit blyk duidelik uit presedentereg sedertdien. Aan die hand van 'n bespreking van die waterskeidingsaak *Ferreira v Levin*, die *Giant Concerts*-aangeleentheid, die *Tulip Diamonds*-saak en etlike ander onlangse uitsprake, bied hierdie artikel 'n uitstippeling van die howe se stelselmatige vertolking en toepassing van artikel 38 met betrekking tot die vereistes vir verskyningsbevoegdheid in grondwetlike aangeleenthede. Dit word eerstens vinnig duidelik dat daar, in teenstelling met destyds, nou van howe verwag word om 'n ruim benadering tot verskyningsbevoegdheid in grondwetlike litigasie te volg en só te verseker dat die regte in die Handves van Regte sowel as elders in die Grondwet verwerklik word. Tweedens blyk dit dat litigante wat in eie belang optree, verkieslik ook "iets meer" as blote eie belang moet bewys; 'n groter openbare belang wat met die Grondwet strook. Sodanige groter openbare belang sluit onder meer in die behoefte aan groter regsekerheid vir behoorlike regspleging, die belang om te verseker dat openbare mag ingevolge grondwetlike en regsvoorskrifte uitgeoefen word, en die behoefte om die onafhanklikheid van die regbank te verseker en te versterk. Die derde en finale gevolgtrekking van hierdie navorsing is dat artikel 38 van die Grondwet inderdaad 'n radikale en doelbewuste afwyking van die gemenereg behels, en dat die Grondwet self 'n juiste en doeltreffende raamwerk bied vir 'n hof om grondwetlike verskyningsbevoegdheidsvereistes te bepaal. Laastens word die nie

implementering van die Suid Afrikaanse Regskomissie se konsep wetsontwerp vir openbare-en klasaksies betreur omdat regsrekerheid reeds 'n geruime tyd gelede oor kwessies van *locus standi* verkry kon gewees het.

1 Introduction

This article examines the judicial application and development of standing in constitutional actions since the advent of the constitutional era in South Africa. In the face of Parliament's lamentable failure to act on the recommendations of the South African Law Commission (SALC) pertaining to class and public actions, the task of the country's courts has been a challenging one, as described by Wallis JA with reference to class actions:[1]

> We are thus confronted with a situation where the class action is given express constitutional recognition, but nothing has been done to regulate it. The courts must therefore address the issue in the exercise of their inherent power to protect and regulate their own process and to develop the common law in the interests of justice.

This dictum is of course as much applicable to all the other categories of litigants that are mentioned in section 38 of the Constitution, as well as litigants in non-constitutional matters – class actions. Was it not for the regrettable failure of Parliament to implement legislation pursuant to the SALC's proposals, litigation in regard to standing could have been avoided.

In *Ferreira v Levin*,[2] O'Regan J described the courts' "new" role in a constitutional democracy as follows:

> This role requires that access to courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact.

1 *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* 2013 2 SA 213 (SCA) par 223[15 + 16] C-F. In this case, the Supreme Court of Appeal referred an application back to the court *a quo* because the action (an ordinary class action not related to section 38) was not properly certified as a class action. Had the draft Bill on Class and Public Interest Litigation proposed by the SALC been promulgated by parliament, legal certainty would have existed as the proposed draft Bill extensively provides for the certification process. (The proposals made by the SALC are discussed infra par 3).Significantly, Wallis JA's certification requirements for class actions, are essentially those that were proposed by the SALC.

2 *Ferreira v Levin* and *Vryenhoek v Powell* 1996 1 BCLR 1 (CC).

As the SALC's proposed draft Bill on public interest and class actions[3] has not been implemented, the courts have had to develop standing in a constitutional context in an incremental fashion. It has meant a "radical and deliberate departure from common law" rules on standing, in line with the Constitution.[4] Thus, against the backdrop of the number of judgments and significant parts of judgments that have dealt with standing in recent times, particularly the "interest" requirement for standing, this article evaluates the judicial application of this requirement in constitutional litigation, and concludes that, in the absence of statutory guidance, the courts themselves have recently provided useful legal certainty in this regard.

Before moving on to the judicial application of the requirements for standing in South Africa's constitutional dispensation, however, it is apt first to refer briefly to the pre-constitutional position in cases where a direct or indirect public interest was at stake. It is further useful to then refer to the proposals of the South African Law Reform Commission (SALRC), before discussing recent case law.

2 A Brief Reference to the Common-Law and Pre-Constitutional Judicial Application of Standing in Public Interest Actions

In Roman-Dutch law, the "popular action" or *actio popularis* associated with Roman law disappeared. In the matter of *Dalrymple v Colonial Treasurer*,[5] Wessels J explained its disappearance by referring to the "inconvenience" of the action and the possibilities it created for every second person to sue ministers "at the instance of enthusiastic or hostile politicians".[6] The judgment was a classic example of the courts' reasoning behind limiting standing in litigation where the public interest may have been directly or indirectly at stake, for fear that it would result in "floodgate" litigation, which would in turn, hamper public administration.

The only exception to the rule that required a direct and substantial interest to establish standing was in terms of the *interdictum de libero homine exhibendo,* which was the equivalent of the English writ of *habeas corpus*. The interdict was perceived as an *actio popularis* on the grounds

3 SALC Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law (1998) (including the Commission's proposed draft Bill on public interest and class actions). See http://www.ii.org/za/other/zalc/report (accessed 2012-07-23). Since 1998, the SA DoJCD has failed to act to promulgate the proposed legislation.

4 Per Van der Westhuizen J in *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* 2013 (2) SACR 433 (CC) 455 [29].

5 1910 TS 372.

6 *Idem* 392.

that it could be instituted by anyone.[7] In *Wood v Odangwa Tribal Authority*,[8] this remnant of the *actio popularis* was used as authority to grant three appellants an interdict against the then South West African tribal authorities to prevent them from continuing with their illegal mistreatment of members of certain groups. None of the appellants themselves had been subjected to this treatment and/or imprisoned.

On the contested standing of the appellants, Rumpff CJ[9] found that although, in Roman-Dutch law, no private person could proceed with the popular action, it was clear that the interdict *de libero homine exibendo* remained part of our law.[10] He found that the interest of the person who applied for this interdict "should not be narrowly construed",[11] because "illegal deprivation of liberty is a threat to the very foundation of a society based on law and order".[12]

Bamford v Minister of Community Development and State Auxiliary Services[13] was a rare matter in which the applicant alleged to have been acting purely in the public's interest. The applicant was a member of Parliament for the Groote Schuur constituency, and was a permanent resident of Rondebosch, Cape Town. He instituted an action for a permanent interdict restraining the respondent from erecting houses on the Groote Schuur Estate at Rondebosch, which, he claimed, was in contravention of the Rhodes' Will (Groote Schuur Devolution) Act,[14] the provisions of which provided for the continued preservation of access to the park for the benefit of the public. The respondent contested the applicant's standing to bring the application, on the grounds that the applicant did not allege that he himself had ever used the right of access to the park, or intended to do so, and relied on the judgment in *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd*.[15] To Watermeyer JP, however, the facts in *Roodepoort-Maraisburg*,[16] in which the court was confronted with illegal occupation of property by persons

7 Van der Vyver "*Actiones Populares* and the Problem of Standing in Roman, Roman-Dutch, South African and American Law" 1978 *AJ* 193. It is presumed that women and children could only apply for the interdict if the detainee was related to them. If several persons presented themselves to the *praetor* as potential applicant, the *praetor* had to choose the most suitable based on who had the greatest interest, as well as the relationship between the potential applicants and the detainee.

8 1975 2 SA 294 (A).

9 *Idem* par 310D.

10 Par 310E.

11 Par 310F.

12 Par 310G.

13 1981 3 SA 1054 (C).

14 9 of 1910.

15 *Idem* n 13 par 1059G. The respondent relied on the following passage in the judgment: "It is incumbent on the party complaining to allege and prove that the doing of the act prohibited has caused him some special damage, some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by the infringement of the law".

16 1933 AD 87[92].

in contravention of apartheid legislation, were distinct from those in *Bamford v Minister of Community Safety*.[17] Whereas *Roodepoort-Maraisburg* was concerned with an Act that statutorily prohibited certain actions, in *Bamford*, the court had to deal with a statutory provision that conferred a right of access in favour of all members of the public, a right framed positively, which would allow any member of the public, without proof of special damages, to seek relief from unlawful interference with that right.[18]

At least one academic commentator[19] found this distinction "irrelevant", with particular reference to the settled general rule applied in the *Roodepoort-Maraisburg* matter, namely the need "to prevent the courts being inundated by actions brought by persons who have no real connection with the matter".[20] This argument of course strongly resembled the reason why the popular action had disappeared as articulated by Wessels J in the *Dalrymple* matter.[21]

With the promulgation of section 38 of the South African Constitution, it was clear that the Constitution contemplated a radical departure from common law requirements for standing and the SALC was tasked to make recommendations. A brief synopsis of those proposals follows below. These have lamentably not been followed by Parliament, leaving the courts with the unenviable task to incrementally develop these themselves.

3 Recommendations by the SALC on Public Interest and Class Actions

The SALC[22] took note that, in the past, actions in public interest were virtually unknown in South Africa. It further noted that, despite the opportunity afforded by *Wood*,[23] "the South African courts have not even allowed organisations to claim relief on behalf of their members, insisting that the individual members must approach the court themselves".[24] The Commission proposed the introduction of legislation that would introduce class and public interest actions.

17 1059[G]-1060[B].
18 Par 1059H & 1060A.
19 Beck "*Locus standi in iudicio* or *ubi ius ibi remedium*" 1983 *SALJ* 286.
20 *Ibid*.
21 *Supra* n 5 par 392.
22 1998 *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* http://www.ii.org/za/other/zalc/report (accessed 2012-07-23).
23 1975 (2) SA 294 (A).
24 SALC 22 at 4.2.3. This observation was made with reference to cases such as *Ahmadiyya Anjuman Ihaati-Islam Lahore (South Africa) and another v Muslim Judicial Council (Cape) and others* 1983 4 SA 855 (C), *South African Optometric Association v Frames Distributors (Pty) Ltd* 1985 3 SA 100 (O) *Natal Fresh Produce Growers' Association and others v Agroserve (Pty) Ltd and others* 1990 4 SA 749 (N).

3 1 Class Actions

The following definition of a class action was proposed:

> … an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class, and certified as a class action in terms of section 6 of this Act.[25]

Section 6 provided for a certification process.[26] In deciding whether to certify an action as a class action, it allows a court to take into account: (a) Evidence in support of the existence of "an identifiable class of persons"; (b) the existence of a *prima facie* cause of action; (c) issues of fact or law common to the claims or defences of individual members of the class; (d) the availability of a suitable representative for the class of persons; (e) the interests of justice; and (f) whether, having regard to all relevant circumstances, a class action was appropriate.[27] In section 6, the court is authorised to withdraw certification at any time before judgment, if the criteria set out are no longer met.[28] Furthermore, in terms of section 7, the court must appoint one or more representative of the class,[29] and can at any time before judgment *mero motu* or on application, remove a representative, and appoint a suitable substitute.[30] Sections 8 and 9 respectively make extensive provision for notice to members of the class,[31] and the procedure to be followed in a class action.[32] Significantly, section 10(3) provides that a judgment of the court would be binding on all members of the class unless the court, on consideration of the section 8(2)-listed factors was convinced that the class action did not come to the attention of all members.[33]

3 2 Public Interest Actions

The SALC proposed that the term "public interest action" be defined as:

> Public interest action means an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative's own interest. Judgment of the court in respect of a public interest action shall not be binding (*res judicata)* on the persons in whose interest the action is brought.[34]

25 SALC 89 s 1.
26 SALC 92 s 6(1).
27 *Idem* s 6(2).
28 *Idem* s 6(3).
29 SALC 93 s 7(1).
30 *Idem* s 7(5).
31 SALC 94.
32 SALC 95.
33 SALC 96.
34 SALC (v) 3. Section 2(3) of the Commission's proposed draft Bill stipulates that the court may give directions "to the representative as to the appropriate person or persons to be served as respondents", and section 2(4) determines that "unless the court holds otherwise, judgment in a public interest action shall not be binding on the person or persons in whose interest the action is brought".

Despite certain limitations on bringing public interest actions that were proposed to the Commission,[35] the Commission responded that it would be contrary to the spirit and purport of section 38 of the Constitution to subject public interest actions to "costly procedures and requirements". The Commission was clear on the fact that it ought to be possible for a person, not having a direct interest in the relief claimed, to institute an action in the public interest. No certification process was to be required. However, courts would be able to limit unmeritorious public interest actions by the requirement that the action be instituted in the interest of the public, be it a section of the public or the public as a whole and on condition of the presence of a suitably qualified representative.[36]

There can be little doubt that the proposals of the SALC were sensible and extensively provided for a number of issues of standing that have subsequently arisen in litigation, as is discussed below.

4 The Broadening of Standing in Actions of a Public Nature in the South African Constitutional Context

Generally, standing has always been a preliminary procedural question as to whether the parties to litigation have the required standing or legal capacity to litigate.[37] The inquiry into standing is however also a question of substance as far as the sufficiency and directness of a litigant's interest in the proceedings are concerned.

The common-law requirements for legal standing have been substantially broadened by section 38 of the Constitution of the Republic of South Africa.[38] A listed number of persons may approach a competent court "alleging that a right in the Bill of Rights has been infringed or threatened". In the absence of legislation implementing section 38, as proposed by the SALC, sole reliance on the Constitution, provides the framework against which the infringement of constitutional rights, and thus the development of legal standing, is measured. This has been the courts' endeavour as is discussed below.

35 The draft Bill contains no limitations on the relief that could be attained through a public interest (or class) action.

36 SALC 25 at 4.4.4. Later on, the Commission refers to the person who brings a public interest action as "the ideological plaintiff" (27 at 4.6 *et seq*). Such a plaintiff, according to the Commission, ought to be "suitably qualified" or "genuine" in his or her efforts to represent the public interest.

37 Harms *Civil Procedure in the Supreme Court* (1997) 5.1.

38 1996.

5 *Ferreira v Levin* with Reference to Standing in a Constitutional Context

A key judgment by the Constitutional Court with regard to standing in a constitutional context, was that of *Ferreira v Levin*,[39] in which Chaskalson P, writing for the majority, made a number of significant findings contextual to this article. It will be recalled that in this case, the inconsistency of section 417 of the Companies Act[40] with the Constitution was at issue. The right against giving self-incriminating evidence during winding-up proceedings of companies was asserted for the reason that such evidence was allowed to be used in subsequent criminal proceedings against the examinee. None of the litigants that brought the challenge had faced criminal charges, and only faced the possibility of having to give evidence in winding-up processes that could later be used against them in criminal proceedings. Their *locus standi* to challenge the impugned section of the Companies Act was attacked on the basis that they had insufficient interest in the relief that was sought. It is the standing issue that is further discussed. Chaskalson P found that "a person has standing to challenge the validity of that law in our courts" in instances where that person's rights are directly affected in "a manner adverse to such person" – requirements that the applicants in *Ferreira v Levin* met. [41] This implies that the mere possibility of criminal charges was sufficient. Secondly, in respect of the question as to "when" the challenge may be made when it concerned the constitutional validity of a law, he argued that it could be made as soon as a clear conflict between the law and the Constitution was established.[42] I agree with this contention, particularly where a broader public interest is demonstrated. In *Ferreira v Levin*, that public interest was to obtain legal certainty arising from impugned legislation that threatened the common-law right against self-incrimination. For this particular reason, it followed that the constitutional challenge in *Ferreira v Levin* was therefore not "hypothetical" or "academic", but rather informed by, from the applicants' perspective, a genuine fear of prosecution and, importantly, from the public's perspective, by the need to obtain legal certainty about the common-law right against self-incrimination, which was impugned as unconstitutional in section 417(2)(b) of the Companies Act.[43] This common-law principle for determining standing, will therefore continue to act as catalyst in preventing unjustifiable cases from being brought to court.[44]

In constitutional cases, Chaskalson P continued, the courts should adopt a broad, not narrow approach to standing. Such an approach

39 *Ferreira v Levin* and *Vryenhoek v Powell 1996* 1 BCLR 1 (CC).
40 61 of 1973.
41 Par 97[162].
42 Par 97[165].
43 61 of 1973.
44 Burns & Beukes *Administrative Law under the 1996 Constitution* (2006) 469 *et seq*.

would be consistent with the courts' mandate to ensure that constitutional rights come to fruition.[45] As far as the interpretation of section 7(4) of the Interim Constitution, (section 38 of the Constitution) was concerned, Chaskalson P, with reference to section 98(2) of the Interim Constitution (section 172 of the final Constitution), found that the provisions of section 7(4) did not limit standing in constitutional challenges to only those rights set out in chapter 3 of the Interim Constitution (chapter 2 of the Constitution):

> The constitutionality of a law may be challenged on the basis that it is inconsistent with the provisions of the Constitution other than those contained in Chapter 3. Neither section 7(4) nor any other provisions of the Constitution denies to the applicants the right that a litigant has to seek a declaration of rights in respect of the validity of a law which directly affects his or her interests adversely.[46]

On the question of "when" the constitutional challenge may be brought where a law is challenged, and its influence on standing, O'Regan J deviated from the majority judgment. In her view, the applicants in *Ferreira v Levin* did not have standing for direct access to the Constitutional Court "acting in their own interest", as there was nothing in the application before the court that indicated a threat of prosecution in which "compelled evidence" may be led against them.[47] However, in the particular circumstances of the case, she held that the applicants' standing derived from the fact that they were acting in the public interest.[48] She further held that "this court will be circumvent in affording applicant standing in terms of section 7(4)(b)(v)", and that possible determinant factors were the existence of other and effective measures to bring the application; the nature of the relief sought; the extent to which the relief was of "general and prospective application"; the range of persons or groups who may directly or indirectly be affected by a court order, and the opportunity afforded to possibly affected persons or groups to make representations and present evidence to the court. These factors needed to be considered in light of the facts and circumstances of each case.[49] O'Regan J further observed that although the challenge to the validity of section 417(2)(b) of the Companies Act possibly could have been brought by a number of other persons, "a considerable delay may result if this Court were to wait for such challenge".[50] In my view, this "expediency" line of reasoning adopted by O'Regan J supported Chaskalson P on the question of "when" a challenge may be brought, namely as soon as an inconsistency between an impugned law and the Constitution has been established. Other relevant factors for consideration, according to O'Regan J, were the fact that the relief sought in *Ferreira v Levin* fell under the exclusive jurisdiction of the

45 Par 98[166].
46 Par 99[167].
47 Par 119[231].
48 Par 120[233].
49 Par 120[234].
50 Par 121[236].

Constitutional Court (leave to have direct access to the Constitutional Court to challenge an impugned law); that the relief was of a general, instead of a particular, nature and that adequate notice had been given to a wide range of individuals and organisations, who submitted *amicus curiae* briefs to the court.[51]

6 The Judicial Application of the "Interest" Requirement for Standing in Constitutional Cases

The rationale for adopting section 38 of the Constitution could not have been expressed in more lucid terms than those used by Cameron JA, as he then was, in the matter of *Permanent Secretary v Ngxuza*.[52] Having successfully obtained the reinstatement of their disability grants, the three applicants in the matter sought to institute representative class action and public-interest proceedings on behalf of tens of thousands of Eastern Cape grantees in terms of section 38(b), (c) and (d) of the Constitution.[53] The court *a quo* granted them leave to proceed and they subsequently decided to institute a class action under section 38(c). In this judgment, which dealt with the appeal against the court *a quo's* leave to appeal, Cameron JA noted as follows:[54]

> The class action was until 1994 unknown to our law, where the individual litigant's personal and direct interest in litigation defined the boundaries of the court's powers in it. If a claimant wished to participate in existing court proceedings, he or she had to become formally associated with them by compliance with the formalities of joinder.

Because of so many South Africans' "poor position to seek legal redress", the technicalities of legal procedures, and the need for the opportunity to attain justice, both the interim and final Constitution "created the express entitlement that 'anyone' asserting a right in the Bill of Rights could litigate", as was made possible by sections 7(4) and 38 of the interim and final Constitution respectively.[55] Cameron JA described government's response to the valid claims of social grantees as an example of how no government in a constitutional dispensation should respond: Public administration in whatever form, he said, had to be "conducted on the basis that people's needs must be responded to".[56]

Against this backdrop, I now turn to recent case law that has dealt specifically with the own-interest category of litigants (section 38(a)) in order to ascertain exactly how far the courts have been prepared to go in

51 Par 121[237].
52 *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA).
53 Par 1191[1] C-D.
54 Par 1192[4] G-H.
55 Par 1194[6] B-C.
56 Par 1197[15] C-D.

granting standing to litigants in constitutional cases. To contextualise, I will first indicate the synergy between the Promotion of Administrative Justice Act[57] and section 38 of the Constitution, and will then elaborate on the judicial principles for own-interest standing in constitutional cases.

7 The Synergy Between the Promotion of Administrative Justice Act and Section 38 of the Constitution

A distinct group of litigants are emerging in South African constitutional litigation who invoke the Promotion of Administrative Justice Act (hereinafter PAJA) to seek relief for impugned public administration in terms of section 33 of the Constitution. In such cases, the standing-related provisions of section 38 inevitably arise for judicial consideration and interpretation. In his judgment in the matter of *Giant Concerts CC v Rinaldo Investments (Pty) Ltd*,[58] Cameron J found as follows:

> PAJA, which was enacted to realise section 33, confers a right to challenge a decision in the exercise of public power or the performance of a public function that 'adversely affects the rights of any person and which has a direct, external legal effect'. PAJA provides that 'any person' may institute proceedings for the judicial review of an administrative action. The wide standing provisions of section 38 were not expressly enacted as part of PAJA. Hoexter suggests that nothing much turns on this because 'it seems clear that the provisions of Section 38 ought to be read into the statute'. This is correct.

Standing, as a preliminary issue, is separated from the merits of a case and has, according to Cameron J, two implications for the own-interest litigant.[59] Firstly, it "insulates" the:

> … nature of the interest that confers standing on the own-interest litigant from the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated.

Secondly, according to the court:

> [i]t means that an own-interest litigant may be denied standing even though the result could be that the unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether *this* particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only 'if the right remedy is

57 3 of 2000.
58 As yet unreported, case CCT25/12 2012 ZACC 28. See http://www.saflii.org (accessed 2013-06-19).
59 *P*ar 18[33].

> sought by the right person in the right proceedings'. To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even where the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest. Hence, where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown.[60]

The reasoning by Cameron J here was similar to O'Regan's thinking in *Ferreira v Levin* referred to above, where, although she found pure "own interest" lacking in that particular case, the broader public's interest and the grounds of expediency demanded that the matter be heard and be dealt with by the Constitutional Court.[61]

But what "more" must be demonstrated for standing by the own-interest litigator?[62] The *Giant Concerts* matter cited above, provides a sound departure point for an exploration of the judicial principles in this regard.

8 Establishing the Judicial Principles for Own-Interest Standing in Constitutional Cases: The *Giant Concerts* Matter

In answering the question as to how much "more" the own-interest litigant must establish for purposes of standing in constitutional cases, the court in the *Giant Concerts* case referred to the matters *Ferreira v Levin*, *Minister of Home Affairs v Eisenberg & Associates*,[63] and *Kruger v President of Republic of South Africa*,[64] and highlighted the following four principles:

(a) With reference to *Ferreira v Levin*,[65] it was established that "own interest standing does not require that a litigant must be the person whose constitutional right has been infringed or threatened", but that the person concerned "should make the challenge in his or her own interest". This clearly referred to two aspects. Firstly, at that stage, there had not yet been any infringement of the right against self-incrimination in *Ferreira v Levin*, but secondly, if left unchallenged, the stipulations of section 417(1)(b) of the Companies Act had the

60 Par 19[34-35].
61 Refer to discussion under par5 above.
62 See Cameron's *dictum* quoted *supra*.
63 *In Re Eisenberg & Associates v Minister of Home Affairs* 2003 ZACC 10; 2003 5 SA 281 (CC); 2003 5 BCLR 838 (CC).
64 2008 ZACC 17; 2009 1 BCLR 268 (CC).
65 *Supra* n 41 par 20[37].

potential[66] to directly affect the applicants' rights, and thereby their interest.

(b) With reference to *Minister of Home Affairs v Eisenberg*,[67] where a challenge was brought against immigration law regulations that had been published without following the prescribed process of inviting public comment, it was established that a law firm had own-interest standing to bring a constitutional challenge, and "had an interest as a member of the public in asserting the right that it claimed to have and had standing to raise that issue in its own interest".[68]

(c) With reference to *Kruger v President of Republic of South Africa*,[69] it was established that certain uncertainties about proclamations "had negatively affected his [the attorney's] ability to understand and engage with the legislative scheme on which his clients relied for compensation, making him less able to manage his clients 'affairs'".

(d) Still with reference to *Kruger v President of Republic of South Africa*,[70] it was established that practitioners who asserted personal standing in challenging legislation had to demonstrate that bringing the challenge was in the interest of the administration of justice, addressing the need to bring legal certainty. Sole reliance on pure financial interest was not enough.[71]

I will next deal with the *Tulip Diamonds* case,[72] in which an own-interest applicant was found to be lacking the "something more" requirement for standing that Cameron J established in the *Giant Concerts* matter. The different approaches followed by the Supreme Court of Appeal and the Constitutional Court in determining standing are notable. In my view, the approach followed by Van der Westhuizen J in the Constitutional Court encapsulates the reason why the own-interest category of claimants was established in terms of section 38(a) of the Constitution.

9 Applying the Principles: The *Tulip Diamonds* Matter

Both the Supreme Court of Appeal and the Constitutional Court agreed that the applicant, Tulip Diamonds, a foreign company conducting business in Dubai, United Arab Emirates, (a foreign company with interests in South Africa) had standing to bring an application for an interdict to protect its interests in the South African courts. However, as far as demonstrating a protectable interest derived from a vested right

66 Own emphasis.
67 *Supra* n 41 par 21[21].
68 Par 21[38].
69 Par 22[39].
70 Par 22[40].
71 Par 23[40].
72 *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* 2013 (2) SACR 443 (CC)).

was concerned, both courts dismissed Tulip's appeals, and found it to lack standing.

The facts of the case were as follows:[73] Tulip imported diamonds from countries such as Angola and the Congo to Dubai, from where it exported the stones to various countries. A South African company referred to as "Brinks", served as Tulip's courier service to transport the diamonds to Dubai. As such, Brinks was in possession of a number of documents pertaining to its dealings with Tulip. A Belgian client of Tulip's, Omega Diamonds, was placed under investigation in Belgium for tax-related issues. It was suspected that Omega under-declared the value of diamonds imported from Dubai. In its investigations, the Belgian authorities came across the invoices issued by Brinks, and subsequently requested the South African authorities, in terms of the Cooperation in Criminal Matters Act,[74] to gather certain evidence from Brinks. Included in the Belgian request to the South African authorities was the request "to seize and take copy of all relevant documents (including invoices, Kimberley certificates, packing lists [and] shipment dockets").[75] The South African authorities acceded to the request and issued a subpoena against Brinks. Tulip heard about the subpoena and, after an exchange of letters between the legal representatives of the two companies, successfully applied for an interdict in the South Gauteng High Court restraining Brinks from producing the listed documents, pending an application by Tulips to review the decisions taken by the Director-General, the Minister, and the Magistrate who issued the subpoena. The High Court held that because Tulip was a foreign company with no South African presence, it lacked standing, and the review application was dismissed.

9 1 The Supreme Court of Appeal Judgment

In its appeal to the Supreme Court of Appeal, Tulip contended that it had a substantial interest in the subject matter of the litigation based on its right to confidentiality in the documents held by Brinks,[76] and argued that it had standing in a South African court to protect that right. The court[77] reiterated the common-law requirement for legal standing, namely proof of a sufficient and direct interest in proceedings to warrant a litigant's title to prosecute the claim asserted. Moreover, the court found that the court *a quo*'s finding of non-standing was based on a faulty premise created by the judgments in *Lawyers for Human Rights v Minister Home Affairs*[78] and *Kaunda v President of the RSA*,[79] amongst others. Those cases were distinguishable from the *Tulip Diamonds* matter in that

73 447[2-16].
74 75 of 1996.
75 *Supra* n 56 par 39[81].
76 *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* 810/2011 ZASCA 111 par [3].
77 *Idem* par [13].
78 2004 4 SA 125 (CC).
79 2005 4 SA 235 (CC).

they had dealt with the definition of the class of beneficiaries of the rights in the Bill of Rights. They did not deal with standing *per se*, as in the *Tulip Diamonds* case, and there was no bar against the standing of a foreign litigant with a "protectable interest" in a South African court.[80]

However, because Tulip did not demonstrate that it had a direct and substantial interest in the right that was the subject matter of the litigation, namely the right to confidential treatment of the information contained in the documents held by Brinks, the court found that Tulip lacked standing. Significantly, once this finding was made, the Supreme Court of Appeal did not deal with the merits of the case, while the Constitutional Court – on authority of *Giant Concerts* – did.

