DE JURE

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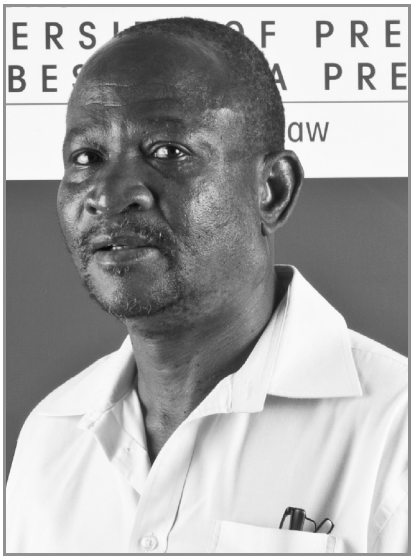
Editorial/Redaksioneel

The editorial board of *De Jure* has pleasure in presenting the second volume of 2015. As with every volume of *De Jure*, this volume contains valuable contributions by a variety of academics on a wide variety of topics. This issue contains discussions pertaining to customary marriages, the conservation status of the Wedge-tailed eagle and the conservation of species; aspects relating to unjustified enrichment law and trade mark law to mention but a few. The *De Jure* team wish to thank all contributors to this volume for their efforts and contributions to this volume. This issue, in addition, contains one of the last publications by late Professor Papa Maithufi who sadly passed away on 15 May 2015. This issue is accordingly dedicated to the memory of Professor Papa Maithufi.

The editorial committee would like to express our gratitude to our editorial assistant, Robert Steenkamp, for his diligent assistance during the production of this volume. We would also like to express our gratitude to the team of Pretoria University Law Press (PULP), and especially Lizette Herman, for making this volume a reality.

Dr GP Stevens
Editor



In memoriam

Prof Ignatius Philip "Papa" Maithufi

Papa Maithufi, in his own quiet, reserved way, made more than his share of history and broke down many racial barriers that remained after the fall of Apartheid. He commenced his career around 1982 while still a student at the former University of the North when students were appointed as temporary clerks during vacations at various magistrates' offices. After completing his LLB degree, he was appointed as an assistant magistrate in 1982 and in 1983 he was appointed as a legal advisor in the then Lebowa Government Services where his main duties were to research the law with a view to the drafting of legislation.

In 1984, he was appointed as a lecturer at the former University of Bophuthatswana in the School of Law, where he taught, *inter alia*, Customary Law, Law of Succession, Law of Delict and Private International Law to both undergraduate and postgraduate students. His interest in research grew as a result of this appointment, which gave rise to the publication of his first four articles in accredited journals. In 1998 Papa obtained his LLM-degree from the former Potchefstroom University.

His next appointment was with the former Vista University as a senior lecturer in 1990 where he taught Customary Law, Law of Property, Family law and Advanced Family Law. This employment lasted until 1998 and he was able to add eleven publications in accredited and peer reviewed journals. In 1991, he registered for the LLD degree with the University of Pretoria and in 1993 he made history as he became the first black person to obtain an LLD from the University of Pretoria.

Papa again made history and broke down barriers when, in 1998, he was one of the first black people to be appointed as a professor in the Faculty of Law at the University of Pretoria. Among the courses he taught were Indigenous Law, Interpretation of Statutes, Education Law and Social Welfare Law. While at the University of Pretoria, he published twenty-six articles in accredited and peer-reviewed journals and came to be well-known and highly respected for his expertise on Customary Law.

His research had a clear impact on the development of customary law in South Africa as his journal articles were often cited with approval in the highest courts, *inter alia*, in *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC); *MM v MN* 2010 4 SA 286 (GNP); *MG v BM* 2012 2 SA 253 (GSJ); *MM v MN* 2012 4 SA 527 (SCA); *Moropane v Southon* [2014] JOL 32177 (SCA) and *Netshituka v Netshituka* 2011 5 SA 453 (SCA).

He served a term as full-time member of the South African Law Reform Commission and chair of the Project Committee on the Harmonization of the Common Law and Customary Law, overseeing the completion of two research reports in this field. One of the reports resulted in the promulgation of the Reform of Customary Law of Succession and Regulation of Related Matters Act of 2009. The report on the Judicial Functions of Traditional Leaders was also completed.

Papa served on various commissions of enquiry dealing with chieftainship disputes, *inter alia*, the Commission on the chieftainship dispute of Bakwena Ba Mogopa and Batlhako Ba Matututu. He also served as chairperson of the commission on the chieftainship dispute of Batlhako Ba Leema. From 2000 to 2008, he was appointed as a member of the Appeals Authority of the South African Police Service which dealt with misconduct cases instituted against members of the SAPS. This work involved researching labour law issues and the preparation of reports.

In April 2015, Papa left the service of the University of Pretoria to take up a position at the University of South Africa. On 15 May 2015, Prof Papa Maithufi suddenly and unexpectedly passed away. His passing left a huge void in the lives of his family, but also in the lives of his academic colleagues. Prof Maithufi was generally considered to be the leading expert on indigenous law in South Africa and his research has shaped the legal landscape, provided clarity and certainty and improved the lives of many people, particularly women, living in indigenous communities. His absence leaves a massive void in the scholarship on indigenous law. May he rest in eternal peace.

The requirements for validity and proprietary consequences of monogamous and polygynous customary marriages in South Africa: Some observations

Papa IP Maithufi
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OPSOMMING

Die Vereistes vir die Geldigheid en Vermoënsregtelike Gevolge van Monogame en Poligene Gebruiklike Huwelike in Suid Afrika: 'n Paar Waarnemings

Die Wet op die Erkenning van Gebruiklike Huwelike van 1998 erken beide monogame en poligene gebruiklike huwelike. Dit gee die vereistes vir geldige gebruiklike huwelike en stipuleer die vermoënsregtelike gevolge daarvan. Monogame gebruiklike huwelike mag óf binne gemeenskap van goedere wees óf buite gemeenskap van goedere. Waar daar geen voorhuwelikse kontrak bestaan nie sal monogame gebruiklike huwelike binne gemeenskap van goedere geag word. Hierdie reëling kan tot die nadeel wees van 'n gade wat nie verkies of bedoel het dat dié huweliksgoedere bedeling toepassing moes vind nie. 'n Gebruiklike huwelik is 'n proses, wat aanvang vind by die onderhandeling rakende lobolo en eindig by die oorhandiging van die bruid aan die familie van die bruidegom. Dit is daarom moontlik dat daar aan al die vereistes vir 'n geldige gebruiklike huwelik voldoen word, voordat die aanstaande gades 'n ooreenkoms rakende die vermoënsregtelike gevolge bereik het. Dit word aangevoer dat 'n ooreenkoms rakende die vermoënsregtelike gevolge 'n vereiste vir die totstandkoming van 'n geldige gebruiklike huwelik moet wees.

Wilsooreenstemming is een van die belangrikste vereistes vir 'n geldige gebruiklike huwelik. Die aanstaande gades moet wilsooreenstemming bereik om met mekaar te trou, onderworpe aan die gewoontereg. Op dieselfe wyse waarop wilsooreenstemming, om ooreenkomstig die gewoontereg te trou, bereik word, moet die aanstaande gades toegelaat word om die vermoënsregtelike gevolge van hulle huwelik te bepaal om sodoende te voorkom dat regsprobleme onstaan in die geval waar die man besluit om met meer as een vrou te trou.

Waar 'n man in 'n gebruiklike huwelik besluit om nog 'n vrou te trou ooreenkomstig die gewoontereg, sal hy 'n kontrak moet verkry wat die vermoënsregtelike gevolge van sy huwelike bepaal. Die proses om aansoek te doen vir hierdie kontrak word volledig bespreek, alhoewel die versuim om dit te doen nie die geldigheid van die opvolgende gebruiklike huwelike raak nie.

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1 Introduction

Very interesting and sometimes controversial decisions have been reached by South African courts in their interpretation of the provisions of the Recognition of Customary Marriages Act.[1] One such decision is *Netshituka v Netshituka*,[2] which dealt with the validity of a civil marriage contracted before the coming into operation of this Act[3] where the Supreme Court of Appeal decided that the said civil marriage was a nullity on the ground that the deceased's previously subsisting customary marriages were "revived" because his wives by customary rites did not leave him after he married another woman by civil rites. The deceased in this case was married to four wives by customary rites. The first wife was married on 1 December 1956 and the rest were married thereafter. The deceased married another woman by civil rites during the subsistence of these customary marriages and this civil marriage was dissolved by divorce on 5 July 1984. The deceased thereafter married another woman by civil rites on 17 January 1997. Despite the fact that the legal position at the time when the said civil marriage was contracted was that an existing customary marriage was dissolved by a subsequent civil marriage with another wife, the court held that the customary marriages of the deceased were "revived" when the deceased divorced his wife by civil rites on 5 July 1984. The reason for this conclusion appears to be that the wives did not leave the deceased after he married another woman by civil rites and further that he did not *phuthuma* them.[4] The Supreme Court of Appeal therefore decided to depart from the precedent established since *Nkambula v Linda*[5] that a civil marriage had the effect of dissolving a subsisting customary marriage. Applying the provisions of the Marriage and Matrimonial Property Law Amendment Act[6] read with the Recognition of Customary Marriages Act, and following the decision in *Thembisile v Thembisile*,[7] the court came to the conclusion that "… the civil marriage between the deceased and the first respondent, having been contracted while the deceased was a partner in existing customary unions with Tshinakaho and Diana, was a nullity".[8]

The other decision is that of *Gumede v President of the Republic of South Africa*[9] which dealt with the interpretation of section 7(1) of the

1 Act 120 of 1998.
2 *Netshituka* v *Netshituka* 2011 5 SA 453 (SCA).
3 Act 120 of 1998.
4 *Netshituka* v *Netshituka supra* n 2 at parr 8-10.
5 *Nkambula v Linda* 1951 1 SA 377 (A).
6 Act 3 of 1988.
7 *Thembisile v Thembisile* 2002 2 SA 209 (T).
8 *Netshituka Netshituka supra* n 2 at par 15. See further criticism by Bakker & Heaton "The co-existence of customary and civil marriages under the Black Administration Act 38 of 1927 and the Recognition of Customary Marriages Act 120 of 1998 – The Supreme Court of Appeal introduces polygyny in civil marriages: *Netshituka v Netshituka* 2011 5 SA 453 (SCA)" 2012 *TSAR* 586-589).
9 *Gumede v President of the Republic of South Africa* 2009 3 BCLR 243 (CC).

Recognition of Customary Marriages Act. Before this Act came into operation on 15 November 2000, the proprietary consequences of customary marriages were regulated in terms of customary law. The Act had initially provided that the matrimonial property consequences of customary marriages entered into before 15 November 2000 were to be regulated in terms of customary law. This applied to both monogamous and polygynous customary marriages.[10] The court held that this provision was unconstitutional in relation to proprietary consequences of monogamous customary marriages and that no distinction should be made between monogamous customary marriages, whether entered into before or after the date of the commencement of the Act, with regard to such consequences.[11] Monogamous customary marriages, therefore, are in community of property, with profit and loss, unless these consequences are excluded by means of an antenuptial contract. Although proprietary consequences of polygynous customary marriages are still regulated in terms of customary law, the Act provides that such consequences may be governed by an approved contract – as envisaged by the Act. This arrangement will be elaborated on below.[12]

MM v MN[13] is another interesting decision that dealt with the requirements for valid customary marriages, their proprietary consequences and the effect of a civil marriage on the validity of an existing or subsisting customary marriage. It is an appeal against the decision in *MM v MN*[14] and *MM v MN.*[15] Closely related to it, is the decision in *MG v BM.*[16] It was held in *MM v MN*, *inter alia,* that failure to comply with the provisions of section 7(6) of the Recognition of Customary Marriages Act does not lead to the invalidity of the second or further customary marriage and that this marriage should be regarded as being out of community of property and of profit and loss.

The Recognition of Customary Marriages Act has brought about profound changes to South African family law. As suggested in the name, the main aim of the Act is to recognise customary marriages as valid marriages on the same footing as civil marriages in South Africa. The Act came into operation on 15 November 2000. It recognises all customary marriages which comply with its requirements; that is, those contracted after 15 November 2000, as well as those entered into before it came into operation – provided that they were in existence and valid at such date of coming into operation.[17]

10 S 7(1) of Act 120 of 1998.
11 See Bekker & van Niekerk "*Gumede v President of the Republic of South Africa* or the creation of new marriage laws" 2009 *SAPL* 206.
12 See parr 4 2 – 5 *infra*.
13 *MM v MN* 2013 4 SA 415 (CC).
14 *MM v MN* 2010 4 SA 266 (GNP).
15 *MM v MN* 2012 4 SA 527 (SCA).
16 *MG v BM* 2012 2 SA 253 (GSJ).
17 S 2 of Act 120 of 1998.

This discussion deals with the requirements and proprietary consequences of monogamous and polygynous customary marriages. A monogamous customary marriage is, irrespective of when it was entered into, in community of property, with profit and loss, in the absence of an antenuptial contract. As this may be contrary to the intention of one or more of the prospective spouses, it is suggested that the spouses to this marriage be allowed to regulate these consequences by means of a postnuptial agreement as opposed to approaching the court in terms of section 7(4)(a) of the Act (which may be quite costly for the applicants).

A second, or further, customary marriage has been held to be valid even in the case where the provisions, dealing with intended proprietary consequences, have not been complied with. The contract required in this instance is very important in the determination of any dispute relating to a title to property that may arise between spouses in a polygynous customary marriage. As a result of the close connection between the requirements for validity and proprietary consequences of customary marriages, it is necessary that spouses who decided to enter into a polygynous customary marriage obtain the required written contract as provided for by section 7(6) of the Act. These issues are addressed in paragraphs two, three and four below. Is a customary marriage preceded by *ukuthwala* valid? It is submitted that when there was consent by the prospective spouses to resort to *ukuthwala*, for whatever reason, the resultant customary marriage should be regarded as valid as the parties have shown a clear intention to marry one another in accordance with customary law.

2 Requirements for Validity

The requirements for a valid customary marriage are contained in section 3 of the Recognition of Customary Marriages Act. The Act prescribes the following as requirements:

- Both parties to the marriage must be eighteen years or older;
- Both must consent to be married to each other by customary rites; and
- The marriage must be negotiated and entered into or celebrated in accordance with customary law.

The first two requirements mentioned above are self-explanatory. It means that persons who are below the age of eighteen years cannot conclude a valid customary marriage. In the case of a minor – that is, a person below this age who wishes to conclude a customary marriage – either his or her parents or guardian must give their consent to the said marriage.[18] Alternatively, the minor may approach the Commissioner of Child Welfare in the case where the parents or guardian refuse to grant the necessary consent. When parental consent or the consent of the Commissioner of Child Welfare cannot be obtained, a court may be

18 S 3(3) of Act 120 of 1998.

approached to grant such consent. The Minister of Home Affairs or any authorised officer in the Public Service may also be approached to grant consent to a customary marriage of a minor if the refusal to grant it, by the parent(s), guardian or Commissioner of Child Welfare, was without adequate reason and contrary to the best interests of the minor.[19]

The second requirement is that both parties must consent to be married to each other by customary rites; that is, they must consent to enter into a customary marriage and not any other form or type of a marriage. Both requirements relating to consent appear to be in conflict with certain customary law transactions which may be concluded in anticipation or contemplation of a customary marriage. Customary marriages may be arranged by parents of prospective spouses while such spouses are still young – that is, below the age determined by the Act or if above the required age, without such prospective spouses' involvement or active participation in the conclusion of the proposed marriage. These transactions include the engagement of infants which is well known in customary law and has been described as follows:

> Infants betrothal, although possible and viewed with favour, does not occur very frequently. It occurs, mostly, in families of high political status, where it is important that an heir should be born of a properly designated mother. In such case the preferential partner is usually engaged shortly after birth, or even before birth. If the eventual husband of such a girl should be considerably older than she is, he may marry other wives before she comes of age, but if negotiations for her marriage preceded those of his other wives, she will become the principal wife when her marriage is finalised.[20]

The practice of *ukuthwala*, which is prevalent amongst the Cape Nguni, also appears to be contrary to both the requirements, regarding consent, prescribed by the Act. *Ukuthwala* is normally resorted to when there is an impediment to the proposed customary marriage.[21] The impediment may relate to various circumstances, such as when a parents of a prospective bride unnecessarily refuses to grant consent to the marriage or demands an unreasonable amount of *lobolo*. In such a situation, where the prospective spouses are both of the prescribed age, the prospective husband may make use of *ukuthwala* to compel the prospective wife's parent to consent to the marriage or agree to a reasonable amount of lobolo. The practice cannot, however, be used to compel a prospective wife to consent to be married by civil rites.[22] The consent of the parent of a bride, although not a requirement for validity in terms of the Act when the bride is eighteen years or above, is still regarded as a requirement in traditional customary law. Therefore, it may still be regarded as a requirement, in terms of section 3(1)(b) of the Act, in respect of a prospective bride who was above the age of eighteen years

19 Jansen 'Family Law' in Rautenbach & Bekker (eds) *Introduction to Legal Pluralism in South Africa* (2014) 99-101.
20 Mönnig *The Pedi* (1978) 130.
21 See Koyana *Customary Law in a Changing Society* (1980) 1.
22 Bekker & Koyana 'The indomitable *ukuthwala* custom' 2007 *De Jure* 179.

when *ukuthwala* occurred as he or she is entitled to the *lobolo* to be furnished or provided for in anticipation or contemplation of her customary marriage.

The aforementioned requirements appear to be easy to fulfil. However, if regard is given to the prerequisite that the marriage must be negotiated and entered into or celebrated in accordance with customary law, the picture changes.[23] This requirement entails examining whether the customs, traditions or rituals, that have to be observed in the negotiations and celebration of customary marriages, have been complied with. These include the negotiations leading to the provision of *lobolo*, its actual provision and the "handing over" of the bride to the bridegroom's family or the bridegroom himself as well as any other tradition, custom or ritual associated with these.[24] As held in *Rasello v Chali In re: Chali v Rasello,*[25] once a customary marriage has not been concluded in accordance with customary law, it cannot be regarded as valid even though all the other requirements were met. In this case, the appellant's contention that she was introduced or handed over to the deceased's family before *lobolo* was provided was held to be contrary to the principles governing the entering into of valid customary marriage. This customary marriage was, therefore, invalid.[26]

Although the Act does not provide that the provision of *lobolo* is a requirement for a valid customary marriage, it regards it as one in terms of the requirements laid down in section 3(1)(b).[27] This is because customary marriages in South Africa are always preceded by negotiations relating to the provision of *lobolo*. Even civil marriages contracted by indigenous African peoples of South Africa are accompanied by *lobolo* negotiations.[28]

A customary marriage is concluded when a bride is handed over to the family of the bridegroom or the bridegroom himself. The handing over of the bride is an important indication that a valid customary marriage has been concluded.[29] At the time of handing the bride over, a celebration is held.[30] The handing over of the bride to the bridegroom's family is a very important requirement without which a valid customary marriage cannot exist.

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23 S 3(1)(b) of Act 120 of 1998.
24 *Moropane v Southon* [2014] JOL 32172 (SCA).
25 *Rasello v Chali In re: Chali v Rasello* 2013 JOL 30965 (FB) ("*Rasello*").
26 *Idem* par 11.
27 Mofokeng 'The *lobolo* requirement as the "silent" prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act" 2005 *THRHR* 27; *Fanti v Boto* 2008 5 SA 405 (C).
28 See Vorster (ed) *Urbanites perceptions of lobolo (Mamelodi and Atteridgeville)* (2000).
29 *Mabuza v Mbatha* 2003 7 BCLR 743(C); Bekker 'Requirements for the validity of a customary marriage: *Mabuza v Mbatha*' 2004 *THRHR* 146.
30 See *Rasello v Chali In re: Chali v Rasello supra* n 25; *Moropane v Southon supra* n 24.

In the case of a subsequent customary marriage, that is, a second or further customary marriage, the consent of the spouse of the existing customary marriage is a requirement for the validity of such second or further customary marriage. This is the position amongst the Tsonga.[31] There is no doubt that this rule will be extended to polygynous customary marriages of all indigenous African peoples of South Africa.[32]

Closely related to the requirements for the validity of customary marriages are the provisions relating to their proprietary consequences.[33] The Recognition of Customary Marriages Act provides that monogamous customary marriages are in community of property, with profit and loss, unless these consequences are excluded by means of an antenuptial contract.[34] The proprietary consequences of polygynous customary marriages, contracted after the date of commencement of this Act, are, or have to be, regulated in terms of a contract approved by a court, as envisaged by section 7(6) where an application to this effect has to be made by the husband.

3 Legal Issues that may Arise

Can a valid monogamous customary marriage exist even in the case where the prospective spouses did not agree about its proprietary consequences? Phrased differently, are parties validly married by customary rites if they had only complied with the provisions of section 3 of the Act without agreeing on the proprietary consequences of such a monogamous customary marriage?

The answer to this question is found in section 7, read with section 3, of the Recognition of Customary Marriages Act. Section 7 provides that a monogamous customary marriage is in community of property, with profit and loss, unless these consequences are excluded by an antenuptial contract. The Act, therefore, deems these marriages to be in community of property, with profit and loss.[35]

From the abovementioned provisions, it appears that even in the case where the prospective spouses in a monogamous customary marriage have failed to determine the matrimonial property system of their marriage by means of an antenuptial contract, the customary marriage between them is valid. It also appears that such a customary marriage is to be regarded as being in community of property, with profit and loss, for the reason that an antenuptial contract was not concluded by the parties. This position may be detrimental to a spouse who was not aware,

31 *MM v MN supra* n 13.
32 See Maithufi 'Modjadji Florah Mayelane v Mphephu Maria Ngwenyama Case CCT 57/12 [2013] ZACC 14 (30 May 2013)' 2013 *De Jure* 1078.
33 See, *inter alia, MM v MN supra* n 14; *MG v BM supra* n 16.
34 S 7(2) of Act 120 of 1998
35 Bekker & West 'The validity of "further" customary marriages: A new legal conundrum *MZG and BM Case* no 10/873 62 (GSJ)' 2012 *THRHR* 515.

at the time when the customary marriage was entered into, that the legislature had already decreed that his or her customary marriage was in community of property, with profit and loss.

A customary marriage may be negotiated over a period of time. One of the prospective spouses may not have intended to marry or be married in community of property but nevertheless allowed or left the negotiations in order to bring about a valid customary marriage and, therefore, proceeding to finality before thinking about entering into an antenuptial contract. Another scenario is that the prospective spouses may not have agreed that they were to marry in community of property, with profit and loss, as envisaged by the Act after the completion of the negotiations leading to a valid customary marriage. Once all the requirements prescribed by section 3 of the Recognition of Customary Marriages Act have been met, it appears that the parties would be regarded as being married in community of property, with profit and loss, despite the absence of an agreement or consent relating to the proprietary consequences of their marriage. Is the intention of the parties not of cardinal importance in determining the proprietary consequences of their marriage?

Customary marriages are generally entered into by persons who may hardly be aware or know that the law provides that such marriages are automatically in community of property, with profit and loss, in the absence of an antenuptial contract. I have been approached in a number of divorce disputes where all the requirements for a valid customary marriage have been met but where one of the parties disputed the existence of a valid marriage on the basis that he or she did not have any intention to marry in community of property, with profit and loss. Therefore, some people find themselves, even before they commence to live together as husband and wife or before the actual celebration of their customary marriage, locked in a marriage whose consequences they did not intend or contemplate.

Should the consent or agreement between the prospective spouses, relating to the proprietary consequences of their customary marriages, be made a requirement for the validity of a customary marriage in addition to the requirements provided for by section 3 of the Recognition of Customary Marriages Act? The same question has arisen in respect of the validity of a second or further customary marriage in the event of failure to comply with the provisions of section 7(6) of the Act.[36] An attempt is made to address these issues below.

36 *MN v MM supra* n 15.

4 Proprietary Consequences

4 1 Monogamous Customary Marriages

Mention has already been made above that a monogamous customary marriage entered into in terms of the Recognition of Customary Marriages Act of 1998 is in community of property, with profit and loss.[37] This is the position in respect of monogamous customary marriages contracted before or after the commencement of this Act.[38]

Spouses to valid customary marriages contracted before the commencement of the Recognition of Customary Marriages Act may change the matrimonial property system applying to their marriage.[39] The court may grant the spouses leave to change the matrimonial property system which applies to their marriage if satisfied that:

(i) There are sound reasons for the proposed change;

(ii) Sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500,00 or so much as may be determined by the Minister of Justice by notice in the Gazette; and

(iii) No other person will be prejudiced by the change.[40]

Once satisfied, the court will order that the matrimonial property system, applicable to the customary marriage of the applicants, no longer applies and authorise the parties to enter into a written contract which will regulate the future matrimonial property system of their marriage on conditions the court may determine.

The proprietary consequences of polygynous customary marriages, which were entered into before the date of the commencement of the Act, may also be changed in the same manner as described above. In this case "... all persons having a sufficient interest in the matter, and in particular, the existing spouse or spouses, must be joined in the proceedings".[41]

Prospective spouses to monogamous customary marriages contracted after the coming into operation of the Act are allowed to regulate the matrimonial property system of their marriage by means of an antenuptial contract in the case where they do not wish or intend to marry in community of property.

As already indicated above, the prospective spouse(s) may not have wished or intended to marry in community of property, with profit and

37 S 7 (2) of Act 120 of 1998.
38 *Gumede v President of the Republic of South Africa supra* n 9.
39 S 7(4)(a) of Act 120 of 1998.
40 Ss 7(4)(a)(i)-(iii) of Act 120 of 1998.
41 S 7(4)(b) of Act 120 of 1998.

loss, but was not aware that an antenuptial contract was necessary to exclude these consequences. Alternatively, the prospective spouses might have intended to fix the consequences of their marriage by means of an antenuptial contract after the handing over of the bride to the bridegroom or his family was done. As all the requirements for a valid customary marriage would have been complied with, can it be concluded that the parties are married in community of property, with profit and loss, because no antenuptial contract was concluded at the time when the handing over took place?

In providing an answer to this question, it is important to make a distinction between the requirements for a valid customary marriage and its proprietary consequences. Once this distinction is kept in mind, it is possible to come to a conclusion that a valid customary marriage may exist even in the case where the spouses did not fix their desired proprietary consequences by means of an antenuptial contract. Therefore, it is possible to come to the conclusion that the parties should not be regarded to have entered into a customary marriage in community of proprietary, with profit and loss, for the mere reason that they failed to regulate the consequences of their marriage by an antenuptial contract. It is submitted that where there is a clear indication that one, or both, of the spouses did not intend to marry in community of property, the resultant valid customary marriage should not be deemed to be in community of property, with profit and loss.

This submission implies that whenever the validity of a customary marriage is disputed by any of the spouses during divorce proceedings – where one spouse alleges that the marriage is in community of property – two questions arise, namely:

- Whether the requirements for a valid customary marriage in terms of the Recognition of Customary Marriages Act of 1998 have been complied with; and
- If it is found that a valid customary marriage was concluded, the next issue for determination is whether the said spouses may be deemed to have contracted the said marriage in community of property and of profit and loss as intended by section 7(2) of the Act.

The spouse who avers that the customary marriage is in community of property bears the burden of proving this on a balance of probabilities. Similarly, the spouse who claims otherwise bears the burden of proving this, that is, that the marriage should not be deemed to be in community of property, with profit and loss. The presumption created by section 7(2) of the Recognition of Customary Marriages Act may therefore be rebutted by evidence to the contrary.

4 2 Polygynous Customary Marriages

4 2 1 Polygynous Customary Marriages Contracted Before 15 November 2000

Polygynous customary marriages contracted before 15 November 2000 are recognised as valid marriages if they were valid and in existence when the Recognition of Customary Marriages Act came into operation.[42]

The proprietary consequences of polygynous customary marriages contracted before 15 November 2000 are governed by customary law.[43] In the same manner as monogamous customary marriages, such consequences may be changed by the spouses by applying to a court of competent jurisdiction.[44] The court may grant leave to change such matrimonial property system if it is satisfied that there are sound reasons for the proposed change, sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500,00 or so much as may be determined by the Minister in the Gazette and that no person will be prejudiced by the proposed change. If satisfied, the court may order that the matrimonial property system applicable to these marriages will no longer apply and authorise the parties to enter into a written contract which will regulate their future matrimonial property system on conditions determined by it.[45] Once this order is granted, the proprietary consequences will no longer be regulated by customary law but in terms of a written contract entered into by the spouses and approved by the court. All persons having a sufficient interest in the matter, including the existing spouse, must be joined in the proceedings.[46]

4 2 2 Polygynous Customary Marriages Entered into After 15 November 2000

A customary marriage is potentially polygynous and a husband may, during its existence, contract another customary marriage with another woman. Before 15 November 2000, a further or second customary marriage could be entered into without any condition except that the requirements for a valid customary marriage, which included the consent of the spouse of the existing customary marriage, were complied with.[47]

Irrespective of whether a customary marriage was entered into before or after 15 November 2000, the husband in such existing customary marriage is required to apply to a court for the approval of a written

42 S 2(2) of Act 120 of 1998.
43 S 7(1) of Act 120 of 1998.
44 S 7(4) of Act 120 of 1998.
45 Ss 7(4)(a)(i)-(iii) of Act 120 of 1998.
46 S 7(4)(b) of Act 120 of 1998.
47 *MM v MN supra* n 13.

contract which will regulate the future matrimonial property system of his marriages when he wishes to contract a second or further customary marriage with another woman. At the time when this application is made, the husband would be a spouse to a monogamous customary marriage whose proprietary consequences may be in community of property, with profit and loss, unless excluded by an antenuptial contract. The existing customary marriage may also be out of community of property, with profit and loss and with or without accrual sharing, where an antenuptial contract was concluded. The proprietary consequences may further be regulated in terms of a written contract as envisaged by section 7(4)(a) of the Recognition of Customary Marriages Act.

In the case of a customary marriage in or out of community of property, but subject to accrual sharing, the court is authorised to terminate the said matrimonial property system and effect its division.[48] The court may allow further amendments to the terms of the proposed contract and grant the order, subject to conditions it may deem just, or it may refuse the application if the interests of the parties would not be sufficiently protected by means of the proposed contract.[49] It is clear that the main intention of this is to protect the interests of the existing spouses (that is, the husband and wife) as well as those of the prospective spouse (the woman who the husband wishes to marry by customary rites).[50] The Act also provides that all persons who have a sufficient interest in the matter have to be joined in the proceedings.[51] Therefore, the intention is to ensure that a person, whose interests may be affected by the proposed contract, is placed in a position to object to what may be prejudicial to him or her with regard to the terms of the proposed contract.

The reason behind the termination of the matrimonial property system of the existing marriage and the division of property, at the time when the court approves the written contract, is to avoid unnecessary future litigation concerning the property of the female spouses to polygynous customary marriages.[52] Disputes relating to the title to property may arise especially at the time of the death of any of the spouses to this polygynous marriage. Where the proprietary consequences are not clearly spelt out in the proposed contract, this may lead to difficult problems in the interpretation of the Intestate Succession Act,[53] as amended by the Reform of Customary Law of Succession and Regulation of Related Matters,[54] at the death of any of the spouses to a

48 Ss 7(4)(a) & (b) of Act 120 of 1998.
49 S 7(7) of Act 120 of 1998.
50 See Maithufi & Moloi 'The need for the protection of rights of partners to invalid marital relationships: A revisit of the "discarded spouse" debate' 2005 *De Jure* 144.
51 S 7(8) of Act 120 of 1998.
52 See Maithufi & Moloi 'The current legal status of customary marriages in South Africa' 2002 *THRHR* 599.
53 Act 81 of 1987.

polygynous customary marriage. This may be due to the fact that the property which belonged to the deceased was not adequately defined in the proposed contract or no contract, as envisaged by section 7(6) of the Act, was approved by a court because the husband had failed to make the necessary application when he decided to marry another wife by customary rites. A valid will may, however, go a long way in resolving legal disputes of this nature.

During the existence of the various marriages, spouses may also face problems with regard to property that has to be used to maintain the children born as a result of the different marital relationships created for the various wives. What happens if property belonging to one wife is used for the benefit of a child of another wife or the wife herself? Is there any obligation on the part of the wife whose child benefited or on the husband to refund the said property to the impoverished wife? Should resort be had to the old customary law transaction of *ukwethula* in resolving such disputes?[55]

The Constitutional Court in *MM v MN*[56] confirmed the finding of the Supreme Court of Appeal that where there was failure to obtain the contract envisaged by section 7(6) of the Recognition of Customary Marriages Act, the resultant second or further customary marriage is valid but has to be regarded as being out of community of property with profit and loss. If it is accepted that a second or further customary marriage is out of community of property with profit and loss, polygynous customary marriages may, therefore, be regarded as having created distinct entities which have their own property to be used for their exclusive benefit. This is almost the same as the customary law arrangement of creating a "house" for each customary marriage contracted by a husband. To each wife, the husband was expected, in terms of customary law, to allot property and certain other kinds of property acquired in terms of customary law, automatically accrued, to a particular "house".[57]

The property arrangement envisaged by section 7(6) of the Recognition of Customary Marriages Act, therefore, appears to be similar to the consequences of customary marriages as governed in terms of customary law. What is intended by this proposed contract is that the property belonging to the various wives have to be kept separate from each other and whenever property belonging to one house is used for the benefit of another, an inter-house debt (*ethula*) is created.[58]

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54 Act 11 of 2009.
55 See, *inter alia*, Bekker 'Law of Contract' in Rautenbach & Bekker (eds) *supra* n 19 at 145-154.
56 *MM v MN supra* n 13.
57 See Bekker *Seymour's Customary Law in Southern Africa* (1989) 71-77 & 126 – 140; Jansen 'Family Law' in Rautenbach & Bekker (eds) *supra* n 19 at 108.
58 See Bekker *supra* n 57 at 334-335.

The next issue to be dealt with, without which this discussion will not be complete, is the procedure to be followed in obtaining a contract which has to be approved by a court when a husband of an existing customary marriage wishes to contract a customary marriage with another woman. Although this contract is not a requirement for the validity of a second or further customary marriage, it is submitted that obtaining it is important in ensuring that unnecessary disputes between spouses in polygynous customary marriages are avoided.

5 The Application and Annexures

5 1 Notice of Motion and Terms of Order Sought

The Recognition of Customary Marriages Act saddles the husband, of an existing monogamous customary marriage, with the responsibility to obtain the approval of a contract by a court which will regulate the future matrimonial property system of his marriages when he wishes to contract another customary marriage.[59] Although this is the position, the cumulative effect of this provision is that this has to be a joined application by the husband, his wife or wives by customary rites as well as his prospective wife. This is clear from the provision that "all persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses, must be joined in the proceedings instituted in terms of subsection (6)".[60] Moreover, a court may not deal with the termination and division of the matrimonial property system in the absence of a female spouse or spouses of an existing customary marriage or marriages. Therefore, the court cannot grant an order in the case where any of the parties, who are likely to be affected by such order, are not joined in the proceedings. An order issued in terms of section 7(6) of the Act may not only affect the rights of the existing and prospective spouses but may also affect the rights of others with "a sufficient interest in the matter".[61] This may include any person, including the person who has to receive *lobolo* or who is responsible for the refund of the *lobolo* in the case where a customary marriage is dissolved.

The section 7(6) application is done by means of a notice of motion. There must be at least three applicants. The first applicant is the husband of a customary marriage who wishes to conclude a second or further customary marriage. The second applicant, in the case of a monogamous customary marriage, is the existing customary marriage wife. In the case of a polygynous customary marriage, all existing wives have to be joined as applicants. The prospective spouse must be joined as the third applicant. There are, therefore, as many applicants, apart from the husband, as the number of already married female spouses and prospective spouses, if more than one wife is intended to be married.

59 S 7(6) of Act 120 of 1998.
60 S 7(8) of Act 120 of 1998.
61 *Ibid*.

The terms of the order sought have to be clearly stated in the notice of motion. The most important of these terms are the following:

- An order, in terms of section 7(6) of the Act, for the approval of the proposed contract to govern the future matrimonial property system of the customary marriages;
- An order to amend the terms of the proposed contract as the court may deem just;
- An order to grant such further or alternative relief as may be just; and
- An order relating to the registration of the customary marriages, if necessary.

5 2 Annexures

5 2 1 The Founding Affidavit

The husband, as the first applicant, must depose to an affidavit (the founding affidavit) that clearly spells out the reasons for the order sought. The other affidavits – those of the existing spouse or spouses of a customary marriage or marriages and those of the prospective spouse or spouses – have to refer to the reasons for the order sought and that the deponents agree with such order. These affidavits, which may be referred to as supporting affidavits, have to, therefore, support the order sought by the husband, namely, that the court approve the proposed contract to regulate the future matrimonial property system of his marriages.

The founding affidavit must disclose the following issues:

- The personal particulars of the first applicant – including his full names and surname, identity number and address or place of residence;
- The personal particulars of the wife, in the case of a monogamous marriage, or wives in the case of a polygynous marriage, her or their identity number or numbers as well as their address or place or places of residence;
- The personal particulars of the prospective wife, her identity number, address or place of residence;
- That the spouse or spouses in the existing customary marriage or marriages were validly married in terms of customary law and that her marriage or their marriages are still in existence;
- That the spouse or spouses referred to above have agreed or consented to the proposed customary marriage with the prospective spouse and the terms of the proposed contract;
- The particulars relating to the current proprietary or matrimonial consequences of the existing customary marriage or marriages;
- That the matrimonial property regime of the exiting customary marriage or marriages be terminated, its division be ordered and such consequences be replaced in accordance with the terms of the proposed contract as indicated by section 7(6) of the Act;

- That the matrimonial property regime, as proposed in the contract in terms of section 7(6) of the Act, for all the existing spouse or spouses and the prospective spouse be confirmed by the court;
- The personal particulars of all the children born as a result of the existing customary marriage or marriages with each spouse;
- That all persons having a sufficient interest in the matter have been joined in the proceedings;
- That the interests of all persons having a sufficient interest in the matter will be adequately protected by the terms of the proposed contract;
- That the court grants the order as proposed in the application or that the order be granted subject to such conditions or amendments as the court may deem just; and
- If necessary an order directing the registration of the customary marriages.

5 2 2 Supporting Affidavits

The other applicants, that is, the first applicant's existing spouse or spouses and his prospective spouse, also have to depose to separate affidavits which support the reasons for obtaining the order sought. Besides the personal particulars of all applicants, these affidavits have to deal with the following issues:

- The existence of a valid customary marriage between the first applicant and each of the respective applicants;
- The number and personal particulars of all the children born as a result of the existing customary marriage or marriages with the first applicant;
- The proprietary consequences of the existing customary marriage or marriages with the first applicant;
- That all the applicants have agreed or consented to be married in accordance with the proposed contract, which is intended to regulate the future matrimonial consequences of their marriages;
- That the matrimonial property system of the existing customary marriage or marriages be terminated or its division be ordered and that such consequences be replaced by the terms of the proposed contract;
- That all the applicants have consented to the proposed customary marriage with the prospective spouse;
- That the court grants the order in terms of the notice of motion or on such terms and conditions as it may deem just taking into account the interests of all the parties; and
- If necessary, an order directing the registration of the customary marriages in terms of section 7 (4) of the Act.

5 2 3 Specific Matters to be Dealt with by the Prospective Wife

The affidavit of the prospective wife must confirm the issues indicated above in support of the order sought. In addition, the prospective wife must, *inter alia,* state the following:

- That all the requirements for a valid customary marriage between her and the first applicant have been met;
- That she is aware that the first applicant is a spouse in an existing customary marriage or marriages and mention the name(s) of the existing spouse(s);
- The number and names of children born as a result of her relationship with the first applicant (if any);
- That the spouse or spouses of the existing customary marriage or marriages with the first respondent has or have agreed or consented to her customary marriage with the first applicant;
- That she had consented to the terms of the proposed contract aimed at dealing with the future matrimonial property consequences of their customary marriages; and
- Any other relevant information that the court may consider in the determination of whether or not the terms of the proposed contract should be approved.

All the parties – the spouse or spouses in the existing customary marriage or marriages, the husband who wishes to contract another customary marriage and the prospective spouse of the customary marriage to be entered into – must be *ad idem* with regard to the proposed customary marriage and the proposed proprietary consequences of all the marriages.

6 The Proposed Contract to Regulate the Matrimonial Property Regime of Polygynous Customary Marriages

From this discussion it is clear from that the terms of the proposed contract, intended to govern the future matrimonial property system of polygynous customary marriages, is a product of agreement between all the spouses to such marriages. The spouses have to agree as to which assets or properties will belong to a particular customary marriage by reference to a female spouse of each such marriage. Therefore in the case of polygynous customary marriages, there will be as many distinct estates as the number of wives.

Mention has already been made that the arrangement provided for by the provisions of section 7(6) of the Recognition of Customary Marriages Act resembles the customary law concept of creating a "house" for each wife.[62] The applicant husband must therefore indicate with certainty the properties or assets that belong to his various wives. All properties or assets which, at the time when a customary marriage was entered into, belonged to a particular wife must be indicated in the proposed contract as belonging to that wife. Any property or asset which was donated or

62 See Pienaar 'Law of Property' in Rautenbach & Bekker (eds) *supra* n 19 at 124-125; see also par 4 2 2 *supra*.

allotted or is to be donated or allotted to a particular wife by the husband must also be indicated as her property. Any property to be acquired, in whatever manner, during the course of the marriage by each wife is also to be indicated as forming part of the property of such wife. The general rule is that the property or assets of each wife in a polygynous customary marriage should be kept as distinct as possible from the properties or assets of the other wives.[63]

The properties or assets that were brought into the marriage by all spouses, including the husband, must be fully disclosed and a proposal made as to their ownership in the proposed contract. It is advisable that a separate contract be prepared and approved by the court for each wife of a customary marriage in a polygynous marriage. The arrangement envisaged by section 7(6) of the Act is that of complete separation of property between the husband and all his wives and the wives *inter se*.

7 Conclusion

The Recognition of Customary Marriages Act is one of the most important pieces of legislation in the field of family law in South Africa. It has brought to finality the thorny question relating to the legal status of a customary marriage in South Africa.

The requirements for a valid customary marriage are almost similar to those prescribed for a civil marriage except that a customary marriage has to be negotiated and entered into or celebrated in accordance with customary law.[64] A clear distinction is still, however, maintained between these marital relationships. One such distinguishing feature is the requirement relating to the provision of *lobolo*. Another feature is that a customary marriage is potentially polygynous. Although *lobolo* is usually negotiated and furnished in respect of a civil marriage by all the indigenous African peoples of South Africa, it is not a requirement for a valid civil marriage. It is, however, not surprising that indigenous African peoples in South Africa negotiate and provide *lobolo* even in respect of civil marriages.

The proprietary consequences of monogamous customary marriages are similar to those of civil marriages. Monogamous customary marriages are in community of property, with profit and loss, unless these consequences are excluded by an antenuptial contract irrespective of whether the customary marriage was entered into before or after the date of the commencement of the Recognition of Customary Marriages Act.[65]

For the reasons mentioned in paragraphs two, three and four above, it is recommended that when the prospective spouses fail to enter into

63 *Ibid.*
64 See s 3 of Act 120 of 1998.
65 See *Gumede v President of the Republic of South Africa supra* n 9.

an antenuptial contract, they should be allowed to conclude any agreement which will deal with the proprietary consequences of their marriage after the requirements for a valid customary marriage have been fulfilled. This may be achieved by amending section 7 of the Act to the effect that a contract, which has the similar impact as an antenuptial contract, may be entered into by the spouses after the handing over of the bride to the bridegroom or his family.

When a husband in an existing customary marriage wishes to enter into another customary marriage, he is expected to make an application to court for the approval of a written contract which is aimed at regulating the future matrimonial property system of his marriages.[66] Despite these provisions being phrased in seemingly peremptory language, it has been held that failure to comply therewith does not lead to the invalidity of the ensuing customary marriage, but that the said marriage should be regarded as being out of community of property.[67] All the requirements for the existence of a valid customary marriage must, however, have been complied with.[68] It has also been held that the consent of the female spouse of the existing customary marriage is a requirement for the validity of a second or further customary marriage.[69]

Despite the ruling in *MM v MN*,[70] it is advisable that a husband who wishes to contract another customary marriage apply for the approval of a contract which will regulate the future matrimonial property system of his marriages so as to avoid possible conflicts of interests between his various wives.