9 2 The Constitutional Court Judgment

In an analysis of Tulip's standing, or lack thereof, the majority judgment of the Constitutional Court, delivered by Van der Westhuizen J, proceeded from the basis that because the review application was brought in terms of PAJA, and the terms of section 38 of the Constitution ought to have been included in and read into the PAJA, the meaning and definition ascribed to the phrase "adversely affects" in the PAJA had to be considered in the context of standing as well.[81]

The court found that where a litigant sought to vindicate "a right promised in the Bill of Rights", as Tulip did, the starting point had to be section 38 of the Constitution. This was so, because section 38 was "a deliberate and radical departure from common law". Moreover, the court said that this approach was "precise and efficient", and that "constitutional standing is broader than traditional common-law standing".[82] It made substantial reference to the judgment in *Giant Concerts*,[83] and stated as follows:[84]

> To succeed, Tulip must establish both components of own-interest standing: interest and direct effect. As discussed in Giant Concerts, Tulip must demonstrate that its interests are more than hypothetical or academic. It must also show that its interests and the direct effect are not unsubstantiated. Mere allegations, without more, are not sufficient to prove the elements of own-interest standing.

9 2 1 The Alleged Interest Derived From a Right

On what "interest" derived from vested rights did Tulip rely? In its founding papers, Tulip stated that South Africa's accession to the Belgian authorities' request to seize the documents in Brinks' possession would materially infringe upon Tulip's "proprietary rights in its confidential

80 *Idem* n 59 par [14].
81 *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* 93/12 2013 ZACC par 15[27-29].
82 *Idem* par 16[29].
83 Discussed in paragraph 7 *supra*.
84 65 par 18[31].

business information …".[85] This line of reasoning was extended in argument before the Constitutional Court, where this interest was described as "informational privacy", which included a right to "informational self-determination". As Tulip was the subject of the information contained in the documents to be seized, it was argued that Tulip was entitled to determine with whom such information could be shared.[86]

9 2 1 1 The Interest Derived From the Right to Privacy

The court was swift in dealing with Tulip's reliance on the right to privacy in the documents to be seized. It pointed out that juristic persons were not the bearers of human dignity, and that, for this reason, their rights to privacy could hardly be "as intense" as those of human beings.[87] In addition, no facts indicated that there was an infringement upon Tulip's privacy rights, either subjectively or as "an objectively reasonable expectation".

9 2 1 2 The Interest Derived from the Right to Confidentiality

Next, Tulip relied on interest based on its right to confidentiality in the documents to be seized. However, this claim also did not assist Tulip in establishing standing, because: (a) It was not shown that a general duty of confidentiality existed between principal and courier in South African law; and (b) There was no contract between Tulip and Brinks that created a mutual confidentiality obligation.[88] The court, in my view, correctly, observed as follows:

> There may be remedies for breaches of confidentiality between immediate parties in private law, but that does not translate without more into a legally protectable interest in preventing the disclosure of information sought in respect of an investigation of a third person, as in the case here.[89]

9 2 1 3 The Interest Derived From the Right of Ownership of the Documents

Van der Westhuizen J interpreted Tulip's final reliance on interest deriving from its alleged right of ownership of the documents held by Brinks as a claim based on the contents of the documents rather than the documents themselves.[90] However, Tulip failed to lay any basis for its ownership of the contents of the documents. The fact that the documents might have mentioned Tulip was no indication of ownership.[91]

85 Par 18[32].
86 Par 18-19[33].
87 Par 19[35].
88 Par 20[37].
89 Par 23[43].
90 Par 20[38].
91 Par 21[39].

9 2 2 "Direct Infringement" of Interest, on the Assumption that there is Interest

The line of reasoning next followed by Van der Westhuizen J in addressing the "second leg" of the inquiry into standing followed the authority of Cameron J in the *Giant Concerts* case discussed earlier.

Reason would have dictated that, once the court made the finding that there was no interest derived from any right, there could be no "direct infringement". However, the court for the moment assumed that the purported interests did exist. As noted before,[92] the court in the Giant Concerts matter did say that:

> … there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even where the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.

Van der Westhuizen J thus proceeded on this basis. In finding that Tulip did not demonstrate any direct effect on any of its interests, the consideration of that (potential) effect, according to the court, needed not to be contemplated "in the abstract" in this case.[93] On the assumption that Tulip did have an interest that could potentially have been affected, the court found that "there is nothing to show that ownership of the documents will be lost or that a breach of confidentiality will potentially affect Tulip in some demonstrable way".[94]

10 Own Interest Combined With the "Other" Interests Provided for in Section 38 of the Constitution

In closing, I will refer to a few cases where the applicants relied on a combination of own-interest litigation and litigation based on the other "interests" provided for in terms of section 38 of the Constitution. If, in addition to own interest, a litigant is able to demonstrate a broader public interest, the chances of obtaining legal relief in constitutional cases increases substantially.

In *Kruger v President of the RSA*,[95] the applicant was an attorney who specialised in personal-injury cases. The matter concerned the constitutional validity of two proclamations that had been issued by the President and that intended to give effect to certain sections of the Amendment Act that would have resulted in the amendment of a number of sections of the Road Accident Fund Act.[96] The respondent

92 Under par 7.
93 *Supra* n 64 par 21[41].
94 Par 22[42].
95 2009 1 SA 417 (CC).
96 *Idem* par 421[3] E&F.

objected to the applicant's standing to bring the application. Skweyiya J, with reference to O'Regan J in *Ferreira v Levin*, explained the need for a generous and expanded approach to standing in constitutional litigation.[97] In cases of a public nature, the *nexus* between the plaintiff as victim of harm as well as beneficiary of relief is not always that "intimate". Skweyiya J said: "The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may be quite diffuse or amorphous". In affirming the view of a generous approach to standing, Skweyiya J[98] was mindful of the fact that "constitutional litigation is of particular importance in our country where we have a large number of people who have had scant educational opportunities and who may not be aware of their rights". *In casu*, the applicant's demonstration of the central importance of the impugned proclamations in his field of work, as well as the need to obtain legal certainty for the proper administration of justice, was sufficient to clad him with standing.

In *Democratic Alliance v The Acting National Director of Public Prosecutions*,[99] the court *a quo* held that the Democratic Alliance, a registered political party in South Africa, had no standing to ask the court to review a decision by the first respondent to discontinue prosecution of the third respondent. As a consequence, the court refused the Democratic Alliance's application that would have compelled the handing-over of the record that had informed the first respondent's aforementioned decision.

In his judgment, Navsa JA referred to the constitution of the Democratic Alliance, which recognised the 1996 South African Constitution as the "only foundation" on which "an open opportunity society can be built", and the necessity to "protect the people of South Africa from the concentration and abuse of power".[100] It was accepted on behalf of the third respondent that all political parties in the national parliament of South Africa subscribed, swore or affirmed faithfulness to the country and its Constitution, and therefore, that "all political parties participating in Parliament must necessarily have an interest in ensuring that public power is exercised in accordance with constitutional and legal prescripts and that the rule of law is upheld".[101] In summary, Navsa JA found that the DA had standing "to act in its own interests, as well as in

97 Par 427[23] G.
98 Par 428[23] C&D.
99 2012 3 SA 486 (SCA).
100 *Idem* par 503[43].
101 Par 503[44]. See also the judgment in *Bio Energy Afrika Free State (Edms) Bpk v Freedom Front Plus* 2012 2 SA 88 (FB) par 92[10]-[17], where the court held that the Freedom Front Plus – a political party who challenged the legality of the conduct of an organ of state in transferring public property to a private party in contravention of the relevant statutory provisions, and sought to have the transaction set aside – had standing on the grounds that it was acting in the public interest as well as in the interests of its supporters, who were residents and ratepayers of the concerned area of the local authority's jurisdiction.

the public interest, and is entitled to pursue that application to its conclusion".[102]

In *Southern African Litigation Centre v National Director of Public Prosecutions*,[103] two non-governmental organisations applied for a review of a decision taken by the National Director of Public Prosecutions not to investigate alleged crimes against humanity that were said to have occurred in Zimbabwe in 2007, and were allegedly committed by Zimbabwean officials against Zimbabwean citizens. The *causa* of the application was based on the principle of universal jurisdiction, and its statutory recognition in South Africa in terms of the Implementation of the Rome Statute of the International Criminal Court Act.[104] A number of objections against the applicants' standing were unsuccessfully raised.[105] The applicants stated that they had brought the application in their own interests, as provided for in section 38(a) – on behalf of the victims of torture in Zimbabwe, who could not act in their own names, and therefore, in terms of section 38(b) and (c) of the Constitution – as well as in the public interest, in terms of section 38(d) of the Constitution. Torture is universally condemned by the international community, and the applicants therefore contended that they had "an interest in the prohibition of torture and the apprehension of torturers".[106] The essential content of the "public interest" of the application was that, without effective prosecution of torturers, there was a risk of "South Africa becoming a safe haven for torturers, who may travel here freely with impunity".[107]

The court reiterated the need for a broad approach to standing in constitutional matters, as referred to in *Ferreira v Levin*,[108] and, because of the magnitude of the crisis in Zimbabwe:

> … SALC [the Southern African Litigation Centre] was accordantly not barred from bringing an application in its own interest, namely an interest in ensuring investigations and prosecutions of those suspected of having committed crimes against humanity.[109]

Freedom under Law v Acting Chairperson: Judicial Service Commission[110] concerned the well-publicised debacle about Hlophe JP's alleged attempts to influence certain judges of the Constitutional Court, the subsequent complaint to the Judicial Service Commission by the Constitutional Court judges concerned, the counter-complaint by Hlophe JP, and the Commission's dismissal of the complaint. The Supreme Court

102 Par 504[44].
103 Unreported, case number 77150/09 (NGHC). See http://www.saflii.org/za/cases (accessed 2012-07-20).
104 27 of 2002.
105 *Supra* n 86 par 40(12–60).
106 Par 42(12.1).
107 Par 42(12.1).
108 See discussion *supra*.
109 *Supra* n 86 par 51(23).
110 2011 3 SA 549 (SCA) par 549.

of Appeal was called upon to review the Commission's decision. Hlophe JP contended that the applicant, Freedom under Law, lacked standing. Streicher JA, who delivered the judgment and finding that the applicant did indeed have standing, pointed out that the mission of the applicant, as a registered non-profit company, was "to promote democracy under law, advance the understanding and respect for the rule of law and the principle of legality, and secure and strengthen the independence of the judiciary".[111] He found no reason to doubt the applicant's statement that it was acting in the public interest. Furthermore, he found that "every South African citizen has an interest to be served by judges who are fit for judicial office, and by courts which are independent and impartial".[112] The Commission was reminded of its duty to properly and lawfully deal with complaints.

11 Conclusion

Before I draw some specific conclusions with regard to the South African law on standing in constitutional cases, it is opportune to remind ourselves that in the previous South African Westminster model of parliamentary supremacy, no court of law was competent to inquire into or pronounce upon the validity of an Act of Parliament In direct contrast to the present constitutional democracy. That position meant that courts simply did not have the power of judicial review by which the legality of Acts of Parliament and of the exercise of state power could be determined. Under the Westminster model of state, courts attempted to discern the intent of Parliament, and confined themselves to the interpretation of legislation based on the intent of the legislator. To a great extent, courts merely determined what the law was, while very little was left to judges' own convictions about justice.

The strict requirements for standing in South Africa's previous legal dispensation, and the importance of a litigant showing a "direct and substantial interest" in the subject matter as well as in the relief claimed in actions where the public interest may have been directly or indirectly at stake, were illustrated in paragraph 2. This strict judicial application of standing requirements was based on the fear that a too liberal approach to standing would result in "floodgate" litigation, which would in turn hamper public administration.

By necessary implication, the adoption of the 1996 South African Constitution introduced an era of monumental change in constitutional standing provisions, the extent of which is reflected in South African case law. *Ferreira v Levin* was a seminal judgment in this regard. Not only did it rule that courts were expected to follow a generous approach to standing in constitutional litigation so as to ensure that rights contained in the Bill of Rights came to fruition, but extended that to other rights also

111 *Supra* par 556[16] B-C.
112 Par 557[22] D,E-F.

contained in the Constitution. The applicants in *Ferreira v Levin* did not have to wait until their rights against self-incrimination were infringed or threatened by their potentially incriminating answers in company liquidation inquiries, but were able to bring their challenge to court as soon as an inconsistency was established between the impugned law and the Constitution. The common-law requirement for standing, namely that the subject matter and relief should not be hypothetical or academic, including in constitutional challenges, was retained and gainfully applied in *Ferreira v Levin* so as to ensure that unjustifiable cases are not brought to court.

I proceeded to demonstrate the synergy between the PAJA and section 38 of the Constitution. Cameron J's judgment in the *Giant Concerts* matter established this synergy, and was substantial as precedent to an inquiry into the requirements for standing for the own-interest litigant. His judgment, namely that even though the standing of a litigant may be questionable, courts were nevertheless expected to investigate and determine the merits of a constitutional challenge on the presumption that a protectable interest did exist, was evidence of the generosity of the Constitution in allowing us to ensure that constitutional rights and principles came to fruition. He correctly based his judgment on "the interests of justice under the Constitution",[113] and the broader concerns of accountability and responsiveness by the judiciary. In addressing the question of the "something more" that the own-interest litigant is required to establish, Cameron J clearly had in mind a broader public interest consonant with the Constitution.

When bringing constitutional challenges, the own-interest litigant will be well-advised not only to establish his or her own interest and how it is or may be affected, but also a broader public interest in the relief that is sought. From the case law discussed under paragraph 10, it appears that this broader public interest could include: (a) The need to obtain legal certainty for the proper administration of justice; (b) an interest in ensuring that public power is exercised in accordance with constitutional and legal prescripts; (c) the need for the rule of law to be upheld; (d) an interest in preventing South Africa from becoming a safe haven for international criminals; (e) an interest in the promotion of democracy under law; (f) an interest in advancing an understanding and respect for the rule of law and the principle of legality; and (g) the need to secure and strengthen the independence of the judiciary.

The Constitutional Court judgment in the *Tulip Diamonds* case confirmed that section 38 was a radical and deliberate departure from common law, and that the Constitution itself provided a "precise and efficient"[114] framework for a court to inquire into constitutional standing, which inquiry should always have section 38 as starting point.

113 See discussion under par 7.
114 See discussion under par 8.

The judgment by Van der Westhuizen J certainly attested to this and was in all respects consonant with the Constitution.

This undoubtedly augers well for greater legal certainty on the matter of legal standing in constitutional litigation. It has also been demonstrated that much of the incremental development of standing requirements by our courts reflect the proposals made by the SALC in the draft Bill for public interest and class actions, the non-promulgation of which is, as Wallis JA states, lamentable.

The regime of forfeiture of patrimonial benefits in South Africa and a critical analysis of the concept of unduly benefited

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OPSOMMING

Die Leerstuk van die Verbeurdverklaring van Vermoënsregtelike Voordele in Suid-Afrika en 'n Kritiese Ontleding van die Konsep van Onbehoorlike Voordeel

Hierdie artikel poog om die verbeurdverklaring van vermoëensregtelike voordele van die huwelik in die Suid-Afrikaanse reg volledig te bespreek. Die Suid-Afrikaanse howe is gereeld genader om sulke bevele in egskeidings sake te maak vandat die Romeins-Hollandsereg in Suid-Afrika aangeneem is. Hierdie kwessie is eers in 1979 in die Wet op Egskeidings artikel 9(1) gereguleer. Hierdie artikel fokus spesifiek op artikel 9(1) van die Wet en bespreek die faktore wat die howe in ag mag neem as verbeurdverklaringsbevele toegestaan word. Daar word egter geargumenteer dat die howe gevaal het om artikel 9(1) behoorlik te interpreter, aangesien hulle nie riglyne in verband met die betekenis van "onbehoorlike voordeel" (soos dit in die wetsartikel verskyn) voorsien het nie.

1 Introduction

The object of this paper is not simply to narrate the law relating to forfeiture of patrimonial benefits in South Africa, but to provide an in-depth examination of this area of our family law which, in my opinion, has not been adequately covered in recent literature.[1] This paper is necessary not only in academic circles, but also as a point of reference for family law practitioners. Since the adoption of the Roman-Dutch law in South Africa, our courts have, for decades, been called upon to decide whether or not to grant an order of forfeiture of patrimonial benefits in divorce matters.[2] However, the concept of forfeiture of patrimonial

1 Barratt, Domingo, Mahler-Coetzee, Olivier & Denson *Law of Persons and the Family* (2012); Himonga "Persons and Family" in F du Bois (ed) *Wille's Principles of South African Law* (2007) 145-394; Schäfer *Family Law Service* (Issue 54) (October 2010) 26-27; Cockrell, Keithtley, Sinclair, Heaton, Van Heerden, Clark, Mosikatsana & Cockrell *Boberg's The Law of Persons and Family Law* (1999); Cronje, Bernard & Olivier *The South African Law of Persons and Family Law* (1990); Eekelaar & Nhlapo *The Changing Family: Family Forms and Family Law* (1998); Heaton *South African Family Law* (3 ed) (2010); Monareng *A Simple Guide to South African Family Law* (2008); Robinson, Human, Boshoff, Smith & Carnelly *Introduction to South African Family Law* (4 ed) (2009).

2 Mackarness "Roman Dutch Law" 1906 (1) *Journal of the Society of Comparative Legislation* 39.

benefits was legislated in 1979 by the Divorce Act.[3] Section 9(1) of the Act provides factors to be taken into consideration by a court when granting a forfeiture order.[4] This section directs that a forfeiture order should be granted in circumstances where, if the order is not granted, the one party will be unduly benefited in relation to the other. However, the Act neither provides the definition of the phrase "unduly benefited" nor does it clarify what is meant by this phrase in the context of the Act.[5] It is even more concerning that our courts have generally failed, neglected or refrained from explaining or interpreting what this phrase entails, despite this phrase being at the heart of section 9(1) of the Act.

The purpose of this paper is to discuss section 9(1) of the Act as well as to explain what is meant by "unduly benefited" in the said section. I will argue that in order for our courts to adequately discharge divorce matters where forfeiture of patrimonial benefits has been claimed, there must be a clear and concise interpretation and guidance from our courts as to what is meant by "unduly benefited" in the said section. Even though I do not intend to provide a definition in this paper, I will nonetheless unpack the phrase in an attempt to understand what it's possible meaning can be. In the first part of this paper, I will briefly discuss the development of the South African forfeiture of patrimonial benefits regime and demonstrate how South African courts have approached section 9(1) of the Act.

2 Historical Perspective

2 1 The Guilty Principle

At common law, marriage was "to last during the lifetime of the parties; and no divorce was allowed, but by the death of one of the parties, or on account of preceding adultery".[6] As such, divorce was based on the fault principle where the court had to decide the guilt or innocence of a spouse. The common law position was that the guilty spouse should not be allowed to benefit from his or her wrong doing.[7] At common law, "if either of the consorts commits adultery, he or she will forfeit thereby, for

3 Act 70 of 1979 (the Act).

4 "When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited".

5 S 1 of the Act only provides definitions for the following: "court", "divorce action", "rules", "pension fund", and "pension interest".

6 Van Leeuwen *Commentaries on the Roman-Dutch Law* (1820) 83. It is worth noting that adultery was regarded as a crime in both Roman and Roman-Dutch law. See also *Murison v Murison* 1930 AD 159.

the benefit of the injured party, whatever either of them would otherwise have been entitled to by the local law or ante-nuptial contract".[8] De Korte J in *Mulder v Mulder,*[9] was called upon to decide whether the court has the power to make any order regarding what was brought into the marriage by the guilty party. He was of the opinion that the court has the right to declare that all property brought into the marriage by the guilty party shall be forfeit in favour of the other spouse.[10]

Kotze JP differed from the position adopted by De Korte J in *Ferguson v Ferguson* where he held that:

> It was held by Esselen and De Korte JJ, in the case of *Mulder v Mulder* … that property brought into community by a wife guilty of adultery may be forfeited in favour of her husband. Jorissen J however, dissented from this view and thought that the guilty wife could only be declared to have forfeited any benefits which she would have derived from her husband in consequence of the community of property, but not also any property which she herself brought into the community. ... There are decisions of the Dutch courts which support the view taken by Jorissen J and which, with respect, I have always considered to be the correct opinion on the subject. … The passage in van Leeuwen's *Commentaries*, which I have already quoted, can certainly not be said to mean that the guilty spouse forfeits everything that he or she may have brought into the community. … That this is so is clear from what is said by him in ch. 37, sec. 8, where, treating of the rights of the injured spouse in case of adultery, van Leeuwen observes that 'the adulterer forfeits to the injured party everything which, according to the common law or by ante-nuptial contract or otherwise, would have been acquired by him out of the property of his spouse.' And he mentions a decision pronounced on the 19th February, 1609, by the Court of Holland to that effect. This decision is also alluded to in Lybrechts and Kersteman (*loc. cit*.). So in van den Berg's *Nederl. Advysboek*, cons. 118, at p. 298, there is an opinion precisely identical with what is stated by van Leeuwen.[11]

The *Ferguson* case referred to above, was instrumental in explaining and clarifying forfeiture jurisprudence as it is applied in South Africa today. This case in actual fact, drew a road map for practitioners and

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7 Quansay "The order of forfeiture of benefits in divorce proceedings in Botswana: A relic of a bygone era or a ghost of the past?" 2005 (1) *University of Botswana LJ* 120.

8 Van Leeuwen (1820) 424.

9 *Mulder v Mulder* (1885-1888) 2 SAR TS 238.

10 *Idem* 238 (see the headnote).

11 (1906) 20 EDC 221. Kotz JP was further of the view that "the headnote of this consultation erroneously states that the guilty husband forfeits all his property in favour of his wife, for the opinion itself at p. 298 distinctly says that the guilty husband only forfeits all benefits which he would have derived from the property of his wife. Consultation 334 in vol. 1 of the *Dutch Consultations*, and van Zutphen (*Neerl. Practyck, sub voce Overspel*, n. 1, p. 591), likewise agree with van Leeuwen. Nor can van der Keessel (*Thes.* 88) be interpreted in any other way, especially as he refers to a decision of the Supreme Court of Holland of the 19th February, 1743, where a wife guilty of adultery, on a decree of divorce being granted against her, was declared to have forfeited 'all such privileges and benefits as she might otherwise have enjoyed from the said marriage' (*vide* Lybrechts, *loc cit*.)

judicial officers of how to understand the regime of forfeiture of patrimonial benefits. This case was decided on the strength of Jorrisen J's minority judgment in *Mulder v Mulder*.[12] The essence of Jorrisen J's minority judgment was that it does not make sense for a person to bring property or assets into the marriage only to be told that because of his or her wrongdoing which led to the breakdown of the marriage, he or she would lose such property or assets as a punishment for his or her guilt.[13] The effect of the *Ferguson* decision and the minority judgment in *Mulder* was that on divorce only benefits which are derived from the marriage can be forfeited.[14] The guilty party was allowed to keep property that he or she brought to the marriage, in that he or she only forfeited property which was acquired during the subsistence of the marriage.[15] Furthermore, at common law, factors which courts took into account on divorce when granting a forfeiture order were "adultery" and "malicious desertion".[16] Either of the said factors, if proven, would suffice for the innocent spouse to be granted forfeiture.[17]

The better opinion is that laid down by van Leeuwen. The effect of the doctrine adopted in *Mulder v Mulder* would be that, if a millionaire were to marry a poor woman in community of property, he could, on a dissolution of the marriage by reason of his adultery, be declared to have forfeited the whole of his fortune. It seems to me that such a doctrine carries its own refutation with it, and I am satisfied that it is not the correct rule of law. The opinion expressed by van Leeuwen is also that adopted in this colony, as appears from the reported cases. I need but refer to *Dieperink v Dieperink* (Buch. 1877, p. 92), *Hasler v Hasler* (13 SC 377), and *McGregor v McGregor* (15 CTR 114). It is a matter of daily and uniform practice in actions for divorce, where a forfeiture is asked, to declare, on a dissolution of the marriage, that the guilty spouse has forfeited, not his or her property brought into the marriage, but the benefits arising from the marriage. The ground for divorce is in the present instance, however, not adultery, but malicious desertion on the part of the wife".

12 (1885-1888) 2 SAR TS 238 241.

13 *Idem* 241.

14 It is worth noting that it is a moot point in divorce law today as to whether a person can forfeit property he or she brought into the marriage. See *W v W* 2011 (1) SA 545 (GNP) where it was stated that, "the central question in this divorce action is whether a party to a marriage in community of property can be ordered to forfeit an asset she/he has brought into the joint estate. The answer should, in my view be in the negative. The essence and nature of the twin concepts of marriage in community of property and forfeiture of benefits arising from such marriage is this: a party can only benefit from an asset brought into the estate by the other party, not from his own: a *fortiori* such a party cannot be ordered to forfeit her/his own asset. This is the primary basis on which I conclude in this judgment that forfeiture should not be ordered". With respect, I am of the view that this issue is far from being settled in our law, until either the Supreme Court of Appeal or the Constitutional Court pronounce on it.

15 Mulder *op cit* 238.

16 See also *Estate Heinamann & Ors v Heinamann* 1919 A.D 126 and *Allen v Allen* 1951 (3) SA 230(A) 327, the "innocent" spouse had to pray for an order that the "guilty" spouse should forfeit the benefits that have accrued to him or her during the duration of the marriage. The court would make such an order if the "innocent" spouse alleged and proved that the "guilty" spouse had committed adultery or was guilty of malicious desertion.

The doctrine of forfeiture of patrimonial benefits was governed at common law by the wide legal principle of general operation that a man cannot take advantage of his own fault.[18] However, at common law, forfeiture does not follow divorce automatically; a decree of forfeiture would not be granted unless there was a special prayer for it.[19] A forfeiture order would be refused at common law if the court was satisfied that the party claiming forfeiture has, during the marriage, been accessory to or connived in the adultery complained of or has condoned the adultery complained of or that he or she has been guilty of adultery during the marriage.[20] It is evident that at common law there was no formal assessment of whether any party would be benefited or even unduly benefited if the order of forfeiture was not made. There was no objective criterion to follow to establish whether a forfeiture order was competent to be made, hence the courts embarked upon an enquiry to establish the fault of one party as opposed to the other.

2 2 Abolition of the Guilty Principle and the Investigation by the South African Law Reform Commission[21]

South African courts derived their powers to grant forfeiture orders on divorce directly from the common law.[22] As such, courts granted forfeiture of patrimonial benefits on the same grounds as they granted

17 *Ibid*. See also Quansay (2005) 1 *University of Botswana LJ* 120, who argued that "the genesis of the order for the forfeiture of benefits in Roman-Dutch Law is said to be found in Article 18 of the Political Ordinance, 1980 of Holland. This article dealt expressly only with divorce on the ground of adultery and reserved to the plaintiff his Roman law rights conceived as a penalty for the disruption of the marriage. When malicious desertion was eventually accepted as a ground for divorce in Holland, forfeiture of benefits was extended to cover this ground as well by drawing analogy from Article 18 of the Political Ordinance. Thus, forfeiture of benefits was as readily decreed on the ground of malicious desertion as on the ground of adultery".

18 *Murison op cit* 159, "*Digest* 50 17 134 and *Digest* (24 3 10 1) cited in footnote to that maxim. Matthaeus *De Criminibus* on *Digest* (48.3) Note 11 says that a man who has married a woman knowing that she was immodest and hoping that she would commit adultery so that he may get her dowry cannot recover. The same principle applies in the case of a man who puts his wife on the road to ruin after marriage".