66 S 7(6) of Act 120 of 1998.
67 *MM v MN supra* n 13.
68 *Fanti v Boto supra* n 27.
69 *MM v MN supra* n 13.
70 *Ibid.*

Section 71 of the National Health Act: a call for a review of the consent requirement for child participation in health research

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OPSOMMING

Artikel 71 van die Nasionale Gesondheidswet: 'n Pleit vir Hersiening van die Toestemmingsvereiste vir Deelname van Kinders in Gesondheidsnavorsing

Die Nasionale Gesondheidswet handel spesifiek oor die toestemming van kinders tot deelname aan gesondheidsnavorsing. Artikel 71, wat op 1 Maart 2012 in werking getree, het, verplig ouers of voogde om toestemming vir navorsing met kinders, ongeag hul ouderdom, te verleen. Daarbenewens moet die kind toestem as hy of sy voldoende begrip toon. Alhoewel die doel van die artikel is om kinders te beskerm, is dit nie sonder kritiek nie. Die artikel neem nie die outonomie van adolessente voldoende in ag nie en ignoreer ook die feit dat baie kinders nie ouers of voogde het nie, maar deur sorggewers versorg word. Die doel van die artikel is dan juis om na hierdie twee punte van kritiek te kyk en aanbevelings te maak. In die bespreking sal dit duidelik blyk dat die artikel in stryd is met bepalings van die Kinderwet en die Wet op die Beëindiging van Swangerskap en dat dit ook kinders se grondwetlike regte ondermyn. Spesiale aandag word ook gegee aan die vraag of sorggewers, veral kinderhoofde van huishoudings, toestemming tot navorsing kan gee.

1 Introduction

Children are regarded as vulnerable to exploitation in health research due to their physical and developmental immaturity. Codes of research ethics, such as the Declaration of Helsinki,[1] emphasise that vulnerable populations, such as children, need special protection.[2]

Prior to the implementation of the National Health Act,[3] there was limited specific legal protection for children: No specific South African

1 World Medical Association Declaration of Helsinki Ethical principles for medical research involving human subjects Helsinki: WMA General Assembly, 1964 (revised 2008) ('Declaration of Helsinki').
2 *Idem* Principle 9.
3 61 of 2003.

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legislation addressed health research with children.[4] Research ethical committees relied on principles of health law relating to the medical treatment of a minor in order to identify protection for children.[5] This determination was supported by ethical guidelines which provide that adolescents[6] may consent unassisted to research if the research meets certain criteria.[7]

The National Health Act is the first effort by government to protect child participants in health research by means of legislation. The National Health Act deals specifically with consent to children's participation in research. Section 71, enacted on 1 March 2012, mandates written consent from a parent or legal guardian for all research conducted with minors, irrespective of their age. In addition, minors, as well as their parents or legal guardians, must consent if they have sufficient understanding.[8] The National Health Act (the "Act") does not define the term "minor", but the Children's Act[9] and the Constitution[10] define a "minor"[11] as anyone under the age of eighteen years.

It is clear from section 71 that consent by a parent or legal guardian is a legal requirement for the inclusion of children in research. The purpose of the Act is to provide legal protection to participants, but the Act is not beyond criticism.[12] First, it does not sufficiently take into account the emerging autonomy of the adolescent. Second, the Act ignores the fact that many children in South Africa do not have a parent or legal guardian and are cared for by caregivers. Therefore, the Act prevents children without legal guardians from accessing research that could be of great benefit to them.

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4 National Health Research Ethics Council *Ethical-legal protection for vulnerable research participants in South Africa: An audit of relevant laws and ethical guidelines* (2011). See also Zuch *et al* 'Changes to the law on consent in South Africa: implications for school-based adolescent sexual and reproductive health research' 2012 *BMC International Health and Human Rights* 2.

5 For example, s 39 of the Child Care Act 74 of 1983 determined that any person over the age of 14 could consent independently to medical treatment without the assistance of a parent or guardian. The Child Care Act has since been repealed and replaced by the Children's Act 38 of 2005, which determines, in s 129(2), that a child may consent to his or her own medical treatment if the child is over the age of 12 and is of sufficient maturity and mental capacity to understand the implications of the treatment. See Nienaber 'Consent to research by mentally ill children and adolescents: the implications of chapter 9 of the National Health Act' 2013 *SAJP* 20; Zuch *et al* 2012 *BMC International Health and Human Rights* 2.

6 Defined as 'persons who have reached puberty'.

7 See Department of Health *Ethics in Health Research: Principles, structures and processes* (2004).

8 S 7(2) & (3).

9 38 of 2005.

10 Constitution of the Republic of South Africa, 1996.

11 The terms 'minor' and 'child' will be used interchangeably in this article to denote the same subject.

12 See Zuch *et al* 2012 *BMC International Health and Human Rights* 2; Nienaber 2013 *SAJP* 22.

In light of this, the article elaborates on these issues and stresses that the Act (by placing stricter control on research with children under eighteen years) is clearly in contravention of the Children's Act and the Choice on Termination of Pregnancy Act,[13] and, further, undermines constitutional rights such as the right to the bodily and psychological integrity and dignity of children. Special attention is also given to the question whether caregivers, including child-heads of families, may give legally valid consent to health research.

Before addressing these issues, it is important to briefly look at the requirements for legally valid consent to health research.

2 Consent to Participation in Health Research

Research cannot be conducted without the participant's informed consent – it is absolutely essential.[14] This requirement is regarded as a primary way of ensuring that research participants are protected against exploitation. Informed consent is based on the recognition that all persons have unconditional worth on the basis of the ethical principle of respect for personal autonomy.[15]

Section 71 of the National Health Act requires the participant's informed consent to research participation. It provides that:

> [R]esearch or experimentation on a living person may only be conducted in the prescribed manner; and with the **written** consent of the person after he or she has been informed of the object of the research or experimentation and **any possible** positive or negative consequences to his or her health (own emphasis).

Section 71 gives effect to the individual's right to autonomous self-determination protected by section 12(2) (the right to bodily and psychological integrity, which includes the right not to be subjected to medical or scientific experiments without their informed consent), section 10 (the right to inherent dignity), and section 14 (the right to privacy) of the Constitution.

To obtain valid consent the researcher must ensure that the research participant is sufficiently well-informed to make an informed decision.[16] The researcher must also determine that the person possesses the

13 92 of 1996.

14 See also the Declaration of Helsinki Ethical principles for medical research involving human subjects Helsinki: WMA General Assembly, 1964 (revised 2008) principle 26; *Trials of war criminals before the Nuremberg military tribunals under control council law* Washington, DC: US Government printing office (1949) 181.

15 Beauchamp & Childress *Principles of Biomedical Ethics* (2001) 63; Nienaber 2013 *SAJP* 22.

16 Meadde & Slesnick 'Ethical considerations for research and treatment with runaway and homeless adolescents' 2002 *Journal of Psychology* 450.

cognitive capacity to understand the risks and benefits of participation and ensure that participation is voluntary.[17]

Young children may not be able to make autonomous decisions and, therefore, need special protection. Subsections 71(2) and 71(3) of the Act specifically pertain to research in children.[18] These subsections mandate, amongst other requirements, written consent from a parent or legal guardian for therapeutic and non-therapeutic research conducted with minors, irrespective of age. In the case of non-therapeutic research an additional procedural safeguard for child participation has been created by providing that the Minister of health must consent to the conduct of such research. The Act, in protecting children from harmful and exploitive research, excessively regulates the matter so that it discredits the autonomy of adolescents and it ignores the fact that many children are cared for by caregivers, as will be discussed below.[19]

As far as the issue of consent is concerned, it is important to note that the use of the terms "therapeutic research" (usually taken to mean that the participant benefits directly from the research) in subsection 71(2) and "non-therapeutic research" (usually taken to mean that it confers no personal benefit to the research participant) in subsection 71(3) have been criticised. It has been submitted, apart from the lack of a clear definition of these terms in the Act, that it is often difficult to distinguish between the two types of research.[20] Furthermore, it has been submitted by critics that the distinction in the Act between therapeutic and non-therapeutic research fails to take into account different risk standards.[21] It is suggested, as is the case in local and international guidelines, that, instead, the legislator should have used the different categories of risk or defined the research permissible in minors in terms of well-defined risk standards, such as research which involves only minimal risk or a minor increment over minimal risk.[22] Minimal risk means the probability or magnitude of harm or discomfort anticipated in the research is not greater, in itself, than that ordinarily encountered in daily life or routine medical or psychological examination. A minor increase over minimal risk is linked to risk commensurate with those risks in a child's medical, dental, psychological, social or educational setting.[23]

Research that involves minimal risk generally takes the form of surveys which address sensitive topics, which include questions about

17 *Ibid*.
18 Note that these subsections make no distinction between children and adolescents.
19 See also Nienaber 2013 *SAJP* 19; Zuch *et al* 2012 *BMC International Health and Human Rights* 1; Strode & Slack 'Using the concept of "parental responsibilities and rights" to identify adults able to provide proxy consent to child research in South Africa' 2011 *SAJBL* 69.
20 Nienaber 2013 *SAJP* 22.
21 *Ibid*.
22 *Ibid*.
23 *Regulations relating to research with human participants* GG 38000 GN R719 of 2014-09-19. See also Strode & Slack 2011 *SAJBL* 71.

illicit drug use, teenage pregnancies, physical or sexual abuse, experiences in receiving treatment for sexually transmitted infections and perceptions of school counselling services.[24] This research is valuable in understanding the needs of children and to develop and evaluate effective programmes or interventions and deliver adequate services promoting their welfare. The benefits of participating in research should not be underestimated and, therefore, may be in the best interest of the child participant.[25] This discussion focuses on research that involves minimal risk or a minor increment over minimal risk.

3 Independent Adolescent Consent

"Childhood" is a unique concept and has been described as a "process" rather than a "state".[26] Childhood is a process of continuous change, which takes place as the child develops from newborn to adolescent. This process of maturation results in the gradual development of the child's capacity for rational thought and action.[27]

In order for children to develop into rational autonomous adults who are capable of making decisions children should, initially, be protected against the consequences of their irrational actions. However, one cannot ignore the overwhelming findings of research done by developmental psychologists regarding the intellectual social and moral development of children,[28] which indicates that a child reaches decision-making capacities around adolescence.[29] Adolescents may be as competent as adults in their ability to make decisions and provide informed consent. Although not all adolescents mature at the same rate, the question of adolescent self-consent can be resolved by evaluating the child's competence to understand that to which he or she is consenting[30] and to make the best choices for him or herself.[31]

24 Strode & Slack 2011 *SAJBL* 73; Zuch *et al* 2012 *BMC International Health and Human Rights* 3.
25 Zuch *et al* 2012 *BMC International Health and Human Rights* 2.
26 Kruger 'Traces of Gillick in South African jurisprudence: Two variations on a theme' 2005 *Codicillus* 5.
27 *Ibid*.
28 *Idem* 6.
29 *Ibid*; see also Zuch *et al* 2012 *BMC International Health and Human Rights* 4.
30 In *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS* [1985] 3 All ER 402 at 422a the court held that a child acquires the capacity to make his own decisions when he or she reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision. The test formulated by Lord Scarman thus involves an individual assessment of a child's level of maturity and intellectual ability.
31 S 28(2) of the Constitution provides that 'the best interests of the child are of paramount importance in all matters concerning the child'. Therefore children should not be allowed to make decisions that, clearly, are contrary to their own best interest.

The Children's Act and the Choice on Termination of Pregnancy Act[32] both recognise the autonomy of the child and allow them to give independent consent. The Choice on Termination of Pregnancy Act gives a pregnant minor,[33] irrespective of her age, the right to terminate her pregnancy without parental or guardian consent.[34] She must be advised to seek parental assistance, but cannot be refused access to a termination if she does not wish to do so. The constitutionality of these provisions was unsuccessfully challenged in *Christian Lawyers Association v Minister of Health and Others*.[35] In this case the court gave recognition to the autonomy of a child. The High Court held that the cornerstone of the regulatory framework for termination of pregnancy was the informed consent of the woman or girl.[36] Noting that this required the three legs of knowledge, appreciation and consent (i.e. subjective consent to the harm and risk posed by the procedure), the court said that the Act did not fix a rigid age for this, but opted for capacity to give informed consent as the yardstick, i.e. the girl must be mature enough to form an intelligent will.[37] Where such capacity exists, the Act recognises it in spite of the youthfulness or age of the person. The right to choose was granted by sections 12(2), 10 and 14 of the Constitution to everyone which, the court held, extends to girls aged below eighteen years. Furthermore, the court found that the Choice on Termination of Pregnancy Act, which was based on the girl's capacity rather than a specific age, promoted the best interest of the child because it was flexible and recognised that decisions taken to terminate pregnancy would depend on her intellectual, psychological and emotional maturity. The court also held that it cannot be in the interest of the pregnant minor girl to adopt a rigid age-based approach that takes no, little or inadequate account of her individual peculiarities.[38]

The Children's Act sets the minimum age of independent consent for medical treatment at twelve years. In addition, the Children's Act requires that the child must be sufficiently mature and have the mental capacity to understand the benefits and risks, as well as the social and other implications, of the treatment.[39] The Children's Act adopts a combined approach whereby maturity and age determine the capacity to consent to medical treatment. The legislature elected to adopt a fixed age approach, possibly in the interests of greater legal certainty for those involved in providing medical treatment in all its forms.[40]

32 92 of 1996.
33 Defined as 'a female under the age of 18'.
34 S 5(3).
35 2005 1 SA 509 (T).
36 *Idem* par 515.
37 *Idem* par 516, citing Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* (1999) at 850.
38 *Idem* par 528.
39 S 129(2).
40 Sloth-Nielson 'Protection of children' in Davel & Skelton (eds) *Commentary on the Children's Act* (2007) 7-31.

From the above discussion it is demonstrated that adolescents are in the process of becoming fully-autonomous individuals. It is generally accepted that twelve year olds are old enough to make autonomous and informed decisions. The Act, by requiring parental consent, does not sufficiently take into account the emerging autonomy of the adolescent and, therefore, implies that all children lack the capacity to make decisions for themselves. In prohibiting children aged between twelve and eighteen from providing independent consent under certain circumstances, section 71 may compromise a child's right to autonomy and may be against the best interest of the minor.

If consistent standards are applied to adolescent participation in research they will be able to consent independently to research projects which pose minimal risk to them and parental consent need not be mandatory as long as the subject is deemed able to give informed consent for him or herself and the research is in the best interest of the child. The effect of this change is that researchers will have to establish the participant's level of understanding. Procedures should be in place and assessment may include verbal or written tests to gauge the participant's level of understanding of the consent form, knowledge of their rights as research subjects, as well as their rights to withdraw.[41]

It is important to note that allowing children to make important decisions about participation in health research, that involves minimal risk, does not mean leaving them to their own devices in making such vital decisions. The minor may seek assistance (consult with their parents/guardian) so that he or she makes an informed choice whether to participate or not.

4 The Issue of Parental Consent

Subsections 71(2) and (3) mandate consent from a parent or legal guardian, despite the fact that many children in South Africa do not live with a parent or a legal guardian but with another caretaker. The exact number of children without a legal guardian is unknown: Statistics indicate that the number is high. The United Nations Children's Fund ("UNICEF") estimates that there are 3.7 million orphans in South Africa.[42] Most of these children are placed in the care of extended families and some of these children take on adult roles as caregivers of ill parents, or of siblings in child-headed households. According to a study by the South African Institute of Race Relations, 98 000 children were living in child-headed households as of 2008.[43] The Act prevents children without legal guardians from accessing research that could be of great benefit to them in terms of, for example, developing and evaluating

41 Zuch *et al* 2012 *BMC International Health and Human Rights* 4.
42 UNICEF Protection for orphans and vulnerable children available from http://www.unicef.org/ southafrica/protection 6633.html. See also Zuch *et al* 2012 *BMC International Health and Human Rights* 2.
43 Zuch *et al* 2012 *BMC International Health and Human Rights* 4.

programmes or interventions and reducing rates of sexual risk behaviour, teenage pregnancy and sexually transmitted infections. This issue is especially problematic given that the health of orphans and vulnerable children, precisely those without legal guardians, is at risk.

By mandating consent from a parent or legal guardian, the Act is in direct contrast to section 129(4) of the Children's Act which allows consent for the medical treatment of a child to be provided, amongst others, by a parent, guardian or care-giver, if the child lacks capacity to consent. Section 132(2), dealing with HIV testing, provides that a caregiver can give the required consent if the child does not have the capacity to consent. The Children's Act defines a caregiver as:[44]

> [A]ny person other than a parent or guardian, who factually cares for a child, such as a foster parent, a person who cares for a child with the implied or express consent of a parent or guardian, a person who cares for a child while the child is temporarily in safe care, the person at the head of child and youth-care centre where the child has been placed, the person in charge of a shelter, a child and youth-care worker who cares for a child that does not have appropriate family care in the community, and the child at the head of a child-headed household.

These persons who voluntarily provide day-to-day care for children do not have parental responsibilities and rights.[45] [46]

However, although those persons who provide day-to-day care do not have parental responsibilities and rights in our law, they are the bearers of a number of duties or responsibilities (which include decision-making powers). According to Strode and Slack these duties correspond to the nature of decision-making relating to consent to certain forms of health research.[47] Their duties include an obligation to safeguard the child's health, well-being and development and to protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm or hazard.[48] Their responsibilities are also mentioned in the broad definition of care which is an element of parental responsibilities and rights.[49] They may consent

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44 S 1.

45 The concept 'parental responsibilities and rights' is defined in s 18(2) of the Children's Act and consists of four elements, namely guardianship, care, contact and maintenance. Care is very broadly defined in s 1: It includes what used to be referred to as custody. Custody referred to a person's capacity physically to have the child with him or her and to control and supervise the child's daily life. Thus it includes caring for the child, supporting and guiding the child, and assuming responsibility for the child's upbringing, health, education, safety and welfare. However, care also includes the duty to support and contact.

46 For a detailed discussion of who has parental responsibilities and rights and how they can be acquired see Strode & Slack 2011 *SAJBL* 71.

47 Strode & Slack 2011 *SAJBL* 71.

48 S 32(1) of the Children's Act.

49 See s 1 of the Children's Act and n 45 *supra*.

to a child's medical treatment and HIV testing which, in turn, promotes a child's health and well-being.[50]

Strode and Slack,[51] with whom we agree, submit that consent from caregivers ought to be permissible where the research approximates minimal risk or represents a minor increase over minimal risk (and other requirements are met, such as that the adolescent cannot consent independently, no person with parental responsibilities in respect of the child is available or not reasonably available). The reason is that in many instances decisions regarding children's participation in minimal risk research approximate decisions regarding children's day-to-day care.[52] As already mentioned, minimal risk is anchored to risks encountered in daily life or routine medical or psychological examinations.[53] A minor increase over minimal risk is linked to risks commensurate with those in a child's medical, dental, psychological, social or educational setting. This permission would not only facilitate research with children but also act as an important protection for them.

According to Strode and Slack[54] caregiver's consent should not be extended to research with potentially higher risk involved, such as clinical trials. The reason is that decisions about participation in clinical trials cannot as easily be equated with decisions about day-to-day care. The Children's Act has excluded caregivers from making some highly exceptional decisions, such as granting permission to a marriage.[55]

It is accepted that there will be complexities associated with allowing caregivers to consent to minimal risk research.[56] One of the complexities mentioned, that needs further discussion, is that some caregivers, such as heads of child-headed households (children under the age of eighteen, but older than sixteen years) may be too vulnerable to take on this adult responsibility to consent to minimal risk research. The question that arises is whether heads of child-headed households should be excluded even though they are recognised as caregivers?

Section 137 of the Children's Act provides for the identification, legal recognition and support of child-headed households. Section 137(1) provides that a provincial head of social development may recognise a household as a child-headed household if:

(a) The parent, guardian or caregiver of the household is terminally ill, has died or has abandoned the children in the households;

50 See ss 129(4) & 130(2) of the Children's Act. It is clear that caregivers have more or less the same decision-making powers and responsibilities as private law custodians.
51 Strode & Slack 2011 *SAJBL* 71.
52 *Ibid*.
53 See par 2 *supra*.
54 Strode & Slack 2011 *SAJBL* 71.
55 In terms of s 18(3)(c) only the guardians of a child may consent to a child's marriage. See Strode & Slack 2011 *SAJBL* 71.
56 For a discussion of these complexities see Strode & Slack 2011 *SAJBL* 71.

(b) no adult family member is available to provide care for the children in the household;

(c) a child over the age of 16 years has assumed the role of caregiver in respect of the children in the household and

(d) it is in the best interest of the children in the household.

From the above it is clear that all four factors need to be present before a household may be recognised as a child-headed household. The last two mentioned factors or conditions are important for this discussion. A child heading a child-headed household must be at least sixteen.[57] It is clear that if the child-head of the household is under the age of sixteen, then, even if all the remaining three factors exist, the household cannot be recognised given the young age of the child-head: Subsection (c) above merely refers to the fact that a child has assumed the role of a caregiver and does not explicitly encompass whether the child is able to perform that role effectively. The quality of care which is available to members from within a household, and, in particular, that the child-head is able to provide, is surely crucial? Clearly, if the child who provides leadership is not able to carry the responsibilities of the household and provide proper care for the other children then the care available to them is not sufficient to meet the best interests standard mentioned as the last factor that needs to be considered when taking a decision on whether or not to recognise a household as a child-headed household.[58] In other words, an important factor to consider when deciding whether it would be in the best interests of the children to recognise their household as a child-headed household is whether the older child is sufficiently mature to take charge of the needs of the children in the household (i.e. the child, developmentally, is mature enough to understand the decisions and the responsibilities involved and has realistic expectations and experience in caring for a household, in making decisions and understanding advice given).[59] The child will have to undergo a developmental assessment to determine if he or she has certain core capabilities to be able to take on the responsibility of the head of the household (taking on a *de facto* adult/parental role) and to make day-to-day decisions relating to the household and the children in the household as provided for in section 137(7) of the Children's Act.

Once a household is classified as a child-headed household it is registered in a provincial register and, in terms of the provisions of the Act, an adult designated by the children's court, a government organ, or a non-governmental organisation (NGO) as determined by the provincial

57 Not only is a child of 16 beyond school leaving age and able to work, but the Social Assistance Act 13 of 2004 defines a caregiver 'as a person 16 years or older'. For the purpose of social grants, a child aged 16 can qualify as a primary care giver of its siblings.

58 Couzens & Zaal 'Legal recognition for child-headed households: An evaluation of the emerging South African framework' 2009 *International Journal of Children's Rights* 310.