19 See *Potter v Potter* (8 EDC 103) & *Peter's v Peters* (1906) TS 515.

20 Lee *An Introduction to Roman-Dutch Law* (4 ed) (1946) 87.

21 This commission used to be known as the "South African Law Commission" but is now referred to as the South African Law Reform Commission (hereinafter referred to as the SALC).

22 See Hahlo *Law of Husband and Wife* (4 ed) (1975) 430 and Himonga in F du Bois 339.

divorce orders, adultery and malicious desertion.[23] In the late 1910s, courts started moving away from treating adultery as a crime when granting divorce orders and started recognising that divorce ought to be granted when the marital contract between spouses has broken.[24] Courts were also not willing to order forfeiture of patrimonial benefits against the "guilty" party who contributed to the acquisition of the property within the marriage.[25] However, our courts continued to treat divorce cases on "the guilt" (or fault) principle, namely on the unrealistic assumption that, in every divorce action, only one of the spouses is "to blame" for the breakdown of the marriage, the other spouse being completely "innocent".[26] As such, the guilt principle was regarded as determinative with regard to the forfeiture of patrimonial benefits of the marriage.[27] This was clearly undesirable as it did not properly cater for both litigants before the court, because it is possible that blame can be apportioned between the spouses. Furthermore, by relying on the guilt principle, courts prevented themselves from properly evaluating the nature of the relationship between the spouses in order to properly assess whether or not forfeiture of patrimonial benefits was an appropriate remedy.

In 1935, South Africa saw the promulgation of the now repealed Divorce Laws Amendment Act,[28] which introduced two further grounds for divorce; incurable insanity for not less than seven years and, the imprisonment of one spouse for at least five years after such spouse has been declared to be an habitual criminal.[29] However, this innovation did not have any impact on the regime of forfeiture of patrimonial benefits.[30] Himonga correctly argues that "in accordance with the function of a

23 *Murison* "where a marriage is dissolved on the ground of adultery committed by one of the spouses, such spouse forfeits any benefits derived from the marriage, and the Court has no discretion to withhold an order for forfeiture of benefits if such an order be claimed by the injured spouse". See also, *Bodley v Bodley* 1911 TPD 756 at 756, where the court stated that "the practice in South Africa is that forfeiture may also be granted in cases of malicious desertion".

24 *Estate Heinamann & Ors v Heinamann* 126, the court held that "forfeiture of the benefits of the marriage by the guilty party stands on a different footing. Forfeiture is decreed not on the ground that adultery is a crime and as a punishment to the guilty party, but on the ground that the contract between the parties has been broken. It is as readily decreed on the ground of malicious desertion as on the ground of adultery".

25 *Celliers v Celliers* 1904 TS 926 where it was held that "in an action for divorce on the ground of adultery the plaintiff is entitled to claim a division of the joint estate and a forfeiture of any benefits which the guilty party may have derived from the marriage; but the Court will not deprive the guilty party of the share of the joint estate which he or she may have contributed".

26 Cockrell 597. See also *Strauss v Strauss* 1971 1 SA 585 (O).

27 *Strauss ibid*.

28 32 of 1935.

29 S1(1)(a) & (b). See also Himonga 320 as well as authorities cited in n 844 thereto.

30 This Act did not have a specific section dealing for forfeiture of patrimonial benefits.

forfeiture order as a punishment of the guilty 'spouse' for his or her misconduct, forfeiture could not be ordered against the defendant in a divorce action based on his or her incurable insanity for the guilty principle did not apply in such a case".[31] Incurable insanity was the only ground for divorce which was not based on the matrimonial misconduct of the spouse whose insanity was declared incurable, but on the objective fact that in reality no marriage existed and thus it was justified that the marriage should be dissolved.[32]

The shortcomings of the South African divorce law and the regime of forfeiture of patrimonial benefits until 1978 attracted severe criticism from academics and legal practitioners.[33] In 1974 the state instructed the South African Law Commission (SALC), as it then was, to inquire into the South African divorce law, which the SALC interpreted to mandate an investigation into "improving this branch of law and adapting it to the requirements of the present-day conditions".[34] At the beginning of 1975 the SALC embarked upon an enquiry into the defects in the existing divorce laws and possible reform measures.[35] The initiative of the SALC led to the publication of a SALC Report on the Law of Divorce and Matters Incidental Thereto.[36] This report among others recognised that:

> Most of the objections to our law of divorce can be traced back to the guilty principle on which the common law grounds are based. It is contended that it is unrealistic to proceed from the assumption that the blame for the breakdown of the marriage lies only with one of the spouses while the other is completely innocent. In by far the majority of cases both parties are to a greater or lesser extent to blame for their marriage breakdown.[37]

Due to the fact that the South African divorce law in 1978 provided that the court had no discretion to deny a forfeiture order if an innocent party claimed for it, the SALC was of the view that this rule was too rigid and failed to take into account the fact that both spouses might be to blame for the breakdown of the marriage.[38] The SALC refused to recommend scrapping the forfeiture concept altogether, but recommended that fault be only one of several factors taken into account

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31 *Ibid* 339. See also Divorce Laws Amendment Act 32 of 1935 s2(b). It is not clear however, whether courts were prepared to grant forfeiture orders against spouses who were declared habitual criminals and imprisoned for more than 5 years. It would appear however, that courts would have granted forfeiture orders in such circumstances, especially if they would be imprisoned for lengthy periods and the other spouse was not prepared to wait for such a spouse to serve his or her sentence.

32 *Harris v Harris* 1949 1 SA 264. See also Barnard *The New Law* (1979) 1.

33 See Barnard *ibid* & *South African Law Commission Report on the Law of Divorce and Matters* incidental Thereto (RP 57/1778).

34 Burman & Huvers 'Church versus State? Divorce Legislation and Divided South Africa' 1985 (12) *Journal of Southern African Studies* 121.

35 Barnard 9.

36 (RP 57/1978).

37 Par 6.2 of the Report (RP 57/1978).

38 Proposals for Law Reform in Namibia' (2000) 117 available at http://www.lac.org.na/projects/grap/Pdf/divlawref.pdf (accessed 2012-10-12).

in forfeiture decisions and not the sole factor.[39] The SALC made it clear that it was ideologically unsupportable to base the law of divorce on the guilty principle and that it was equally unrealistic to assume that fault for the marital breakdown lay with only one party to the marriage. The SALC stated further that:

> In truth, the essence of divorce is the candid acceptance on the part of both parties that the marriage has failed. The Commission recognised further that the disintegration of marriages resulted from a variety of contributory factors and social problems, and was not always, or exclusively, due to marital misconduct. Accordingly, the primary aim of a sound law of divorce is to take account of the social reality of marital break-down, while at the same time providing for the protection of the interests of society in general and of its weaker members in particular. For this reason the Commission proposed that where the marital relationship had in fact broken down irretrievably a decree of divorce should be granted. [40]

The investigation by and the recommendations of the SALC, led to the promulgation of the Act.[41] This was a remarkable development in the South African law of divorce which effectively resulted in the "guilt" and "fault" principles being done away with as grounds for divorce.[42] It has been argued that "the reform of the law of divorce had as its primary objective the formulation of realistic rules for the dissolution of marriages: rules which make it possible to dissolve failed marriages in a way that results in the possible least disruption for the spouses and their dependants, and that best safeguards the interest of minor children".[43] The Act shaped the forfeiture jurisprudence in South Africa, which was somewhat uncertain before its enactment.

3 Forfeiture of Patrimonial Benefits under the Divorce Act 70, 1979

3 1 Section 9(1)

The Act came into operation on 1 July 1979 and totally reformed the South African divorce law.[44] Forfeiture of patrimonial benefits is dealt with in section 9 of the Act which provides that:

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39 Proposals for Law Reform in Namibia' (2000) 117.

40 http://butterworths.wits.ac.za.innopac.wits.ac.za/nxt/gateway.dll?f = templates$fn = default.htm$vid = mylnb:10.1048/enu (accessed 2012-10-12).

41 70 of 1979.

42 In terms of the Divorce Act s4(1), a court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them. The court may also grant a decree of divorce in terms of s5 of the Act on the ground of mental illness.

43 Himonga 321.

44 *Idem* 320–326.

(1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.

(2) In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant.

For the purposes of this paper, emphasis is placed on section 9(1) of the Act, as it is the subsection which courts have often been requested to interpret.[45] This subsection mandates courts to consider three factors before granting a forfeiture order: The duration of the marriage; the circumstances which gave rise to the break-down thereof; and any substantial misconduct on the part of either of the parties. It is not clear as to what is regarded as a long or short marriage duration. However, what is clear from the courts is that when the marriage is regarded by a court as of short duration, the court will order forfeiture if it is established that if the order is not made one party will be unduly benefited.[46] In *Swanepoel v Swanepoel,*[47] the court held that a marriage in community of property which was concluded on 15 December 1990, where one of the parties left the common home on 4 June 1995, was of a short duration.[48] Similarly, in *Malatji v Malatji,*[49] where *lobola* was paid for the defendant during October 2001, the parties married in community of property on 14 February 2002 and the defendant left the common home during June 2003, the marriage was held to be of short duration.[50] The Act does not provide guidance as to how the courts should go about establishing that a marriage is of either long or short duration. It seems it is left to the courts to make their own pronouncement based on the facts of each case without any legislative guidance.

The Act does not determine what circumstances may be considered by the courts in assessing what led to the breakdown of the marriage. Cases are also not explicit on this point. It seems however, that such an analysis will be made on a case-to-case basis and there is no closed list of factors which may be taken into consideration.[51] Misconduct itself is not a factor which can bring about a forfeiture order, such misconduct must be substantial.[52] It is worth noting that the concept of substantial misconduct is not really defined in the Act, and it is unclear what exactly

45 See generally, *Botha v Botha* 2006 4 SA 144 (SCA), *JW v SW* 2011 1 SA 545 (GNP) & *Wijker v Wijker* 1993 4 SA 720 (A).
46 See generally *Swanepoel v Swanepoel* All SA 1996 (3) 444.
47 All SA 1996 3 444.
48 *Ibid.*
49 (23124/2003) [2005] ZAGPHC 142 (4 Feb 2005).
50 *Idem.*
51 *Molapo v Molapo* (4411/10) [2013] ZAFSHC 29 (14 Mar 2013) par 24.3.

it entails. Our courts have also not been helpful in this regard. However, in order to establish substantial misconduct in any given case, there is a need to assess the extent, nature and gravity of the conduct which gave rise to the breakdown of the marriage.[53]

Even though fault is no longer a ground for divorce, it nonetheless remains an important consideration when a court is called upon to make an order of forfeiture of patrimonial benefits.[54] At least two factors listed in section 9(1) of the Act contain elements of fault. The court is empowered to look at the circumstances which led to the breakdown of the marriage, and to ensure whether or not there was any substantial misconduct on the part of either of the parties before the court. When parties allege circumstances which, according to them, led to the breakdown of the marriage, they may apportion blame to the other, thereby establishing the fault of the other party. This will be taken into consideration by the court.

Initially, there was uncertainty whether courts granting a forfeiture order were obliged to have regard to all the factors listed in section 9(1) of the Act. It was not clear whether all these factors must be present and proven to justify a basis for a forfeiture order. In other words, should one factor be absent, then the court should deny a forfeiture order. In *Matyila v Matyila,*[55] the court held that all three factors in section 9(1) had to be alleged and proven and that there is no indication that the court may have reference to only one such factor.[56] There were however, other courts which were of the view that substantial misconduct was the most important factor that must be proven before a court can grant a forfeiture order.[57] In other words there must be proof of substantial misconduct leading to the irretrievable breakdown of the marriage. This position became evident in the case of *Singh v Singh,*[58] where a husband of 22

52 The Act s 9(1) lists substantial misconduct as one of the factors to be considered by the court making a forfeiture order.

53 See 'Forfeiture of Benefits' available at http://butterworths.wits.ac.za/nxt/gateway.dll?f = templates$fn = default.htm$vid = mylnb:10.1048/enu (accessed 2012-10-24).

54 See *Wijker v Wijker* 1993 4 SA 720 at 729 I-J, where van Coller AJA held that "I have little doubt that notwithstanding the introduction into our law of the 'no fault' principle to divorce, a party's misconduct may be taken into account in considering the circumstances which gave rise to the breakdown of the marriage".

55 1987 3 SA 230 (WLD).

56 *Matyila v Matyila* 1987 3 SA 230 (WLD) 234G, Van Zyl J was of the view that "on a proper interpretation of this section it would appear that all three factors should in fact be both alleged and proved. There is no indication that the Court may have reference to only the one or the other. Had the section read differently insofar as there was a reference to 'any other factor which may be relevant' or had the word 'or' or some similar word indicating alternative possibilities been used, then Wepener's argument may hold water". In *Matyila,* Wepener argued that all these factors did not have to be pleaded or proved when an order was sought. His submission was that it would be sufficient to prove only one or two.

57 *Singh v Singh* 1983 1 781 [TPD].

58 *Ibid*.

years, accused his wife of, *inter alia*, leaving the common home, committing adultery during the last two years of the marriage and neglecting her marital duties. The wife contended that she left the matrimonial home due to her husband's mistreatment of her but admitted her adultery. The court found the wife's misconduct to be "substantial" and held that such misconduct outweighed the fact that the marriage had lasted for more than twenty years. The court accordingly ordered forfeiture against the wife on the strength of her misconduct.[59]

The effect of the *Singh* case is that, in the absence of substantial misconduct, the court will not order forfeiture of benefits.[60] This, despite the fact that there is evidence before the court relating to other section 9(1) factors warranting forfeiture of benefits. For instance, if the marriage is of relatively short duration and there is evidence that one spouse entered into the marriage for the sole purpose of benefiting materially.[61] The question of one party being unduly benefited if the forfeiture order was not granted was not entertained in the two cases referred to above. These two cases seem to suggest that such an assessment was not important. The decision in *Matyila* was held to be clearly wrong in *Binda v Binda*.[62]

In *Klerck v Klerck, it was held that:*

> … it was not the intention of the Legislature that substantial misconduct or any of the other factors mentioned in section 9(1) had to be present before the Court could grant an order of forfeiture: what the Court had to do was to ask itself whether one party would be unduly benefited if an order of forfeiture was not made and in order to answer that question regard should be had to the duration of the marriage, the circumstances in which it broke up and, if present, substantial misconduct on the part of one or both parties. Further, that in the circumstances of the present case where there was no evidence of substantial misconduct on the part of the plaintiff or the defendant, because of the short duration of the marriage the plaintiff would be unduly benefited if an order of forfeiture was not made.[63]

59 *Singh v Singh* 1983 1 781 [TPD] 791 C-D. See also Schäfer *Family Law Service Issue* (54, Oct 2010) 28.

60 Himonga 340.

61 See *Swanepoel v Swanepoel* All SA LR 1996 3 444.

62 1993 (2) SA 123 (W) at 127 I, Leveson J held that "in my opinion the considerations I have mentioned and the anomalies I have conjured up show clearly that the Legislature required each of the three factors to be given due and proper weight in assessing whether a party had been benefited unduly. But I am unable to hold that the factors are cumulative and that all must be present before a claimant is entitled to relief by way of a forfeiture order. I therefore consider that the opposite view is clearly wrong and that this Court is not obliged to follow the decision in *Matyila v Matyila".*

63 1991 1 SA 265 (W). See the English headnote. This case was followed with approval in *Binda op cit* 127, where Leveson J held that "Kriegler J, in my opinion, makes the same point in *Klerck v Klerck* at 268C-G, and in that regard I respectfully agree with him".

It has been argued that "the court is empowered to grant forfeiture of patrimonial benefits even in the absence of substantial misconduct, as the legislature had clearly eschewed the principle of fault by enacting the Act and that fault should not be permitted to creep in through forfeiture of benefits".[64] It was further stated in *Englebrecht v Engelbrecht,*[65] that, in the granting of the forfeiture order, the legislature did not elevate fault (substantial misconduct) prominently above all other factors listed in section 9(1) of the Act.[66] It is now evident that courts were beginning to realise that there was no hierarchy as far as factors mentioned in section 9(1) are concerned, and that all the factors listed were equally important hence no one factor amongst them was individually decisive. This essentially meant that each factor on its own, or with another, was capable of convincing the court to grant a forfeiture order.

Even though the court made an assessment as to whether one party would be unduly benefited if an order of forfeiture was made in *Klerck*, it nevertheless failed to explain what the legislature meant by the phrase "unduly benefited". The court simply looked at the length of the marriage and found that the short duration of the marriage warranted an order of forfeiture being made, without explaining how the short duration of the marriage would result in one party being unduly benefited if forfeiture was not ordered. I am alive to the fact that there are instances where it might be said that it is clear that one party will be unduly benefited, especially if the marriage was of relatively short duration and it appears a party wanted to cash in on the marriage, and end it quickly. Here he or she should not benefit. However, things are seldom that simple, hence clear guidance as to what amounts to "unduly benefited" is needed, especially from our courts.

In 1993, the Appellate Division[67] was presented with an opportunity to clarify the South African forfeiture of benefits jurisprudence in the case of *Wijker v Wijker*.[68] Even though this case is celebrated as having clarified the law, especially with regard to the approach our courts should adopt when dealing with the factors in section 9(1), I am of the view that it missed a golden opportunity to provide clarity on what is meant by "unduly benefited". In this case, the court held that "the context and the subject matter make it abundantly clear that the legislature could never have intended that the factors mentioned in the section should be considered cumulatively".[69] This means that the party seeking a forfeiture order need not allege and prove all the factors listed in section 9(1) to be successful. A party seeking an order of forfeiture of benefits will be successful if he or she can prove that as a result of one or more of the

64 Sinclair "South Africa: Protecting children - poverty, abuse, divorce and political turmoil" 1992 – 1993 (31) *U Louisville J Fam. L* 475. See also *Klerck v Klerck op cit*.
65 1989 1 SA 597.
66 *Idem* 602-3.
67 As it then was. Now the Supreme Court of Appeal.
68 1993 4 SA 720.
69 *Idem* at 729 E.

factors listed in section 9(1), the other spouse would be unduly benefited if forfeiture of benefits is not ordered.[70]

The approach in *Wijker* was followed and confirmed in *Botha v Botha,*[71] where the court further clarified that "the trial court may therefore not have regard to any factors other than those listed in section 9(1) in determining whether or not the spouse against whom the forfeiture order is claimed will, in relation to the other spouse, be unduly benefited if such an order is *not* made".[72] This simply means that the factors listed in section 9(1) are a closed list, hence the court will not entertain any other factor. Unfortunately, the court in *Botha* also failed to analyse what the legislature meant in section 9(1) by "unduly benefited". I respectfully submit that the court should have done so irrespective of whether or not it was called upon to do so by the parties. Furthermore, the court should, at the very least, have made *obiter* remarks regarding the phrase "unduly benefited".

Section 9(1) further grants courts the discretion, after granting a decree of divorce, to decide whether or not to grant a forfeiture of patrimonial benefits order having regard to the circumstances of the particular case, the nature of the evidence led and the facts proven before the court. When exercising their discretion, courts should be careful not to refuse such an order when it is competent to do so in the circumstances of the particular matter. Courts should also be careful to apply their minds thoroughly to the facts before the court when granting forfeiture of patrimonial benefits orders, especially in undefended divorces. The decision whether or not to grant forfeiture orders, lies with the court. It has been held however, that the court's discretion is restricted to a consideration of the three factors mentioned in section 9(1) of the Act, thus no other factor may be taken into account by a court when granting a forfeiture order.[73]

4 Unduly Benefited

It is worth noting that although *Wijker* has given some clarity, this area of South African family law still needs to be further clarified, more

70 See Marumoagae "Forfeiture of patrimonial benefits – it's not about what is fair" *De Rebus* (July 2012) 21-22 22. See also *Wijker op cit* 729 E.

71 2006 4 SA 144 (SCA).

72 2006 4 SA 144 (SCA) par 8.

73 *Moodley v Moodley* [2008] 48 ZAKZHC par 8. See also an unreported case of *O v O* [2011] ZAGPPHC 182; 35432/2008, 42644/2010, 40419/201 (2 Sept 2011) par 66, where it was held that "a discretion is clearly conferred upon the court in terms of section 9(1) whether or not to order forfeiture of the p**a**trimonial benefits of the marriage. That discretion may be exercised in favour of either of the spouses and may relate to the whole or only a portion of the patrimonial benefits. Moreover, the court is enjoined to have regard to various factors specified in the said section, in the exercise of that discretion in order to determine whether one party will in relation to the other be unduly benefited if the order for forfeiture is not made".

especially with regard to what section 9(1) means by "unduly benefited". This phrase has never been under judicial scrutiny despite being at the heart of section 9(1). Our courts have been really creative in manoeuvring around this phrase without attaching any real significance to it. I therefore submit that a proper contextual analysis by our courts is needed in order to provide guidance on what is meant by "unduly benefited", in section 9(1). I am of the view that such an analysis will go a long way in assisting our courts to reach well-reasoned and just decisions. Such a positive step by our courts may inspire the legislature to amend the Act and provide relevant definitions which are currently absent from the Act.

I am not proposing that courts should provide a concise and precise definition of "unduly benefited", rather, they should provide guidelines on how this phrase should be understood, as this will assist litigants in convincing the court to either grant or refuse a forfeiture of patrimonial benefits order. Interpreting and contextualising this phrase would breathe life into section 9(1) and would lead to it being understood within a social context. I submit that this approach would make it even easier for the court to marry the facts before it with the law and thus properly articulate how it has arrived at its decision. This will also go a long way in assisting parties before the court in understanding the reasoning behind the order. It is important that courts start deciding cases relating to section 9(1) of the Act by interpreting and providing clarity as to what is meant by the phrase "unduly benefited" in the context of that section. Surely it cannot be regarded as being sufficient to merely assess the facts and reason in such a manner as to force them to align with one or more of the factors listed in section 9(1), and thereby conclude that one party will be unduly benefited should the order of forfeiture of patrimonial benefits not be made, without a proper interpretation and guidance regarding the meaning of "unduly benefited".

It is not my purpose to provide a definition of what "unduly benefited" means but I will make some suggestions in order to spark academic and judicial debate which may lead to a working definition. I submit that this phrase can be understood as a benefit (being property subject to the joint estate) accruing to a person whose conduct does not justify such a person receiving such a benefit. In other words, the person to whom the benefit is due has, through his or her conduct, shown him- or herself not to be entitled, worthy, warranted or deserving to receive such a benefit.

An example of such conduct would be if A marries B in community of property knowing B to be wealthy and under a mistaken impression that B suffers from a particular disease and would die soon. Shortly after the marriage A discovers that B is actually healthy and proceeds to file for divorce. Under these circumstances, should A be allowed to receive half of the joint estate which, by virtue of the marriage in community of property, he or she is entitled to? A would, In my opinion, be unduly benefited thereby. Such a benefit is undue because, at the time of entering the marriage, A was motivated by his or her expectation of

being rewarded from the proceeds of B's estate. This was effectively a marriage of convenience. A is not deserving of the benefit which would ordinarily accrue to him or her. These facts will be used in assessing the "duration of the marriage" factor listed in section 9(1) and this will be a basis to award forfeiture of benefits. It is thus evident from the example I provided that should A nonetheless receive a benefit despite his or her conduct, he or she will be unduly benefited in the circumstances.

5 Conclusion

It is trite that divorce dissolves a marriage from the moment that the court grants the divorce decree and makes its pronouncement. The joint estate in a marriage in community of property usually comprises both the movable and immovable assets acquired before and during the subsistence of the marriage. A spouse to such a marriage cannot argue that he or she acquired an asset before the marriage and therefore such asset does not form part of the joint estate. In the event of a marriage in community of property being terminated by a decree of divorce and the spouses failing to agree on the division of assets, the court may appoint curators or liquidators to divide the property.[74] Absent a forfeiture order, the assets of the joint estate will be equally divided between the spouses.

This paper first discussed the common law position and then looked at how South African courts treated cases relating to forfeiture of patrimonial benefits before the promulgation of the Act in 1979. It was shown that the courts relied on the guilt principle in order to reach their decisions. Since the coming into effect of the Act, South Africa's courts have been called upon to pronounce on section 9(1), however, they have been inconsistent regarding the weight to be attached to each of the factors listed in section 9(1) when granting an order of forfeiture of patrimonial benefits. It was only in 1992 that the Appellate Division in *Wijker* "clarified" the position and stated that all three factors do not have to be present and they need not be considered cumulatively. I submit that South African courts generally, have failed to properly interpret section 9(1) of the Act as they have neglected to provide guidance on

74 *Salaman v Salaman and Another* [2008] ZAKZHC 61 par 16. In *Gillingham v Gillingham* 1904 TS 609 Innes CJ stated that: "When two persons are married in community of property a universal partnership in all goods is established between them. When a court of competent jurisdiction grants a decree of divorce that partnership ceases. The question then arises, who is to administer what was originally the joint property, in respect of which both parties continue to have rights? As a general rule there is no practical difficulty, because the parties agree upon a division of the estate, and generally the husband remains in possession pending such division. But where they do not agree the duty devolves upon the court to divide the estate, and the court has power to appoint some person to effect the division on its behalf. Under the general powers which the court has to appoint curators it may nominate and empower someone (whether he is called liquidator, receiver, or curator … perhaps curator is the better word) to collect, realise, and divide the estate. And that that has been the practice in South African courts is clear".

what the phrase "unduly benefited" means within the context of the Act. I have argued that should the court give due weight to the said phrase, this will go a long way in assisting them to reach just decisions.

Aantekeninge/Notes

Is die rede vir die beslissing in *Knox NO v Mofokeng and Others* 2013 4 SA 46 (GSJ) regtens korrek?

1 Inleiding

Knox NO v Mofokeng and Others (2013 4 SA 46 (GSJ)) is verlede jaar in die Julie 2013 hofverslag opgeteken. Die beslissing wys op verskillende aspekte wat vir die Sakereg belangrik is. Daar gaan in hierdie aantekening op een aspek, naamlik die rede vir die beslissing, gekonsentreer word. Daar word begin deur na die feite van die saak te verwys.

2 Feite

Applikant is die eksekuteur van sy oorlede moeder se boedel. Hy doen aansoek om 'n bevel vir drie bedes. Bede een vra dat die aanvanklike geregtelike verkoping van die onroerende eiendom van die oorledene se bestorwe boedel en verdere verkooptransaksies nietig is (50G-H). Bede twee versoek dat die oordrag van die eiendom aan tweede respondent en daarna aan eerste respondent gekanselleer word (50H-I). Laastens, versoek applikant dat die vermelde eiendom geherregistreer word in die naam van die bestorwe boedel van die oorledene (50I). Die Registrateur het geen beswaar teen die toestaan van die bevel deur applikant aangevra nie (50I).

By afsterwe van oorledene was die eiendom, wat by wyse van geregtelike verkoping aan tweede respondent verkoop is met verband ten gunste van FirstRand Bank Ltd beswaar. Die betaling van die verbandpaaiemente het met die bereddering van die boedel agterstallig geraak en applikant het FirstRand meegedeel dat die verband by afhandeling van die boedel volbetaal sal word. Desnieteenstaande, beteken FirstRand 'n dagvaarding op oorledene se *domicilium citandi et executandi* ingevolge die verbandooreenkoms. Applikant het nooit kennis van hierdie dagvaarding gekry nie en sodoende verkry FirstRand vonnis by verstek teen die applikant in sy hoedanigheid as eksekuteur van die boedel van oorledene. FirstRand voltooi die proses deur 'n lasbrief vir eksekusie op die beswaarde eiendom ook op die vermelde *domicilium* te beteken. Weereens dra applikant geen kennis van die beslaglegging nie. Die eiendom word geregtelik aan tweede respondent verkoop, wie dit daarna aan eerste respondent oordra. Eers nadat hierdie tweede oordrag plaasgevind het, verneem applikant van die oordragte. Dit noop applikant tot 'n nietigverklaringsaansoek van die bevel by verstek, wat toegestaan word (parr 7-8).