59 Kassan & Mahery 'Special child protective measures in the Children's Act' in Boezaart (ed) *Child Law in South Africa* (2009) 198.

head of social development, is appointed as a supervisor.[60] Although not explicitly stated, the mentioned adult is likely to be a paid community worker (albeit on a stipend basis) rather than acting on a purely voluntary basis.[61]

The role of the supervising adult is to support the child heading the household to care for the other children. The adult must perform the duties set out in Regulation 50. These include a range of issues: Assisting with health care requirements, including the supervision of the taking of medicines and assistance to members with disabilities, and ensuring that the children access health care facilities and that their health needs are met; assisting members of the household with legal documentation when required; and assisting the member heading that household with his or her responsibilities.

It should be borne in mind that a supervising adult cannot take decisions concerning the household or the children in the household without consulting the child that heads the household as well as the other children, depending on their age, maturity and stage of development.[62] As already stated, all the day-to-day decisions relating to the household or children in the household fall within the exclusive domain of the child-head's responsibility. The autonomy of the child-head is further strengthened by section 137(7), which affords the child the opportunity to report the supervising adult to the relevant authority that initially designated such an adult if dissatisfied with the manner in which the adult is performing his or her duties.

It is clear that the responsibilities of a child-head are significant and that he or she can play a significant role in the health needs and care of those under their care. This process, whereby a child-head takes on the responsibilities of a household, is referred to as parentification.[63] Therefore it is essential that we look beyond the child-only label and duly recognise the autonomy of child-heads who are tasked with taking on the full burden of their household's responsibilities. The important role which child-heads play in family and kinship structures is indeed duly recognised by the Children's Act. The main purpose of section 137 of the Children's Act is to respect the rights and responsibilities of children heading households as a head of a household – assisting and enabling them to perform their responsibilities as caregivers to younger siblings and to protect their rights as children and, therefore, accommodate their

60 S 137(2).

61 Sloth-Nielson 'Protection of children' in Davel & Skelton (eds) *Commentary on the Children's Act* (2010) 7-48.

62 The Act requires consultation only with the children in the household, but if there is an adult in the household who is ill, steps should be taken to include them in the dialogue.

63 Le Roux-Kemp 'Child-headed households in South Africa: The legal and ethical dilemmas when children are the primary caregivers in a therapeutic relationship' in Bray & Mak (eds) *People being Patients: International, Interdisciplinary Perspectives* (2013) 122.

needs and rights as children while they perform their responsibilities as a head of a household.

In view of the above, child-heads of a legally recognised child-headed household should not be excluded from giving consent to minimal risk research with children (under the age of twelve or over, but is of insufficient maturity or is unable to understand, the benefits, risks, and social implications of the research) under his or her care. The effect thereof will be that researchers will have to consider each case on its merits.[64] They will have to consider factors such as whether the research participant is a member of a child-headed household recognised in terms of section 137, whether the child-head has undergone a developmental assessment to determine if he or she has certain core capabilities to be able to take on the responsibility of the head of the household (taking on a *de facto* adult/parental role) and to make day-to-day decisions relating to the households and the children in the household as provided for in section 137(7) and whether a supervisor has been appointed. The child-head's decision with regard to participation in research by his or her household members must also be considered with due cognisance of that child-head's psycho-social state, maturity and decision-making capabilities (thus a researcher will have to establish the child caregiver's level of understanding).[65]

It is important to note that a child-head may seek assistance from the supervising adult (consult with a supervising adult) before he or she gives consent. Researchers must advise the child-head to obtain assistance from the supervisor: The assistance is definitely in the best interests of the minors concerned.

5 Conclusion

On the one hand, adolescent research, as pointed out in paragraph two, is important. On the other hand, a high standard of protection is required to keep children from harm. Yet, to preserve their right to self-determination and to recognise the social circumstances, and based on the comments made in this article, we call for a review of the Act to bring it in line with other legislation. The following recommendations are made as to who ought to consent and the conditions attached to consent for research:

(1) The risk of the research should be minimal or represent a minor increase over minimal risk.

(2) If a child is an adolescent (a child under eighteen but older than twelve years) and understands the nature and consequences of the research which poses minimal risk to him or her, the child should be able to give independent consent.

64 *Ibid.*
65 *Ibid.*

(3) If the child does not understand the nature and consequences of the research, then the parent or legal guardian (person with parental responsibilities and rights in respect of the child) should consent.

(4) If no parent or legal guardian is available or if they are not reasonably available, then a caregiver should consent. The adult from whom consent is sought ought to be a caregiver as defined in the Children's Act. If the caregiver is a child-head (i.e. a child of sixteen years and older in a legally recognised child-headed household) then he or she should also consent. If a child headed household has not been legally recognised in terms of section 137 of the Children's Act, then the minor should not be able to consent as being too vulnerable.

Lastly, it is important to note that any human research must receive prior approval by a relevant human research ethics committee in order to ensure an adequate balance between the risks and benefits and to determine that the research meets the ethical standards of that.[66] The research ethics committees, therefore, will have the last say in granting or denying approval.

66 S 73(2)(b) of the National Health Act.

The conservation status of the Wedge-tailed Eagle in Australian law and thoughts on the value of early legal intervention in the conservation of a species

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OPSOMMING

Die Bewaringstatus van die Wigstertarend in die Australiese Reg en Gedagtes oor die Waarde van 'n Vroeë Regsingreep Ten Aansien van die Bewaring van 'n Spesie

Die Wigstertarend (*Aquila audax*) was histories een van die mees vervolgde roofvoëlspesies op aarde. Tans geniet dié arend volledige regsbeskerming. Die Australiese omgewingsreg het waarskynlik 'n belangrike bydraende rol gespeel ten opsigte van die *prima facie* gunstige bewaringstatus van die spesie. Vergeleke met die intensiewe bewaringsingrepe wat in Spanje ten opsigte van die Spaanse Keiserarend (*Aquila adalberti*) van regsweë vereis word, is die bewaringsingrepe wat regtens op die Australiese vasteland ten opsigte van die Wigstertarend vereis word, veel meer beperk in aantal, reikwydte en intensiteit. Die Australiese bewaringsingrepe kan egter *prima facie* as effektief beskou word, en kan waarskynlik onder andere toegeskryf word aan die feit dat volledige regsbeskerming ingetree het voordat die spesie deur uitwissing bedreig is. Daar word aan die hand gedoen dat die vroegtydige regsbeskerming van 'n spesie minder beswarend op individue en die staat sal wees, as regsbeskerming wat eers ingetree het op 'n stadium toe die betrokke spesie reeds deur uitwissing bedreig is. Hierdie insig het toepassingswaarde ten opsigte van die aanwending van omgewingsreg en –beleid vir die beskerming van roofvoëls in ander regstelsels, insluitend dié van Suid-Afrika.

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1 Introduction

The Wedge-tailed Eagle is the largest Australian bird of prey, or raptor, species.[1] It has a wide distribution in Australia and is described as "common" or "locally common" in ornithological texts.[2] Ferguson-Lees and Christie, who attempted to provide rough estimates of the population sizes of all the bird of prey species in the world, state that the population size of the Wedge-tailed Eagle is likely to be in the "hundreds of thousands", the highest figure given by the authors to any large eagle species.[3] Ferguson-Lees and Christie are of the opinion that Wedge-tailed Eagle numbers may even be increasing in parts of Australia,[4] and international conservation organisations also report the population trend as increasing.[5] At a time when the general trend for large eagle species worldwide is to decline in numbers, and their conservation status gives cause for concern, the Wedge-tailed Eagle has fared better than most.[6]

The *prima facie*[7] sound conservation status of the Wedge-tailed Eagle is remarkable in view thereof that the species was, in the not too distant past, reputedly the most severely persecuted eagle species in the world.[8] Sheep farming is a major Australian industry, and the Wedge-tailed Eagle was traditionally regarded as a prolific lamb killer. There was a time when governments of Australian States paid bounties for the destruction of Wedge-tailed Eagles. In 1892, the government of Western Australia

1 *Aquila audax*. BirdLife International *Species factsheet: Aquila audax* (2014) www.birdlife.org/datazone/speciesfactsheet.php?id = 3538 (accessed 2014-08-15); Debus *Birds of Prey of Australia* (2012) 125-127; Del Hoyo, Elliot & Sargatal (eds) *Handbook of the Birds of the World* (1994) 198; Ferguson-Lees & Christie *Raptors of the World* (2001) 746-748; Global Raptor Information Network *Species account: Wedge-tailed Eagle Aquila audax* (2014) www.globalraptors.org/grin/SpeciesResults.asp?specID = 8349 (accessed 2014-08-15); Marchant & Higgins (eds) *Handbook of Australian, New Zealand & Antarctic Birds* (*HANZAB*) (1993) 164-168; Olsen *Wedge-tailed Eagle* (2005); IUCN Red List of Threatened Species *Aquila audax* (2014) http://www.iucnredlist.org/details/22696064/0 (accessed 2014-08-15). The terms 'bird of prey' and 'raptor' are used as synonyms in this contribution; see Kemp 'What is a Raptor?' in Newton (ed) *Birds of Prey* (1990) 14-31.

2 Debus 126; Del Hoyo, Elliot & Sargatal (eds) 198; Ferguson-Lees & Christie 746; Olsen 19-20. Marchant & Higgins (eds) 166 state that the perceived status of the species may be biased because of its conspicuousness.

3 Ferguson-Lees & Christie 748. For comparison, the Golden Eagle *Aquila chrysaetos*, which is the eagle species with the widest distribution on earth, is estimated by Ferguson-Lees & Christie (745-746) also to have a total population size in the range of 100 000 – 1 000 000, with a total of 250 000 individuals regarded as a likely figure.

4 *Idem* 748.

5 BirdLife International *Species factsheet: Aquila audax* (2014) www.birdlife.org; IUCN Red List of Threatened Species *Aquila audax* (2014) www.iucnredlist.org.

6 Katzner & Tingay (eds) *The Eagle Watchers* (2010) 1.

7 See cautionary remarks in par 3 below.

8 Burton & Boyer *Vanishing Eagles* (1987) 85; Brooker 'Persecution of the Wedge-tailed Eagle' in Newton (ed) *Birds of Prey* (1990) 196; Olsen 91.

offered a reward of two shillings per eagle destroyed.[9] The number of eagles for which bounties were paid out in two of the States, Queensland and Western Australia, ran to 120 000 in the period 1958-1967.[10] It was a common practice in rural Australia to hang eagle carcasses in rows on roadside fences, after the birds had been shot, trapped or poisoned.[11]

The persecution of the Wedge-tailed Eagle was also formalised in legislation. The position in Western Australia may serve as an example.[12] On 7 February 1919 the Governor declared[13] "Eagle Hawks"[14] to be vermin throughout the State under the Vermin Boards Act, 1909. In the same year, the Vermin Boards Act was replaced in parts of the State by the Vermin Act, 1918,[15] and in 1925 the Vermin Act replaced the Vermin Boards Act throughout the State.[16] The Vermin Act placed a duty on any occupier of a holding to report the presence of vermin on the holding, or signs or marks of such presence, to certain appointed officials.[17] All owners and occupiers of holdings also had a duty to destroy vermin, at all times and at their own expense, to the satisfaction of the relevant Minister or a vermin board.[18] Penalties for non-compliance were provided for,[19] and officials were given the power to enter the holdings to search for vermin[20] and, on holdings of non-compliant owners and occupiers, to perform activities deemed necessary for the destruction of vermin.[21] Vermin boards were authorised to pay bonuses for the destruction of vermin in certain instances.[22]

Fortunately attitudes towards the Wedge-tailed Eagle have changed. Scientific investigation has shown that the numbers of lambs actually killed by Wedge-tailed Eagles are typically low.[23] The legal status of the Wedge-tailed Eagle was changed from vermin to a species protected by the law.[24] Deliberate persecution did not cease completely, but

9 Olsen 90.
10 *Idem* 91.
11 *Idem* 92; Brooker 'Persecution of the Wedge-tailed Eagle' in Newton (ed) *supra* n 8 at 196.
12 Cf Olsen 90.
13 *GG 6/1919* dd 7-2-1919 162.
14 'Eagle hawk' (also 'Eaglehawk' or 'Eagle-hawk') was a vernacular name of the Wedge-tailed Eagle at the time; Olsen 11.
15 Vermin Act, 1918 ss 2 & 3 read with the First Schedule.
16 Vermin Act Amendment Act, 1925 ss 2 & 3. The Amendment Act specifically made provision for the paying of bonuses for the destruction of 'Eagle-Hawks' in s 10.
17 Vermin Act, 1918 s 93.
18 *Idem* s 94.
19 *Idem* ss 93, 94 & 97.
20 *Idem* s 95.
21 *Idem* s 98.
22 *Idem* s 107.
23 See e.g. Brooker & Ridpath 'The diet of the Wedge-tailed Eagle, *Aquila audax*, in Western Australia' 1980 *Australian Wildlife Research* 433-452; Leopold & Wolfe 'Food habits of nesting Wedge-tailed Eagles, *Aquila audax*, in South-Eastern Australia' 1970 *CSIRO Wildlife Research* 1-17; cf Debus 126; Olsen 85; Ferguson-Lees & Christie 747-748.
24 Olsen 92.

continued at a level that is perceived to be less intense and more localised.[25]

The aim of this contribution is to give an overview of the current legal provisions that are relevant to the conservation status of the Wedge-tailed Eagle; to offer critical remarks on their contributory role in respect of the conservation of the Wedge-tailed Eagle; and to reflect on the applicability of insights that are gained in this way to the legal conservation of a species in general, with a particular emphasis on birds of prey. Some comparative remarks are made in respect of the status of the Spanish Imperial Eagle in Spanish and European law and policy. In addition, some thoughts are presented on possible implications for the application of environmental legislation to further the conservation of birds of prey in South Africa.

2 Legislation Affecting the Conservation Status of the Wedge-tailed Eagle

2 1 General

Australian laws that determine the legal conservation status of the Wedge-tailed Eagle may be grouped into laws providing for direct, species-based protection and laws that confer indirect protection on species by aiming at the protection of wider aspects of the environment. In this contribution, the main focus is on laws providing direct protection. The applicable laws may furthermore be categorised according to the tier of government from which they emanate. On this basis, a distinction must be made between federal or Commonwealth legislation, and legislation of the States and Territories.[26] The Commonwealth and the States and Territories exercise concurrent legislative powers in respect of most environmental issues, including environmental protection, with the States and Territories traditionally taking the most active part in respect of this.[27] In cases of inconsistency, Commonwealth laws will prevail over State and Territory laws,[28] but in respect of environmental matters the current trend is for the Commonwealth and States and Territories to follow a cooperative approach.[29]

International environmental law also exercises an influence on the legal status of Australian species.[30] Two international legal instruments

25 Debus 126; Olsen 85; cf Ferguson-Lees & Christie 747-748.
26 See in general Bates *Environmental Law in Australia* (2013) 129 and further 155 and further.
27 See in general Bates 129-130 & 155-171 on constitutional arrangements in Australia and their effect on Australian environmental law; Aumann, Mooney & Olsen 'The legal status of birds of prey in Australia' in Meyburg & Chancellor (eds) *Raptors in the Modern World* (1989) 591.
28 *Commonwealth of Australia Constitution Act* s 109, Bates 160-162.
29 Bates 163-171.
30 See in general Bates 97-125.

that are particularly relevant in respect of the Wedge-tailed Eagle are the Convention on Biological Diversity[31] and the Convention on International Trade in Endangered Species ("CITES").[32] To be binding in Australia, international treaties must be ratified by the Commonwealth Government and be given effect in domestic legislation.[33] This contribution focuses on the legislation of the Australian Commonwealth and the States and Territories, and the international legal instruments will not be discussed in detail here.[34]

2 2 Direct, Species-based Protection

2 2 1 Federal or Commonwealth Laws

The most important Federal Act currently dealing with the protection and conservation of biodiversity is the Environment Protection and Biodiversity Conservation Act 1999 (Cth) ("EPBCA").[35] The EPBCA List of Threatened Fauna, published under this Act, lists the Tasmanian subspecies of the Wedge-tailed Eagle[36] as Endangered with effect from 16 July 2000.[37] The EPBCA provides that a person may not take an action that has, will have or is likely to have a significant impact on a listed threatened species,[38] which includes endangered taxa such as the Tasmanian subspecies of the Wedge-tailed Eagle.[39] The civil penalty for non-compliance is 5 000 penalty units for an individual and 50 000 penalty units for a juristic person.[40] An action that has or will have a significant impact on an endangered species is also a strict-liability[41]

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31 See www.cbd.int (accessed 2014-08-20); cf Bates 428-429.

32 See www.cites.org (accessed 2014-08-20); see further Bates 511; Aumann, Mooney & Olsen 'The legal status of birds of prey in Australia' in Meyburg & Chancellor (eds) *supra* n 27 at 594-595.

33 Bates 101-102, 122 & 135.

34 But see par 2 2 1 on the implementation of CITES by Commonwealth legislation.

35 Cf Bates 171-182.

36 *Aquila audax fleayi*. For detailed information on the Tasmanian subspecies of the Wedge-tailed Eagle, see www.environment.gov.au/cgi-bin/sprat/public/publicspecies.pl?taxon_id = 64435 (accessed 2014-08-21).

37 www.environment.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl?wanted = fauna#birds_endangered (accessed 2014-08-21).

38 EPBCA s 18(3). 'Action' is defined in s 523 and 'impact' in s 527E.

39 *Ide*m s 178.

40 *Idem* s 18(3). A 'penalty unit' is the lowest single monetary punishment, or fine, that can be imposed for a transgression of a law. In a jurisdiction where a penalty unit system is in force, different Acts impose fines on offences in multiples of the basic penalty unit. A single Act, that is devoted to sentencing, defines the monetary value of the basic penalty unit, and monetary penalties in all the Acts can thus be amended simultaneously by changing only the sentencing Act; see Mann (ed) *Australian Law Dictionary* (2013) 540. The current value of a penalty unit under Australian Commonwealth law is AUD 180; Crimes Act 1914 (Cth) s 4AA(1). The States and Territories have their own sentencing Acts and therefore the value of a penalty unit is not uniform across Australian jurisdictions.

41 There is no need to prove fault but mistake of fact is a defence; see the schedule to the Criminal Code Act 1995 (Cth) s 6.1 read with s 9.2.

criminal offence, and the maximum punishment is seven years imprisonment or 420 penalty units, or both.[42] Furthermore, killing, injuring, taking, trading, keeping and moving an endangered species in Commonwealth areas are prohibited and also constitute strict-liability criminal offences.[43] Within 90 days of a species being listed, the Minister must decide whether a Recovery Plan for the species is necessary,[44] and if deemed necessary, such a Recovery Plan must come into force within three years.[45] If it is decided to adopt a Recovery Plan, it must provide for research and management actions that are necessary to stop the decline and support the recovery of the species to maximise its chances to survive in the wild.[46] A Recovery Plan has indeed been adopted and implemented for the Tasmanian Wedge-tailed Eagle.[47]

Apart from the Tasmanian subspecies, the Wedge-tailed Eagle is not a listed species in the EPBCA itself. However, in terms of the Environment Protection and Biodiversity Conservation Regulations 2000 (Cth), published under the EPBCA, it is a protected species[48] in Commonwealth areas.[49] Therefore, any action in a Commonwealth area that would result in the death or injury of a Wedge-tailed Eagle, or that would involve the taking, trading, keeping or moving of it, is prohibited. Non-compliance can attract a civil or criminal penalty of 50 penalty units.[50] Criminal liability is strict.[51] Furthermore, damaging or destroying a nest of a Wedge-tailed eagle is also prohibited, and again the penalty or a transgression is 50 penalty units.[52] These prohibited actions may be authorised by permits.

42 EPBCA s 18A. The Act makes provision for a number of exceptions to these prohibitions; see s 19.
43 *Idem* ss 196-196E.
44 *Idem* s 269AA.
45 *Idem* s 273(1).
46 *Idem* s 207(1).
47 The Tasmanian Wedge-tailed Eagle had a Recovery Plan at the time when a decision of the Minister was required, but at the moment a Recovery Plan is required for the subspecies; www.environment.gov.au/cgi-bin/sprat/public/publicspecies.pl?taxon_id = 64435#summary (accessed 2014-08-21). A recovery team that has been formed for the Tasmanian Wedge-tailed Eagle was reported to be ineffective due to a funding shortage; see Debus 'Eagle recovery team canned' 2009 *Boobook* 36.
48 Environment Protection and Biodiversity Conservation Regulations 2000 (Cth). The Dictionary of the Act defines 'protected species' as a 'native species that is: (a) not a listed species; and (b) mentioned in Schedule 12; and (c) in, or taken in, a Commonwealth area to which Part 9 applies'. Schedule 12 cl 2(b) lists species in the class *Aves* (birds) as a protected species. Part 9 deals with the conservation of biodiversity in Commonwealth areas.
49 Environment Protection and Biodiversity Conservation Regulations 2000 (Cth) reg 9.02.
50 *Idem* reg 9.03(1).
51 *Idem* reg 9.03(2).
52 *Idem* reg 9.03(3).

The EPBCA also implements CITES[53] in Australia, making it an offence to export or import specimens of species listed by CITES without a permit.[54] The Wedge-tailed Eagle is listed in Appendix II of CITES,[55] and is therefore subject to these provisions of the EPBCA.[56] These provisions are applicable to the entire Australian population of the Wedge-tailed Eagle, not just the Tasmanian subspecies or birds in Commonwealth areas.[57]

2 2 2 Legislation of the States and Territories

2 2 2 1 Australian Capital Territory

In terms of the Nature Conservation Act 2014 (ACT),[58] a person may not, without a licence, kill,[59] injure or place in danger of injury or death,[60] take,[61] keep,[62] sell,[63] or import or export[64] a Wedge-tailed Eagle. The maximum penalty for the most serious of these transgressions is 100 penalty units, one year imprisonment, or both.[65] Interference with a nest is also prohibited,[66] and such interference that endangers the lives of the eagles or their progeny, or places the eagles in danger of not breeding successfully, may attract a penalty of 100 penalty units, imprisonment for one year, or both.[67] For less serious instances of nest interference, the penalty is 20 penalty units.[68] "Nest" is defined to include a place, structure or object that has been used as a nesting place within the two

53 Par 2 1 *supra*.
54 EPBCA ss 303CC & 303CD.
55 See http://cites.org/sites/default/files/eng/app/2014/E-Appendices-2014-06-24.pdf (accessed 2014-08-21). Appendix II lists all species of the *Falconiformes*, with a few exceptions such as the species listed in the other appendices.
56 EPBCA s 303CA provides that the Minister must publish a list of CITES species, and the list must include all the species listed in appendices I, II and III of CITES.
57 EPBCA ss 303BA & 303BC. These provisions regulate trade between Australia and other countries; cf Bates 512.
58 Cf Bates 527-528 on the Nature Conservation Act 1980 (ACT), which was the predecessor of the current Act.
59 Nature Conservation Act (ACT) s 130(1) read with the definition of 'native animal' in s 12.
60 *Idem* s 133.
61 *Idem* s 132 read with the definitions of 'native animal' in s 12 and 'take' in s 126.
62 *Idem* s 133 read with the definitions of 'native animal' in s 12 and 'exempt animal' in s 154.
63 *Idem* s 134 read with the definitions of 'native animal' in s 12 and 'exempt animal' in s 154.
64 *Idem* ss 136 & 137 read with the definition of 'exempt animal' in s 154.
65 *Idem* ss 130-137; in respect of native animals with a special protection status under s 109, the maximum penalty can be higher, but the Wedge-tailed Eagle does not have such a special protection status.
66 *Idem* s 128(1) read with the definitions of 'native animal' in s 12, 'interfere with' and 'nest' in s 127.
67 *Idem* s 129(1) read with the definitions of 'native animal' in s 12, 'interfere with' and 'nest' in s 127.
68 *Idem* s 128(1).

previous years, as well as a partially constructed nest that has not been used as a nesting place.[69]

2 2 2 2 New South Wales

Under the National Parks and Wildlife Act 1974 (NSW),[70] a person may not harm a Wedge-tailed Eagle.[71] The definition of "harm" includes to hunt, shoot, poison, net, snare, pursue, capture, trap, injure or kill.[72] The maximum penalty for such a transgression is 100 penalty units, plus an additional ten penalty units for each individual specimen harmed, or six months imprisonment.[73] Buying, selling or possessing a Wedge-tailed Eagle without a licence is also prohibited,[74] and a Wedge-tailed Eagle may also not be imported or exported from New South Wales.[75]

2 2 2 3 Northern Territory

Under the Territory Parks and Wildlife Conservation Act 1976 (NT),[76] a person may not take or interfere with a Wedge-tailed Eagle, unless the person is authorised to do so under the Act.[77] "Take" means to hunt, catch, restrain or kill, or to attempt to perform these actions or to assist with them.[78] "Interfere with" means to harm, disturb, alter the behaviour, affect the capacity of the animal (here the eagle) to perform its natural processes, or to damage or destroy its habitat.[79] Having a Wedge-tailed Eagle in possession or under control,[80] as well as bringing a Wedge-tailed Eagle into, or taking it out of the Northern Territory, or releasing it in the Territory, is prohibited.[81] The maximum penalty for these transgressions is 500 penalty units or five years imprisonment, or, if the offender is a juristic person, 2 500 penalty units.[82]

2 2 2 4 Queensland

Under the Nature Conservation Act 1992 (Qld)[83] and the Nature Conservation (Wildlife) Regulation 2006 (Qld), a person may not take,

69 *Idem* s 127.
70 Cf Bates 528-530.
71 National Parks and Wildlife Act (NSW) s 98(2) read with the definition of 'protected fauna' in s 5 and the list of 'unprotected fauna' in sch 11.
72 *Idem* s 5.
73 *Idem* s 98(2).
74 *Idem* s 101 read with the definition of 'protected fauna' in s 5 and the list of 'unprotected fauna' in sch 11.
75 *Idem* s 106 read with the definition of 'protected fauna' in s 5 and the list of 'unprotected fauna' in sch 11.
76 Cf Bates 531.
77 National Parks and Wildlife Act (NSW) s 66(1) read with s 43, in which 'protected wildlife' is defined.
78 *Idem* s 9.
79 *Ibid*.
80 *Idem* s 66(2) read with s 43.
81 *Idem* s 66(3) read with s 43.
82 *Idem* s 66.
83 Cf Bates 531-534.

keep or use a Wedge-tailed Eagle without authorisation.[84] "Take" includes to hunt, shoot, wound, kill, skin, poison, snare, trap, catch, pursue, lure, injure or harm; or to attempt to perform these activities.[85] "Use" includes to buy, sell, give away, process, move or gain any benefit from the wildlife (in this instance the eagle).[86] "Protected wildlife", including the Wedge-tailed Eagle, is to be managed to conserve the wildlife and its values, *inter alia* to ensure its survival and natural development; to identify, and reduce or remove processes threatening it; and to identify its critical habitat[87] and conserve it to the greatest extent possible.[88] Furthermore, management of protected wildlife must ensure that any use of the wildlife for scientific study and monitoring; for educational, recreational, commercial and other authorised purposes; or by Aboriginal people under their tradition, is ecologically sustainable.[89] In principle, and subject to certain exceptions, Wedge-tailed Eagles are the property of the State.[90]

2 2 2 5 South Australia

Under the National Parks and Wildlife Act 1972 (SA),[91] a person may not take a Wedge-tailed Eagle or its eggs without a permit.[92] "Take" is defined to include any act of hunting, catching, restraining, killing or injuring, or any attempt to perform these activities.[93] The National Parks and Wildlife Act also contains restrictions on releasing;[94] keeping and selling;[95] exporting and importing;[96] and possessing or controlling Wedge-tailed Eagles.[97] The Minister may declare open seasons for the

84 Nature Conservation Act (Qld) s 88 read with ss 71 & 80 of the Act, the definition of 'protected animal' in the Dictionary of the Act, and ss 35(2) & 31 & sch 6 of the regulations. In terms of these provisions, the Wedge-tailed Eagle belongs to the class 'least concern wildlife', which in turn is a component of 'protected wildlife'. S 33 of the regulations recognises that 'least concern wildlife' is a component of the biodiversity of Queensland and a vital feature of the ecosystem in which the wildlife lives. It also recognizes that such wildlife has inherent value and potential importance for the maintenance of ecosystem processes, and is a source of genetic information integral to understanding the evolution of Australian biota, and a genetic resource of potential benefit to society.

85 Dictionary of the Act.

86 *Ibid*.

87 'Critical habitat' is defined in s 13 of the Nature Conservation Act (Qld).

88 Nature Conservation Act (Qld) s 73(a).

89 *Idem* s 73(b).

90 *Idem* s 83.

91 Cf Bates 534-536.

92 National Parks and Wildlife Act (SA) s 51 read with s 53 and the definition of 'protected animal' in s 5.

93 *Idem* s 5.

94 *Idem* s 55 read with the definition of 'protected animal' in s 5.

95 *Idem* s 58 read with the definition of 'protected animal' in s 5.

96 *Idem* s 59 read with the definition of 'protected animal' in s 5.

97 *Idem* s 60.

taking of specific species of protected animals, which could conceivably include the Wedge-tailed Eagle.[98]

2 2 2 6 Tasmania

The Wedge-tailed Eagle is listed as Endangered by the Threatened Species Protection Act 1995 (Tas).[99] A person may not take, keep, trade in or process any specimen of the listed taxa; or disturb such a specimen under certain specified conditions; or release such a specimen into the wild.[100] "Take" includes to kill, injure, catch, damage, destroy and collect.[101] The Threatened Species Protection Act also provides that a Recovery Plan may be drawn up for endangered species.[102]

2 2 2 7 Victoria

Under the Wildlife Act 1975 (Vic),[103] a person may not hunt, take, or destroy a Wedge-tailed Eagle without a licence.[104] "Hunt" includes to pursue, trail, stalk, search for or drive out.[105] The Wildlife Act furthermore provides that a person may not buy, sell, acquire, receive, dispose of, keep, possess, control, breed, process, display, take samples from or experiment on a Wedge-tailed Eagle.[106] There are also prohibitions on importing and exporting,[107] marking,[108] and releasing[109] a Wedge-tailed Eagle. Willful molesting, injuring, or disturbing a Wedge-tailed Eagle is also an offence, as is the willful separating of a Wedge-tailed Eagle from its young.[110] If a protected wildlife species, including the Wedge-tailed Eagle, appears to the Minister to be causing injury or damage to *inter alia* property or another kind of animal, that species may be declared to be unprotected in a specified area and for a specified period of time.[111]

2 2 2 8 Western Australia

Under the Wildlife Conservation Act 1950 (WA),[112] all fauna is wholly

98 *Idem* s 52. For comments on open seasons in the era pre-1989, see Aumann, Mooney & Olsen 'The legal status of birds of prey in Australia' in Meyburg & Chancellor (eds) *supra* n 27 at 592.
99 Threatened Species Protection Act (Tas) s 13 & sch 3.
100 *Idem* s 51 read with the definition of 'take' in s 3.
101 *Idem* s 3.
102 *Idem* s 25. This has been done for the Tasmanian Wedge-tailed Eagle, see par 2 2 1 *supra*.
103 Cf Bates 536-537.
104 Wildlife Act (Vic) s 43 read with the definition of 'protected wildlife' in s 3(1).
105 *Idem* s 3(1).
106 *Idem* s 47 read with the definition of 'protected wildlife' in s 3(1).
107 *Idem* s 50.
108 *Idem* s 51.
109 *Idem* s 52.
110 *Idem* s 58 read with the definition of 'protected wildlife' in s 3(1).
111 *Idem* s 7A.
112 Cf Bates 538-539.

protected throughout the State.[113] A person may not take[114] a Wedge-tailed Eagle, and "take" includes to kill or capture by any means, and to disturb or molest, and to attempt to or assist with these activities.[115] Activities such as possessing,[116] breeding, importing and exporting, selling or releasing a Wedge-tailed Eagle are also prohibited.[117] The Minister may declare open seasons for fauna for specified periods in parts of, or throughout the State,[118] and this discretion has on occasion been exercised in respect of the Wedge-tailed Eagle.[119]

2 3 Indirect Protection

Australia has a vast body of environmental legislation aimed at securing a healthy environment and sustainable development.[120] Many of these laws should benefit the Wedge-tailed Eagle indirectly and, in the long run, may be more important for the conservation of biodiversity, including the Wedge-tailed Eagle, than legislation giving direct protection to wildlife species.[121] However, this study concerns itself only with legislation impacting directly on the conservation status of the species, and for this reason environmental legislation of more general application, as important as it undeniably is, falls mainly outside the scope of this contribution.

Nevertheless, brief mention should be made here of legislation providing for the creation of protected areas such as national parks.[122] The most important Commonwealth legislation in this regard is the EPBCA referred to above.[123] The most important State and Territory laws in this regard are the Planning and Development Act 2007 (ACT);[124] National Parks and Wildlife Act 1974 and Wilderness Act 1987 (NSW);[125] Territory Parks and Wildlife Conservation Act 1976 (NT);[126] Nature Conservation Act 1992 (Qld);[127] National Parks and Wildlife Act 1972 (SA);[128] Nature Conservation Act 2002 and National Parks and Reserves

113 Wildlife Conservation Act (WA) s 14.
114 *Idem* s 16.
115 *Idem* s 6.
116 *Idem* s 16A.
117 *Idem* s 17.
118 *Idem* s 14(2).
119 The Department of Conservation and Land Management issues so-called damages licences, but this is done cautiously and sparingly, in cases where damage is evident (Olsen personal communication 2014-04-02). For an older reference, see Aumann, Mooney & Olsen 'The legal status of birds of prey in Australia' in Meyburg & Chancellor (eds) *supra* n 27 at 592.
120 Bates 559.
121 *Ibid.*
122 See Bates 435-470.
123 Part 15; for commentaries cf Bates 438-453.
124 Ss 315-317; cf Bates 455.
125 Cf Bates 455-456.
126 *Idem* 458.
127 *Idem* 456-458.
128 *Idem* 459.

Management Act 2002 (Tas);[129] National Parks Act 1975 (Vic);[130] and Land Administration Act 1997 and Conservation and Land Management Act 1984 (WA).[131] Formally protected areas can be of great importance for the conservation of birds of prey, provided that such areas are large enough, and provided that the creation of such areas is supplemented by legal provisions that safeguard birds of prey when they venture outside such areas.[132] A total of 17,88 percent of the land area of Australia has been set aside as protected terrestrial areas, and several of the individual protected areas are large enough to support significant Wedge-tailed Eagle populations.[133]

Another interesting and relevant aspect of Australian environmental law that potentially benefits the Wedge-tailed Eagle is the legal protection given to indigenous vegetation. Relevant legislation includes the Native Vegetation Act 2003 (NSW);[134] Vegetation Management Act 1999 (Qld);[135] Native Vegetation Act 1991 (SA);[136] and the Environmental Protection Act 1986 (WA).[137] These and other legal provisions place various controls on the clearing of indigenous vegetation.[138] In addition to legal controls on the clearing of indigenous vegetation, non-governmental conservation organisations are involved in programmes for the active reintroduction of such vegetation.[139] Interestingly, a view has been expressed that some clearing of native vegetation may have been beneficial to the Wedge-tailed Eagle.[140] In the shorter term, clearing of vegetation may make it easier for the eagle to hunt, while leaving enough large trees intact to accommodate nests and to provide perches. However, in the longer term, if there is little recruitment of trees, the Wedge-tailed Eagle will be deprived of nesting opportunities and perches where it can rest and roost in safety. For this reason, the Wedge-tailed Eagle will probably ultimately benefit from legal provisions combating wholesale clearing of indigenous vegetation.

129 *Idem* 459-460.
130 *Idem* 460-461.
131 *Idem* 461.
132 Debus 146. Cf, in general, Department of the Environment *State of the Environment 2011* (2011) www.environment.gov.au/topics/science-and-research/state-environment-reporting/soe-2011 (accessed 2014-08-21) ch 8 par 4 4 1 & Bates 431. The provisions discussed in par 2 2 *supra* are examples of Australian legal provisions that safeguard birds of prey outside protected areas.
133 Collaborative Australian Protected Area Database (CAPAD) (2014) http://www.environment.gov.au/land/nrs/science/capad/2014 (accessed 2015-11-12); cf Bates 437.
134 Cf Bates 476-479.
135 *Idem* 484-487.
136 *Idem* 480-484.
137 Environmental Protection Act (WA) ss 51A-51T; cf Bates 489-490.
138 See Bates 471-510.
139 Department of the Environment *State of the Environment 2011 supra* n 132 at ch 8 par 4 4 2; cf Paton & O'Connor *The State of Australia's Birds 2009: Restoring Woodland Habitats for Birds* (2010) birdlife.org.au/documents/SOAB-2009.pdf (accessed 2013-11-09).
140 Debus 126; Ferguson-Lees & Christie 748.

3 Discussion

In a conservation statement issued by Birds Australia, the forerunner of BirdLife Australia, Olsen has no trouble in finding a causal link between the adoption of protective laws and a recovery of Wedge-tailed Eagle populations, but she also hints at the resilience of the species.[141] In her monograph on the species, Olsen finds a link between legal protection of the Wedge-tailed Eagle and changed attitudes among the human inhabitants of the country, but in the same breath she mentions the positive impact of the conservation movement and wildlife documentary films.[142] Brooker also gives credit to the legal protection and the resilience of the species, but, in addition, credits prey availability and the sparse occupation of the countryside by humans as further reasons for the survival of the species.[143] Burton and Boyer credit the last-mentioned factor with decisive importance.[144]

From the opinions of these authors, the following possible causal factors in the survival of the Wedge-tailed Eagle may be identified: Legal protection, an inherent resilience of the species, changed attitudes of the human population, the conservation movement, wildlife documentaries, prey availability, and low density of the human population. It is probably reasonable to conclude that all these factors have played a role, and to allow for the possibility that several others may also have contributed. Research, in this instance particularly into the true impact of eagle predation on livestock, comes to mind in this regard.[145] Other factors that may have contributed are education of the public about the hunting behaviour and role of birds of prey in nature,[146] and the fact that most Australian people now live in cities where they have little need for or interest in the killing of eagles.[147]

The above-mentioned positive views on the conservation status of the Wedge-tailed Eagle must be balanced with negative trends that are also apparent. Debus points out that the reporting rate of the Wedge-tailed Eagle in bird atlas projects has declined by 28 percent nationally and by 15 percent in New South Wales over the two decades to 2000, and that

141 Olsen *Birds Australia Conservation Statement No 2 – Australia's Raptors: Diurnal Birds of Prey and Owls* (1989) www.birdlife.org.au/documents/OTHPUB-Raptors.pdf (accessed 2013-11-09) viii.
142 Olsen *supra* n 1 at 92.
143 Brooker 'Persecution of the Wedge-tailed Eagle' in Newton (ed) *supra* n 8 at 196.
144 Burton & Boyer 85.
145 See Olsen *supra* n 1 at 84-85; Debus 126 145; cf Ferguson-Lees & Christie 747-748.
146 Cf Debus 149; Olsen *Australian Birds of Prey* (1995) 230-232.
147 Olsen personal communication 2014-04-02.

numbers of the species have declined in the South of Australia due to habitat loss and disturbance.[148] At a recent raptor conference held in Adelaide,[149] a District Manager of the Department of Environment, Water and Natural Resources of South Australia reported that active persecution of the Wedge-tailed Eagle is still a regional reality, citing an extreme example where more than 100 Wedge-tailed Eagles were killed on a single farm in South Australia.[150] It is perhaps realistic to conclude that while certain negative population trends may be apparent on national and regional levels, and whereas complacency would be inappropriate, the conservation status of the Wedge-tailed Eagle can be described as favourable compared to that of many other large eagle species of the world. Thus Debus mentions various negative impacts on Wedge-tailed Eagle populations, but nevertheless states that the species "remains widespread and common on the Australian mainland despite former intense persecution".[151] He also points out that whereas the Tasmanian subspecies is still officially classified as endangered, its position was reassessed more favourably, as vulnerable, in 2011.[152]

Focusing specifically on the role of biodiversity legislation, and working with probabilities rather than hard facts, it appears safe to conclude that the law has played, and is still playing, an important contributory part in the conservation of the Wedge-tailed Eagle. Crucially, the law has changed its position from encouraging the destruction of Wedge-tailed Eagles by a bounty system, to outlawing the practice of killing Wedge-tailed Eagles and visiting it with penalties. While few judicial officers appear to enforce adequate penalties for the destruction of eagles, the small numbers of farmers and other individuals who still kill eagles, mostly do so surreptitiously and probably with

148 Debus 126; with reference to Barrett *et al The New Atlas of Australian Birds* (2003) 751. Note that Barrett *et al* caution (736) that atlas data is not well suited to making inferences about changes over time, and that comparisons of differing reporting rates in the two atlas periods should be interpreted with caution due to methodological changes and other factors.

149 Australasian Raptor Conference 2013 Adelaide (2013-08-10) 11.

150 The abstract of the paper has been published as Falkenberg 'Has the pendulum of public sentiment swung in favour of eagles? A regional perspective' 2013 *Boobook* 75. For a similar account from Tasmania, of a farmer claiming to have killed 230 eagles in an 18-month period, see Mooney 'Persecution of Wedge-tailed Eagles in Tasmania' 2011 *Boobook* 8. See further Aumann, Mooney & Olsen 'The legal status of birds of prey in Australia' in Meyburg & Chancellor (eds) *supra* n 27 at 593-594.

151 Debus 126. Cf par 1 *supra*. For an assessment of the outlook for Australian biodiversity in general, featuring both a pessimistic scenario and an optimistic one, see Department of the Environment *State of the Environment 2011 supra* n 132 at ch 8 par 7.

152 By Birds Australia, forerunner of BirdLife Australia; see Garnett, Szabo & Dutson *The Action Plan for Australian Birds 2010* (2011) 148-149. This change in status of the subspecies reflects a scientific assessment of its factual status. It legal status is unchanged, and it remains listed as endangered under the EPBCA *(Cth)* and the Threatened Species Protection Act 1995 (Tas); see Department of the Environment *EPBCA list of threatened fauna* (2009) http://www.environment.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl#birds_extinct (accessed 2014-08-20).

knowledge that such conduct is unlawful and is frowned upon by sectors of the community.[153] It is reasonable to conclude that the relevant laws were instrumental, together with activities of researchers, conservation activists, producers of wildlife documentaries and so forth, to mitigate deep-seated prejudice, and, in its place, to foster a culture of respect and appreciation for wildlife in general and eagles in particular,[154] although such a change of attitude has not permeated to all members of the community.

Interesting insights may be gained by comparing the legal protection of the Wedge-tailed Eagle in Australia with the legal protection of other eagle species in other jurisdictions. Only one example, and a remarkable one at that, will be considered here: The application of the environmental laws and policy of the European Union and Spain to save the Spanish Imperial Eagle from extinction.[155] The European and Spanish conservation efforts in respect of the Spanish Imperial Eagle and the Australian conservation efforts in respect of the Wedge-tailed Eagle may both be regarded as *prima facie* successful. However, the interventions on behalf of the Spanish Imperial Eagle are much more numerous and intensive than those on behalf of the Wedge-tailed Eagle. Examples of such more numerous and intensive interventions include the creation of Special Protection Areas to enable the Spanish Imperial Eagle to breed and hunt in safety and without disturbance even on privately owned land; extensive research into juvenile dispersal patterns; the creation of dog and other patrols to combat the illegal use of poisons; and the adoption of management or Recovery Plans that are immensely detailed, ambitious and holistic in approach, to the point of providing for the management of prey animals, creating no-access zones around active nests (even by closing roads and restricting maintenance activities on power lines if needed), prohibiting the cutting down of trees containing nests that have been active in the previous ten years, structurally reinforcing nests in danger of collapsing, and implementing captive breeding programs to bolster wild breeding populations. A vast body of laws and environmental policy make the majority of these interventions mandatory.[156] The interventions require a big financial commitment from governments and may be burdensome to persons such as landowners, who have breeding eagles on their properties and to juristic persons, such as electricity providers whose transmission structures may harbour occupied eagle nests or may pass through occupied eagle territories.[157]

153 Olsen personal communication 2014-04-02.

154 E.g. the Wedge-tailed Eagle was chosen as the emblem of the Northern Territory in 1975; see Olsen *supra* n 1 at 92.

155 See Knobel 'The legal status of the Spanish Imperial Eagle in Spain and thoughts on environmental law and policy as contributing factors in the conservation of species' 2014 *PER/PELJ* 1828-1905.