Na nietigverklaring van die bevel by verstek ten gunste van FirstRand, verlaat eerste respondent die eiendom en herwin applikant weer beheer van die eiendom. Intussen verkry Standard Bank SuidAfrika (Standard Bank SA) 'n lasbrief vir eksekusie van die eiendom vir geld aan eerste respondent geleen. Die geld is geleen en met verband teen die eiendom ten gunste van Standard Bank SA verseker. Die lasbrief vir eksekusie maak voorsiening vir `n geregtelike verkoping van die eiendom op 21 Julie 2011. Desnieteenstaande pogings van applikant om die regsposisie aan Standard Bank SA te verduidelik, hou laasgenoemde vol dat hulle geregtig is op geregtelike verkoping van die eiendom. Gevolglik noop dit applikant om 'n dringende aansoek te bring om die geregtelike verkoping stop te sit, wat op 21 Julie 2011 toegestaan is (par 9). Standard Bank SA (derde respondent) is die enigste party wat die aansoek om die bevel dat die eiendom in naam van die bestorwe boedel van oorledene herregistreer word, teenstaan. Hulle verweer is dat eerste respondent die eienaar van die eiendom bly, aangesien die eiendom in sy naam geregistreer is (par 10).

3 Regsargumente van Regsverteenwoordigers van Applikant en Derde Respondent (Standard Bank SA)

3 1 Regsargumente van Applikant

Applikant se regsverteenwoordiger voer aan dat die geregtelike verkoping van die eiendom, nadat FirstRand 'n bevel by verstek verkry het, nietig is, aangesien die verstekvonnis teruggetrek is (52D-E). As gesag vir hierdie argument word daar op twee beslissings gesteun. Een, in *Menqa and Another v Markom and Others* (2008 2 SA 120 (HHA)) word bevind dat die lasbrief vir eksekusie nietig was en gevolglik is alle daaropvolgende verkope en oorgang van eiendomsreg nietig (*Knox*-saak par 12). Twee, in *Campbell v Botha and Others* (2009 1 SA 238 (HHA), het die Hof ook beslis dat die geregtelike verkoping van eiendom en die oorgang van die eiendomsreg nietig is, omdat die oorspronklike bevel teruggetrek is (*Knox*-saak par 12).

In die alternatief word aangevoer dat die geregtelike verkoping aan tweede respondent ongeldig is, aangesien die vereistes van artikel 30 van die Boedelwet (66 van 1965) nie nagekom is nie (par 13). Artikel 30 bepaal onder andere, dat niemand wat met die tenuitvoerlegging van 'n lasbrief of ander prosesstuk belas is, mag enige goed in die boedel van die ooreledene verkoop nie, tensy die hof anders gelas of tensy die persoon wat met die tenuitvoerlegging van 'n lasbrief of ander prosestuk belas is nie van die dood van die oorledene kon geweet het nie.

3 2 Regsargument van Standard Bank SA

Standard Bank SA se regsverteenwoordiger steun op die abstrakte stelsel vir die oorgang van eiendomsreg as verweer. Ingevolge hierdie stelsel word eiendomsreg oorgedra desnieteenstaande die verbintenis-skeppende ooreenkoms nietig is, indien die saaklike ooreenkoms geldig

is. Hiervoor steun hy op twee beslissings waar die abstrakte stelsel ook in die geval van die oorgang van eiendomsreg van onroerende goed aanvaar is, naamlik *Legator McKenna Inc and Another v Shea and Others* (2010 1 SA 35 (HHA)) en *Meintjes NO v Coetzer and Others* (2010 5 SA 186 (HHA)) (*Knox*-saak par 14). Standard Bank SA voer aan dat aangesien die saaklike ooreenkomste in die saak onder bespreking nie aanvegbaar is nie, was daar geldige eiendomsoorgang aan eerste en tweede respondente (par 15). Omdat *Menqa* en *Campbell* (hierbo 3 1) nie die abstrakte stelsel op onroerende eiendom toegepas het nie, is die beslissings teenstrydig met die vermelde stelsel (par 15) en is die eiendomsoorgang geldig.

4 Kommentaar op die Beslissing en die Rede(s) van die Hof

Die aansoek slaag en die hof maak 'n bevel wat al drie bedes verleen (par 32). Daar word met die beslissing saamgestem. Daar word egter van die rede vir die beslissing verskil.

4 1 Die *Ratio Decidendi* vir die Beslissing

Die toepassing van die abstrakte teorie vir eiendomsoorgang is myns insiens die hof se rede vir die beslissing. Ek sal dit vervolgens aantoon. Soos bekend is die inhoud van hierdie teorie in die woorde van die hof in *Legator* (par 8):

> *In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery – which in the case of immovable property is effected by registration of transfer in the deeds office – coupled with a so called real agreement or* saaklike ooreenkoms*. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property. … Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass – despite registration of the transfer – if there is a defect in the real agreement. …* (Sien ook *Du Plessis v Prophitius and Another* 2010 1 SA 49 (HHA) parr 10 & 11 vir die inhoud van die abstrakte teorie.)

4 2 Die Vindikasiebevoegdheid van die Skuldenaar-Eienaar

Die hof is van mening dat daar twee gemeenregtelike beginsels/reëls by geregtelike verkopings toepassing vind.

Beginsel een het as inhoud dat die vindikasiebevoegdheid (en ook eiendomsreg) tot niet gaan, indien 'n geregtelike verkoping ingevolge 'n geldige hofbevel plaasvind en eiendomsreg aan 'n *bona fide* koper oorgedra word en die bevel daarna tersyde gestel word (sien ook *Campbell v Botha* par 10). Die bewyslas rus op die skuldenaar-eienaar om aan te toon dat die koper nie *bona fide* was toe hy gekoop het nie en geweet het van 'n gebrek in die proses (*Sookdeyi and Others v Sahadeo and Others* 1952 4 SA 568 (A) 571E-F, 572A-F). Die vindikasie-

bevoegdheid (eiendomsreg) herleef nie bloot omdat die hofbevel tersyde gestel is nie (55E-G). In sekere uitsonderingsomstandighede mag *restitutio in integrum* die remedie wees omdat eiendomsreg oorgedra is (sien *Joosub v JI Case SA (Pty) Ltd (now known as Construction and Special Equipment Co (Pty) Ltd) and Others* 1992 2 SA 665 (N) 679-680 en gesag aangehaal. Sien egter ook 680-681 waar die hof van mening is dat die *rei vindicatio* die gepaste remedie is. Dit sal alleen die geval wees indien eiendomsreg nie oorgedra is nie en beginsel twee hieronder aanwending vind). Indien die bevel voor oordrag tersyde gestel word, verloor die skuldenaar-eienaar nie eiendomsreg nie (*Jubb v Sheriff, Magistrate's Court, Inanda District, and Others; Gottschalk v Sheriff, Magistrate's Court, Inanda District, and Others* 1999 4 SA 596 (D) 605; *Vosal Investments (Pty) Ltd v City of Johannesburg and Others* 2010 1 SA 595 (GSJ) parr 16 & 21).

Beginsel twee vind toepassing waar daar geen bevel is nie of die bevel *ab initio* nietig is of waar die essensiële statutêre formaliteite vir die geregtelike verkoping nie nagekom is nie. Indien enige van hierdie omstandighede aanwesig is, behou die skuldenaar-eienaar sy vindikasie-bevoegdheid (en eiendomsreg), desnieteenstaande die eiendom reeds aan die *bona fide* koper oorgedra is (55G-I. Sien ook *Van Der Walt v Kolektor (Edms) Bpk en Andere* 1989 4 SA 690 (T) 697; *Joosub v JI Case SA (Pty) Ltd (now known as Construction and Special Equipment Co (Pty) Ltd) and Others* 674, 679; *Jones and Others v Trust Bank of Africa Ltd and Others* 1993 4 SA 415 (K) 420-421, 422; *Kaleni v Transkei Development Corporation and Others* 1997 4 SA 789 (TkS) 791-792; *Menqa v Markom* par 24; *Campbell v Botha* parr 12-13; *Absa Bank Ltd v Van Eeden and Others* 2011 4 SA 430 (GSJ) veral parr 39, 40 &42).)

> *The reason for the second rule is that where the sale in execution was invalid, the sheriff* ***had no authority to conduct the sale and to transfer the property*** *to the purchaser. The result is not only that the underlying sale agreement concluded at the sale in execution is invalid, but also that the real agreement is defective since the sheriff does not have authority to transfer the property to the purchaser. The sheriff only has such authority where a valid sale in execution had taken place.* (Knox 55I-56A) (Beklemtoning bygevoeg.)

Die rede vir beginsel twee word teruggevoer na die feit dat die balju nie die bevoegdheid het om die koopkontrak te sluit nie en ook nie om die eiendom aan die koper oor te dra nie. Sakeregtelik vereis die reg dat sekere vereistes aanwesig moet wees alvorens eiendomsverkryging op afgeleide wyse plaasvind. (Sien oa Van Der Merwe *Sakereg* (1989) 301-305; Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's The Law of Property* (2003) 80-82.) Van Der Merwe vermeld onder andere met verwysing na die vereistes vir eiendomsoorgang dat (i) "[d]ie oordraer moet regtens bevoeg wees om eiendomsreg oor te dra" (301) en "[d]ie oordraer moet ook handelingsbevoeg wees." (302); en (ii)

> [d]ie partye moet die bedoeling hê om die eiendom van die saak oor te dra (*animus transferendi dominii*) asook die bedoeling om die saak te ontvang (*animus accipiendi dominii*). Hierdie bedoeling verskaf die subjektiewe element by oordrag … By hierdie vereiste het 'n mens te doen met die

> sogenaamde saaklike ooreenkoms wat, …, spesifiek op eiendomsoordrag gerig is. (302-303).

Daar word saamgestem met die stelling hierbo dat die gevolg hiervan is dat die onderliggende koopooreenkoms nietig is. Die rede hiervoor is omdat die balju nie handelingsbevoeg is om die ooreenkoms te sluit nie en gevolglik kan eiendomsoorgang ook nie bewerkstellig word nie. Dit is waar dat die abstrakte teorie vir eiendomsoorgang nie 'n geldige koopooreenkoms vereis nie, maar handelingsbevoegdheid word vereis vir eiendomsoorgang. (Vgl. die vereistes deur Van Der Merwe hierbo gestel.) Bykomstig hiertoe is die balju ook nie bevoeg om die eiendomsoorgang te bewerkstellig nie. Hierdie gebrek kan vergelyk word met die afwesigheid van die *ius disponendi*. Soos bekend is die *ius disponendi,* 'n inhoudsbevoegdheid van eiendomsreg. Alhoewel die balju nie eienaar van die eiendom is nie verleen die objektiewe reg aan hom die bevoegdheid om eiendomsoorgang te verleen en is hierdie bevoegdheid vergelykbaar met die eienaar se *ius disponedi* as inhoudsbevoegdheid van eiendomsreg. Omdat die balju mank gaan aan die "*ius disponendi*" kan eiendomsoorgang ook nie verleen word nie. Die vraag na die geldigheid al dan nie van die saaklike ooreenkoms raak eers relevant nadat die handelingsbevoegdheid en vervreemdings-bevoegdheid aanwesig is. Die hof verwys geensins hierna nie, maar is van mening dat dit tot gevolg het dat die saaklike ooreenkoms defektief is. Die hof verontagsaam handelings- en/of vervreemdings-onbevoegd-heid as redes vir die gebrek aan eiendomsoorgang en vermeld die nietigheid van die saaklike ooreenkoms as rede dat eiendomsoorgang nie plaasvind nie. In die lig van die voormelde is hierdie rede en siening, met respek gesê, misplaas en foutief. Gevolglik word daar verskil van die rede vir die beslissing.

4 3 Toepassing van die *Ratio Decidendi*

Die hof in *Knox* handhaaf deurgaans die toepassing van die abstrakte teorie in die onderstaande sake as die rede vir eiendomsoorgang of gebrek daarvan. *Knox* pas dit ook vir die beslissing toe. Vervolgens word hierdie aspek van nader beskou.

4 3 1 Die Menqa*-beslissing*

Die hof meld met verwysing na *Menqa* waar die geregtelike verkoping sonder geregtelike toesig plaasgevind het, dat

> *[s]ince the sale in execution was void, the sheriff had no authority to transfer the property in terms of the real agreement … . Since* ***the real agreement was defective*** *the property could be vindicated in principle from the bona fide purchaser.* (56G-H) (Beklemtoning bygevoeg.)

Die hof in *Menqa* motiveer die terugvordering egter anders en ek haal aan (par 24 van *Menqa*):

> *The sheriff derives his or her duty and authority to transfer ownership pursuant to a sale in execution of immovable property from rule 43(13) of the Magistrates'*

> *Court Rules. If the sale in execution is null and void because it violates the principle of legality, as in the present case, then the sheriff can have no authority to transfer ownership of the property in question to the purchaser who will thus not acquire ownership despite registration of the property in his or her name.*

Hier berus die nietigheid van die eiendomsoorgang op die afwesigheid van die "*ius disponendi*" en nie op die nietigheid van die saaklike ooreenkoms soos *Knox* te kenne wil gee nie. (Vgl. ook *Mngadi NO v Ntuli and Others* 1981 3 SA 478 (D) 484 waar eerste verweerder se aanstelling as verteenwoordiger van die boedel deur die destydse Bantoe Kommissaris nietig is en die hof bevind dat dit tot gevolg het dat sy geen *beskikings-/vervreemdingsbevoegdheid* gehad het om eiendomsoorgang te bewerkstellig nie.)

4 3 2 Campbell v Botha

Met verwysing na *Campbell v Botha* merk die hof in *Knox* tereg dat die geregtelike verkoping nietig was (57A), aangesien nog die lasbrief vir eksekusie nog die kennisgewing vir beslaglegging op die skuldenaar-eienaar beteken is. Hieroor merk die hof in *Knox* op (57A-B):

> *Since the sale in execution was void, the sheriff had no authority to transfer the property in terms of the real agreement ... Since* ***the real agreement was defective,*** *the property could be vindicated from the bona fide purchaser. Again the judgment is consistent with the abstract theory of transfer of ownership, although no express reference was made to the abstract theory.* (Beklemtoning bygevoeg.)

Die hof in *Campbell* laat die terugvordering van die eiendom toe omdat die skuldenaar-eienaar nie eiendomsreg verloor het nie (245E). Hy het nie eiendomsreg verloor nie, aangesien

> *…, the sheriff had no authority to conduct a sale thereof and to transfer the property to the purchaser. As was said by Maasdorp JA in* Rossouw and Steenkamp v Dawson *1920 AD 173 at 180:*
>
> *'The Sheriff acting without authority is in no different position to any other person acting without authority in selling the property of a person who has not authorised such sale.'* (245D-E.)

Die rede vir die beslissing in *Campbell* is nie die nietigheid van die saaklike ooreenkoms nie, maar die feit dat die balju nie die vervreemdingsbevoegdheid (die "*ius disponendi*") het nie.

4 3 3 Legator McKenna v Shea

Die verwysing na *Legator McKenna* as gesag vir die rede vir die beslissing in *Knox* is ook onvanpas. Die feitelike omstandighede in *Legator McKenna* is heeltemal verskillend van bovermelde twee beslissings. Hier draai die eiendomsoorgang om die vraag na die geldigheid al dan nie van die saaklike ooreenkoms en die toepassing van die abstrakte stelsel van eiendomsoorgang. Die hoogste hof van appèl beslis dat die kooptransaksie nietig is (par 17, 43F, 44A, 45C). Die abstrakte stelsel van

eiendomsoorgang verg egter nie 'n geldige kooptransakie nie, maar slegs dat lewering in geval van roerende goed of registrasie in geval van onroerende goed gepaard met `n geldige saaklike ooreenkoms plaasvind. (Par 22 in *McKenna*). Hierdie stelsel aanvaar die hof ook uitdruklik vir die eiendomsoorgang van onroerende goed (par 21). Aangesien tweede appellant (McKenna) sy aanstelling as kurator vir eerste respondent se boedel voor sluit van die saaklike ooreenkoms ontvang het, is die saaklike ooreenkoms geldig gesluit en het eiendomsoorgang van die eiendom plaasgevind (par 25). Die vraag na die kurator se vervreemdingsbevoegdheid is nie die kernvereiste soos dit in *Knox* behoort nie. Vervreemdingsbevoegdheid het die kurator met die aanstellingsbriewe ontvang. Die vraag is alleen of daar die bedoeling was om eiendomsoorgang te bewerkstelling, wat deur die saaklike ooreenkoms verteenwoordig word. Die hof is van mening dat daar 'n geldige saaklike ooreenkoms is (par 25) en gevolglik het eiendomsoorgang plaasgevind en het eerste respondent eiendomsreg verloor. *Legator McKenna* is ook geen motivering en gesag vir die rede vir die beslissing in *Knox* nie.

4 3 4 Meintjes NO v Coetzer

Met verwysing na *Meintjes NO v Coetzer* meld die hof in *Knox* dat die koopkontrak sowel as die transportakte vervals is. "*Consequently, both the underlying agreement of sale as well as the real agreement was invalid and the property could be vindicated from the purchasers.*" (57E). Die saak van *Meintjes NO v Coetzer* is myns insiens ook irrelevant vir die beslissing in *Knox*. In eersgenoemde saak is, soos vermeld, eiendom deur die bedrieglike optrede van eerste en tweede respondente onderskeidelik in hulle name geregistreer. Appellant as eksekuteur van die oorledene se boedel eis die eiendom terug. Die vraag voor die hof is of oorledene haar terugvorderingsbevoegdheid geabandoneer het, toe sy vir sestien maande tot haar dood, nadat sy ontdek het dat die eiendomme in name van eerste en tweede respondent geregistreer is, niks gedoen het om die eiendom te vindiseer nie (par 2). Dit volgens respondente regverdig dat sy van die terugvorderingsbevoegdheid afstand gedoen het (par 6) en berus het dat respondente eienaars van die plase is (par 11). Die hof by monde van Shongwe AR, aanvaar nie hierdie argument van repondente nie (par 11) en vermeld dat

> *[t]he fact that both the obligation-creating agreement and the real agreement were falsified is enough to deal a fatal bow to first and second defendants' defence, which is in fact asking this court to countenance their fraudulent actions* (par 5).

Die saaklike ooreenkoms, indien ek reg verstaan, bestaan volgens respondente in *Meintjies v Coetzer* daarin dat oorledene van haar terugvorderingsbevoegedheid afstand gedoen het. Daarvolgens het sy die bedoeling gehad om aan respondente eiendomsreg oor te dra. (Sien ook die opmerking van Leach AR op 194A – B waar hy meld dat *"… a waiver in these circumstances could constitute a valid real agreement for the transfer of ownership …"*). Hierdie toepassing van die saaklike

ooreenkoms behoort, soos reeds vermeld, nie toepassing op die feitelike omstandighede in *Knox* te vind nie. In *Knox* is die saaklike ooreenkoms nie nietig omdat dit vervals is of nooit aanwesig was nie, maar nietig omdat die balju nooit die *ius disponendi* gehad het nie. Laasgenoemde rede bring mee dat geen eiendomsoorgang in *Knox* plaasgevind het nie. Die werklike rede is nie die nietigheid van die saaklike ooreenkoms nie, maar omdat die balju nie die vervreemdingsbevoegdheid gehad het nie. (Sien ook par 4 3 5 hieronder).

4 3 5 Knox NO v Mofokeng

Nadat die hof in *Knox* die toepassing van die abstrakte stelsel in bovermelde sake bespreek het, wend hy hom tot die toepassing daarvan in *Knox* self. Die hof vermeld dat eiendomsoorgang nietig is, indien die saaklike ooreenkoms waarvolgens eiendomsoorgang plaasgevind het, defektief was (58I). Die blote feit dat die bevel teruggetrek is, nadat die eiendom oorgedra is, het nie tot gevolg dat eiendomsoorgang nie plaasgevind het nie. (Sien ook par 4 2 hierbo). Hiermee verwerp die hof dan die hoofargument (sien 3 1 hierbo) van die applikant. Die terugtrekking van die bevel nadat eiendomsoordrag plaasgevind het, het nie tot gevolg dat die saaklike ooreenkoms ongeldig word nie (58I-J). Applikant sal alleen geregtig wees op herregistrasie van die eiendom indien volgens die hof daar bewys kan word dat die saaklike ooreenkoms ongeldig is.

Applikant voer in die alternatief aan dat die geregtelike veiling/verkoping teenstrydig met die bepalings van artikel 30 van die Boedelwet (66 van 1965) plaasgevind het (59A. Sien ook par 3 1 hierbo). Die hof antwoord hierop (60C-E):

> *It follows that the sale in execution of the property constituted a nullity and that the sheriff had* ***no authority to enter into the real agreement for the transfer of property*** *to the second respondent pursuant to the purported sale in execution of the property. Since the transfer of the property to the second respondent was invalid, the subsequent sale and transfer of the property by the second respondent to the first respondent was also invalid, because the second respondent was not the owner of the property. The principle, that no one can transfer more rights to another than he himself has,* ***applies to the real agreement in respect of the second sale as well.*** *See e.g.* Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others *2011 (2) SA 508 (SCA) in par 26, where Harms DP found that the old adage* nemo plus iuris ad alium transferre potest quam ipse haberet *applies to such a situation.*
>
> *[28] I am accordingly of the view that the applicant is in principle entitled to claim vindication of the property* (Beklemtoning bygevoeg).

Hierdie aanhaling vermeld korrek dat eerste respondent nie eiendomsreg verkry het nie, aangesien tweede respondent nie eiendomsreg kon oordra nie omdat laasgenoemde nie eienaar was nie. Die sinsgedeeltes in vetdruk is egter vatbaar vir kritiek. Die balju het nie die verveemdingsbevoegdheid nie omdat hy teenstrydig met die voorskrif van artikel 30 van die Boedelwet (66 van 1965) gehandel het en

die verkoping nietig is. (Sien bv. *De Faria v Sheriff, High Court, Witbank* 2005 3 SA 372 (T) parr 31, 34, 35). Dit is die rede waarom eiendomsoorgang nie plaasgevind het nie en nie soos die hof vermeld omdat die balju nie die bevoegdheid het om 'n saaklike ooreenkoms te sluit nie. Die vervreemdings-/beskikkingsbevoegdheid is verskillend van die bedoeling om eiendomsoorgang te bewerkstellig wat deur die saaklike ooreenkoms verteenwoordig word. Die bedoeling om eiendomsoorgang te bewerkstellig en te ontvang (die saaklike ooreenkoms) is afhanklik van die bestaan van die vervreemdings-bevoegdheid. Eers wanneer die persoon vervreemdingsbevoegdheid besit, word die saaklike ooreenkoms vir eiendomsoorgang belangrik en nie andersom nie. Die sinsnede in die tweede vetgedrukte gedeelte span ook spreekwoordelik die kar voor die perd in. Dis nie die saaklike ooreenkoms wat deur die *nemo plus iurs*-reël geaffekteer word nie, maar die vervreemdingsbevoevoegdheid.

5 Ten slotte

Ek sluit af met die volgende slotgedagtes:

(a) Daar word met die beslissing saamgestem (vgl par 4 hierbo).

(b) Daar word van die rede vir die beslissing verskil. Soos vroeër vermeld is die rede vir die beslissing die toepassing van die abstrakte teorie vir eiendomsoorgang (vgl par 4 1 hierbo).

(c) Die toepassing van hierdie teorie op die feite van die saak is myns insiens misplaas en foutief (vgl par 4 2 hierbo). Die hof is van mening dat die saaklike ooreenkoms defektief is omdat die balju nie die bevoegdheid het om die eiendomsoorgang te bewerkstellig nie. Hierdie standpunt word met verwysing na ander regspraak gehandhaaf (vgl par 4 3 hierbo).

(d) Die regspraak wat die hof as gesag vir die standpunt gebruik, steun óf nie op die abstrakte teorie nie óf pas die abstrakte teorie korrek op feitelike omstandighede toe wat fundamenteel van die *Knox*-feite verskil (*ibid*).

(e) Daar is twee regsaanvaarbare redes vir die beslissing. Die feit dat aangesien die geregtelike verkoping nietig is, bring mee dat die balju nie handelingsbevoegdheid het nie en moet die aansoek slaag (vgl par 4 2 hierbo). Alternatiewelik het die nietige geregtelike verkoping ook tot gevolg dat die balju nie beskikkingsbevoegdheid het nie en mag die aansoek nie afgewys word nie (vgl parr 4 2 & 4 3 5 hierbo).

(f) Enige van laasgenoemde twee redes dien vir die sukses van die aansoek en nie soos die hof aangee die feit dat die saaklike ooreenkoms defektief is nie (vgl par 4 3 5 hierbo).

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Onlangse regspraak/Recent case law

Ex parte MS 2014 JDR 0102
Case No 48856/2010 (GNP)

Surrogate motherhood agreements, condonation of non-compliance with confirmation requirements and the best interests of the child

1 Introduction

The confirmation of surrogate motherhood agreements has become a focus point of attention since the reporting of the judgment in *Ex parte WH* (2011 6 SA 514 (GNP) (for which see, Carnelley "*Ex parte WH* 2011 6 SA 514 (GNP)" 2012 *De Jure* 179; Pillay & Zaal "Surrogate motherhood confirmation hearings: The advent of a fundamentally flawed process" 2013 *THRHR* 475; Bonthuys & Broeders "Guidelines for the approval of surrogate motherhood agreements: *Ex parte WH*" 2013 *THRHR* 485; Louw "Surrogacy in South Africa: Should we reconsider the current approach? 2013 *THRHR* 564; Nicholson C "Surrogate motherhood agreements and their confirmation: A new challenge for practitioners?" 2013 *De Jure* 510). There seems to be general consensus that the judgment has not provided the anticipated, much needed guidance. The discrepancy between what the court preached and what it practiced (as succinctly phrased by Pillay & Zaal 2013 *THRHR* 483) as far as the enforcement of the surrogacy provisions is concerned, forms a central theme throughout the published comments which, without exception, have been negative to varying degrees. The failure of the court to undertake a rigorous investigation into the court documents and the facts that underlie them, coupled with the inadequacy of the statutory provisions and the evident difficulty implementing them, have elicited a call for legislative amendment. However, none of the authors mentioned, anticipated the possibility of the factual scenario with which the court was faced in *MS*, the case under discussion. The lack of foresight is easy to explain. Since it was generally accepted that the Children's Act requires a surrogate motherhood agreement to be confirmed *before* the artificial fertilisation of the surrogate mother, the possibility of the court considering a request for confirmation after the surrogate had been fertilised, was simply never entertained.

2 The Judgment in *Ex parte MS*

In this case, the commissioning parents applied for the confirmation of a surrogate motherhood agreement which was entered into *after* the artificial fertilisation of the surrogate mother (par 4). In accordance with Practice Directive 5 of 2011, issued by the Deputy Judge President of the Gauteng Division of the High Court (see *In re Confirmation of Three*

Surrogate Motherhood Agreements 2011 6 SA 22 (GSJ) [27]), application was made *ex parte* and was heard in chambers by Keightley AJ. As in the case of *Ex parte WH*, a written judgment was handed down with the express aim of providing some guidance to future applicants faced with the same "novel" issue, which according to Keightley AJ, was "… not expressly dealt with in the [Children's] Act" (par 3).

The court thus had to determine whether it was competent to confirm a surrogate motherhood agreement where the written agreement was only entered into, and confirmation sought, *after* the artificial fertilisation and subsequent pregnancy of the surrogate mother (who was 33 weeks into her pregnancy at the time of the application) (par 4). Notwithstanding the fact that, by her own admission "… one of the central requirements running through this 'highly structured' scheme is that surrogate motherhood agreement must be … confirmed by the High Court *before* any steps are taken that may result in the conception of a child" (own emphasis, par 8), the agreement was validated through confirmation by the court (par 75).

2 1 Legislative Framework

The true significance of the court's decision to confirm the agreement can only be appreciated with reference to the legislative context within which it was made. Only those provisions directly relevant to the questions addressed by the court will be canvassed (for a general discussion of all the provisions regulating the practise of surrogacy, see Louw A "Surrogate motherhood" in Davel & Skelton (eds) *Commentary on Children's Act* (2007) ch 19 last updated in 2012).

In this regard, section 296(1), read with sections 303 and 305 of the Children's Act, is perhaps the most important provision. In terms of this section, the artificial fertilisation of the surrogate mother may not take place before the agreement is confirmed. A person who renders assistance or artificially fertilises a woman without the court having authorised the artificial fertilisation, commits an offence and, if convicted, is punishable with a fine or imprisonment for a period of ten years or both (s305(6)).