156 *Idem* 1839-1866 for an overview of relevant legal provisions and policies at the levels of the European Union, the Spanish national government, and the Autonomous Communities of Spain.

157 *Idem* 1839-1866, 1874 & 1876.

On the Australian mainland, by contrast, legal and other conservation interventions on behalf of the Wedge-tailed Eagle are not so numerous, far-reaching or intensive.[158] Basic law enforcement appears to be more or less restricted to licencing controls and prosecution for offences, and these activities may be subject to relatively low funding levels and must often take place in the context of vast, thinly populated land surfaces.[159] Some important interventions are not driven directly by the law. Examples include localised initiatives such as the involvement of local farming communities in bird of prey conservation goals,[160] and an ambitious project to mitigate the effects of the clearing of Australian woodlands by re-vegetating land and creating corridors of indigenous vegetation linking remnant patches of woodland.[161]

In Tasmania, the local subspecies of the Wedge-tailed Eagle has been, due to its listing as endangered under the EPBCA, the object of more intensive measures, which are more comparable to the interventions on behalf of the Spanish Imperial Eagle.[162] Examples include intensive searches, including by helicopter, to find and monitor nests, as well as the adaptation of forestry management practices to promote the breeding success of the eagles.[163] In State forests, forestry operations are excluded from buffer zones around nests during the breeding season.[164] Conservation officials investigate the complaints of farmers that eagles are preying on livestock, and, where possible, devise responses tailored to protect the interests of both the farmers and the eagles. An example is the issuing of licences which permit farmers to repeatedly discharge firearms near eagles in order to scare them away from livestock.[165]

158 See on the conservation of Australian raptors in general, Debus 152. In 1995, Olsen *supra* n 146 at 228 stated that conservation of Australian birds of prey had been largely confined to giving legal protection to all birds of prey and setting apart protected land. See Aumann, Mooney & Olsen 'The legal status of birds of prey in Australia' in Meyburg & Chancellor (eds) *supra* n 27 at 595-596 for recommended improvements to Australian raptor legislation that were proposed in 1989.

159 Cf Aumann, Mooney & Olsen 'The legal status of birds of prey in Australia' in Meyburg & Chancellor (eds) *supra* n 27 at 592-594.

160 E.g. Falkenberg *supra* n 150 at 75 supplies details of a Conservation Action Process that involves communities in a collaborative and transparent manner at a landscape level in South Australia.

161 Paton & O'Connor *supra* n 139 at 2; although this project is not earmarked specifically for the protection of the Wedge-tailed Eagle, the species may benefit from it.

162 Par 2 2 1 *supra*.

163 Koch, Wiersma & Munks *Tasmanian Wedge-tailed Eagle Nest Monitoring Project 2007-2012* (2013) www.fpa.tas.gov.au/__data/assets/pdf_file/0004/87673/FPA_s_wedgetailed_eagle_nest_monitoring_project_2007-12_-_final.pdf (accessed 2014-08-18); Mooney 'Tasmanian area rep's report 2005-2008' 2009 *Boobook* 8.

164 Debus 126-127; Olsen *supra* n 1 at 93.

165 Mooney 'Wedge-tailed Eagles preying on sheep with "ryegrass staggers"' 2012 *Boobook* 17-18. It is worth noting that Mooney (18) also commends a member of the farming community for his patience and cooperation with such procedures.

Conservationists also engage with the wind energy industry regarding eagle mortalities at wind energy turbines.[166]

The Spanish Imperial Eagle is classed as endangered by the International Union for Conservation of Nature ("IUCN"), while the Wedge-tailed Eagle is classed as a species of least concern.[167] This difference in conservation status must in turn be linked to the small population size of the Spanish Imperial Eagle and its relatively small distribution range, compared to the large population size of the Wedge-tailed Eagle and its vast distribution range. Expressed in terms of the history of decline of a population, one can characterise the most important legal interventions on behalf of the Spanish Imperial Eagle as relatively "late", whereas the important legal interventions on behalf of the mainland population of the Wedge-tailed Eagle may, in spite of having been preceded by nearly a century of intense persecution, be characterised as comparatively "early".

The Spanish conservation efforts in respect of the Spanish Imperial Eagle make an inspiring conservation success story, and are worthy of emulation by any jurisdiction with raptor populations in trouble. However, it is submitted that if a choice could still be made, it would be preferable to introduce full legal protection earlier in the history of the decline of a raptor species, as has been done for the Wedge-tailed Eagle. Such an earlier intervention is likely to be less costly to governments, less management-intensive, and less burdensome on landowners and other citizens than a later intervention. Ultimately, the potential for legal protection to ensure a secure future for its target species, is also likely to be better in the case of an early intervention compared to a later intervention.

This insight is of importance for the application of environmental law and policy to the conservation of birds of prey in other jurisdictions, including South Africa. Many of the South African bird of prey species still occur in relatively large populations, and relatively few species have been listed as endangered or critically endangered like the Spanish Imperial Eagle. However, an updated *Red Data Book of Birds of South Africa, Lesotho and Swaziland* will in the near future reflect the deteriorating

166 Cf e.g. Duchamp 'Windfarms: suspicious error by consultant condemns Tasmanian Eagle to extinction' 2012 *Boobook* 7-9 (see also commentary by the editor (9)); Hull & Sims 'Results from ten years of eagle studies at the Bluff point and Studland Bay wind farms, Tasmania' 2013 *Boobook* 47; Mooney 'Priority work required for Wedge-tailed Eagle conservation in Tasmania' 2013 *Boobook* 15; Mooney 'Projecting Wedge-tailed Eagle *Aquila audax fleayii* and White-bellied Sea-Eagle *Haliaeetus leucogaster* mortality from collisions with wind-farms in Tasmania' 2012 *Boobook* 54; Mooney 'Windfarms' 2013 *Boobook* 5-6; Smales 'Modelling wind farm collision risk for raptors' 2012 *Boobook* 42-44.

167 IUCN Red List of Threatened Species *Aquila adalberti* (2014) www.iucnredlist.org/details/22696042/0 (accessed 2014-08-20); IUCN Red List of Threatened Species *Aquila audax* (2014) www.iucnredlist.org/details/22696064/0 (accessed 2014-08-20).

conservation status of several South African bird of prey species.[168] Twelve South African bird of prey species are likely to be listed as endangered[169] and two species as critically endangered.[170] The *prima facie* effectiveness of the legal protection of the Wedge-tailed Eagle in Australia supports a strong case that many bird of prey species, and certainly larger species such as eagles and vultures, should be given full legal protection as early as possible. Focusing, for instance, on South African eagles, only four species enjoy full legal protection under national legislation.[171] All bird of prey species are protected under provincial legislation,[172] but the position is not entirely satisfactory.[173] One major weakness in certain provincial laws is the immunity enjoyed by landowners and their families, including persons acting with their authority, for the killing of eagles and other birds of prey. In the relevant provinces, which constitute a large part of South Africa, the mentioned persons do not need to obtain permission from conservation authorities to kill eagles.[174] Much of the Karoo, which is probably the most well-known sheep-farming region in South Africa, and the mohair goat farming areas of the Eastern Cape, are situated inside these provinces where landowners enjoy immunity for the killing of eagles on their land.

168 Release of this publication is imminent; www.birdlife.org.za/publications/red-data-book-of-birds (accessed 2014-08-15); see further Knobel *supra* n 155 at 1877.

169 They are the Hooded Vulture *Necrosyrtes monachus*; Cape Vulture *Gyps coprotheres*; White-backed Vulture *Gyps africanus*; Lappet-faced Vulture *Torgos tracheliotos*; White-headed Vulture *Trigonoceps occipitalis*; Black Harrier *Circus maurus*; African Marsh Harrier *Circus ranivorus*; Bateleur *Terathopius ecaudatus*; Southern Banded Snake Eagle *Circaetus fasciolatus*; Martial Eagle *Polemaetus bellicosus*; Tawny Eagle *Aquila rapax* and Pel's Fishing Owl *Scotopelia peli*.

170 Bearded Vulture *Gypaetus barbatus* and Taita Falcon *Falco fasciinucha*.

171 They are the Bateleur *Terathopius ecaudatus*; Southern Banded Snake Eagle *Circaetus fasciolatus*; Martial Eagle *Polemaetus bellicosus* and Tawny Eagle *Aquila rapax*, all classified as 'vulnerable'; see National Environmental Management (Biodiversity) Act 10 of 2004 s 56, read with the Threatened or Protected Species Regulations (GN R152 in *GG* 29657 of 2007-02-23) and the Lists of Critically Endangered, Endangered, Vulnerable and Protected Species (GN R151 in *GG* 29657 of 2007-02-23); see Knobel 'The conservation status of eagles in South African law' 2013 *PER/PELJ* 183/487. A revised new Threatened or Protected Species list has been published for comment in March 2015: Publication of Lists of Species that are Threatened or Protected, Activities that are Prohibited and Exemption from Restriction (Gen N 256 in *GG* 38600 of 2015-03-31). This draft list classifies 3 raptor species as 'critically endangered' and 10 raptor species, including 3 eagle species (the Bateleur, Martial Eagle and Tawny Eagle) as 'endangered'. The Southern Banded Snake Eagle is not listed. If the draft list is enacted, the legal position of raptors will be better than the current one, but much room for improvement will remain. E.g. the new Red List will list 5 bird of prey species as 'vulnerable', while the draft Threatened or Protected Species list does not classify any raptor species as 'vulnerable'.

172 Knobel *supra* n 171 at 186/487-190/487.

173 *Idem* 198/487-204/487.

174 E.g. Nature and Environmental Conservation Ordinance 19 of 1974 s 27; see Knobel *supra* n 171 at 190/487; the Ordinance is in force in both the Western and Eastern Cape provinces.

Therefore, some of the regions with the highest potential for a perceived conflict[175] between the conservation of eagles and the financial interests of the human occupants of the land, fall squarely in a part of South Africa where protection under provincial legislation is inadequate.

The Australian position, where the killing of eagles is outlawed in principle but provision is made that landowners may obtain permits for killing eagles in meritorious instances,[176] is by far the preferable approach. To prevent a scenario where comparatively radical legal measures, like those pertaining to the Spanish Imperial Eagle, are eventually required to protect many South African bird of prey species, an Australian-style legal protection regime is highly desirable. This would require reform of provincial legislation in instances where the legal protection of raptors falls short, or, more preferably, bestowing a comprehensive protection status on eagles, vultures and other vulnerable bird of prey species under national legislation.[177]

175 The phrase 'perceived conflict' is used deliberately. While larger eagles are capable of killing small-stock lambs, and while some such predation undoubtedly takes place, its scope and impact are usually exaggerated. Furthermore, the presence of large eagles on a small-stock farm may in fact benefit the farmer financially, because the eagles prey on wild animals that compete with domestic stock for grazing; for an in-depth analysis see Davies 'The extent, cost and control of livestock predation by eagles with a case study on Black Eagles (*Aquila verreauxii*) in the Karoo' 1999 *Journal of Raptor Research* 67-72. Also, most eagles will take carrion, and for this reason, seeing an eagle feeding on a lamb does not in itself constitute proof that the eagle has killed the lamb; see Knobel *supra* n 171 at 163/487 n 14.

176 As discussed in par 2 2 *supra*.

177 Knobel *supra* n 171 at 198/487-204/487.

Clinical legal education: determining the mission and focus of a university law clinic and required outcomes, skills & values

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OPSOMMING

Kliniese Regsopleiding: Die Vasstelling van die Missie en Fokus van 'n Universiteitregskliniek en die Verwagte Uitkomste, Tegnieke en Waardes

Die doel en fokus van verskillende tipes regsklinieke word aangedui waarna daar op universiteitsregsklinieke gefokus word. Kritiek vanuit die regspraktyk rakende die praktiese gereedheid van LLB graduandi bevestig die belangrike rol van praktiese regskursusse. Sodanige kursusse moet, ten einde suksesvol te wees, volgens universeel aanvaarbare riglyne beplan word. Alvorens 'n leerplan beplan word, moet die kliniek se missie en fokus, asook die rol van die kliniese toesighouers bepaal word. Die leerplan moet aan bepaalde uitkomste, tegnieke en waardes voldoen. In hierdie artikel word uitkomste, tegnieke en waardes uit verskeie internasionale jurisdiksies saamgevat en met die van Suid-Afrikaanse universiteitsregsklinieke vergelyk. Die doel is tweesydig: die resultaat toon eerstens in hoeverre Suid-Afrikaanse klinieke aan internationale tendense voldoen Tweedens verleen dit dan ook aan Suid-Afrikaanse klinieke die geleentheid om hulle leerplanne in die lig van die resultate te hersien, waar nodig.

1 Introduction

In South Africa two different types of law clinics can be identified. First, law clinics with their main missions and areas of focus being to serve the indigent members of the community by providing free legal services – the justice centres of Legal Aid South Africa are the most prominent examples. Second, university law clinics also strive to serve the indigent members of the community, but their main focus area is providing practical training to LLB students in an academic clinical environment, whilst the free legal services are rendered. These clinical courses are referred to as clinical legal education ("CLE").

Since the introduction of the four-year undergraduate LLB degree in 1997, legal practice complained about the level of preparation of the LLB

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graduates they recruit and the Law Society of South Africa has indicated that students are generally unprepared to enter practice.[1] In view of this criticism, CLE provides the setting from where shortcomings can be addressed.

CLE serves a two-fold purpose, namely practical legal training of students and providing free legal services to the (indigent) community.[2] The mission of a university law clinic lies at the core of the operation of such an entity. The mission will inform the focus of the university law clinic and the roles of the clinicians. Furthermore, where there is a focus on the training of students, an assessable curriculum must be in place to ensure academic sustainability of the clinical course. Before such a curriculum can be designed, finalised and implemented, the outcomes, skills and values of the clinical course should be determined. An assessable curriculum should be designed to comply with such outcomes, skills and values, all of which should conform to the mission of the university law clinic.

2 Determining the Mission of the Clinic

The most valuable clinical programmes prove to be those which place significant operational responsibility in the hands of students, because that level of trust encourages their learning more effectively than any other strategy.[3] In South Africa, students were allowed to consult with clients within a few weeks (or often less than that) from the onset of such clinics during the early 1970s.[4] This trend currently continues,[5] and is

1 A number of law firms complained about the level of preparation of the LLB graduates they recruit, see http://www.universityworldnews.com/article.php?story = 20140424114611428 (accessed 2015-04-22); the CEO of Law Society South Africa also indicated that most students did not have the requisite academic literacy or numeracy skills to complete the undergraduate LLB degree in four years, see http://www.universityworldnews.com/article.php?story = 20140424114611428 (accessed 2015-04-22).

2 South African universities have identified their objectives as three-fold, namely teaching, community service and academic research. See Wimpey & Mahomed 'The practice of freedom – the South African experience' 2006 *Unpublished, Copy on file with author* 17. University law clinics generally have to satisfy two main objectives, namely teaching of the students and service to the community. See Du Plessis 'Closing the gap between the needs of students and the community they serve' 2008 *Journal for Juridical Science* ('*JJS*') 33.

3 Evans & Hyams 'Independent Valuations of Clinical Education Programs' 2008 *Griffith Law Review* 60.

4 De Klerk *et al Clinical law in SA* (2006) 264.

5 At the University of Pretoria Law Clinic, students attend an intensive two-day workshop, where after they consult with clients, initially in groups, later in pairs and eventually as individuals. See Haupt 'Some aspects regarding the origin, development and present position of the University of Pretoria Law Clinic' 2006 *De Jure* 235. At the Law Clinics of the Universities of the Witwatersrand and Johannesburg, students consult with clients from the

mirrored at Monash in Australia.[6]

In order to design clinical programmes, it is imperative that the clinic has a clear mission. In most law schools, CLE is taught in a live-client environment. Hyams, voicing an Australian perspective, indicates that a:[7]

> Clinic has a broader mandate than just the integration of practical legal skills with knowledge of the law. Clinicians can (and should) take on the mantle of teaching for lifelong learning, which includes three additional requirements of a professional … – autonomy, judgment and a commitment to lifelong education.

When formulating a mission statement, the clinic's primary constituencies need to be identified and, thereafter, the framework for dialogue on the mission should be established.[8] Potential constituencies include the public served, students, employers of law graduates, law schools, applicants for admission, taxpayers, alumni, courts, all the role players in the legal profession and the university to which the clinic is attached.[9] Some important points to consider are:[10] The knowledge, skills and values a lawyer may require during the next ten to twenty years; the technology that must be mastered; whether a broad base of knowledge and a wide range of skills will suffice, or will specialisation be required;[11] the emphasis on scholarship;[12] how teaching, research and service should be prioritised;[13] and what society's need for lawyers be in

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second week of clinic duty and at the University of the Free State Law Clinic students already consult during their first clinical session.

6 Hyams 'On teaching students to "act like a lawyer": What sort of a lawyer?' 2008 *International Journal of Clinical Legal Education (IJCLE)* 25. Students at Monash, Australia are, within a few weeks from the start of their clinical course, trusted to see clients on their own and to provide advice to clients after consulting with the clinician. This proved to be effective in developing respect for clients, increased student confidence and the educational outcome of rapid but sustained and comprehensive student learning.

7 Hyams 2008 *IJCLE* 25.

8 There must be collaboration between the legal profession, which regulates the post-degree vocational training phase, and the academy, which controls the foundational education phase. See Greenbaum 'Current issues in legal education: a comparative review' 2012 *SALJ* 26.

9 Munro 'How do we know if we are achieving our goals?: Strategies for assessing the outcome of curricular innovation' 2002 *Journal of the Association of Legal Writing Directors* 231; Swanepoel, Karels & Bezuidenhout 'Integrating theory and practice in the LLB curriculum: Some reflections' 2008 *JJS Special Issue* 101.

10 Munro 2002 *Journal of the Association of Legal Writing Directors* 231-232.

11 *Ibid*.

12 *Ibid*; it is submitted that scholarship is necessary in order to theorise about the wider area of clinical legal education.

13 *Ibid;* it is submitted that there is uniqueness to the university law clinics in South Africa, specifically as instruments of social justice, which originated during the apartheid-era. What is important for the clinics 20 years into the South African democracy is to build on the past and assess what the current context is. The current context calls for a prioritising of teaching of students in CLE courses.

the future (numbers, fields of specialisation or multi-disciplinary practice)?[14] Fisher proposes that typical mission statements should address the preparation of students for the practice of law,[15] promoting justice and scholarship,[16] encouraging diverse perspectives and communities,[17] including service and embracing high ethical standards.[18]

A recent PhD study reviewed the CLE mission statements of four South African university law clinics, namely those of the Universities of the Witwatersrand, Pretoria, Johannesburg and Free State.[19] The mission statements of these university law clinics are indicated.

The mission statement of the Wits Law Clinic was formulated in 2006 and reads: "The Wits Law Clinic aspires to: develop and provide an effective clinical legal education programme to students; promote published research by clinical teachers; and to provide quality legal services to the community".[20]

The University of Pretoria's Law Clinic's mission statement reads:[21]

> To use the practice of law (simulated and actual) as a context to teach and research substantive and procedural law, ethics, professional skills, effective interpersonal relations, appropriate dispute resolution techniques and the ability to integrate law, fact, procedure and values; to provide quality legal services to the indigent thereby increasing access to justice; to promote access to and transformation of the organised legal profession by providing opportunities and training to candidate attorneys especially those from previously disadvantaged groups; and to foster a commitment in staff and students to build a society based on democratic values, social justice and the rule of law.

The University of Johannesburg's Law Clinic states that the aim/mission of their CLE course, Applied Legal Studies (incorporated into their clinic), is two-fold: Firstly, the clinical legal education of final year LLB students, with the focus on analytical skills, the application of theory and an appreciation of the practical nature and consequences of theory; and secondly, the rendering of free legal services to the indigent according to the guidelines of the Attorneys Act,[22] and the Law Society of the Northern Provinces.[23]

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14 *Ibid*.
15 Fisher 'Putting students at the center of legal education: how an emphasis on outcome measures in the ABA standards for approval of law schools might transform the educational experience of law students' 2011 *Southern Illinois University Law Journal* 225.
16 *Ibid*.
17 *Ibid*.
18 *Idem* 3.
19 Du Plessis *Assessment methods in clinical legal education* (PhD thesis 2014 University of the Witwatersrand).
20 Mahomed 'United in our challenges – Should the model used in clinical legal education be reviewed?' 2008 *JJS* 63.
21 University of Pretoria Law Clinic, Practical Law 410 study guide (2012) 3.
22 Act 53 of 1979.

The mission and vision of the University of the Free State Law Clinic is stated as a venture conducted by the University's Faculty of Law, where primarily: a) members of the indigent society of the greater Mangaung area of the Free State Province, that qualify in terms of a means test, receive free legal services; and b) that final year students of the Faculty receive practical legal training, are exposed to various aspects of legal practice and engage in community service learning projects.[24]

Once a clinic's mission is determined, it will be the foundation from which the subsequent student and institutional outcomes, curriculum, teaching methods and assessment will be reflected.[25]

3 The Focus of the Clinic, CLE and the Role of the Clinician

The focus of a university's law clinic, which forms part of the university's law school and generally includes an accredited academic course in the law degree curriculum, is key in determining how the teaching methodology of CLE will be applied in the training of the students and the setting of the curriculum. This, in turn, will determine the role of the clinician, who fulfils a dual role, namely that of an attorney/lawyer – assuming professional responsibility for all the matters that the students are dealing with – and that of a law teacher who has to account to the university as his/her employer.

South African universities state their objectives as threefold, namely teaching, community engagement and academic research.[26] University law clinics comply with the first two objectives. Academic research by law clinic clinicians, resulting in accredited publication output, is already an essential objective of some law clinics.[27] During the 2011 Association of University Legal Aid Institutions ("AULAI"; now "SAULCA") winter conference,[28] it was confirmed by the delegates that such research output should form an essential objective for all South African law clinics.[29]

Although tension exists between the teaching of students and client services,[30] the general view across a number of jurisdictions is that the

23 University of Johannesburg, Applied Legal Studies learning guide (2012) 2.
24 University of the Free State Law Clinic: 'Mission and Vision', available at the University of the Free State Law Clinic.
25 Munro 2002 *Journal of the Association of Legal Writing Directors* 231-232.
26 Wimpey & Mahomed *supra* n 2 at 17.
27 Du Plessis 'Access to justice outside the conventional mould: creating a model for alternative clinical legal training' 2007 *JJS* 46.
28 Note that at a Special General Meeting held in Port Elizabeth at the Nelson Mandela Metropolitan University on 5 July 2013, the name 'AULAI' was changed to 'SAULCA – South African University Law Clinics Association'.
29 The conference was held from 27-30 June 2011 and was hosted by the University of the Western Cape.

main focus of a university law clinic should be CLE – that is, the teaching of students by the clinicians and not the provision of free legal services.[31]

The South African view, as was confirmed by the delegates during the 2011 AULAI winter conference, was set out by Du Plessis as follows:[32]

> Where clinical legal education is compulsory, the role of law clinics in the academic environment becomes more pronounced and a stronger emphasis is placed on the academic training of students in the clinical environment. Access to justice for the indigent is no longer the main or only focus of the law clinic, but will remain a strong component, as client service is inseparable from the clinical methodology.