Furthermore, the court may not confirm a surrogate motherhood agreement unless, *inter alia*, "the commissioning parent or parents are not able to give birth to a child" (s295(a)) and are in all respects suitable persons to accept the parenthood of the "child that is to be conceived" (s295(b)). The court may, in addition, not confirm the agreement unless it is satisfied "in general, having regard to the personal circumstances and family situations of all the parties concerned, but above all the interests of the child that is to be born, the agreement should be confirmed" (s295(e)). The provisions of section 297 are also important as they describe the effect of a surrogate motherhood agreement on the status of the child. Apart from the fact that the child born of a surrogate, in accordance with the agreement, is for all purposes deemed the child

of the commissioning parent or parents from the moment of the child's birth (s297(1)(a)), the agreement may not be terminated after the artificial fertilisation of the surrogate mother has taken place (s297(1)(e)). Section 297(2) states unequivocally:

> [a]ny surrogate motherhood agreement that does not comply with the provisions of this Act is invalid and any child born as a result of any action taken in execution of such an arrangement is for all purposes deemed to be the child of the woman that gave birth to that child.

2 2 Legal Questions to be Answered

The first question the court concerned itself with was whether it is possible for a court to confirm a *surrogate motherhood* agreement post-fertilisation. As already indicated, the question was entertained, in the first place, because Keightley AJ held that the Act does not provide a clear answer to this question (par 29). Although admitting that the Act prohibited the artificial fertilisation of the surrogate mother without prior authorisation of the court and that the *general* scheme of the Act is to require judicial confirmation *before* any steps are taken to give effect to the arrangement between the parties (par 29), Keightley AJ insisted that:

> … the Act does not say what the consequences of non-compliance with these provisions will be on the validity of a written agreement subsequently entered into between the parties. The Act is also silent on the concomitant question whether the court has the power to validate such an agreement under section 292. (par 30).

In the opinion of the court, the *lacuna* thus created in the Act, provides scope for interpreting the relevant provisions.

The second issue the court deemed necessary to grapple with, was whether an unenforceable agreement to commit a lawful act (the artificial fertilisation of the surrogate mother without prior authorisation of the court), could be validated by retrospective confirmation of the agreement by the court (par 32). Once again, despite admitting to the existence of "… well-established principle[s] of our common law" in this regard (outlined in parr 31 & 33) which "cannot be ignored" (par 34), Keightley AJ found that "… they are not determinative of the issues that arise in this case" (par 34).

2 4 *Ratio Decidendi*

2 4 1 Competency of Court to Confirm Agreement Post-fertilisation

Having found the Children's Act wanting in this particular regard, the court based its departure from the applicable statutory provisions, firstly, on the *sui generis* nature of surrogate agreements (parr 7 & 34) and secondly, the Constitution.

The court first (par 36) referred to section 39(2) of the Constitution which enjoins the courts to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation. Statutory interpretation should, therefore, in the opinion of the court (*ibid*), positively promote the rights entrenched in the Bill of Rights. However, the courts must ensure that the interpretation adopted is "reasonably possible" or plausible (as pointed out by Currie & De Waal *The Bill of Rights Handbook* 61)(*ibid*). Reaching a plausible, constitutionally compliant interpretation entails reading legislation purposively and contextually (*ibid*). Referring to Currie and de Waal (60, citing as an example, *De Beer NO v North-Central Local Council & South-Central Local Council* 2002 1 SA 429 (CC)), the court found support for a generous interpretation of a statute in order to ensure it is constitutionally compliant (*ibid*). According to the court (*ibid*), the absence of an express grant of a discretion could, for example, call for an interpretation conferring such a discretion.

Applying these considerations to the case at hand, the court held that the prohibition of the artificial fertilisation of the mother prior to the confirmation of the agreement "is aimed largely at ensuring that there is certainty in the legal relationship between the parties involved before the prospect of a child becomes a reality", that the prohibition serves the interests of all the parties involved and it also advances the best interests of the child (par 38). While considering it "ideal" that the legal and parental status of the child be settled before conception, the court is, however, paradoxically of the opinion that "this does not mean that the best interests of the child may not also be served by a subsequent confirmation of the surrogacy agreement" (par 39). Since the best interests of the intended child would thus be served either way, the answer had to be found elsewhere. Seemingly mindful of the example used by Currie and de Waal, the court then proceeded to determine whether "… the Act, properly interpreted, may be read as giving a court the discretion to grant such confirmation" (*ibid*). For this purpose, the court found "some ambiguity" in the wording of section 295. While section 295(b)(ii) requires the court to find the commissioning parents suitable to accept the rights of parenthood of "the child to be conceived", section 295(d) and (e) refer to the need for the court to make sure that provision has been made for the care, upbringing, welfare and interests of "the child to be born". Bolstered by this supposed inconsistency, and the fact that "neither section 292 nor section 295 require the court to be satisfied that the surrogate mother has not yet undergone the process of artificial fertilisation and that she is not already pregnant as a result", the court concluded that the provisions do not preclude the court from confirming the agreement post-fertilisation (par 43).

The logic of the argument used by the court is unconvincing, if not outright misguided. Firstly, if the provisions in this regard are in general, as admitted by the court (par 38), constitutionally compliant (because they protect the parties and are in the best interests of the child), what justification is there for the court to interpret the provisions in the first place? The *De Beer* case (*op cit*) used by the court (par 36) as an example

of a case where a generous interpretation was justified, would also seem to be inapplicable in the present case. The *De Beer* case (at par 24) merely sanctions a "constitutional construction in cases where a statutory provision is capable of more than one reasonable construction, one which would lead to constitutional invalidity and the other not". Clearly not the case *in casu*. Secondly, the supposed ambiguity in the wording of section 295 is intentional and accords with the context in which the impugned phrases are used. Section 295 outlines the requirements which must be satisfied before the court may confirm the agreement. As far as the commissioning parents (addressed in s295(b)) are concerned, the court must be satisfied as to their suitability at the time of the confirmation proceedings, that is, before the child has been conceived. It is for this reason that section 295(b)(ii) uses the phrase "child that is to be *conceived*" (own emphasis). Section 295(d) deals with the agreement itself. In terms of this section the agreement must make provision for the care and welfare of the child "that is to be born" simply because the agreement cannot make provision for the care of the child before it is born! The care and welfare of a child before its birth is exclusively in the hands of the surrogate mother. In the same way, section 295(e) confers a discretion on the court to confirm the agreement if, in general, having regard to the considerations mentioned in the section, the court is satisfied that the agreement should be confirmed. These considerations refer to anticipated circumstances and family situations of all the parties concerned and the best interests of the child, specifically *after* the child is born. The fact that sections 292 and 295 do not require the court to be satisfied that the surrogate has not yet been artificially fertilised, in no way lends credence to the court's argument. The artificial fertilisation of the surrogate mother is dealt with in a separate section (s296) wherein the Act prohibits the fertilisation of the surrogate mother before confirmation. Why then, should any other section deal with the issue? The selective reading of only two provisions of the Act contradicts every rule of statutory interpretation and is therefore inexcusable (see discussion of interpretation *ex visceribus actus* in Du Plessis *Re-interpretation of Statutes* (2002) 112 and observation by the same author (at 115) that "[p]urposiveness nowadays seems to be becoming the substitute for *clear language* as the key to constitutional interpretation"). Lastly, but by no means least of all, the court's assumption at the outset, that the Act does not provide a clear answer to the issues under discussion is simply untrue. Section 297(2) clearly states that a surrogate motherhood agreement that does not comply with the Act (in its entirety) is invalid and a child born of such an agreement is deemed to be the child of the surrogate mother. The court should consequently have refused confirmation unless it could prove the possession of a residuary discretion to confirm the agreement, notwithstanding the fact that the agreement did not comply with the requirements in terms of the Act (in terms of s295(e), as argued below).

2 4 2 Effect of Post-fertilisation Agreement and the Possibility of Ratification

Despite the prohibition against the artificial fertilisation (not "insemination" as used by the court in par 45) of the surrogate mother without a pre-existing authorised surrogate agreement (referred to in par 45), the court concluded that the Act does not make it unlawful for the parties involved in the prohibited act to subsequently enter into a valid surrogacy agreement with the sanction of the court (par 46). The court found support for this conclusion in the fact that the Act does not expressly state that an agreement based on the prohibited act (the unlawful fertilisation) is unlawful (par 46). Had the legislature wanted to rule out such a possibility, in the court's opinion "… it would have made it clear, in section 292 or 295, that a court is precluded from confirming a post-fertilisation surrogacy agreement in those circumstances" (par 46). The court seems to hold the view that since section 295, which lists the requirements for confirmation, does not specifically require the court to be satisfied that the surrogate mother has not yet undergone the process of artificial fertilisation, a court may also confirm the agreement afterwards (pars 42 and 47). The Act thus "… prescribes an express criminal penalty for the commission of a prohibited act …; it does not provide for the invalidity of the surrogacy agreement as a penalty" (par 48).

The court (par 49) held that interpreting the Act in this way was consistent with the constitutional injunction on courts to positively promote constitutional rights in their interpretation of statutes. Despite the fact that, by the court's own admission (*ibid*), the Act requires a judicially sanctioned surrogacy agreement "as a first step in the process" to ensure sufficient protection of the parties' constitutional rights, the court must retain a discretion to confirm a surrogacy agreement even in circumstances where the parties have "missed out on this first step". Any other interpretation would render the agreement invalid, vest legal parentage in the surrogate mother and thus undermine the constitutional rights of the parties, contrary to the broad objective of the Act (par 50). The lack of parental status would impinge, firstly, on the dignity of the commissioning parents, who would be denied the opportunity to experience family life of their own and, secondly, on their right to make reproductive choices (par 51). The constitutional right of the surrogate mother to make her own decisions regarding reproduction would also be infringed if full parental responsibilities and rights are imposed on her (par 52). Most importantly however, in the court's opinion, would be the violation of the child's constitutional rights (parr 53 & 54). The child would have to rely on the parental care of the surrogate mother who had deliberately chosen not to take responsibility for the child (par 54). As such, it would violate the child's constitutional right to family and parental care (in terms of s28(1)(b) of the Constitution) and would be contrary to the best interests of the child (s28(2) of the Constitution) to be denied "… the family life that was planned for him or her" (parr 54 &

55). Ultimately therefore, the court came to the conclusion "… that the Act does not preclude a court from confirming a surrogacy agreement subsequent to the artificial fertilisation of the surrogate mother, and in circumstances where she is already pregnant with the child to be born under the agreement" (par 56).

The generalised nature of the conclusion reached by the court is a cause for serious concern. Once again, it effectively sanctions, on constitutional grounds, a departure from statutory provisions which are, by the court's own admission, constitutionally compliant. While admitting that the broad objective of the Act is to ensure sufficient protection for the rights and interests of all the parties (par 49), the court nonetheless concluded that the enforcement of the provisions would infringe on the constitutional rights of the parties, especially those of the intended child (parr 51-54). What the court was thus in fact saying, was that the provisions of the Children's Act are unconstitutional in this regard and can, as such, be ignored. The admonition by the court (in par 57) that "… this does not mean that parties are free to ignore the general requirement that surrogacy agreements must be confirmed by a court before the artificial fertilisation of the surrogate mother takes place" and that the discretion of the court is "not open-ended", "can only be exercised in exceptional circumstances", "when it is in the best interests of the child" does little to assuage the effect of its judgment on the enforcement of the Act. The immediate question that arises is when would it *not* be in the best interests of a child to confirm a surrogacy agreement once the child has been conceived? Given the negative effect of imposing legal parenthood on the surrogate mother, indicated by the court, it is difficult to conceive of circumstances that would convince a court to deny confirmation under such circumstances. In terms of the enacted legislation, the way in which the best interests of the intended child can best be protected is by assessing the suitability of the commissioning parents and surrogate mother *before* the child in question is conceived. If the judiciary finds the approach adopted in the Children's Act to be in conflict with the Constitution, the necessary steps should be taken to invalidate the provisions. The solution is not to introduce a loop-hole which, in effect, makes a mockery of the requirement and prohibition of pre-confirmation artificial fertilisation (see Louw 2013 *THRHR* 583 for a discussion of a similar situation in the UK with regard to the ban on commercial surrogacy). That health professionals, acting in contravention of the prohibition (to fertilise a surrogate mother without an agreement authorising the procedure), remain open to criminal prosecution (par 58) provides no assurance of future compliance with the requirement. It is important to note in this regard, that neither the National Health Act (61 of 2003, in accordance with s296(2) of which the fertilisation must have been done), nor the Regulations in terms of the National Health Act specifically address the artificial fertilisation of a surrogate mother in the execution of a surrogate motherhood agreement. The health professional can therefore simply deny any

knowledge of the surrogacy arrangement at the time of performing the procedure, thereby escaping prosecution.

The court's conclusion that the Act empowers a court to confirm an agreement post-fertilisation (par 46) is also at odds with its indication that the Act requires the confirmation of the agreement to be "… the first step in the process" (par 49). If the court requires confirmation prior to fertilisation then it cannot also allow the court to confirm the agreement post-fertilisation. The better approach would have been to acknowledge the fact that the Act does not sanction post-fertilisation confirmation. Once that is accepted as the point of departure, it is no longer a question of deciding whether the Act allows for post-fertilisation confirmation of the agreement, but rather, whether the court should be able to override such a requirement should the Act *not* allow for such a possibility. The extent to which the Act confers such a residuary discretion on a court during confirmation proceedings has been the subject of some speculation on a previous occasion (see Louw 2013 *THRHR* 573 n96). As indicated in that discussion, section 295(e) could be used to prove the existence of such a residuary discretion. In terms of this subsection the court has the power to confirm a surrogate agreement if "… in general, having regard to the personal circumstances and family situations of all the parties concerned, but above all the interests of the child that is to be born" it is satisfied that the agreement should be confirmed. The personal circumstances and family situation in this case could easily have justified a post-fertilisation confirmation of the agreement, including not one, but two previously failed surrogacy agreements which were confirmed prior to the artificial fertilisation of the surrogate mothers in question (parr 11-17 & 74). As such, the judgment of the court could have been justified based on the exceptional circumstances in this particular case and not, as indicated earlier, on the implied unconstitutionality of the requirement as a whole.

2 5 The Way Forward?

The multifaceted nature of surrogacy arrangements, coupled with the potentially dire legal consequences which may ensue in the absence of clear regulation, initially prompted the enactment of Chapter 19 of the Children's Act. The provisions regulating surrogacy were introduced only after extensive research and careful consideration of its effects (See Louw in *Commentary on the Children's Act* 6 as confirmed in *Ex parte WH and Others* 2011 6 SA 514 (GNP) par 31 and *Ex parte MS* 2014 JDR 0102 (GNP) par 7). Apart from protecting the rights of all parties concerned, the objective was to create certainty in a context in which uncertainty abounds. Of course, that does not by any means make the provisions inviolate to judicial scrutiny based on the Constitution. However, the ease with which the court justified its departure from the "carefully" and "highly" structured scheme (par 8) is troubling to say the least. Using the best interest criterion as a *deus ex machina* only reinforces claims of its manipulative character (See e.g., Bonthuys "Of biological bonds, new fathers and the best interests of children" 1997 *SAJHR* 622 637 and

Heaton "An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context" 2009 *Journal for Juridical Science* 8). The best interests of the child may be of paramount importance but is not the only consideration (*S v M (Centre for Child Law as Amicus Curiae*) 2007 2 SACR 539 (CC) (also reported as 2008 3 SA 232 (CC) [26])). Moreover, as indicated before (Louw 2013 *THRHR* 573) its application in the context of surrogacy should be considered with caution. Rather than serving as a guideline for future applicants, the judgment should be used as another example of hard cases making bad law. While the applicants in this case may have been accommodated not entirely without good cause, the arguments justifying the intervention of the court have undermined the value of the legislation in question and created uncertainty in the fragile context of surrogacy where it can be ill afforded. The courts should definitely do better.

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Constitutional perspectives on the judgments of the Labour Appeal Court and the Supreme Court of Appeal in *Solidarity (acting on behalf of Barnard) v South African Police Services*[1]

1 Introduction

Save for a possible appeal to the Constitutional Court, the unanimous judgment of the Supreme Court of Appeal (SCA) in *Solidarity (acting on behalf of Barnard) v South African Police Services (Vereniging van Regslui vir Afrikaans amicus curiae)* (Case number 165/2013 delivered on 28 November 2013) has brought to a close a legal battle of more than eight years between Captain Renate Barnard and the South African Police Services (SAPS) on Barnard's promotion to the rank of superintendent. The saga surrounding Barnard's promotion began in 2005. It went through the internal grievance procedure, the Commission for Conciliation, Mediation and Arbitration (CCMA), the Labour Court (LC) and then the Labour Appeal Court (LAC). Barnard was successful in the LC (*Solidarity abo Barnard v SAPS* 2010 (10) BCLR 1094 (LC)) but on appeal by the SAPS to the LAC in *South African Police Services v Solidarity*

1 I am grateful to colleagues Christo Botha and Anton Kok with whom I had the opportunity to discuss some of the arguments presented in this note.

abo Barnard (2013 (3) BCLR 320 (LAC)) she was unsuccessful. The judgment of the SCA was on appeal from a ruling of the LAC.

From the point of view of the right to equality and against unfair discrimination in general and, more particularly, from an employment equity point of view, the judgment of the SCA is certainly important, albeit, as indicated in 6.5, not beyond criticism. However, it is also important for another very significant reason, in that it serves to demonstrate the manner in which courts of law should discharge their distinctive responsibility to dispense justice. Entrusted with this responsibility, a court must vigilantly maintain its detachment from the parties. It must carefully apply its mind to the relevant facts as presented by the parties and even-handedly apply the relevant law to pronounce a just verdict. This is the ideal way in which courts are traditionally required to arrive at equitable conclusions. Sometimes, however, as the judgment in the LAC in the case under discussion starkly demonstrated, courts do deviate in a spectacularly reprehensible manner from the ideal manner of adjudication. In the present case, the LAC, for instance, failed to maintain the basic standards which a court of law operating in a constitutional order and committed to the protection of basic constitutional rights is required to meet in compliance with the rule of law and the principle of judicial independence. In the context of the Barnard case, the judgment of the SCA is therefore of extreme importance because it corrected that which had gone appallingly wrong in the LAC.

At least some of the LAC's obvious errors are highlighted in the SCA's judgment. However, the LAC's argumentation poses additional questions of a constitutional nature which the SCA did not address directly but of which awareness can be inferred from certain parts of the judgment. These questions are important and are dealt with in part 6 of this discussion. It will not be argued there that the LAC, after having applied its mind to the merits of the matter, came to a legally incorrect conclusion. The argument will be that, on a proper analysis of the LAC's judgment, it is obvious that the approach followed by the LAC resulted in it not actually adjudicating the case at all, thus failing to discharge the distinctive responsibilities of a court of law.

In the discussion below I first relay the material facts of the case (in part 2). A concise account of the judgments of the LC and the LAC follows in parts 3 and 4. Part 5 contains a synopsis of the judgment of the SCA. Part 6 is an analysis consisting of five sub-parts. The first four of these contain a critique of the judgment of the LAC. This is done with reference to applicable tenets of constitutional law, which in part also resonate in the argumentation of the SCA. In the last sub-part, the judgment of the SCA is criticised. Paragraph references are references to paragraphs of the judgment of the SCA, unless indicated otherwise.

2 Factual Background

Renate Barnard, a White female, joined the SAPS in 1989. Her single-mindedness and talents caused her to move rapidly up through the ranks, reaching the rank of Captain in 1997. From 1996 to 2004 she was Branch Commissioner at Hartbeespoort Dam Detective Services and then, following restructuring, Section Commander to a larger division, namely Brits Detective Services (par 5). Thereafter she was transferred to the Complaints Investigation Division at the head office of the SAPS, which at that stage was called National Evaluation Services (NES) (par 6).

During September 2005, Barnard applied for a newly created position of Superintendent at the NES (par 8) and on 3 November of that year Barnard and five other applicants were interviewed by a racially diverse interviewing panel and received an average score of 86.67%, which was by far the highest score of all the candidates. The second and third-best candidates were also White. In the fourth place was a Black male, Captain Shibambu who scored 17.5% less than Barnard (parr 25-27). The panel recommended Barnard's appointment to the position in spite of the fact that it would not advance representivity of Black staff as envisaged in the Employment Equity Plan (EEP) of the SAPS adopted in terms of the Employment Equity Act (55 of 1998) (EEA). The panel reasoned that the gap between Barnard and Shibambu was too big to recommend the latter for the position as that would compromise effective services. It took the view that Barnard's appointment would not aggravate the racial representivity at the level of Superintendent, which in the ranking hierarchy of the SAPS is on level nine, because the representivity of the NES as a whole would not be affected since Barnard, if promoted, would remain part of NES (par 27). The panel met with the relevant Divisional Commissioner, Commissioner Rasegatla. The meeting grappled with the under-representivity of Blacks in the NES which, in their view, would be aggravated by the appointment of any of the first three candidates.

In consequence, the Divisional Commissioner decided not to make any appointment and eventually the position was withdrawn. It was clear that Barnard's race was the reason why she was not appointed (par 28). In May 2006 the same vacancy was once again advertised. Barnard again applied for the position and she and seven other candidates – five Africans, one Coloured and one White male – were interviewed by an interviewing panel which was once again racially diverse. Three weeks before the interview the Deputy National Commissioner wrote to Provincial and Divisional Commissioners that interviewing panels should focus, inter alia, on the appointment of personnel who would enhance service delivery (par 31). In the assessment of the interviewing panel Barnard was the top candidate once again. She scored 7.33% more than the runner-up, a Black applicant (parr 30& 32). This time, both the interviewing panel and the Divisional Commissioner recommended Barnard's promotion. The panel reasoned that Barnard's appointment would not enhance representivity on salary level nine. However, it would not aggravate these figures in the Division as a whole as she was already

part of it. Concerning Barnard's exceptional merits, the panel noted that she was the only candidate that displayed a unique blend of passion and enthusiasm for the position that she applied for, that she displayed a high level of commitment towards the SAPS and an eagerness to contribute towards enhanced services (par 33). In the ensuing meeting between the panel and Divisional Commissioner Rasegatla, he supported her promotion (par 35). In consequence, Rasegatla recommended to the National Commissioner, in whom the authority vests to decide on promotions, that Barnard be promoted. Rasegatla noted that as the best candidate, Barnard had proven competence and experience to perform all the core functions of the post; that even though her promotion would not enhance representivity at level nine it would not aggravate representivity in the Division as she was already part of it and that it would, moreover, create an opportunity for enhancing representivity on level eight as a result of the vacancy caused by her promotion. To this the Divisional Commissioner added that it would be in the interest of service delivery to promote Barnard (par 36).

Despite the recommendations of Divisional Commissioner Rasegatla and of the views of the interviewing panel, the National Commissioner did not approve the appointment of any of the candidates. A letter on behalf of the National Commissioner stated that he had decided not to approve the recommendation because, firstly, it would not address representivity and secondly, filling of the post was not critical and that non-filling would not affect service delivery (par 38). The post was nevertheless re-advertised (par 39). Having unsuccessfully sought redress through a grievance procedure and at the CCMA, Barnard, assisted by Solidarity Trade Union, then approached the LC.

3 Labour Court

On 24 February 2010, the LC, per Pretorius AJ, ruled in Barnard's favour. According to the LC, the numerical goals envisaged in the SAPS' EEP could not be conclusive. Such a plan had to be applied fairly, that is, balanced against the affected person's (Barnard's) right to equality and her right to dignity (par 41; par 25.2 LC). The LC noted that efficient operation – effective service delivery – was another relevant factor to be taken into account in the implementation of an EEP (par 42; par 25.7 LC). According to the LC, the respondent (SAPS) bore the onus of proving in terms of section 9(5) of the Constitution, that discrimination based upon a listed ground in section 9(3) of the Constitution – race in the present case – was not unfair. In the present case it failed to discharge this onus.

4 The Labour Appeal Court

On appeal by of the SAPS from the judgment of the LC the LAC, on 2 November 2012,overturned the judgment of the LC and ruled in favour of the SAPS. The LAC bench in this matter – a trio consisting of Mlambo JP, Davis and Jappie JJA, unanimously found that there was no discrimination against Barnard. The LAC stated that it was a

misconception "[t]o render the implementation of restitutionary measures subject to the right of an individual to equality" (par 46; LAC parr 26 328G &30). It held that the LC was wrong in treating the implementation of restitutionary measures as subject to the individual conception of the right to equality (par 46). The LAC argued that there was in fact no discrimination simply because, on the facts there was not even any differentiation. If anyone else but Barnard had been appointed there would in fact have been differentiation. In this case, however, there was none because no one was appointed. The LAC stated that:

> [w]hen one talks of discrimination; that is one is in fact, alleging that a differentiation of some sorts between and/amongst people has taken place. On the facts of the case before us, there is no evidence of such differentiation. We are here dealing with a matter where no action by way of appointment took place, meaning that no overt differentiation occurred (LAC par 22).

However, as the SCA pointed out (par 47), the LAC contradicted itself because, in spite of its finding that there was no differentiation (and discrimination), it thereafter went on (LAC par 42 333G) to find that "Discriminating against Barnard in the circumstances of this case was clearly justifiable". The LAC also held that there was no basis for holding that the failure to appoint Barnard would compromise efficient services. According to the LAC, the decision of the National Commissioner was, on proper analysis, final when it comes to promotions in the SAPS and it "[i]s not open to a court to dictate to the National Commissioner that he is compromising service delivery and should fill a post" (LAC par 46).

5 The Supreme Court of Appeal

The SCA held that the SAPS unfairly discriminated against Barnard and overturned the LAC's judgment. Underpinning the argumentation of the SCA is a trite and obviously correct principle, namely that decisions of the National Commissioner of the SAPS purporting to implement employment equity measures, such as the present decision not to promote Barnard, were to be adjudicated with reference to the distinctive facts of each case. The SCA was at pains to emphasise that employment equity measures should not be applied mechanically and that all relevant considerations pertinent to each individual decision purporting to implement such measures had to be scrutinised. This includes the impact of such measures on members of non-designated groups, such as Barnard, as well as considerations of effective service delivery. The SCA found pertinent support for this view in section 15(3) of the EEA which stipulates that affirmative action measures include preferential treatment and numerical goals, but exclude quotas (par 16) and also in the SAPS' own employment equity plan, which states in its foreword that "Whereas the focus of employment equity is on Black people, women and persons with disabilities, no employment policy or practice will be established as an absolute barrier to prospective or continued employment or advancement of persons not from designated groups" (par 18). The SCA also referred to National Instruction (1/2004) which, amongst other things, sets out the generic functions of evaluation (interviewing) panels

such as those that interviewed Barnard, which pertinently states that "A panel must, in considering the applications for promotion, promote equal opportunities, fair treatment, employment equity and advance service delivery by the Service" (par 22). Thus the Court stated in conclusion that, the EEA was designed to assist in the struggle to achieve an egalitarian society by putting measures in place to overcome historical obstacles and disadvantages and provide equal opportunities for all. These objectives, the court stated, could not, however, be achieved by the mechanical application of formulae and numerical targets (par 23).

In adjudicating the dispute whether Barnard was in fact unfairly discriminated against, the SCA followed the approach laid down in *Harksen v Lane NO* (1998 1 SA 300 (CC) parr 43-46 as well as s9 of the Constitution and ss6 &11 of the EEA). Hence, the first question to answer was whether the decision of the respondent not to promote Barnard constituted discrimination and, if so, secondly, whether the discrimination was unfair (par 50). The SCA rejected the finding of the LAC that Barnard had not been discriminated against. (As pointed out above, the LAC contradicted itself in this regard in parr 22 &47 of its judgment) (par 50). The SCA argued that, unlike Barnard who was not promoted, a senior African police officer with Barnard's distinctive skills would certainly have been promoted (par 52).

Save for the remarks made in 6.5 *infra,* the SCA was clearly correct in making this finding. Discrimination may be either direct or indirect. Both are prohibited by section 9(3) of the Constitution and section 6(1) of the EEA. Direct discrimination occurs when a measure expressly discriminates, that is, where two categories of persons are clearly treated differently – one category less favourable than the other. Discrimination is indirect when it is by stealth, that is, where a measure does not openly discriminate, but where on closer scrutiny it produces discriminatory results (*City Council of Pretoria v Walker* 1998 (2) BCLR 257 (CC) par 32 273-274; see also Currie & De Waal *The Bill of Rights Handbook* (2013) 238-9). The present case was not one where a less qualified Black applicant was promoted over the head of a much better qualified White applicant. Arguably there was no overt – direct – discrimination. However, the only exceptionally well-qualified candidate, a White woman, highly recommended for promotion by the interviewing panel and the Divisional Commissioner, was not promoted because she was White and would therefore, in the words of the National Commissioner, "not address representivity". Hence, if the discrimination was not direct, it certainly produced discriminatory consequences, thus constituting indirect discrimination. The LAC failed to consider this aspect of the discrimination question. Fortunately the SCA corrected this blunder.

The discrimination against Barnard was on the basis of race, which is one of the listed grounds in terms of section 9(3) of the Constitution (and s6(1) of the EEA). If discrimination was on a listed ground, unfairness is presumed under section 9(5) of the Constitution unless the discriminator (the respondent in the present case) rebuts such presumption. The test

for fairness, as the Constitutional Court noted in *Harksen*, mainly focusses on the impact of the discrimination on the complainant and similarly placed persons (par 55). To determine whether the discrimination was fair, the facts pertinent to the case must therefore be scrutinised. The LAC, however, completely failed to conduct such an inquiry into the facts of the case and simply made the peremptory declaration that the discrimination was fair (after earlier in its judgment it stated that there was no discrimination at all. As the SCA stated:

> Regrettably, this is not an exercise that the LAC embarked on. The appeal turns on the facts and it would be presumptuous to assert and foolish to assume that this decision will be a Merlin-like incantation to address the varied cases likely to come before courts in relation to the application of the EEA (par 58).

The LAC therefore completely failed to conduct an inquiry into the fairness or otherwise of the discrimination in a situation-sensitive way, as laid down in *Van Heerden* (par 58). Once again, as in the case of the LAC's erroneous finding that there was no discrimination, the SCA also corrected this error by carefully assessing the considerations relating to the question of unfairness. In doing so, it pointed out that the recommendations of the interviewing panel were particularly relevant. These panels are important management tools composed of senior police officers assisting the National Commissioner in considered decisions regarding the filling of vacancies. The National Commissioner must at least give consideration to these recommendations (par 60), which in the present case amounted to a particularly strong recommendation to appoint Barnard (parr 33&62). The same applies to the views of the Divisional Commissioner. The Divisional Commissioner, as the line manager, has first-hand knowledge and insight into the needs and dynamics of his division and his recommendations should therefore be taken account of by the National Commissioner in order to arrive at a just decision in terms of the EEA and the EEP (par 61) and who, moreover, in his written recommendations stated that it would be in the interest of service delivery to promote Barnard (parr 36&63). The respondent also sought to justify the decision not to appoint Barnard on the basis of the National Commissioner's view that the position that Barnard applied for was "not critical". Dealing with this attempt to justify the decision not to appoint Barnard, the SCA referred to the values underpinning the public administration (also applicable to the SAPS) as outlined in section 195(1) of the Constitution, section 205(2) and (3) of the Constitution that pertinently deals with the SAPS, and to the South African Police Service Act (68 of 1995) (par 70-72), all of which envisages "a professional, efficient police force that makes effective use of resources" (par 72). Having regard to these constitutional and legislative provisions, it cannot be contended that a senior position such as the one that Barnard applied for was not seriously considered when it was created and advertised in the first place. The management of the SAPS must have been convinced of the need for such a position and for the need to fill it. Moreover, the National Commissioner's view that filling of

the vacancy was not critical is contradicted by the letter of the Deputy National Commissioner referred to in paragraph 31 of the judgment, that interviewing panels should focus, inter alia, on the appointment of personnel who would enhance service delivery (par 76).

Hence, the SCA stated as follows with regard to the National Commissioner's assertion that it was not critical to fill the position:

> Against this background and in the absence of a reasoned motivation by the National Commissioner, one is left with the distinct impression that the explanation that the post was not filled because it was not 'critical' was contrived (par 73).

The unfair nature of the discrimination is underscored by the unjustifiable detrimental impact of the discrimination on Barnard who, in spite of her being a loyal and dedicated servant of the SAPS, was twice rejected on dubious grounds (par 77).

Certainly of great importance from the point of view of labour law, the SCA stated that although the National Commissioner was not obliged to fill a vacancy, especially where there is no suitable person meeting the requirements of the position, it does not follow that where the only suitable candidate is from a non-designated group in relation to representivity, that person should not be appointed (par 78).

The available evidence clearly shows that the respondent failed to rebut the presumption that the racial discrimination against Barnard was not unfair. In consequence, there was no factual basis for the LAC's decision (par 79), which was overturned.

The judgment of the SCA corresponds in all material respects with that of the LC. What it shows is that there was in fact no basis for the LAC overturning the judgment of the LC. The LAC's judgment, as will be shown in this discussion, was in fact nothing but a dreadful miscarriage of justice.

6 Analysis

The judgment of the SCA is a welcome and much-needed correction to the judgement of the LAC judgment by Mlambo JP, Davis and Jappie JJA. However, the judgment of the SCA, having done what was necessary to correct what went wrong in the LAC, did not embark on a full-blown critical analysis of the unhappy discourse that constituted the judgment of the LAC. That after all, is also not the responsibility of a court (of appeal). The SCA judgment nevertheless provides valuable confirmation to what I will now do, namely, to critique the judgment of the LAC from a constitutional point of view.

The gist of the critique is that the LAC approached the case in such a manner that on proper analysis, it proves not to have adjudicated it at all. It is argued that the LAC:

(1) So completely deferred to an absolute power of the National Commissioner on decisions regarding promotions, and to the policy of representivity, that it prevented itself from considering the merits of the case before it, thus effectively imposing an ouster clause on itself;

(2) materially erred in defining the dispute that it was seized to adjudicate in such generic terms that it could not and did not adjudicate the actual dispute between the parties before it; and

(3) misunderstood the distinctive responsibility of a court in contrast to the legislature and the executive, resulting in its abdicating its judicial duties.

These three errors are closely inter-related, partially overlapping and mutually reinforcing. All three caused the LAC to abdicate its duties and responsibilities as an independent and impartial adjudicator in contrast to the legislature and the executive, thus denying the appellant – and by implication also the respondent – the constitutional right of access to court.

6 1 The LAC Abdicated Absolute "Prerogative" of the National Commissioner and to the Policy of Representivity and thus Administered an Ouster Clause on Itself

It is common cause that the power regarding promotions in the SAPS vests in the National Commissioner. However, the exercise of this power is judicially reviewable. If not, the power is absolute and above judicial control. Such prerogatives and absolute powers are wholly inimical to the principle of the rule of law and the notion of a supreme constitution in which, as stated in section 165(4) of the Constitution, the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

The approach of the LAC was at variance with this. Instead of treating the power of the National Commissioner as reviewable, it dealt with it as if it was absolute, and describes it, quite strikingly, as a prerogative (par 46 443I; also in parr 4 322D & par 17 325H). Not only did the LAC describe the power in absolute terms, it also considered and applied it as an absolute and non-reviewable prerogative.

In the present case, the National Commissioner decided not to promote Barnard solely on account of what he clearly regarded as the unconditional need to achieve prompt representivity in the staff composition of the SAPS. In doing so, he disregarded the whole collection of factors which had been considered by the SCA before concluding that in the circumstances Barnard was entitled to be promoted.

In dealing with the decision of the National Commissioner not to promote an applicant (that is, an applicant in general terms, and not Barnard specifically) the LAC referred to sections 5(7) and 13(7) of National Instruction 1 of 2004 of the SAPS in terms of which the National

Commissioner has a discretion, notwithstanding the recommendations of an interview panel, whether or not to promote a recommended candidate, to leave a vacancy unfilled, or to promote another candidate from the list of recommended candidates submitted to him or her, or to direct that the post be re-advertised (LAC par 43 333G-I). According to the LAC, the National Commissioner is the only person who is answerable as to any determination made regarding service delivery matters. The LAC stated:

> It is not open to a court to 'second guess' a decision that not filling a post will not compromise service delivery … In any event, I am of the view that the National Commissioner was the only person well-placed to determine if service delivery would be compromised by the failure to fill the post and his decision that this would not be so is unassailable. Frankly speaking that is his prerogative and should he be incorrect in so deciding and imperil service delivery as a result, he is answerable to … the Minister and ultimately to Parliament. The National Commissioner is similarly answerable in that manner should he fail to achieve the targets set out in the Employment Equity Plan. Our role as courts is to determine if any conduct, alleged to be based on an Employment Equity Plan, for instance, is justifiable in terms of that plan such as we have here. It is not open to a court to dictate to the National Commissioner that he is compromising service delivery and should fill a post (par 46 334G-335B).

The LAC then concluded that the purpose of employment equity orientated measures may not be subjected to (that is, hampered by) an individual's right to equality and dignity. This conclusion follows logically from the LAC holding that the LC was wrong in finding that the purpose of employment equity orientated measures was subject to an individual's right to equality and dignity (par 47 335C). The LAC made the same wrong assertion in paragraph 20 (326H). (As shown below, the LAC erred in making this assertion, as the LC in fact never made any such decision.)

As the discussion of the judgment of the SCA shows, there was overwhelming evidence showing that Barnard had to be appointed and, conversely, that not to appoint her in fact constituted unfair racial discrimination. (This evidence includes information of Barnard's excellence advanced on her behalf and clearly showing that she was by far the best candidate; the findings and recommendations of the interviewing panel supported by Divisional Commissioner Rasegatla; the fact that the position for which Barnard applied was created and advertised; and the evidence that her promotion would promote effective services.)

These and other relevant factors must be shown to have been considered in order to satisfy the requirement that he had duly exercised the power vested in him. The National Commissioner, however, went no further than to give effect to his own rigid interpretation of representivity in rejecting the recommendation of the Divisional Commissioner to promote Barnard on the basis that it "… did not address representivity" (par 8 323B) and that filling the position was not "critical" (par 8 323E), thus bluntly ignoring all relevant considerations, including the individual

rights of Barnard as well as the operational needs of the SAPS, the institution of which the National Commissioner was the head.

Instead of duly exercising its powers of judicial review, as is incumbent on a court of law devotedly discharging its judicial authority, the LAC simply rubberstamped the National Commissioner's failure to apply his mind to all relevant considerations. In complete deference to the "prerogative" – the absolute power – of the National Commissioner, the LAC, faithfully in step with the Commissioner, also elevated the prompt achievement of representivity to the sole and decisive factor to be considered when decisions regarding promotions are to be made. Thus the LAC held that appointing Barnard "… would fly in the face of the employment equity orientated measures applicable in the appellant's environment and would have aggravated the overrepresentation of Whites in level 9" (LAC par 42 333F). The decisive importance of the representivity factor in fact permeates the whole discourse of the LAC in paragraphs 25, 32, 34, 37 and 40-43 of its judgment. In consequence of this wholesale deference to the representivity factor, the court failed to deal with the pertinent dispute namely, the alleged violation of Barnard's constitutional right against unfair discrimination resulting from the decision of the National Commissioner not to promote her. In so doing, the LAC erroneously tried to effect something which the SCA rejected, namely to pursue employment equity measures by the mechanical application of formulae in order to meet numerical targets.

By the same token, the LAC also deferred to the *ipsissima verba* of the National Commissioner on the question of service delivery instead of reviewing the decision with reference to the relevant evidence as the SCA eventually did. Once again, the effect of this deference was that the LAC failed to attend to the specific dispute before it, namely whether or not Barnard's constitutional rights had been infringed.

Had the LAC duly applied its mind to the actual dispute in the way the SCA did, thus considering the relevant evidence instead of deferring to the "prerogative" of the National Commissioner in conjunction with the representivity factor, it would have come to the same conclusion as the SCA in favour of Barnard. The problem is that the LAC, having so wholly deferred to the decision of the Commissioner and having completely failed to consider the relevant evidence before it, had in fact completely disregarded the actual dispute and, in consequence, failed to adjudicate it.

So what was the LAC, on account of its deference to the National Commissioner's "prerogative" and unjustified subservience to the policy of representivity, actually doing by bluntly declining to decide the case before it? What, specifically, was it doing from a constitutional point of view? Although the SCA identified and corrected this mistake of the LAC, it did not proffer an express answer to this question. On close analysis the answer to the question is that the LAC imposed an ouster clause upon itself, thus preventing itself as a court of law, from adjudicating the merits

of Barnard's complaint that her constitutional rights to equality and dignity had been violated. The LAC did this by proclaiming in general terms, that the constitutional rights of an individual cannot trump decisions implementing an employment equity plan that purports to pursue representivity. Hence, the LAC abandoned the jurisdiction that the Constitution confers upon the courts to adjudicate and rule against decisions that violate rights - in the present case a decision purporting to be in pursuance of an EEP that violates individual constitutional rights. The LAC placed decisions purporting to implement EEP's and promoting representivity beyond judicial review. Ordinarily, ouster clauses are legislative provisions that exclude the jurisdiction of the courts to review decisions of functionaries, more in particular, decisions of executive organs of state, taken in terms of empowering provisions contained in such clauses. Ouster clauses render such decisions final and therefore not subject to judicial control in spite of the fact that they could violate individual rights. Ouster clauses featured in some legislation before 1994. Understandably, they are generally and justifiably regarded as repugnant because they exclude the jurisdiction of the courts to review decisions that violate constitutional rights, thus permitting uncontrolled invasion of constitutional rights. Section 34 of the Constitution now provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. This right has obviously rendered all ouster clauses unconstitutional.

The right of access to the courts is a core constitutional right in that it enables people to seek judicial redress for the invasion of any right provided for in the Constitution. The enforcement of all other constitutional rights is dependent on the right of access to court. If the latter is tampered with, all other constitutional rights become unsettled because judicial redress for their violation can no longer be sought. Ouster clauses therefore undermine the very foundation of a constitutional order premised on the supremacy of the Constitution, the rule of law and the guaranteed protection of constitutional rights.

There is no legislative ouster provision in the present case. What did occur was that the LAC's recognition of the "prerogative" of the National Commissioner and its mechanical interpretation of the policy of representivity amounted to an imposition upon itself of an ouster clause, stripping itself of its own jurisdiction and denying Barnard the right of access to court in order to seek redress for the violation of her right to equality and human dignity. This is egregiously inimical to the principle of constitutional supremacy and the rule of law. The violation of the right was not authorised by the legislature or the executive, something which could be expected in a totalitarian state where scant recognition is afforded to basic rights, but certainly not to be forthcoming from a court of law entrusted with the protection of rights and supposed to be the supreme guardian of the rule of law.

6 2 The LAC's Error on the Nature of the Disputed Issue

Apart from the fact that it allowed itself to be incapacitated by a self-imposed ouster clause, the LAC also, in a different but related way, prevented itself from discharging its adjudicatory duties. What it did was to incorrectly define the dispute that it had to decide materially, in consequence of which it failed to respond to and adjudicate the actual dispute placed before it. According to the SCA, the dispute revolved around the broad and general question whether, in the event of a clash, employment equity measures or the individual rights to equality and dignity should prevail. This was obviously a misdirection because the actual dispute was not a broad, but a narrow one. It merely required the court to weigh up the merits of the National Commissioner's specific decision not to promote Barnard against her individual rights. By making a material error as to the nature of the subject matter of the dispute, the SCA denied the parties, more particularly the appellant who was unsuccessful, the right of access to court and thereby abdicated its core duty as a court of law to acquit its responsibility of considering the actual life disputes it is called upon to decide.

The SCA also identified this error and its judgment was largely focussed on correcting it. The SCA emphasised that employment equity measures should not be applied mechanically but with due consideration of all relevant factors pertinent to the case concerned. It also scolded the LAC for failing to do so. The pertinent constitutional implications of this blunder will now be considered.

When defining the dispute it had to decide, the LAC stated that "the issue … is whether the implementation of equity orientated measures should be stifled in the event that such implementation will adversely affect persons from non-designated groups" (par 20 326H).

According to the LAC, the LC erroneously decided that "… the implementation of employment equity measures must yield to an individual's right to equality and dignity where such individual is adversely affected by the implementation of such measures" (LAC par 23 327H). This means "that the right to equality supersedes other considerations such as, in this case, the implementation of employment equity orientated measures" (LAC par 23 327I), or, as the LAC also stated, the LC "misconstrued the purpose of the employment equity orientated measures by decreeing that their implementation was subject to an individual's right to equality and dignity" (LAC par 47 335C; see also par 20 327H-I).

It should first be emphasised, that the SCA was wrong in its assertion that the LC defined the issue in these general terms. The LC's judgment belies that. The LC in fact only decided the pertinent issue concerning the specific decision relating to Barnard and not the non-pertinent, generic and abstract question which the LAC erroneously identified to be in issue.

Having made these incorrect statements on the supposed dispute, the LAC went on to reject the alleged view of the LC (parr 26 &30) and then "decided" that employment equity measures trumped individual rights. Solely on account of this general "finding", and without considering the specific facts pertinent to the National Commissioner's decision regarding Barnard, the LAC illogically leapt to the non-premised conclusion that the decision not to promote Barnard was legitimate.

The LAC was clearly wrong in interpreting the issue in these broad and generic terms. This was simply not the issue. It could therefore not make a "ruling" that employment equity measures trump individual rights simply because that was not in issue. The issue before the court was not whether in general – *in abstracto* – the right to equality, dignity (and other constitutional rights) trump or are trumped by the implementation of employment equity measures. The issue was specific. It was whether or not the decision of the National Commissioner (that had to, but as the SCA clearly indicated, did not account for all the facts pertinent to that decision) not to promote Barnard was legally, more specifically constitutionally, justified.

The LAC's erroneous generic definition of the issue and its ensuing finding, instead of applying its mind to the actual specific dispute it had to decide, sent its whole discourse astray. It went on an exposition of employment equity measures in general, instead of properly engaging with the actual question in issue in the way the LC and the SCA did.

In support of the LAC's generic assertion that employment equity measures trump individual rights in contrast to the opposite view that it erroneously attributed to the LC (par 26 328G), the LAC strayed through the legal basis of employment equity measures, the EEA and to EEP's (parr 31-39) and the representivity policy. All these considerations could at best, serve as a general background indicating why the decision not to promote *an* applicant *may* or *may not* be taken, and presenting the first preliminary steps for dealing *in abstracto* with *an applicant* for promotion. However, the LAC never reached the point where it dealt with the merits of the specific application, namely that of Barnard, and never gave due consideration to the specific evidence pertaining to Barnard's application for promotion which was the actual question to be decided.

It should be trite that these general considerations which, in any event, are not in dispute, can obviously not determine the specific decision in issue, namely why Barnard was not promoted. This is clear from the SCA judgment and also from the judgment in *Minister of Finance v Van Heerden* (2004 11 BCLR 1125 (CC)) in which Moseneke J, as he then was, stated that it was obvious that affirmative action could often come at a price for those who were previously advantaged (par 44 1143H).However, that does not mean that all individual decisions purportedly taken in terms of such measures are, as a matter of principle, always constitutionally beyond reproach. All such measures and, as in this case, all individual decisions purported to be taken in terms of such

measures, must be considered with reference to all relevant facts pertaining to the case in question in order to determine whether they measure up to what the Constitution requires. The effect of such a decision on the rights of any individual is crucial in this context and might be indicative of the unconstitutionality of the measure. In this regard the significance of the following observation from Moseneke J in *Van Heerden* is obvious:

> However, it is also clear that the long-term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity. Central to this vision is the recognition that ours is a diverse society, comprised of people of different races, different language groups, different religions and both sexes. This diversity, and our equality as citizens within it, is something our Constitution celebrates and protects. *In assessing therefore whether a measure will in the long term promote equality, we must bear in mind this constitutional vision. In particular, a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened* (*Van Heerden* par 44 1144A-C). (Emphasis added)

In consequence, a court duly adjudicating a case before it, cannot rule a decision purported to pursue employment equity, to be legally and constitutionally justifiable without first having considered the effects of such decision on the rights of a person allegedly adversely affected by it. This, however, is exactly what the LAC failed to do in the present case. By its incorrect abstract and generic, instead of correct concrete and specific definition of the disputed issue and its ensuing purported "decision" of this supposed issue, the LAC denied the parties, more in particular the appellant, the right of access to court in terms of section 34 of the Constitution.

The primary prerequisite for exercising this right is that the court adjudicating a matter must apply its mind to the specific dispute before it instead of being carried away by some other imagined dispute which is not in issue. The judgment of the court must respond pertinently to the disputed issues presented by the parties, and not to a supposed issue based upon an erroneous interpretation of what the dispute supposedly entailed, but in fact did not entail. The court must therefore adjudicate the actual *facta probanda*, that is, the disputed issues. The *facta probanda* determine the relevant *facta probantia*, that is, the evidential material that will be relevant to prove or disprove the disputed issues. By the same token, the *facta probanda* also determine which evidential material is in fact not relevant. If the court errs on the disputed issues – on the *facta probanda* – it will also err on the *facta probantia*, that is, if it is wrong on what the actual disputed facts are, the court will also err on the relevance or otherwise of the evidence required to prove or disprove the disputed facts. Having misconstrued what is in dispute, it will also err in deciding which evidence to admit, and which not to admit. Hence, in the final analysis, it will "decide" the wrong dispute on the basis of the wrong evidence. It will not decide the actual dispute in issue between the

parties, but a supposed one that is not really in issue and which is not really before the court. The court's "adjudication" of such (supposed) dispute might benefit the respondent (as in this case it did), or the appellant, or it might be to the detriment or to the benefit of either party (depending on the scenario in question). However, regardless of these variable scenarios, it will undoubtedly amount to a patent denial of the right of access to court and to a serious violation of the integrity of the administration of justice and the rule of law.

This was exactly what occurred in this case as a result of the LAC's erroneous definition and consideration of the dispute before it. The LAC's incorrect definition of what it had to decide, namely whether the specific decision of the National Commissioner taking into account all the facts pertinent to such decision not to promote Barnard, was legally justified or not, caused the right of access to court to be brazenly flouted. The LAC incorrectly defined the *factum probandum* in the above-mentioned abstract and generic terms. However, this was not in issue. The specific issue – and the real pertinent *factum probandum* as described above, was whether or not Barnard was entitled to promotion. Having incorrectly defined the *factum probandum,* the court also dealt incorrectly with the *facta probantia.* It erroneously allowed itself to "decide" the case on the basis of merely generic and background facts (and, as shown above, by a legal misconception that the decision of the National Commissioner was beyond judicial review) that was materially irrelevant for the actual specific dispute in question. At the same time, it disregarded the most relevant evidence that was crucially important for a finding of the specific dispute that it actually had to decide, namely all the evidence that the SCA eventually scrutinised.

On proper analysis therefore, the LAC's judgment was no judgment at all, simply because it did not respond to the dispute that it was seized to decide. It was a general discourse culminating in an assertion that affirmative action measures trump individual rights. However, since the actual specific dispute was not entertained with reference to the pertinently relevant *facta probantia,* the discourse of the LAC amounted to a refusal to give judgment. In doing so, the LAC divested itself of its responsibility to decide the issue, thus denying the parties, more in particular the appellant, the constitutional right of access to court.

6 3 The LAC's Misunderstanding of the Distinctive Responsibility of a Court in Contrast to that of the Legislature and the Executive

Ideally, the three branches of governmental authority should be united in the pursuit of justice. In this pursuit it is, however, crucial to clearly distinguish the salient characteristics of the judicial function from those of the legislature and the executive. Legislatures and executives seek to achieve this through general policies. Well-considered policies designed in terms of Constitution that account for the rights of all sectors of the populace will generally achieve this purpose. However, it is impossible to

foresee the effects of such policies in individual cases, that is, for each specific individual in his or her singularly unique circumstances. The point is that good and well-intended policies aimed at the achievement of a general public good may, in given circumstances, prejudice specific individuals. In such cases the pursuit of justice requires specific decisions in order to achieve justice for such an individual and for the public in general. Aristotle was keenly alive to this dilemma. According to him, general rules aimed at achieving overall justice may, in certain circumstances, prove to be ineffective, thus causing injustice. This is an inevitable consequence of the fact that the circumstances of every specific case are not always foreseeable.

Specific cases require specific decisions based on the unique facts of every particular case. This is necessary in order to achieve fairness in the case concerned and also to secure overall justice for everyone (Aristotle *Nicomachean ethics*, English translation by Martin Oswald, Prentice Hall (1962) 141-2). In the context of the individual case with its unique facts, the distinctive responsibility of the courts is obvious.

In this regard it is appropriate to refer to the views of Ronald Dworkin, expressed in two of his main works (Dworkin, *Taking Rights Seriously* (1977); and Dworkin, *Law's Empire* (1986)). In these works this distinctive feature was emphasised or identified and the unique responsibilities of the courts elucidated. These insights are important: They not only resonate our legal tradition but also clarify the distinctive responsibility of the courts in general. This responsibility is of extreme significance in a constitutional order such as ours, which, amongst other things, avows the values of the supremacy of the Constitution and the rule of law (s1(c) of the Constitution) and where the courts are required to be independent and not subject to considerations of expediency, policy and executive instructions but only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice (s165(2) of the Constitution).

In formulating and applying policies, legislatures and executives should take care to act within the confines of the law and to respect and promote individual rights (also expressly provided for in s7(2) of the Constitution) and in so doing, pursue the achievement of justice. However, the distinctive characteristic of the functional terrain of legislatures and executives is not *specifically individual* and *personal* but *general* and *abstract*. Lawrence Baxter (*Administrative Law* (1984) 349) stated for example, that legislation usually connotes action which is of *general* application or effect in contrast to action which is specific in application. This corresponds with the observation of the Appellate Division in *South African Roads Board v Johannesburg City Council* (1991 4 SA 1 (A) 12-13), which in itself harks back to the Roman *Digest*. (Also see the brief observation of the Constitutional Court in *UDM v President of the RSA* 2002 11 BCLR 1179 (CC) 1200A-B par 70). In consequence, legislatures and executives design and execute policies with a view to achieving an overall collective social, political or economic goal. Courts

are not isolated from such policies. They should generally be inclined to give effect to them. However, this should take place in line with the basic assumptions of constitutionalism. This entails that these policies must be compatible with the Constitution, more particularly with constitutional rights in individual cases. Hence, the central focus of the judicial function and primary responsibility of courts, unlike that of the legislature and the executive, are not these general collective social policies and goals, but the protection of individual (constitutional) rights (as described by Dworkin, among others, in *Law's Empire* 381).

A court adjudicating a case which involves individual constitutional rights can only fulfil its judicial responsibilities when it establishes and gives effect to the rights of the litigating parties. To that end, courts must reason in a principled way. They must not primarily pursue policies deemed to advance or secure an economic, political or social situation for the benefit of all. That is the distinctive terrain of the legislature and the executive. Courts must fulfil their distinctive function and reason on the basis of principle. This will inevitably secure justice and fairness for individuals in specific cases. (For Dworkin's distinction between policy and principle see, amongst others, *Taking Rights Seriously* 22 &82.) The courts' principled argumentation should be intended to secure the establishment (of the ambit and consequences) of the (constitutional) rights of the parties in an instant case. It should not be premised on policy that is directed towards the establishment (and promotion) of collective goals, (See for e.g. *Taking Rights Seriously* 90; *Law's Empire* 244) which policies might possibly infringe upon the constitutional rights of individuals in a specific set of circumstances. Policies seeking to achieve an overall good are essentially utilitarian, that is, in the words of Dworkin, "statistically defined" in contrast with matters of principle that focus on the rights of an individual regardless of the statistical considerations. (*Law's Empire* 223; 243. See also Fiss "The limits of judicial independence" 1993 (vol 25) *Inter-American LR* 57 59-60). Litigants are therefore entitled to the adjudication of their disputes upon the principles underpinning their rights (*Law's Empire* 218, 410).

When a court simply enforces policy instead of discharging its judicial duty of adjudicating individual rights on the basis of principle, it renounces its responsibility as an adjudicator and assumes a new role, namely that of a deputy of the legislature or the executive. This would defeat the very idea of constitutional adjudication. In the words of the Constitutional Court in *S v Makwanyane* (1995 BCLR 665 (CC) par 89) (when dealing with the question of public opinion in the judicial process)):

> [t]he protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution … The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the

rights of minorities and others who cannot protect their rights adequately through the democratic process.