De Klerk echoed this view, stating that:[33]

> Students pay good money to complete clinical courses and have legitimate expectations of the benefits they should receive in return. The teaching that takes place in a clinic should therefore never be incidental or secondary to the practice of law. Teaching students remains the core business of (university) law clinics.

The Clinical Legal Education Organization ("CLEO") in the United Kingdom ("UK") holds the view that:[34]

> [H]owever much the clinic wishes to advise and assist those members of the community who have unmet legal needs … the principal aim of clinical programmes is educational. It is the needs of the student and supervisor competence that must dictate which clients are assisted and in what areas.

For South Africa, Du Plessis states that:[35]

> In planning the clinical curriculum, clinicians have to define the parameters within which the clinic should operate. Only types of cases that will satisfy the goals of clinical legal education should be considered, and [clinicians] should limit the volume of cases taken on … to ensure that students derive the best possible training …

30 Stuckey *et al Best practices for legal education* (2007) 197; Giddings 'Contemplating the future of clinical legal education' 2008 *Griffith Law Review* 7.

31 See Du Plessis & Dass 'Defining the role of the university law clinician' 2013 *SALJ* 390-406 for a full discussion on defining the role of the university law clinician.

32 Du Plessis 2007 *JJS* 46.

33 De Klerk 'Unity in Adversity: Reflections on the Clinical Movement in South Africa' 2007 *IJCLE* 98. This was also confirmed in De Klerk & Mahomed 'Specialisation at a University Law Clinic: The Wits Experience' 2006 *De Jure* 31; and by Haupt *supra* n 5 at 237.

34 CLEO 'Model standards for live-client clinics' 2007 A Clinical Legal Education Organization ('CLEO') document http://www.ukcle.ac.uk/resources/teaching-and-learning-practices/clinical-legal-education/ (accessed 2011-06-14); MacFarlane & McKeown '10 lessons for new clinicians' 2008 *IJCLE* 65.

35 Du Plessis 2008 *JJS* 14.

In both the United States of America ("USA") and the UK, CLE is about the student experience and it should, therefore, be the student who conducts a case, not the clinician.[36] If students are only told what to do, they do not learn much – they must learn why certain practices are better and learn necessary lawyerly skills and relationships with clients, adversaries and adjudicators. Therefore, the case file belongs to the student, as a teaching tool, and the student must do the work, not observe it being done. The clinician should, therefore, not practice but train the student to practice.[37]

4 Outcomes, Skills and Values

Outcomes, skills and values are foundational to the design of a CLE curriculum. In the USA, Canada and Australia "accreditation has been used to drive legal education toward an outcomes-based learning model in which knowledge, skills and values must be clearly articulated and tangibly demonstrated."[38]

Expected outcomes, skills and values were identified as preconditions in designing a curriculum that can be assessed effectively. As the course relates to the training of legal professionals, it is important to identify the skills, values and outcomes that are required by the profession. The following were identified across a number of jurisdictions.[39]

36 MacFarlane & McKeown 2008 *IJCLE* 65; Wizner 'Beyond skills training' 2001-2002 *Clinical Law Review* ('*CLR*') 13; Stuckey *supra* n 30 at 195-197.

37 'Practice' in this context refers to the total of the practice concerning the specific case, excluding the court appearance. The student should ideally, with the supervision of the clinician, prepare a case from the initial consultation until the case is ready to go to trial.

38 Smyth & Liddle 'Lulling ourselves into a false sense of competence: learning outcomes and clinical legal education in Canada, the United States and Australia' 2012 *Canadian Legal Education Annual Review* 21.

39 Identified and proposed by the Law Society of England and Wales, see Stuckey *supra* n 30 at 44; for the State Bar of Wisconsin's Commission on Legal Education, see Findley 'Rediscovering the lawyer school: curriculum reform in Wisconsin' 2006-2007 *Wisconsin International Law Journal* 324; for the USA and Canada see 'Section on legal education and admissions to the bar, American Bar Association's legal education and professional development – an educational continuum, report of the task force on law schools and the profession: narrowing the gap' 1992 (the 'MacCrate Report') available from http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html#B) (accessed 2011-06-14); for the Bar Council of India see Bloch & Prasad 'Institutionalizing a social justice mission for clinical legal education: cross-national currents from India and the United States' 2006 *CLR* 209-212; for Australia see Giddings 2008 *Griffith Law Review* 12; for Germany see Brücker & Woodruff 'The Bologna Process and German Legal Education: Developing Professional Competence through Clinical Experiences' 2008 *German Law Journal* 579.

4 1 Outcomes

Outcomes were defined as "the stated abilities, knowledge base, skills, personal attributes, and perspectives on the role of law and lawyers in society".[40] The outcomes of a clinical programme are relevant to the needs of the society, students and the profession.[41] In July 2008, the American Bar Association ("ABA") shifted its focus from input measures to outcomes assessment, thereby urging law teachers to develop clear learning outcomes for their courses.[42]

When planning a curriculum, certain outcomes are expected. In South Africa, seven main goals (outcomes), each with their own sub-goals, of CLE have been identified.[43] Goal one relates to professional responsibility. The sub-goals (outcomes) are: A system of legal ethics and ethical philosophy; personal norms/morality; the professional role of legal practitioners; the analysis of legal institutions; social awareness; and affording students the opportunity to reform the system. Goal two is judgment and analytical abilities. The sub-goals (outcomes) are: Recognition of relevant facts and applicable law; understanding strategy, tactics and decision making; understanding process and procedure; synthesis; and reflection. Goal three is the knowledge of substantive law. The sub-goals (outcomes) are: Strengthening and deepening of existing knowledge; acquiring new knowledge; the impact of theory (strengthening and extending acquired theory); and the study of specific law areas. Goal four relates to applied practice skills. The sub-goals (outcomes) are: Consultation skills; client counselling; negotiation; trial advocacy; appellate advocacy; drafting of legal documents; legal research; factual investigation; and office management. Goal five is rendering legal services to the community, which ties in with goal six where students are required to learn and work in groups. Goal seven is the integration of all or some of these goals.

4 1 1 Outcomes Summary

A summary of the abovementioned jurisdictions' identified outcomes indicate that when outcomes for CLE are determined, the following should be considered: The outcomes stated by the abovementioned

40 Munro 2002 *Journal of the Association of Legal Writing Directors* 232.
41 Osman 'Meeting quality requirements: a qualitative review of the clinical law module at the Howard College Campus' 2006 *De Jure* 275.
42 Carpenter *et al* 'American Bar Association, Report of the Outcome Measures Committee' 3 http://www.abanet.org/legaled/committees/subcomm/Outcome%20Measures%C20Final%20Report.pdf (accessed 2013-08-01); Hill 'Peer Editing: a comprehensive pedagogical approach to maximize assessment opportunities, integrate collaborative learning, and achieve desired outcomes' 2011 *Nevada Law Journal* 668.
43 De Klerk *et al supra* n 4 at 266-279.

multiple jurisdictions,[44] indicated below, and that of the seven main goals (outcomes), each with their own sub-goals, identified for South Africa were compared. Seventeen outcomes were identified by the multiple jurisdictions. The results are as follows:

(a) Collaboration with legal practice:
The outcomes identified, according to the seven main goals, for South Africa ('SA outcomes') are: Professional responsibility and legal ethics, in line with goal one.

(b) The professional role of legal practitioners:
SA outcomes: Analysis of legal institutions (goal one).

(c) Consistent with the mission of the school and the university:
SA outcomes: Mission statements of the four South African universities reviewed are consistent.

(d) Assessable:
SA outcomes: The outcomes stated by the four South African universities reviewed are assessable.

(e) Must be stated:
SA outcomes: The outcomes were stated by the four South African universities that were reviewed.

(f) Substantive law:
SA outcomes: Substantive law (goal three).

(g) Procedural law:
SA outcomes: Judgment and analytical abilities, understanding, process and procedure, and synthesis (goal two).

(h) Professional conduct:
SA outcomes: Professional responsibility, legal ethics, the professional role of legal practitioners and the analysis of legal institutions (goal one).

(i) Client care:
SA outcomes: Social awareness and legal services to the community (goals one and five).

(j) Ethics:
SA outcomes: Legal ethics (goal one).

(k) Conduct and initial interview:
SA outcomes: Applied practice skills, consultation skills, judgment and analytical abilities, recognition of relevant facts and applicable law, understanding strategy, tactics and decision making (goals two and four).

(l) Preliminary written advice:
SA outcomes: Applied practice skills, judgment and analytical abilities, recognition of relevant facts and applicable law, understanding, strategy, tactics and decision making (goals two and four).

(m) Appropriate English and the ability to draft letters:

44 Identified and proposed by the Law Society of England and Wales, see Stuckey *supra* n 30 at 44; the State Bar of Wisconsin's Commission on Legal Education, see Findley *supra* n 39 at 324; for the USA and Canada see the MacCrate Report *supra* n 39; for the Bar Council of India see Bloch & Prasad *supra* n 39 at 209-212; for Australia see Giddings *supra* n 39 at 12; for Germany see Brücker & Woodruff *supra* n 39 at 579.

SA outcomes: Applied practice skills (goal four).

(n) Draft formal documents:
SA outcomes: Applied practice skills and the drafting of legal documents (goal four).

(o) The ability to bring a case to an appropriate resolution:
SA outcomes: Applied practice skills, counselling, negotiation, trial and appellate advocacy, legal research, factual investigation, judgment and analytical abilities, recognition of relevant facts and applicable law, understanding strategy, tactics and decision making (goals two and four).

(p) To work effectively in a group:
SA outcomes: Learning and working in groups (goal six).

(q) The capacity to reflect on his/her learning and performance:
SA outcomes: Reflection and office management (goals two and four).

4 2 Skills

The Queensland University of Technology, encouraged by the Australian Law Reform Commission's 2000 exhortation to re-orientate legal education around "what lawyers need to be able to do", propose the following set of skills.[45]

Table of Skills by Category:

Attitudinal skills	Cognitive skills	Communication skills	Relational skills
Ethical orientation	Problem solving	Oral communication	Work independently
Creative outlook	Legal analysis	Oral presentations	Teamwork
Reflective practice	IT literacy	Advocacy	Appreciate race, gender, culture and socio-economic differences specifically and diversity generally
Inclusive perspective	Legal research	Legal interviewing	
Social justice orientation	Document management	Mooting	
Adaptive behaviour	Discipline & ethical knowledge	Negotiation	
Pro-active behaviour		Written communication	
		Drafting	Time management

In summarising research done across a wide jurisdiction, the following skills were identified as essential skills that law graduates should have, or would need to have, when entering the legal profession:[46] Ethics; practice management; case management; interviewing skills; the

45 Kift 'A tale of two sectors: dynamic curriculum change for a dynamically changing profession' 13th Commonwealth Law Conference: *Developing the Law Curriculum to Meet the Needs of the 21st Century Legal Practitioner* (Melbourne, Australia) 13-17 April 2003. Conference paper unpublished 1-13 abstract available from http://eprints.qut.edu.au/7468/.

46 Identified and proposed by the Law Society of England and Wales, see Stuckey *supra* n 30 at 44; the State Bar of Wisconsin's Commission on Legal Education, see Findley *supra* n 39 at 324; for the USA and Canada see the MacCrate Report *supra* n 39; for the Bar Council of India see Bloch & Prasad *supra* n 39 at 209-212; for Australia see Giddings *supra* n 39 at 12; for Germany see Brücker & Woodruff *supra* n 39 at 579.

capacity to deal sensitively and effectively with clients, colleagues and others from a range of social, economic and ethnic backgrounds and disabilities; effective communication techniques; recognition of clients' financial, commercial and personal constraints and priorities; effective problem-solving; the ability to use current technologies; legal research; time management and billing; risk management; recognising personal strengths and weaknesses and developing strategies to enhance personal performance; managing personal workload and the number of client matters (clinicians must set the example – if you are a teacher, then limit client intake to teach efficiently); working as part of a team (pairing of students or doing certain activities in a group, in the clinic, are invaluable); legal analysis and reasoning; factual investigation; counselling (to establish a counselling relationship with a client); negotiation; and the skills applicable to litigation and alternative dispute resolution procedure, i.e. trial advocacy.

In South Africa, the skills taught comprise:[47] Professional and ethical conduct. The teaching of this skill will include the rules of professional ethics;[48] what the term "legal practitioner" entails; what constitutes a fit and proper person to be admitted as a legal practitioner; misconduct; professional negligence; the sources where the rules of professional conduct originate from; practitioners' relationship with the State; political dissent; criminal conduct; assisting clients in breaking the law; practitioners' relationship with the court; practitioners' relationship with clients; practitioners' relationship with the opposition and other practitioners; the relationship between attorneys and advocates; and duties towards the poor – access to justice and rules of etiquette.[49]

Consultation skills: The teaching of this skill will include aims of the consultation; preparing for the consultation; stages in the consultation; after the consultation; utilising checklists or client instruction sheets; and assessing consultation skills.[50]

File and case management: The teaching of this skill will include file management systems; opening case files; typical file structure; case management and the closing of files.[51]

47 De Klerk *et al supra* n 4 at 29-262. This textbook is the only one on CLE written by South African clinicians and is used in the majority of South African university law clinics. The authors describe the skills taught together with instruction on the teaching of the different skills. These skills are mostly taught as part of the LLB curriculum, with instructions aimed at teaching these skills as part of CLE courses.

48 For a clinical model as a vehicle for teaching ethics to law students see Kerrigan '"How do you feel about this client?" A commentary on the clinical model as a vehicle for teaching ethics to law students' 2007 *IJCLE* 7-26.

49 De Klerk *et al supra* n 4 at 29-54. Also see Swanepoel, Karels & Bezuidenhout 2008 *JJS Special Issue* 104 on the development of this skill.

50 De Klerk *et al supra* n 4 at 55-71.

51 *Idem* 73-82.

Numeracy skills: The teaching will include use of a calculator; basic numerical writing and reading; addition; subtraction; multiplication; division; averages; exponents; fractions; reading decimal fractions; percentages; conversions; interest; ratios and rates; apportionment of damages; calculating Value Added Tax; and combining calculations.[52]

Practice management: The teaching of this skill will include legal practice and professional ethics; client care and marketing; financial management; trust account management; risk management; personal management; miscellaneous statutory provisions; starting off in a practice; and the business plan.[53]

Legal research: The teaching will include legal research in a law clinic; suggested research methods; and the drafting of an opinion.[54]

Drafting letters: The teaching of this skill will include format; body of the letter; specific letters; and methods of delivery.[55]

Drafting pleadings, notices and applications: This will include important terms and concepts; a general approach to drafting; prior considerations; drafting of pleadings; drafting of motions/applications; and drafting of heads of argument.[56]

The drafting of wills: This will include general approach to drafting; prior considerations; interviewing checklist; contents and order of a will and formalities.[57]

The drafting of contracts: The students will be taught on the law of contract; the art of drafting; and exercises in examples.[58]

Alternative dispute resolution: The teaching of this skill will include types of dispute resolution processes; negotiation; mediation; and arbitration.[59]

Lastly, trial advocacy: The teaching of this skill will include the opening address; examination in chief cross-examination; limitations on cross-examination; technique in cross-examination; re-examination; and the closing address. This will also include practical exercises.[60]

52 *Idem* 83-102.
53 *Idem* 103-128.
54 *Idem* 129-154.
55 *Idem* 155-172.
56 *Idem* 173-192.
57 *Idem* 193-218.
58 *Idem* 219-232.
59 *Idem* 253-262.
60 *Idem* 233-252.

4 2 1 Skills Summary

The skills identified across a number of jurisdictions and those identified for South Africa were also compared. 22 skills were identified across a number of jurisdictions.[61] The results are as follows:

(a) Ethics:
Skills taught in South Africa ('SA skills'): Professional and ethical conduct,[62] and professional responsibility. [63]

(b) Practice management:
SA skills: Practice management,[64] financial management,[65] and office administration.[66]

(c) Case management:
SA skills: File and case management.[67]

(d) Interviewing skills:
SA skills: Consultation skills.[68]

(e) The capacity to deal sensitively and effectively with clients, colleagues and other from a range of social, economic and ethnic backgrounds and disabilities:
SA skills: Social justice,[69] welfare,[70] HIV/AIDS.[71]

(f) Effective communication techniques:
SA skills: Consultation skills,[72] analysis of facts and law.[73]

(g) Recognise clients' financial, commercial and personal constraints and priorities:
SA skills: Social justice,[74] welfare,[75] HIV/AIDS.[76] These are mainly taught during tutorial sessions and may also relate largely to the focus of the clinic and the clinician.

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61 Identified and proposed by the Law Society of England and Wales, see Stuckey *supra* n 30 at 44; the State Bar of Wisconsin's Commission on Legal Education, see Findley *supra* n 39 at 324; for the USA and Canada see the MacCrate Report *supra* n 39; for the Bar Council of India see Bloch & Prasad *supra* n 39 at 209-212; for Australia see Giddings *supra* n 39 at 12; for Germany see Brücker & Woodruff *supra* n 39 at 579.
62 De Klerk *et al supra* n 4 at 29-54; Swanepoel, Karels & Bezuidenhout 2008 *JJS Special Issue* 104.
63 During 2005, AULAI compiled a manual with suggested topics relevant to the setting of a CLE curriculum, see Vawda (ed) *AULAI Manual, Volumes 1 & 2* (2005). See also Du Plessis (PhD thesis 2014) *supra* n 19 at 56-59. For purposes of reference to this manual, the relevant pages of the manual will be indicated under 'AULAI Manual'.
64 De Klerk *et al supra* n 4 at 103-128; AULAI Manual (2005) 32-33.
65 AULAI Manual (2005) 34-35.
66 *Idem* 36-39.
67 De Klerk *et al supra* n 4 at 73-82; AULAI Manual (2005) 32-33.
68 De Klerk *et al supra* n 4 at 55-72.
69 AULAI Manual (2005) 15-31.
70 *Idem* 81-82.
71 *Idem* 75-77.
72 De Klerk *et al supra* n 4 at 55-72.
73 AULAI Manual (2005) 40-45.
74 *Idem* 15-31.
75 *Idem* 81-82.
76 *Idem* 75-77.

(h) Effective problem-solving:
SA skills: Consultation and analysis of facts and law,[77] legal research.[78]

(i) To be able to use current technologies:
SA skills: These skills are not taught.

(j) Legal research:
SA skills: Legal research.[79]

(k) Time management and billing:
SA skills: File and case management,[80] practice management,[81] financial management,[82] office administration.[83]

(l) To recognise personal strengths and weaknesses:
SA skills: These are mainly taught during tutorials.

(m) To manage risk:
SA skills: Practice management,[84] file and case management,[85] financial management,[86] and office administration.[87]

(n) To develop strategies to enhance personal performance:
SA skills: These are mainly taught during tutorial sessions and may also relate largely to the focus of the clinic and the clinician.

(o) Manage personal workload and the number of client matters:
SA skills: These are mainly taught during tutorial sessions and may also relate largely to the focus of the clinic and the clinician.

(p) Work as part of a team:
SA skills: Pairing of students, working in student law firms and trial advocacy.

(q) Problem solving:
SA skills: Legal research,[88] alternative dispute resolution.[89]

(r) Legal analysis and reasoning:
SA skills: Consultation and analysis of facts and law,[90] legal research.[91]

(s) Factual investigation:
SA skills: These can be taught effectively in matters such as medical malpractice,[92] environmental law,[93] family law[94] and motor vehicle accidents.[95]

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77 *Idem* 40-45.
78 De Klerk *et al supra* n 4 at 129-154.
79 *Ibid*.
80 AULAI Manual (2005) 32-33.
81 De Klerk *et al supra* n 4 at 103-128.
82 AULAI (2005) 34-35.
83 *Idem* 36-39.
84 De Klerk *et al supra* n 4 at 103-128.
85 AULAI Manual (2005) 32-33.
86 *Idem* 34-35.
87 *Idem* 36-39.
88 De Klerk *et al supra* n 4 at 129-154.
89 *Idem* 253-262; AULAI Manual (2005) 83-86.
90 AULAI Manual (2005) 40-45.
91 De Klerk *et al supra* n 4 at 129-154.
92 AULAI (2005) 78-79.
93 *Idem* 80.
94 *Idem* 87-106.
95 *Idem* 73-74.

(t) Counselling:
SA skills: Consultation and analysis of facts and law[96] and in matters mentioned under 'factual investigation'.

(u) Alternative dispute resolution and trial advocacy:
SA skills: Alternative dispute resolution,[97] trial advocacy,[98] and preparation for trial.[99]

(v) Negotiation:
SA skills: Alternative dispute resolution,[100] and in most litigation matters.

In South Africa, the following additional skills are taught:[101] Numeracy skills,[102] drafting letters,[103] drafting pleadings, notices and applications,[104] drafting wills,[105] drafting contracts.[106]

4 3 Values

The Carnegie Model of legal education supports courses and curricula that integrate three sets of values or "apprenticeships": Knowledge, practice and professionalism.[107]

Chavkin is of the opinion that there are at least three types of values which are critical to the future of the profession.[108] The first is a private value, namely the lawyer-client relationship. The second and third are public values, namely the lawyer's relationship with opposing counsel, judges and court administration; and the lawyer's relationship to the profession.