In the present case, the LAC refused to consider the merits of the decision of the National Commissioner with reference to the rights of Barnard. It wholly deferred to the "prerogative" of the National Commissioner and to the notion of representivity without appreciating the impact of the National Commissioner's decision on the individual rights of the appellant. In effect, the court assumed the distinctive role of the legislature and abdicated its own distinctive responsibility as a court of law.

6 4 Separation of Powers

Although the LAC never mentioned the doctrine of the separation of powers, it is clear, however, that it was prominently in its mind all along. Its wholesale deference to an absolute power of the National Commissioner and to the policy of representivity, to the extent that it inflicted an ouster clause on itself, attests to the LAC subscribing to a form of separation of powers that aggrandised the legislature and the executive. At the same time, it also minimised the role of the courts to such an extent that it in fact reduced the court to a mere deputy of the political branches and, in this case, more specifically to the National Commissioner of the SAPS. The SCA, however, was clearly not concerned about having to overcome any possible obstruction posed by the doctrine of separation of powers. That is obviously why it did not defer in the way the LAC did. There is also no indication that the SCA deemed its ruling against the SAPS, being an organ of the state and purporting to enforce government policy of representatively, as particularly activist and in disregard of the separation of powers doctrine. So, which of the two courts are correct in this regard? The answer to this question is provided by the explanation in 6.3 above, of the distinctive role of the courts in contrast to that of the executive and the legislature. When a court is called upon to decide on the constitutionality of a broad policy which falls squarely within the terrain of the legislative or the executive, the risk looms large that the court might find itself trespassing on that terrain. That is not to say that the court is necessarily precluded from deciding such an issue. However, realising the risk involved the court should act with careful restraint. If it gives judgment disrupting such broad policies, it could most probably legitimately be blamed for usurping powers that do not really fall within the province of the judiciary. Conversely, however, when the issue before the court is limited and specific and does not relate to the justifiability of a general policy, but merely to the impact of a single decision on a particular individual, the risk of trespassing on the terrain of the executive or the legislature is highly unlikely and a separation of power issue does not arise. If in such a case a court should refrain from deciding the issue and defer to the decision of the state organ in question, it relegates itself to the mere deputy of such state organ, instead of living up to its responsibilities as a court.

The present case was of a specific nature. The risk of the court infringing upon the terrain of the legislature or the judiciary was therefore a remote, if not non-existent, one. There would have been no such risk had the court given judgment against the state, as the SCA in fact did. There was no separation of power issue at stake. However, the LAC incorrectly interpreted the issue. It treated it as a broad issue of policy instead of the specific issue which it in fact was. In consequence, a separation of powers issue was artificially involved in this case. As, if a broad policy issue was at stake, the LAC unjustifiably concocted the need for judicial deference. In complete acquiescence to the prerogative of the National Commissioner and to the policy of representivity, it allowed itself to be relegated to an agreeing delegate of the National Commissioner. Ironically, in doing so, it did not evade a separation of powers question; on the contrary, it created one, but not one involving the risk of the court trespassing onto the terrain of the other branches, but exactly the opposite, that is, of allowing the other branches to trespass upon the functional terrain of the judiciary, in such bold fashion that the court was incapacitated to rule on a human rights issue involving a single individual. In consequence, the LAC disregarded the separation of powers principle instead of affirming the principle by discharging its judicial responsibilities in respect of the dispute before it.

6 5 Possible Flaws in the SCA's Argumentation

Although the judgment of the SCA is to be hailed for correcting the wrongs that occurred in the LAC, it is not necessarily correct in all respects. It might be argued that the SCA erred in part in its argumentation even though its conclusions were correct.

Generally, when dealing with a claim of alleged unfair discrimination based on one of the listed grounds (including race) in terms of section 9(3), read with section 9(5), of the Constitution, unfairness of discrimination is presumed unless the respondent (discriminator) can prove that the discrimination was in fact not unfair. In such cases the tests for equality and unfair discrimination, as developed in the Constitutional Court judgment in *Harksen v Lane* (*supra*) are applied.

However, the present case is not an ordinary case of alleged unfair discrimination. It deals with constitutionally authorised measures of remedial or restitutionary equality aimed at achieving equality as envisaged in section 9(2) of the Constitution. The decision of the National Commissioner was taken in pursuance of an EEP under the EEA which was adopted in terms the operative part of section 9(2) (the second sentence of section 9(2)) which provides:

> To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

This part of section 9(2) basically envisages restitutionary equality among which counts the affirmative action measures outlined in the EEA.

Employment equity measures such as those in the EEP of the SAPS necessarily differentiate on the basis of race (and other grounds such as gender and disability). The question therefore arises whether measures for restitutionary equality adopted under section 9(2) should be dealt with in the same way as other forms of differentiation. Two options are possible:

First, measures for restitutionary equality grounded in section 9(2) that differentiate on one of the listed grounds of section 9(3), read with section 9(5), are to be considered on the same footing as other forms of racial differentiation. They will also be regarded as *prima facie* unfairly discriminatory, unless the author of the measures proves the contrary. The tests of *Harksen v Lane* (*supra*) will apply to them in the same way as to any other differentiating measure. Loot Pretorius ("Fairness in transformation: a critique of the Constitutional Court's affirmative action jurisprudence" 2010 *SAJHR* 536-570) is an advocate of this view.

Second, restitutionary measures, in pursuance of section 9(2), should be treated differently from other forms of differentiation, more particularly, they should not be regarded as *prima facie* discriminatory. This is the view that the Constitutional Court per Moseneke J (as he then was) took in *Van Heerden* (*supra*) where the following is said:

> It seems to me plain that if restitutionary measures, even based on any of the grounds of discrimination listed in section 9(3), pass muster under section 9(2), they cannot be presumed to be unfairly discriminatory. To hold otherwise would mean that the scheme of section 9 is internally inconsistent or that the provisions of section 9(2) are a mere interpretative aid or even surplusage. I cannot accept that our Constitution at once authorises measures aimed at redress of past inequality and disadvantage but also labels them as presumptively unfair. Such an approach, at the outset, tags section 9(2) measures as a suspect category that may be permissible only if shown not to discriminate unfairly (par 33) (footnotes removed).

Viewed against the backdrop of this view, the SCA might have been wrong to apply the *Harksen* test to the National Commissioner's decision not to promote Barnard and thus to have considered the decision as constituting *prima facie* unfair discrimination in terms of section 9(3), read with section 9(5). It does not follow, however, that the SCA was necessarily wrong because it did not deal with a restitutionary measure as such – an EEP – as envisaged in section 9(2) of the Constitution. What it did deal with was an individual decision purported to have been taken in pursuance of an EEP. The SCA seems to have been correct in applying sections 9(3) and (5) to the decision of the National Commissioner. However, even if sections 9(3) and (5) were not applicable, and even if the decision of the National Commissioner was to be considered solely on the basis of section 9(2), the SCA's reasoning and its conclusion would remain valid. The reason for this conclusion is that the constitutionality of both measures for restitutionary equality under section 9(2), such as EEP's, and of individual decisions purported to be taken in pursuance of such measures, cannot be assumed to be measures or decisions for

restitutionary equality solely on the basis of what they purported. They have to be scrutinised in order to establish, with reference to the relevant evidence, whether they are in fact truly measures and decisions that promote equality for all. To qualify as such, both the interests of beneficiaries of such measures and decisions (those previously disadvantaged by unfair discrimination), as well as all others persons, such as those in Barnard's position, will have to be taken into account. No one must be unfairly discriminated against and the enjoyment of all rights and freedoms must be equally available to all. The clear basis for this is to be found in the first sentence of section 9(2) that provides that "[e]quality includes the full and equal enjoyment of all rights and freedoms".

Following the basic tenets of contextual interpretation, section 9(2) must be read as a whole. It cannot be interpreted as if its first provision is not in existence. In fact, measures for remedial equality, including affirmative action adopted in terms of section 9(2), are indeed regarded as expressions of the right to equality and not exceptions thereto, because the provision (the second sentence of s9(2) follows on the first) includes into the right to equality the full and equal enjoyment of all rights and freedoms. This underscores the importance of reading section 9(2) as a whole.

The resitutionary measures authorised in the second sentence of section 9(2), that is, the "… legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination …" are in fact authorised to promote, in the words of the first sentence of section 9(2) "… the full and equal enjoyment of all rights and freedoms". Restitutionary measures may therefore quite obviously not create new inequalities. If so, they unjustifiably go beyond the aim of such measures and are incompatible with the above quoted first provision of section 9(2). They are provided for in order to enable full and equal enjoyment of all rights and freedoms, not only for some categories of persons but for all. For that very reason, section 9(2), the provision that allows restitutionary measures, is also the provision that sets the standard for such measures. To the extent that such measures or individual decisions in pursuance thereof create inequalities and discrimination, as in the case of Barnard, and disregard other relevant constitutional provisions (such as s195(1), which the SCA referred to) such measures or decisions will be incompatible with the first provision of section 9(2). In order not to fall foul of that provision and thus to avoid any unconstitutional conclusion, the court should deal fully with all the relevant evidence and its impact, including the impact of the decision on the complainant, which is exactly what the SCA did in the present case. Moreover, it would have been fair and appropriate also to require the respondent to motivate its decision by tendering relevant evidence since the respondent, as the author of the decision, unlike the complainant, possesses all such information and is in the best position to assist the court in this regard. If it is a measure against which the complaint is lodged, the respondent will have to show that the measure is a remedial

equality measure. In the case of an EEP that will be fairly easy to do as the respondent need only show that the measure was properly adopted in terms of the EEA. In the case of a decision purporting to have been taken in terms of an EEP, such as in the present case, the respondent will have to tender evidence showing that the decision was *intra vires* the EEP and that it complies with section 9(2) and has properly accounted for all other relevant considerations, such as those dealt with by the SCA in the present case. The conclusion following from this argumentation is that if the SCA had not followed the route it did, by involving section 9(3) and (5) – and the *Harksen* test but, had confined itself to an inquiry solely in terms of section 9(2), it would have reasoned in materially the same way and would have reached the same conclusion as it in fact did.

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Nedbank Ltd v Swartbooi
Unreported Case No 708/2012 (ECP)

Termination of debt review in terms of the National Credit Act – not the end of the road for over-indebted consumers

1 Introduction

Before discussing the decision in *Nedbank Ltd v Swartbooi* it would be useful, first, to briefly discuss the relevant provisions of the National Credit Act (34 of 2005) (NCA).

One of the primary aims of the NCA is to provide debt relief to an over-indebted consumer (s3(g)) by allowing him or her to apply, in terms of section 86, to a debt counsellor for the review of his or her debt obligations pursuant to a credit agreement as defined in the NCA (see s8). On receipt of the application, the debt counsellor must notify all credit providers that are listed in the application, in the prescribed manner and form, of the debt review application (s86(4)(b)(i)). Within a period of 30 business days the debt counsellor must determine whether the consumer appears to be over-indebted (s86(6)(a) read with reg 24(6)). If the debt counsellor concludes, on account of the assessment, that the consumer is not over-indebted (s86(7)(a)) the debt counsellor must reject the application and the consumer may apply directly to the Magistrate's Court for a debt restructuring order (s86(9)). However, if the debt counsellor concludes that the consumer is over-indebted (s86(7)(c)), the debt counsellor will draft a proposal for the restructuring of the consumer's obligations and submit it to all credit providers for their consideration. It is important to note in this regard, that the NCA does not

require any negotiations in respect of consumers who are found to be over-indebted (*National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) 317). However, in practice, debt counsellors prefer to negotiate with credit providers in the hope of reaching a compromise with them. Negotiations are also undertaken pursuant to the obligation in terms of section 86(5) "to participate in good faith in the review and any negotiations designed to result in responsible debt re-arrangement". If the parties do not reach an agreement, the debt counsellor must bring an application to the Magistrate's Court in terms of section 87(1) for an order in terms of which the consumer is declared over-indebted and his or her debt obligations are restructured pursuant to the debt counsellor's proposal (s86(7)(c) read with ss86(8)(b) and 87(1)). The restructuring powers of the court are limited and the court may in essence, only order that the amount of the instalment be reduced and the payment term be extended or, in the alternative, postpone the dates on which payments are due, or extend the payment term and postpone the dates on which payments are due under an agreement (s86(7)(c)(ii)). The consumer therefore does not receive any discharge of his debt obligations. It should be noted in this regard that the NCA aims to provide "mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of *all* responsible financial obligations" (s3(g); our emphasis).

Section 88(3) protects the consumer by providing for a moratorium on debt enforcement in certain instances. While a consumer is under debt review, or where a debt restructuring order applies to him or her and the consumer strictly complies with such order, a credit provider may not enforce any of its rights in terms of a credit agreement. Section 88(3) is subject to section 86(10) which allows a credit provider to give notice to the consumer to terminate the debt review. Section 86(10), which is especially important for the purposes of this case discussion, provides as follows:

> If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to –
>
> (a) the consumer;
>
> (b) the debt counsellor; and
>
> (c) the National Credit Regulator,
>
> At any time at least 60 business days after the date on which the consumer applied for the debt review.

Where a consumer is under debt review, section 129(1)(b) provides that a credit provider may not commence any legal proceedings to enforce a credit agreement before first providing notice to the consumer as contemplated in section 86(10). In terms of section 130 certain requirements must be complied with before a credit provider may approach a court for an order to enforce a credit agreement. Section 130(1)(a) provides that a credit provider may approach the court for debt enforcement only if, at that time, the consumer is in default and has been

in default under that credit agreement for at least 20 business days. Furthermore, at least ten business days must have elapsed since the notice in terms of section 86(10) has been delivered. In terms of section 130(3) the court may only determine a matter if it is satisfied, *inter alia*, that the credit provider has not approached the court during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction (s130(3)(c)(i)).

A notice to terminate a debt review does not appear to be a dead-end for the consumer (Scholtz *Guide to the National Credit Act* (2008) par 11 3 3 3) as section 86(11) provides that a court may order a resumption of the debt review. Section 86(11) reads as follows:

> If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of Part C of Chapter 6, the Magistrate's Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances.

In *Swartbooi,* the court indicated that a termination in terms of section 86(10) is not the end of the road for an over-indebted consumer seeking debt relief, as section 86(11) allows for a resumption of the debt review process (parr 14 & 16). The exact effect of termination in terms of section 86(10), the correct interpretation of section 86(11) pertaining to the court which is empowered to order a resumption and the interrelationship between these two sub-sections have been the subject of many conflicting court decisions (E.g. *Wesbank v Martin* 2012 3 SA 600 (WCC); *Changing Tides 17 (Pty) Ltd v Erasmus* [2010] JOL 25358 (WCC); *Firstrand Bank v Seyffert* 2010 6 SA 429 (GSJ); *Firstrand Bank Ltd v Evans* Case No 1693/2010 (ECP); *Firstrand Bank Ltd v Collett* 2010 6 SA 351 (ECG*); Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 1 SA 374 (WCC); *Firstrand Bank Ltd v Raheman* 2012 3 SA 418 (KZD); *Firstrand Bank Ltd v Britz* Case No 5243/2011 (2012-02-09) (FB)). In *Collett v Firstrand Bank Ltd* (2011 4 SA 508 (SCA)) the SCA held (par 11) that a credit provider is entitled to terminate a debt review in terms of section 86(10) after a debt counsellor had referred the matter to the Magistrate's Court for an order envisaged by section 86(7)(c) and while the hearing in terms of section 87 is still pending. The court further indicated that the right of the credit provider to terminate the debt review is balanced by section 86(11) and that it is at this moment that the participation of the credit provider in the debt review becomes relevant (par 15; see also *Seyffert v Firstrand Bank Ltd* 2012 6 SA 581 (SCA) par 7). However, notwithstanding the decision of the SCA in *Collett*, the above-mentioned issues pertaining to section 86(10) and (11) are still wrapped in uncertainty. The aim of this case discussion is therefore to analyse and evaluate the facts and decision in *Swartbooi* in view of the relevant provisions of the NCA discussed above and in particular, the provisions of section 86(10) and (11). In addition, the proposed legislative amendments to the said provisions which are currently under consideration, are also discussed (see National Credit Amendment Bill

GN 560 of 2013 in *GG* 36505 of 2013-05-29). The aim of this discussion is to determine whether the said uncertainties will be addressed and to what extent the consumer's opportunity to obtain the debt relief provided for in the NCA will be improved.

2 Facts

Swartbooi was an opposed application for summary judgment (par 1). In the main action the plaintiff (applicant) sought payment by the defendants (respondents), of an amount of R645 734, 38, an order declaring certain immovable property executable and interest on the amount claimed. The amount claimed was in respect of two loan agreements between the plaintiff and the defendants, in terms of which the plaintiff lent and advanced to the defendants an amount of R613 000,00. A mortgage bond was registered in respect of the property that the plaintiff sought to have declared executable. It was not in dispute that the defendants were in default with regard to the repayment instalments of the loans. The defendants who were married in community of property, opposed the application for summary judgment on the basis that the claim in question was the subject of debt review proceedings and that an application for debt re-arrangement was pending before the Magistrate's Court, Port Elizabeth (parr 3–5).

On 11 July 2011, the defendants applied for debt review in terms of section 86 of the NCA. On the same day, the debt counsellor notified the plaintiff of the application for debt review (s86(4)(b)(i)). Before expiry of the required 30 business days period (in terms of section 86(6)(a) and reg 24(6)) the plaintiff was notified that a debt counsellor had determined that the defendants were over-indebted. On 30 September 2011, that is before expiry of the 60 days period (in terms of s 86(10) – see the discussion in 1 above) a copy of the defendants' application for a debt rearrangement order was served on the plaintiff and set down for hearing on 12 October 2011, a few days after the said 60 business days period had expired. On that day, the application was postponed to 9 December 2011 as some of the defendants' credit providers wished to oppose the application. On 24 November 2011 the defendants' debt counsellor received a copy of the plaintiff's opposing papers in which the plaintiff made certain counter-proposals in respect of the application for debt re-arrangement. However, on 12 February 2012, the plaintiff gave notice in terms of s 86(10) to terminate the debt review. The reasons given for such termination were stated as follows: "Partial payment, no rearrangement agreement reached". It was common cause that the parties had not reached an agreement with regard to the terms of the proposed debt rearrangement and that they agreed that the application should be postponed to 16 March 2012 (par 6). The defendants therefore argued that they had a *bona fide* defence to the plaintiff's claim since the plaintiff did not act *bona fide* in proceeding to institute debt enforcing proceedings through their current firm of attorneys when they were parties to an agreement, through their other attorneys, that a debt re-arrangement application would be brought before the Magistrate's Court

on 16 March 2012. They stated further, that they had, since the issue of summons, brought an application under section 86(11) for a resumption of the debt review proceedings and suggested that the plaintiff's claim be stayed pending the finalisation of the section 86(11) application. However, it is not clear from the facts to which court the application for resumption was brought (see the discussion in 4 2 2 below).

In the summons the plaintiff alleged that 60 business days had elapsed since the inception of the debt review process and that the defendants were in default under the credit agreements. They further alleged that they terminated the debt review on the 15 February 2012 pursuant to a notice given to the "First Defendant and the Second Defendant by way of *e-mail, registered mail or fax* to the Debt Counsellor and the National Credit Regulator" (the court's emphasis) and that the debt review process for the defendants was therefore terminated (par 8). Apparently, with reference to section 130(3)(c), the plaintiffs also alleged that the credit provider did not approach the court, alternative dispute resolution agent, consumer court or ombud with jurisdiction during the time that the matter was before a debt counsellor (par 9).

At the hearing of the application *in casu*, it was contended on behalf of the plaintiff that the debt review was cancelled because no agreement could be reached between the parties as to the terms on which the defendants' debts would be restructured. It was also contended that it was evident from the papers that it was unlikely that the defendants would ever be able to meet their liabilities and that there would thus be no purpose served by reinstatement of the debt review (par 10).

3 Decision

By referring to *Joob Joob Investements (Pty) Ltd v Stocks Mavundla Zek Joint Venture* (2009 5 SA 1 (SCA) 11C–G) and Van Loggerenberg (*Erasmus Superior Court Practice* (1994 *et seq*) General Remarks to Rule 32 B1-206) Dambuza J pointed out that the purpose of summary judgment relief is to prevent delay of a plaintiff's claim through what amounts to abuse of court process. Summary judgment is furthermore to be regarded as a stringent or extraordinary remedy in that it effectively closes the door of the court on the defendant without affording an opportunity to ventilate the case by way of trial (par 11).

The court pointed out that it was not in dispute that the amount claimed by the plaintiff was owing to it by the defendants or that the defendants were in default with their repayment instalments under the loan agreement with plaintiff. Section 86 clearly affords consumers the opportunity to restructure their debts and bars credit providers from enforcing credit agreements without complying with the provisions of the Act (see e.g. ss86(10) and 130 discussed in 1 above). This restriction was, as submitted by counsel for the plaintiff (par 12):

> [I]ntended by the Legislature to afford consumers 'breathing space' and to avoid disgorging them of their assets without offering them an opportunity to recover from what might be a '*bad patch*' in their financial circumstances.

The court also emphasised (par 12) that credit providers are obliged to act *bona fide* when participating in the debt review process (see s86(5) discussed in 1 above). Furthermore, the plaintiff's allegation in the summons that the defendants were in default, did not, according to the court, on its own, entitle the plaintiff to proceed with enforcement of the credit agreement. The court also pointed out that it still remained open to the defendants to raise the issue of exception to the plaintiff's summons regarding the allegation made that the section 86(10) notice was given to the defendants by way of e-mail, registered mail or fax (par 13).

The court pointed out that although a debt review may be terminated by a credit provider whilst a referral thereof to the Magistrate's Court is pending, the matter does not end there (par 14). In this regard the court referred to the decision of the court *a quo* in *Firstrand Bank Ltd v Collett* where Eksteen J stated as follows (par 28):

> The credit provider, in my view, does not have carte blanche to terminate the process without good reason. Where a referral to the magistrates' [sic] court is being prosecuted with due efficacy, it would appear to me that, more often than not, it would be inappropriate for the credit provider to serve a notice in terms of s86(10). There may, however, be circumstances where the debt counsellor and the consumer may intentionally delay the hearing in terms of s87, to the prejudice of the credit provider, whilst the consumer might cease all payments under the credit agreement. In such circumstances the credit provider might be justified in terminating the debt review process. Where, however, the credit provider attempts to enforce the credit agreement pursuant to such notice, the consumer is entitled urgently to approach the magistrate hearing the matter to exercise his judicial oversight. Where justice requires, the process will be ordered to resume.

Dambuza J concluded that it would have prejudiced the defendants unduly if summary judgment were to be granted in circumstances where a termination of the debt review would have been so unjustified or improper as to warrant a re-instatement of the debt review (par 15). The defendants' averment that they maintained regular payments in terms of the debt review agreement and that this was supported by a schedule of payments forwarded to the plaintiff by the Payment Distribution Agent was of significance to the court. The basis for termination contended on behalf of the plaintiff, was the inability of the parties to reach agreement on the terms of debt restructuring as well as the absence of prospects that the defendants will ever afford the repayment instalments. However, as pointed out by the court, the summons did not make any mention of the latter (par 15).

The court pointed out that a resumption of the debt review process in terms of section 86(11) is a remedy that remains available to consumers, despite a termination in terms of section 86(10) (par 16). The court once

again referred (par 16) to the decision of the court *a quo* in *Collett* where Eksteen J held "that the consumer is not prejudiced by the right of the credit provider to terminate the debt review process. The rights of the consumer are fully protected in s86(11)" (par 28).

In light of the allegation of the defendants that they have complied with the terms of the debt review arrangement, the discrepancy or ambiguity in the plaintiff's summons as regards the basis for termination of the debt review and the fact that reinstatement of the debt review remains a real possibility, the court finally held that the defendants do indeed have a *bona fide* defence as envisaged in Rule 32 of the Practice Rules (par 17). As a result, the court refused the application for summary judgment (par 18).

4 Analysis and Evaluation

4 1 Crux of the Decision

The court indicated (par 13) that the fact that a consumer was in default did not, on its own, entitle a credit provider to proceed with enforcement of the particular credit agreement. A credit provider must first comply with the pre-requisites for debt enforcement in terms of the Act. The court also indicated that a credit provider is not entitled to terminate the debt review process without good reason and that such termination must therefore comply with section 86(5) which requires that credit providers should act in good faith in the process of debt review (parr 12 & 14). Should a credit provider therefore terminate the debt review, it would not be the end of the road for an over-indebted consumer where such termination is found not to comply with the good faith requirement (parr 14& 15). In such a case, a consumer would be entitled to invoke the remedy provided for in section 86(11) by applying to the Magistrate's Court dealing with the matter for the resumption of the debt review process (par 16). Where the credit provider therefore proceeds to enforce a credit agreement and a termination is found to be so improper or unjustified that resumption of the debt review process would probably have been ordered, the court held that summary judgment should be refused as the consumers will then have a *bona fide* defence to the credit provider's claim (parr 17 & 18).

4 2 Issues Arising From the Facts and Decision

4 2 1 Exact Effect of Termination

The court held that a notice of termination of the debt review in respect of a particular credit agreement which was not given in good faith is not the end of the road for an over-indebted consumer as such consumer may still apply for a resumption of the debt review in terms of section 86(11) (parr 14 & 16). It would appear that the court was of the view that a termination notice actually terminates the debt review process and that the only remedy available to such a consumer would be to apply for a

resumption of the debt review in terms of section 86(11). The correctness of this viewpoint depends, *inter alia*, on the legal position pertaining to the exact effect of a termination notice in terms of section 86(10). Section 86(10) provides that a credit provider "may *give notice* to terminate the review" (our emphasis). This wording is susceptible to more than one interpretation. It is submitted that a likely interpretation is that it may indicate that a notice to terminate in terms of section 86(10) does not actually terminate the debt review, but that it simply serves as a *notice* of an intended termination and that it is merely a pre-requisite for debt enforcement in terms of the Act. Thus a debt review in respect of which a section 86(10) termination notice is given, is not terminated at the moment that the said termination notice is delivered. Section 86(10) is therefore open for an interpretation that the Magistrate's Court may still be approached for a debt restructuring order in terms of sections 86 and 87 up until the stage that the credit provider actually proceeds to enforce the particular agreement.

In *Collett* (par 14), Malan JA apparently held the contrary view, namely that section 86(10) "entitles a credit provider to *terminate* the debt review relating to a specific credit agreement …" (our emphasis). It would therefore appear that the SCA is of the opinion that a notice in terms of section 86(10) is not merely a notice of an intended termination, but that its effect is indeed to terminate the debt review (see also *Changing Tides 17 (Pty) Ltd v Grobler* Case No 9226/2010 (GNP) par 24, where Murphy J interpreted the SCA's decision in *Collett* in the same way). According to this interpretation, a debt restructuring order in respect of a particular agreement would thus not be possible once a notice of termination in terms of section 86(10) was given unless a resumption of the debt review is subsequently ordered by the court.

However, it should be noted that there is authority for an interpretation that a section 86(10) termination notice does not in fact terminate the debt review pertaining to a specific agreement and that the court dealing with the debt restructuring application may still grant a debt restructuring order in respect of such a credit agreement (see the *Martin*, *Raheman* and *Britz*-cases *supra*) It should be noted that both *Raheman* and *Britz* were decided after the SCA's decision in *Collett*. In *Raheman* (par 9) Mokgohloa J sought to distinguish the facts in *Raheman* from those in *Collett* as the order for debt-restructuring in *Raheman* was already granted when proceedings for debt enforcement were instituted, while the application for restructuring in *Collett* was still pending when enforcement proceedings were instituted. In *Britz* (par 20) Phalatsi AJ stated that a section 86(10) notice is of no force and effect where a rearrangement order was finally granted by the court. In *Martin* (par 7), Binns-Ward J held that the effect of a section 86(10) notice is in fact not *ipso facto* to terminate a debt review, but rather to afford a period of notice (i.e. at least ten business days – s129(2) read with s130(1)(a)) upon the completion of which the credit provider may institute proceedings for debt enforcement. According to Binns-Ward J, actual termination as intended in the termination notice would then only take place once the

credit provider initiates debt enforcement proceedings after such notice has been given. It should be noted that neither section 86(10) nor section 130(1)(a) indicates what the purpose is of the ten day notice period which is required to elapse after delivery of a section 86(10)-notice (Scholtz par 11 3 3 3). In an earlier decision by Binns-Ward J in *Changing Tides v Erasmus* (*supra*) the court indicated (par 41) that the evident purpose of the notice is to enable the consumer and/or debt counsellor to urgently bring an application for debt restructuring in terms of section 87(7)(c) or 86(8)(b). These cases thus indicate that the purpose of a notice of termination is merely to enable the credit provider to institute proceedings for debt enforcement and that it does not actually terminate the debt review in respect of the particular credit agreement.

However, in *Changing Tides v Grobler* (*supra*), Murphy J held (parr 18 & 20) that a Magistrate's Court dealing with the debt restructuring application is not empowered to grant a debt restructuring order where the credit provider has already given a notice of termination. Murphy J indicated that this is the case as only the court who deals with the debt enforcement proceedings is entitled to grant an order for resumption of the debt review (see par 26 and the discussion in 4 2 2 below).

It thus appears that the divergence of opinion as to whether the notice in terms of section 86(10) is merely a notice evidencing an *intention* to terminate the debt review at a later stage or whether it is the giving of the notice itself that terminates the debt review, hinges largely on the interpretation of the ten business day period mentioned in section 130(1)(a) which has to expire before debt enforcement may commence. As it currently stands, there is no explanation of the purpose to be served by these ten business days that first have to expire prior to enforcement. This is odd as it is a well-known principle of interpretation of statutes that the legislature does not intend to make meaningless legislation (Botha *Statutory Interpretation: An Introduction for Students* (2012) 133). A possible answer to this apparent *lacuna* is that the legislature probably intended that the section 86(10) notice merely serves as an indication of an intention by the credit provider to terminate the debt review and enforce the relevant credit agreement and that the ten business day period that has to elapse after delivery of the section 86(10) notice is presented as a final opportunity to the consumer to obtain a debt restructuring order prior to enforcement. It is then the actual institution of enforcement proceedings and not the notice in terms of section 86(10), which terminates the debt review. It is on this basis that it is submitted that the Magistrate's Court dealing with the debt restructuring application should still be able to grant a restructuring order in respect of a credit agreement even though a termination notice has already been given in respect of such credit agreement. It is further submitted that the wording of section 86(10) ("notice to terminate" instead of "notice of termination") indicates that a termination notice does not have the effect of actually terminating the debt review. Its purpose is only to serve as a notice of an intended termination. Only when the credit provider has indeed proceeded to enforce a credit agreement will actual termination

take place, in which case the consumer will have to apply for resumption of the debt review in order to protect his or her interests.

In *Swartbooi*, the credit provider in fact proceeded to enforce the credit agreement in respect of which the notice of termination was given. It is therefore submitted that the consumer's remedy would indeed have been to apply for a resumption of the debt review in terms of section 86(11) as the particular credit agreement would actually have been terminated pursuant to the notice in terms of section 86(10).

4 2 2 Correct Interpretation of Section 86(11)

As indicated, section 86(11) provides that if a credit provider who has given notice to terminate a debt review in terms of section 86(10) proceeds with enforcement of the agreement, the Magistrate's Court hearing the matter may order that the debt review resume.

In *Swartbooi* the court stated, that although a debt review may be terminated by a credit provider whilst a referral thereof to the Magistrate's Court is pending, the matter does not end there. Dambuza J further emphasised that a credit provider may not terminate the debt review process without good reason and that a consumer may invoke his or her remedy in terms of section 86(11) to request a resumption of the debt review process if the credit provider has not acted *bona fide* in this regard (parr 12 & 14–16). Dambuza J referred to the decision of the court *a quo* in *Collett*, which decision accorded with that of the SCA in *Collett* in respect of this particular issue.

However, there are conflicting decisions regarding which court is empowered to order such resumption and the decision of the court *a quo* and that of the SCA in *Collett* differ in this regard. It is not clear whether the court in *Swartbooi* was in fact aware of the decision of the SCA in *Collett* as the court did not refer to this case at all. Eksteen J, delivering the decision of the court *a quo* in *Collett* (parr 23–27), interpreted the words "the magistrate's court hearing the matter" in section 86(11) to be a reference to the Magistrate's Court to which the matter has been referred in terms of section 86(8)(b) for a hearing, that is, the Magistrate's Court hearing the application for debt restructuring (see also *Changing Tides v Erasmus* (par 41), *Wesbank v Martin* (par 12) and *Firstrand Bank v Evans* (par 31)). Eksteen J pointed out that the jurisdiction provided for in section 86(11) is specifically restricted to a Magistrate's Court and that it is only the Magistrate's Court which conducts a hearing and provides judicial oversight over the debt review process that would have all the information the consumer was required to provide in terms of regulation 24 before it and which is required to exercise a discretion as to whether or not the debt review should resume. However, the SCA in *Collett* held (par 17) that the court that is being referred to in section 86(11) is the enforcement court and that the word "court" should be read to refer to a Magistrate's Court as well as a High Court (see also *Dunga supra* par 34). It therefore appears that the Court in *Swartbooi* may have overlooked the

decision of the SCA in this regard, and it is submitted that the court in *Swartbooi*, being the enforcement court, was supposed to deal with the issue of resumption of the debt review in terms of section 86(11). Since section 86(11) does not expressly require a substantive application to be brought by the consumer, it is submitted that the court was entitled to *suo motu* order a resumption of the debt review process if it was appraised of sufficient facts to justify such resumption (see Scholtz par 11 3 3 4).

Section 86(11) provides that the court *"may* order that the debt review resume on any conditions the court considers to be just in the circumstances". The wording thus indicates that the court is vested with a discretion in terms of section 86(11) regarding whether it should order the resumption of a debt review (Scholtz par 11 3 3 4). The defendants in *Swartbooi* argued that the plaintiff did not act *bona fide* in proceeding to institute debt enforcing proceedings through one set of attorneys when they were parties to an agreement through another set of attorneys, that a debt re-arrangement application would be brought before the Magistrate's Court on 16 March 2012. Of significance to the court in refusing the application for summary judgment, was the defendants' averment that they maintained regular payments in terms of the debt review agreement which was supported by a schedule of payments forwarded to the plaintiff by the Payment Distribution Agent. The plaintiff relied on an absence of prospects that the defendants would ever be able to afford the repayment instalments and that there would thus be no purpose served by a reinstatement of the debt review process. However, as pointed out by the court, the summons did not make any mention of this issue. In *Wesbank v Schroder* ([2012] JOL 28767 (EL) (par 17)) the court indicated, with reference to the decision of the SCA in *Collett* (parr 15 & 18), that the party who seeks to invoke the remedy in terms of section 86(11) should place sufficient information before the court to enable the court to exercise its discretion in his favour. This information should not only relate to the conduct of the credit provider during the debt review process but also to the prospect that the court, as envisaged in section 87(1), will sanction the recommendation of the debt counsellor and order a re-arrangement of the consumers' obligations.

However, the facts in *Swartbooi* also indicate that the defendants did in fact, since the issue of summons, bring an application for a resumption of the debt review proceedings (par 7). However, as indicated, it is not clear to which court the application was brought. It is submitted that a consumer who wants a debt review to resume need not wait until the credit provider applies for summary judgment before making such a request to the court. Such consumer may also approach the court from which the summons was issued (i.e., the enforcement court) immediately upon service of the summons, by bringing a substantive application for resumption of the debt review process (Scholtz par 11 3 3 4). However, it is not clear whether this was the case in *Swartbooi* or whether there was an application for resumption erroneously brought to the Magistrate's Court dealing with the application for debt restructuring.

The fact that the court failed to make an order in terms of section 86(11) may be an indication that the latter situation applied in this matter.

4 2 3 Mala Fide *Termination,* Bona Fide *Defence and Dismissal of Summary Judgment*

Summary judgment is a remedy that is to the avail of a plaintiff who has issued summons against a defendant for, *inter alia*, a liquidated amount of money, in instances where the debtor defends the claim but the plaintiff believes that the debtor does not have a *bona fide* defence to such claim (High Court Rule 32(1)(a)). The summary judgment remedy enables the plaintiff to obtain judgment against the defendant at an early stage in the proceedings without the matter proceeding to trial and thus, apparently, without full observance of the *audi alteram partem* principle, given that "the doors of the court are closed" to the debtor at an early stage (*Joob Joob Investments supra* 11C-G; Van Loggerenberg B1-32). It is for this reason that the summary judgment procedure has been regarded as extraordinary and stringent. In brief, the summary judgment process entails that where the debtor is of the opinion that he has a *bona fide* defence to the plaintiff's claim, one of the options to his avail is to file an opposing affidavit setting out fully the nature and grounds of the defence and the material facts relied upon for the defence (High Court Rule 32(3)(b); *Breitenbach v Fiat SA (Edms) Bpk* 1976 2 SA 226 (T); *Tesven CC v South African Bank of Athens* 2000 1 SA 268 (SCA)). Once the court finds that the defendant has indeed disclosed a *bona fide* defence, it has no discretion to grant summary judgment and must of necessity, dismiss the application for summary judgment and grant the defendant leave to defend the action (High Court Rule 32(7)).

In order to ward off summary judgment the *bona fide* defence raised by the debtor has to be valid in law (*Standard Bank of SA Ltd v Friedman* 1999 4 SA 928 (SCA) 938D–H). However, over-indebtedness *per se* is not a defence on the merits in respect of a claim for payment of money (*Collett supra* (SCA)). Thus it follows that over-indebtedness *per se*, cannot be regarded as a *bona fide* defence to an application for summary judgment entitling a consumer who raises such over-indebtedness to have the summary judgment application dismissed. The defendant's over-indebtedness can, at most, have a dilatory effect on the proceedings during which it is raised in the sense that the consumer may, at the court's discretion, be afforded an opportunity to obtain debt relief in the form of debt restructuring (NCA s85). If such debt restructuring order is eventually made, it may effectively cause the indefinite suspension or postponement of the main enforcement proceedings instituted against the consumer in view thereof that as long as the debtor complies with the debt restructuring order no enforcement may occur in respect of a credit agreement which is subject to such order (s88(3)).

It should however, be noted that in the context of summary judgment proceedings, the consumer's over-indebtedness may be presented to the court via different scenarios. One such scenario, as appears from the

facts of *Swartbooi,* occurs where the debtor, during summary judgment proceedings, raises his over-indebtedness in the context of a pending debt review that is alleged to have been *mala fide* and unlawfully terminated pursuant to a notice in terms of section 86(10), prior to enforcement of a credit agreement that was subject to such review. Where this situation occurs, it is addressed by section 86(11) of the NCA. It is to be noted that section 86(11) does not specify any specific grounds on which such resumption may occur, save to suggest that in an instance where a credit provider who has given notice to terminate a debt review as contemplated in section 86(10) proceeds to enforce that credit agreement, the court may order that the debt review resume. The court is given a wide discretion to order such resumption based on "any conditions" that it considers to be "just in the circumstances". It is thus possible that even in the case where such termination was procedurally valid in the sense that notice to terminate was given after the appropriate number of days, in the correct manner and to the correct parties, a court may still "undo" the termination and order a resumption of the review "on conditions that it deems just in the circumstances". Obviously the circumstances will have to justify the conditions and, as case law suggests, such circumstances would usually be that the credit provider failed to comply with the duty regarding good faith participation in a debt review (s86(5)) and *bona fide* termination of such debt review (see *Dunga* and *Collett* (SCA) *supra*).

Section 86(11) itself is silent on the effect of a resumption order on enforcement proceedings that were instituted prior to the granting of the resumption order. When one has regard to the concept of "resumption" of legal proceedings, the word "resume" means to "begin again or continue after a pause" (http://oxforddictionaries.com/defenition/english/resume accessed on 2013-08-12). This begs the question whether the effect of the resumption is that the debt review proceedings in the scenario that was present in *Swartbooi*, are revived and the enforcement proceedings nullified, or whether it is merely a case of the court, in its discretion, allowing the debt review to proceed due to the fact that it has been terminated contrary to the inherent notion of good faith which the court in *Dunga* (*supra* par 15) read into section 86(10).

It is submitted that section 86(11) is a remedy aimed at addressing a credit provider's failure to co-operate in, and terminate a debt review in good faith as the basis for a resumption order. Thus, it is not procedural defectiveness, but lack of *bona fides* which grants access to the remedy provided for in section 86(11). Such lack of *bona fides* may not necessarily be that of the credit provider, it may even be that a court deems it just to order resumption of a debt review that was procedurally lawfully terminated by a credit provider because the debt counsellor was not *bona fide* in conducting the debt review proceedings (see *Standard Bank of South Africa Ltd v Kallides* (1061/2012) [2012] ZAWCHC 38 (2012-05-02)). The effect of a resumption order appears to be that the debt review is allowed to proceed from the point where it was terminated, which could have been while the debt counsellor was still

attending to the assessment of the debtor's state of over-indebtedness; while he was in the process of referring the matter to court; or while the matter was still pending before the court. If a resumption order in terms of section 86(11) is refused, it disposes of the issue relating to debt review and, if the credit provider's papers are in order and no other defence on the merits exists, summary judgment ought to be granted in favour of the plaintiff-credit provider. However, if an order is granted in terms of section 86(11) for the resumption of the debt review, the resumed proceedings may or may not result in the consumer eventually being declared over-indebted and having his or her debt restructured. If, eventually, a finding of over-indebtedness is made and a debt restructuring order is granted, its effect would then be to "suspend" the summary judgment proceedings indefinitely pending compliance with the restructuring order. If it happens that the resumed debt review proceedings are for some reason not pursued any further by the debtor, or the court eventually finds him not to be over-indebted or refuses to make a debt restructuring order because it is not economically feasible, the dilatory "defence" of over-indebtedness falls away, entitling the plaintiff, credit provider to summary judgment.

The gist of this argument is that at the stage that the enforcement court makes a resumption order in terms of section 86(11), the outcome of the debt review proceedings which are allowed to resume are not certain and thus its effect on the enforcement proceedings is not certain. Therefore, it is submitted that the most appropriate order that the court ought to make regarding summary judgment proceedings at the stage that section 86(11) is raised, is to postpone the summary judgment proceedings either *sine die* or to a specific date, if the court grants an order for the resumption of debt review proceedings or allows a postponement to facilitate the bringing of a section 86(11) order.

It is submitted that the situation in *Swartbooi*, where the *mala fide* termination of a debt review in terms of section 86(10) of the NCA was raised and the defendant applied in terms of section 86(11) for a resumption order, as opposed to a "defence" merely based on an allegation of over-indebtedness, constitutes a *bona fide* defence of a *sui generis* nature created by the NCA. As opposed to merely alleging that he is over-indebted, which in itself has been held not to have constituted a *bona fide* defence, a defendant who is actually subject to a pending debt review has, as set out above, an added layer of protection afforded to him, namely a statutory moratorium on enforcement. It is therefore submitted that in the latter instance it is not the defendant's over-indebtedness but actually this statutory moratorium on enforcement which affords him the *sui generis* statutory *bona fide* defence to summary judgment, should a credit provider attempt to enforce the credit agreement whilst it is subject to a pending debt review that should not have been terminated. It is further submitted that the *sui generis* situation where a debt review is allowed to resume in terms of section 86(11) in instances where there has been proper procedural compliance with section 86(10) but lack of good faith by a *credit provider* would thus also

constitute a *bona fide* defence to an application for summary judgment (not because the consumer is over-indebted, but because of the lack of compliance with good faith as a statutory pre-enforcement requirement inherent in proper termination of debt review).

It thus appears that the notion of a *bona fide* defence in the context of summary judgment proceedings following upon termination of debt review which is subsequently allowed by a court to resume in terms of section 86(11), has acquired a whole new meaning. Where a *bona fide* defence would ordinarily entitle a defendant to have summary judgment proceedings dismissed, this specific *bona fide* defence created by the NCA, attracts its own procedural rules. These rules merely require the summary judgment proceedings to be adjourned or postponed, not dismissed, pending the eventual outcome of the debt review proceedings and thereafter, if a debt restructuring order is made, pending compliance with such order by the consumer. It is further submitted that procedurally, the exercise of the *sui generis* discretion to order resumption of a previously terminated debt review in terms of section 86(11) should precede the exercise of the overriding discretion that the court has in summary judgment proceedings.This is because the first-mentioned discretion has a direct bearing on the exercise of the last-mentioned discretion, given that the granting of a section 86(11) order confirms the existence of the *sui generis bona fide* defence that a pending debt review was not participated in and not terminated in good faith.

The facts in *Swartbooi* (namely employing one set of attorneys to "negotiate" the debt review terms, agreeing to the postponement of the hearing of the debt restructuring application and some time later, using other attorneys to attend to the enforcement whilst the aforesaid proceedings were still pending) suggest that there may have been a possibility that the credit provider *in casu* acted *mala fide* in terminating the debt review (parr 6-7). However, despite hinting at the resumption of the debt review proceedings and listing some considerations in support thereof, Dambuza J, contrary to the suggestion by the defendants that the plaintiff's claim be stayed pending finalization of their section 86(11) application, actually failed to first consider what should happen to the said section 86(11) application as would have been appropriate. As it appears that the resumption application presumably served before another court and not before the court *in casu,* it is submitted that the present court, being the enforcement court and thus the court having jurisdiction (per *Collett* (SCA)) to entertain the section 86(11) application, should at least have postponed the summary judgment proceedings and should have ordered the consumers to withdraw the application before such other court and bring it afresh before the present High Court for consideration. However, the court failed to make any order in this regard despite arguments regarding the desirability or otherwise of a debt review resumption having been raised by both parties (parr 6, 7 & 10). It is thus submitted that the court erred in the first instance by not making any order relating to an application in terms of section 86(11), when it was apparently possessed of sufficient facts to at least make an order that

the matter be postponed so as to afford the consumers the opportunity to bring their section 86(11) application in the correct forum. The court further erred by dismissing the summary judgment application instead of merely postponing it in circumstances which indicated that the court, although it made no order in terms of section 86(11), clearly favoured the resumption of the debt review (parr 13-17).

4 2 4 Manner of Delivery of a Section 86(10) Notice

In addition to expressing his opinion that the plaintiffs were not entitled to summary judgment on the basis of the consumer's indebtedness alone, Dambuza J indicated that "it remained open to the defendants to raise the issue of exception to the plaintiff's summons that the notice in terms of section 86(10) was given to the defendants by way of email, registered mail or fax". The NCA, in section 86(10), does not prescribe how the notice to terminate should be given to the consumer. It may be argued that the section 86(10) notice, being a requisite notice before enforcement (s129(1)(b)), is a "legal notice" and that it must be "delivered" to the consumer at his address as chosen in the contract (s96(1)) or subsequently amended address (s96(2)). The issue of "delivery" of a section 86(10) notice has not been dealt with definitively in case law. Due to the failure of section 86(10) to stipulate a specific method of delivery, it is submitted that the section 86(10) notice, may be delivered to a consumer in accordance with section 65(2), which provides as follows (for a contrary view, namely that the section 86(10) notice should be "served" on the consumer, see *Standard Bank of South Africa v Wessels* Case No: 64923/2011 (20 April 2012) (GNP) par 28):

> If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must–
>
> (a) make the document available to the consumer through one or more of the following mechanisms–
>
> (i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail;
>
> (ii) by fax;
>
> (iii) by email; or
>
> (iv) by printable web page; and
>
> (b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).

However, the gist of section 65(2) is that the manner in which the credit provider delivers the notice to terminate a debt review in terms of section 86(10) to the consumer, must be consonant with the method that the consumer chose in the credit agreement for purposes of delivery of documents and notices.

Where a section 86(10) notice is not delivered in the prescribed manner, this amounts to non-compliance with a statutory pre-

enforcement notice. This is a procedural defect which would ordinarily entitle a consumer to raise an exception against a plaintiff's particulars of claim on the basis that it lacks a completed cause of action (High Court Rule 23). Ordinarily, the effect of upholding such an exception would eventually be to dispose of the plaintiff's claim (Van Loggerenberg B1-159). However, section 130(4)(c) of the NCA provides its own *sui generis* remedy in respect of non-compliance with section 86(10). The relevant parts of this section provide as follows:

> In any proceedings contemplated in this section, if the court determines that–
>
> …
>
> (c) the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court may–
>
> (i) adjourn the matter, pending a final determination of the debt review proceedings;
>
> (ii) order the debt counsellor to report directly to the court and thereafter make an order contemplated in section 85(b); or
>
> (iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings and make an order contemplated in section 85(b).

Thus, it appears that section 130(4)(c), as a *lex specialis*, "overrides" or "trumps" the usual effect of the ordinary exception procedure afforded by the prevailing rules of civil procedure applicable in the High Courts and Magistrates' Courts, which procedure ordinarily would have applied to the premature enforcement of an agreement absent compliance with a statutory pre-enforcement requirement such as the section 86(10) notice to terminate.

5 Proposed Amendments to Section 86(10) and (11)

According to the 2013 policy review of the NCA (see The Draft National Credit Act Policy Review Framework, 2013 – GN 559 of 2013 in *GG* 36504 of 2013-05-29, hereafter "Policy Review") the aim of introducing the debt review process was

> … to rehabilitate an over-indebted consumer through counselling and assistance to restructure his or her debt obligations, with a view to re-introduce the consumer, once rehabilitated, into the commercial world as an able credit user and asset to the economy.

However, the Policy Review concedes that the success of the debt review process has been compromised, *inter alia*, by the lack of clarity with regard to processes and conflicting judicial interpretations (par 2 4 4 1). The uncertainties in this regard have negatively affected the ability of consumers to successfully access the debt review remedy and consumers have thus been denied the opportunity to obtain the debt relief provided for in the NCA (Policy Review par 2 4 4 2).

The Policy Review points out that a credit provider may, in terms of the current section 86(10), terminate a debt review until a debt review order has been granted, notwithstanding that the matter has been referred to court. However, a number of factors such as a lack of co-operation of credit providers and court backlogs prevent some consumers from timeously obtaining these orders. Although a debt review process that is unnecessarily prolonged can detrimentally affect the interests of credit providers, the interests of consumers and credit providers should be balanced. At present section 86(10) allows the credit provider to terminate a duly instituted court process without notice or oversight by the judiciary to whom the matter has been referred. Moreover, the remedy contained in section 86(11) seldom provides effective checks and balances to section 86(10) (Policy Review par 2 4 6 2).

In order to address the above-mentioned shortcomings, it is proposed that section 86(10) be amended by inserting the underlined reservation clause in the existing Act (s10(b) of National Credit Amendment Bill):

> If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to–
>
> (a) the consumer;
>
> (b) the debt counsellor; and
>
> (c) the National Credit Regulator,
>
> At any time at least 60 business days after the date on which the consumer applied for the debt review: Provided that an application for debt review has not been lodged in court as contemplated in section 87, in which case the credit provider shall be precluded from terminating the debt review in terms of this section.

The proposed amendment to section 86(10) thus confirms the interpretation of the court in *Wesbank v Papier* (2011 2 SA 395 (WCC)) where Griesel J held (par 34), on a contextual and purposive interpretation of section 86, that a consumer is protected against enforcement proceedings, not only once a rearrangement order has been made, but also while proceedings for such an order are pending. Delivery of a section 86(10) notice would thus not be competent once any of the steps referred to in section 86(7)(c), 86(8)(b) or section 86(9) have been taken.

It is submitted that the words "shall be precluded from *terminating* the debt review" in the proposed reservation clause of section 86(10), point toward an intention that a notice to terminate as contemplated in section 86(10), should in fact terminate the debt review process pertaining to a particular credit agreement where an application for debt restructuring is not yet pending. A debt restructuring order in respect of an agreement that had so been terminated would thus no longer be possible (see the *Martin*, *Raheman* and *Britz* cases and the discussion in 4 2 1 above) and

the consumer's only remaining remedy would be to approach the enforcing court (see *Collett* (SCA) par 17) with a request in terms of section 86(11) to resume the debt review process in respect of the particular agreement. However, this raises the question once again as to what the purpose of the ten day notice period in section 130(1)(a) is, since the proposed section 86(10) read with section 86(11), will *now* have the effect that the ten day period can neither be utilized to bring an application for debt restructuring before enforcement, nor can it be utilized to request the Magistrate's Court dealing with the debt restructuring application to order a resumption of the debt review.

It is proposed to amend section 86(11) by omitting the word "Magistrate's" from the existing Act (see s10(c) of National Credit Amendment Bill):

> If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of Part C of Chapter 6, the [Magistrate's] Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances.

The proposed amendment to section 86(11) clearly confirms the decision of the SCA in *Collett* that the court that is being referred to in section 86(11) is the enforcement court, which may either be a Magistrate's Court or a High Court.

However, we cannot see why the consumer has to wait for the credit provider to institute enforcement proceedings before he or she is able to invoke the remedy in terms of section 86(11). As indicated by Blignaut J in *Dunga* (par 46), it is in the consumer's interest that the debt review process resume as soon as possible. If the consumer has to wait for the credit provider to proceed with enforcement, he or she will have to defend the enforcement action in a litigatory environment and will be involved in time-consuming, costly and, for many consumers, unaffordable litigation, all being consequences which the debt review procedure actually seeks to avoid (see *Dunga* par 46). It is therefore submitted that section 86(11) should rather be amended to afford both the restructuring and enforcing court the power to deal with a request for resumption as soon as a termination notice has been given (see the suggestion in Scholtz par 11 3 3 4 that section 86(11) could be amended by removing any reference to the proceedings aimed at the enforcement of a credit agreement in section 86(11)). Such amendment will then also allow the restructuring court, when exercising its discretion to grant the restructuring order, to take into consideration any evidence that a termination did not comply with the good faith requirement in section 86(5) of the NCA.

6 Conclusion

The decision in *Swartbooi* restates the viewpoint of the SCA in *Collett* that a notice of termination in terms of section 86(10) is not the end of the

road for an over-indebted consumer seeking debt relief. The consumer may still invoke his or her remedy in terms of section 86(11) to request a resumption of the debt review process. However, the court did not actually refer to, discuss or apply the decision of the SCA in *Collett*, but only referred to the decision of the court *a quo,* despite the fact that it did not correspond with the decision of the SCA in all respects. As indicated, the court *a quo* was of the view that the Magistrate's Court hearing the debt restructuring application was empowered to deal with the application for resumption in terms of section 86(11), while the SCA was of the view that only the enforcing court had such jurisdiction. Moreover, the facts regarding the court to which the section 86(11) application was actually brought in *Swartbooi*, were unclear. In accordance with the interpretation of the SCA in *Collett*, it is submitted that the court in *Swartbooi*, being the enforcement court, and not the Magistrate's Court dealing with the debt restructuring order, had the power to deal with a possible resumption of the debt review process. As indicated however, the facts are not clear and it may also have been possible that the application for resumption in *Swartbooi* was in fact brought to the court from which the summons was issued (i.e. the enforcement court) immediately after service of the summons on the defendants. It is therefore submitted that the decision in *Swartbooi* only contributes to the legal uncertainty which, despite the decision of the SCA in *Collett*, currently exists with regard to the interpretation of section 86(10) and (11).

The court further erred in dismissing the summary judgment application instead of merely postponing the said application pending the outcome of the section 86(11) application. As the matter stands now, the plaintiffs have erroneously been deprived of their summary judgment remedy at a stage when it was not appropriate to order the dismissal of the summary judgment, the section 86(11) resumption application seems to have been brought in the wrong forum and will have to be withdrawn and re-applied for in the High Court which is the enforcement court *in casu* and, if the resumption application is not granted, the probability of a long and costly trial process looms.

The legal uncertainty regarding sections 86(10) and 86(11) clearly needs to be urgently addressed by legislative amendment. It is submitted that the proposed amendments to section 86(10) and (11) will help to address most of these uncertainties and will also bring about a better balancing of the interests of consumers and credit providers. The proposed amendment to section 86(10) limits a credit provider's right to terminate the debt review process and will thus afford a consumer a better and more reasonable opportunity to obtain the debt relief provided for by section 86 of the NCA. However, the fact that a consumer still has to wait for the credit provider to institute enforcement proceedings before being able to invoke his or her remedy to request a resumption of the debt review process, in fact reduces the consumer's prospects of successfully accessing the debt relief measure provided for

by section 86 of the NCA and thus also his or her chance of eventual rehabilitation and becoming a productive member of society again.

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