In summarising research done across a wide jurisdiction, the following were identified as core values that every competent lawyer must embrace: The provision of competent representation; striving to promote justice, fairness and morality; striving to improve the profession;

96 *Idem* 40-45.
97 De Klerk *et al supra* n 4 at 253-262; AULAI Manual (2005) 83-86.
98 De Klerk *et al supra* n 4 at 233-252; AULAI Manual (2005) 68-70.
99 AULAI Manual (2005) 64-67.
100 De Klerk *et al supra* n 4 at 253-262; AULAI Manual (2005) 83-86.
101 De Klerk *et al supra* n 4 at 29-262.
102 *Idem* 83-102.
103 *Idem* 155-172; AULAI Manual (2005) 46-50.
104 De Klerk *et al supra* n 4 at 173-192; AULAI Manual (2005) 51-55.
105 De Klerk *et al supra* n 4 at 193-218.
106 *Idem* 219-232; AULAI Manual (2005) 125-130.
107 http://educatingtomorrowslawyers.du.edu/about-etl/carnegie-recommendations/ (accessed on 2015-04-22). In 1992 the MacCrate Report identified and published four values as provision of competent representation namely, striving to promote justice, fairness and morality, and striving to improve the profession and professional self-development. MacCrate Report *supra* n 39; see also Brücker & Woodruff 2008 *supra* note 39 at 593.
108 Chavkin 'Experience is the only teacher: Meeting the challenge of the Carnegie Foundation Report' 2007 *Legal Education Digest* 5.

professional and self-development; judgment; professionalism; civility; and conservation of the resources of the justice system.[109]

4 3 1 Values Summary

The core values that were identified in foreign jurisdictions are equally important and embraced in the South African landscape and are specifically evident in the teaching and practice of ethics, professionalism and case and file management.

5 Conclusion

It was indicated that, although university law clinics strive to serve the indigent members of the community, their main focus area is providing practical training to LLB students, in an academic clinical environment, whilst free legal services are rendered.

The mission of a university law clinic informs the roles of its clinicians and its focus, which should be on the training of students, thereby requiring an assessable CLE curriculum to ensure academic integrity and sustainability. It was indicated that an assessable curriculum must comply with the university law clinic's determined outcomes, skills and values.

Required and recommended outcomes, skills and values were identified across a number of jurisdictions and compared to those applied in the South African clinical environment. These should form the basis from which an assessable CLE curriculum can be designed. Adherence should address the complaints and criticisms by legal practice.

109 Identified and proposed by the Law Society of England and Wales, see Stuckey *supra* n 30 at 44; the State Bar of Wisconsin's Commission on Legal Education, see Findley *supra* n 39 at 324; for the USA and Canada see the MacCrate Report *supra* n 39; for the Bar Council of India see Bloch & Prasad *supra* n 39 at 209-212; for Australia see Giddings *supra* n 39 at 12; for Germany see Brücker & Woodruff *supra* n 39 at 579.

Responsible unionism during collective bargaining and industrial action: Are we ready yet?

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OPSOMMING

Verantwoordelike Vakbond Optrede Gedurende Kollektiewe Bedinging en Nywerheidsaksie: Is ons Gereed?

Vakbonde speel nie net 'n belangrike rol in die kollektiewe bedingingsproses (ingesluit nywerheidsaksie) nie maar ook in die breër ekonomie en samelewing. Daar word dus verwag van vakbonde om nie net verantwoordelik op te tree wanneer hulle beding namens hulle lede nie maar ook as verantwoordelike burgers in die algemeen op te tree. Hierdie verantwoordelikheid word verder uitgebrei wanneer vakbonde in die publiek wil protesteer en moet hulle dus verantwoordelikheid neem vir hul lede se optrede in die openbaar. In hierdie artikel word ondersoek ingestel na die vraag of vakbonde verantwoordelik gehou moet word vir die optrede van hul lede wat skade aan ander se eiendom veroorsaak sowel as of vakbonde anders moet optree wanneer hulle met werkgewers beding vir die verbetering van werknemers se lone en diensvoorwaardes.

1 Introduction

In 1995 the South African labour market was transformed by the introduction of the Labour Relations Act (the "LRA").[1] The LRA is the primary piece of labour legislation that governs labour law in South Africa. It marks "a major change in South Africa's statutory industrial relations system" and, following the transition to political democracy, the LRA encapsulates the government's aims to reconstruct and democratise the economy and society in the labour relations arena.[2] Other important pieces of labour legislation in South Africa are the Basic Conditions of Employment Act (the "BCEA")[3] and the Employment Equity Act (the "EEA").[4] The notion of industrial democracy and transformation of the workplace are central issues in South African labour law. Constitutional change in South Africa has advanced the protection of human rights and the democratisation of the workplace.

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1 Act 66 of 1995.
2 Du Toit *et al Labour Relations Law* (2006) 5.
3 Act 75 of 1997.
4 Act 55 of 1998.

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Trade unions in South Africa, even prior to 1994, demand greater democracy in the workplace: Some employers have taken initiatives to involve employees in decision-making.[5] Rights, such as the freedom of association, as well as the rights to organise and strike are afforded to employees and recognised by both the Constitution of the Republic of South Africa, 1996[6] and the LRA.[7] Other rights, such as freedom of trade, occupation and profession, are also provided for in the Constitution.[8] The constitutional right of "[e]very trade union, employer's organisation and employer" to "engage in collective bargaining" is also provided for.[9]

The Constitution grants every person a fundamental right to fair labour practices and the right of workers to strike.[10] The right to strike as well as the right to engage in collective bargaining is regulated by the LRA.[11] Trade unions occupy a particular place in the South African labour market as well as in the economy: They affect the functioning of a business, organisation or workplace internally or externally. Collective bargaining (coupled with the right to strike) has become a primary means to force employers to negotiate on the improvement of standards and conditions of employment.

In the context of the rights and freedoms granted to trade unions, the author attempts to address the issue regarding "responsible unionism". The article, however, will not discuss the intricacies of strike action, the limitations thereof and the consequences of strikes. The article will briefly highlight the following issues: The first part of the article explores the collective bargaining framework as well as the right to strike; the second part looks at what constitutes responsible unionism and the final part looks at the realities and problems that trade unions face.

2 Collective Bargaining and Right to Strike

2 1 Collective Bargaining

Collective bargaining has a long history, evidenced by developments in different countries, as well as by the importance it has played in granting workers a greater "voice" in organisations. Collective bargaining is largely an adversarial process, which involves negotiation between parties with conflicting interests "seeking to achieve mutually acceptable compromises".[12] The right to engage in collective bargaining

5 Du Toit 'Democratising the employment relationship (a conceptual approach to labour law and its socio-economic implications)' 1993 *Stell LR* 325.
6 Ss 23(2), (3) & 4 of the Constitution.
7 Ss 4 & 5 of the LRA as well as Chapter IV of the LRA.
8 S 22 of the Constitution.
9 S 23(5) of the Constitution.
10 Ss 23(1)(a), (2)(c) & (5) of the Constitution.
11 Chapters II, III & IV of the LRA, especially ss 64-68 (for strike provisions). The LRA also provides for protest action in s 77.
12 Godfrey *et al Collective Bargaining* (2010) 1.

"presupposes that workers are entitled to participate effectively in determining and defending their terms of employment".[13] For workers, it is primarily a means of maintaining "certain standards of distribution of work, of rewards and of stability of employment",[14] whereas employers view it as a means of ensuring "industrial peace".[15] In line with this discussion it is important to first look at the development of collective bargaining.

Collective bargaining is widely accepted as the primary means of determining employment terms and conditions in South Africa. Due to South Africa's particular history, collective bargaining has been "underlined by the legacy of deep adversarialism" between employers and organised labour.[16] It has been argued that various behaviours in the selection of collective representatives, the conduct of collective bargaining, and the enforcement of collective agreements are prescribed and proscribed by labour laws in that the greatest net benefit from collective bargaining can be obtained when a system is in place that promotes good faith bargaining and efficient enforcement of collective agreements.[17]

The constitutional framework supports the provisions of the LRA. Section 23(5) of the Constitution provides that every trade union, employers' organisation and employer has the right to engage in collective bargaining.[18] In *SA National Defence Union v Minister of Defence & Others*[19] O'Regan in an *obiter dictum* noted the following:[20]

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13 Du Toit & Ronnie 'The necessary evolution of strike law' 2012 *Acta Juridica* 198. In *SAMWU & Another v SALGA & Others* 2010 31 *ILJ* 2178 (LC) the court said that '[t]he LRA introduced a voluntarist system of collective bargaining, a system in which neither this court (nor any other court or tribunal) is empowered to scrutinize bargain conduct or make pronouncements on the good faith or otherwise exhibited by any of the parties to collective bargaining' (par 16).

14 Du Toit 'What is the Future of Collective Bargaining (and Labour Law) in South Africa' 2007 *ILJ* 1405 points out that the 'qualifier "primarily" is important: power built up in the bargaining arena enables trade unions also to engage with broader issues and exert political pressure'.

15 See Davies & Freedland *Kahn-Freund's: labour and the law* (1983) 69 as well as Godfrey *et al* 1 and Du Toit 2007 *ILJ supra* n 14 at 1405.

16 Du Toit 'Collective Bargaining and Worker Participation' 2000 *ILJ* 1544.

17 Dau-Schmidt, Harris & Lobel *Labor and Employment Law* (2009) 96.

18 It has been a widely controversial issue as to whether s 23 of the South African Constitution imposes a duty to bargain. See Cheadle, Davis & Haysom *South African Constitutional Law* (2006) 18-25 where Cheadle develops three arguments against interpreting the right to engage in collective bargaining so as to include a positive right to bargain. S 27(4) of the *Interim Constitution*, 1993 was worded differently as it afforded works and employers the 'right to organise and bargain collectively'.

19 [2007] 9 BLLR 785 (CC) at par 55.

20 See also Van Niekerk & Smit (eds) *Law@work* (2015) 366 regarding the *SANDU* case. The duty to bargain was deliberately excluded by the drafters of the LRA (Van Niekerk & Smit (eds) 386). See in this regard *The Explanatory Memorandum to the Draft Labour Relations Bill Prepared by the Ministerial Task Team* 1995 *ILJ* 292.

> [I]t should be noted that were section 23(5) to establish a justiciable duty to bargain, enforceable by either employers or unions outside of a legislative framework to regulate that duty, courts may be drawn into a range of controversial industrial relations issues. These issues would include questions relating to the level at which bargaining should take place (i.e. the level of the workplace, at the level of an enterprise, or at industrial level); the level of union membership required to give rise to that duty; the topics of bargaining and the manner of bargaining. These are difficult issues, which have been regulated in different ways in the recent past in South Africa ...

Proponents of the right to organise have argued that collective bargaining not only allows employees the opportunity to gain a larger share of the fruits of their efforts, but also promotes equity in bargaining power between labour and management.[21] The collective bargaining process therefore ensures that the interests of employees can be enforced by themselves or their trade union representatives, and also that an economic exchange between the collective workforce and the employer takes place.[22]

2 2 The Right to Strike

One of the purposes of the LRA (as indicated earlier) is to promote collective bargaining[23] and to provide a framework within which employers, employers' organisations, trade unions and employees can bargain collectively to determine conditions of employment, formulate industrial policy and provide for other matters of mutual interest.[24] It must be reiterated that the LRA sets out not only to promote "*labour peace"* but also "*orderly collective bargaining*" and "*the effective resolution of labour disputes*".[25] It is clear that the "right and concomitant duty to bargain collectively is enshrined in the LRA"[26] and is "integral to a system that sets out to civilise the workplace, to provide for a fair distribution between wage and profits, keep the economy vibrant and contribute to the wider democratic order".[27]

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21 Dau-Schmidt, Harris & Lobel 96.

22 Metcalf 'Workplace Governance and Performance' 1995 *Employee Relations* 9.

23 Chapter III of the LRA regulates collective bargaining in ss 11-63 of the Act.

24 Preamble and s 1 of the LRA. See for example *Rand Tyre and Accessories (Pty) Ltd v Industrial Council for the Motor Industry (Transvaal), Minister for Labour & Minister for Justice* 1941 TPD 108 115 with regards to the meaning of matters of 'mutual interest'.

25 S 1 of the LRA (own emphasis). One of the aims of the LRA is providing 'simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration'. The CCMA was established for these purposes.

26 Davis & Le Roux 'Changing the role of the corporation: A journey away from adversarialism' 2012 *Acta Juridica* 317.

27 *Ibid;* where they refer to Thompson 'Bargaining over business imperatives: The music of spheres after *Fry's Metals*' 2006 *ILJ* 785.

Central to collective bargaining is the right to strike[28] and the recourse to lock-out[29] – respectively available to employees and employers. The processes of consultation and negotiation, as well as the recourse to lock out are options available to employers in their use of power in order to facilitate changes to the terms and conditions of employees.[30] Strike action[31] is the economic weapon available to the employees and trade unions in collective bargaining, but is effective only in certain circumstances. It is argued that strikes grant workers a meaningful voice regarding what goes on in the workplace and thus grants them power to stop production and enables them to retain their dignity by showing the employer that they are "not just cogs in a machine".[32]

The right to strike, freedom of association and organisation and the right to bargain collectively are all interrelated. The right to strike is, evidently, not only an essential component of the right to freedom of association[33] but, is also "inextricably linked to a process of collective bargaining".[34] The right to strike enjoys a "high degree of protection"[35] in South Africa: The right to strike is:[36]

28 See, for example, *South African Police Service v Police and Prison's Civil Rights Union* 2011 (6) SA 1 (CC) where the court confirmed that an important purpose of the LRA is to give effect to the right to strike and that the process of interpretation is important in order to give effect to the purpose 'so as to avoid impermissibly limiting the right to strike' (par 30).

29 S 213 of the LRA defines a lock-out as follows: 'The exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion'.

30 Davis & Le Roux 2012 *Acta Juridica* 317.

31 A strike is defined by s 213 of the LRA as follows: '[T]he partial or complete *concerted refusal to work* or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers for the purpose of remedying a grievance or resolving a dispute over any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory' (own emphasis). '*Concerted refusal to work*' and the reference to *persons* clearly indicates that more than one person must be involved in the refusal to work. This was clearly indicated in *Schoeman & Another v Samsung Electronics (Pty) Ltd* [1997] 10 BLLR 1364 (LC) 1367 where the Labour Court held that an individual employee cannot strike and that a lock-out can also not be effected against a single employee. It is however possible for a single employer to lock-out employees. See also Du Toit & Ronnie 2012 *Acta Juridica* 206 in this regard.

32 Chicktay 'Placing the Right to Strike within a Human Rights Framework' 2006 *Obiter* 348.

33 Manamela & Budeli 'Employees' right to strike and violence in South Africa' 2013 *CILSA* 308.

34 Davis & Le Roux 2012 *Acta Juridica* 319. See also *NUMSA v Bader Bop (Pty) Ltd* 2003 3 SA 513 (CC) par 13 in this regard.

35 Du Toit & Ronnie 2012 *Acta Juridica* 204.

36 Van Niekerk & Smit (eds) 415.

> [A]n essential means for the promotion of the social and economic interests of employees and trade unions, based ultimately on the proposition that trade unions should be free to organise their activities and formulate their programmes for the purposes of defending the interests of their members.

It is clear from the provisions of the Act that strike action (and the recourse to lock-out) should meet certain requirements for it to be protected. Although the right to strike is recognised by the Constitution in section 23(2), it is not absolute since it may be limited under certain circumstances. This limitation applies only to industrial action called by a trade union, in support of a demand related to the bargaining process or matters of mutual interest, being recognised as a "strike". The LRA *also* imposes a number of substantive and procedural limitations on the right to strike.[37]

The recourse to lock employees out of the workplace, is recognised only in the LRA, but it does not mean that the status or protection thereof is lesser or weaker than the right to strike. This sentiment was illustrated in the Constitutional Court's judgment in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* in which the court held that:[38]

> … the effect of including the right to strike does not diminish the right of employers to engage in collective bargaining, nor does it weaken their right to exercise economic power against workers. The right to bargain collectively is expressly recognised by the text …

Yacoob ADCJ (in his majority judgment) in *SATAWU v Moloto*,[39] noted the importance of the right to strike as follows:[40]

> … the right to strike, rooted in collective bargaining, is premised on the need to introduce greater balance in the relations between employers and employees, where employers have the greater social and economic power.

37 Strikes and lock-outs are dealt with in Chapter IV of the LRA. Secondary strikes are dealt with in s 66. Du Toit & Ronnie 2012 *Acta Juridica* 205 point out that one of the implicit limitations which workers in standard employment may not experience as limitations at all is the fact that *Constitution* extends the right to strike to every 'worker' and that s 64(1) of the *LRA* confines it to 'employees'. They add that this limitation 'is significant to the extent that the term 'worker' is broader than the term 'employee', and changing patterns of production have resulted in work being performed by persons other than employees and thus there 'is a duty on the state to ensure, as far as possible, that not only employees but all workers are able to exercise this right effectively'.

38 1996 (4) SA 744 (CC) par 65.

39 2012 (6) SA 249 (CC) par 85.

40 The court went further in the *SACAWU* case par 85-86 regarding the minimal procedural pre-conditions set in s 64 of the LRA.

It should be noted that workers are also afforded the right to take part in protest action,[41] which "may take the same form as a normal strike" but which differs from a strike as its object is different – it deals with the socio-economic interests[42] of workers.[43]

Legitimacy thus attaches to the right to strike when it is part of "a continuing collective bargaining process".[44] The right to strike is regarded as "a potential weapon that serves to maintain the equilibrium between labour and the concentrated power of capital".[45] It is evident from the provisions of the LRA that *labour peace* and *orderly collective bargaining*[46] should be promoted.[47] Strike action should be peaceful: The strike should not only be orderly (in that it should be protected) but workers taking part in such a strike should refrain from misconduct.[48]

3 Responsible Trade Unionism

The role of trade unions is confined not only to the political arena but extends into the economic and social spheres. Labour, through trade unions, plays an important and active role in decision-making that "vitally concerns its interests" as important elements of social life.[49] Trade unions have a duty not only to collaborate with other social institutions, which include representatives of management and capital, but they also have responsibilities when it comes to the production of wealth.[50] Their duties are not limited to the distribution of wealth, but extend to the production thereof. Therefore, it is important for society as

41 S 77 & 213 of the LRA. S 213 of the LRA defines a protest action as the 'partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interest of workers, but not for the purpose referred to in the definition of a strike'.

42 See for example *Government of the Western Cape Province v COSATU* 1999 20 *ILJ* 151 (LC) where the court held that an all-embracing definition of socio-economic rights is not possible and that it should be viewed on a case by case basis and each on its own merits. The protest action against the Western Cape Education Department for the poor state of education fell within this meaning of socio-economic rights of workers.

43 Chicktay 'Defining the right to strike: A comparative analysis of International Labour Organization standards and South African law' 2012 *Obiter* 265. See also Gericke Revisiting the liability of trade unions and/or their members during strikes: Lessons to be learnt from case law' 2012 *THRHR* 570 where she points out that a 'political' strike and thus protest action would be best suited to affect the promotion of the socio-economic interests of workers.

44 Rycroft 'What can be done about strike-related violence?' 2 paper presented at *Labour Law Research Network Inaugural Conference* Pompeu Fabra University, Barcelona 13-15 June 2013.

45 Van Niekerk & Smit (eds) 415.

46 Own emphasis.

47 S 1 of the LRA.

48 Rycroft *supra* n 43 at 16.

49 Lower *Employee Participation in Governance: A legal and ethical analysis* (2012) 151.

50 *Ibid*.

a whole, and not simply for corporations and their shareholders, that wealth creation takes place in a continuous and sustainable manner. Sustainable development and participatory democracy are inextricably connected and trade unions play a key role in the democratic process.[51] The role of trade unions can be summarised as follows:[52]

> Beyond their functions of defending and vindicating, unions have the duty of acting as representatives working for 'the proper arrangement of economic life' and of educating the social consciences of workers so that they will feel that they have an active role, according to their proper capacities and aptitudes, in the whole task of economic and social development and in the attainment of the universal common good.

Responsible unionism is relevant to the "interpretation of good faith bargaining by unions",[53] as well as to other issues such as governance and the exercising of the various rights and freedoms afforded to trade unions. It is clear that trade unions not only play an important role in the promotion of better working conditions for workers, but also contribute to shaping society at large.

It is important to note that the LRA provides not only for "a framework within which employees, trade unions, employers and employers' organisations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest",[54] but also aims to "promote orderly collective bargaining".[55] From a social justice perspective, trade unions are regarded as the primary vehicles through which social justice is achieved.[56] This view is based upon Sir Kahn-Freund's conception of labour law, put forward in the 1950s and 1960s, as a means of counteracting the inequality in bargaining power between employers and employees.[57] An equilibrium, according to Kahn-Freund, can be maintained and best achieved through voluntary collective bargaining in which the law plays (a secondary role) as "it regulates, supports and constrains the power of management and organised labour".[58] The interests of the bargaining parties and their respective power drive not only the bargaining process but also the outcomes of the process. If a more contemporary social justice perspective is applied, it might not only "acknowledge collective bargaining as an important means to define and enforce protection for workers", but also "recognise rights as a complementary and perhaps more significant medium to promote social justice in the workplace".[59]

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51 Kester *Trade Unions and Workplace Democracy in Africa* (2007) 3.
52 Lower 151 where he quotes from *The Compendium of the Social Doctrine of the Church*.
53 Floyd 'Fair work laws: Good faith bargaining, union right to entry and the legal notion of "responsible unionism"' 2009 *ABLR* 265.
54 S 1(c)(i) of the LRA.
55 S 1(d)(i) of the LRA.
56 Van Niekerk & Smit (eds) 8.
57 *Ibid*.
58 See Davies & Freedland 15 as well as Van Niekerk & Smit (eds) 9.
59 Van Niekerk & Smit (eds) 10.

Trade unions are essential in the promotion and protection of the various rights of workers, but they should also ensure, in the promotion of worker interests, that they are sustainable. Unions sometimes face a dilemma: On the one hand they want more benefits through collective bargaining, but on the other, more "collective bargaining benefits" can increase the costs of labour and production which makes the firm less profitable and results, possibly, in reducing the number of workers.[60] Some trade unions are concerned only with the improvement in the benefits of their members and demand higher wages "at the expense of employment levels", thereby overlooking the effect of their actions on other workers and on society.[61] Other unions look for alternative outcomes such as the payment of "market wages" and look for ways to increase productivity that will result in a win-win situation.[62]

There is a situation in which pressure may be exerted by stakeholders, such as trade unions, which have institutional interests that can differ from the interests of their members (let alone those of employers), and other stakeholders outside the enterprise (such as consumers or environmental groups).[63] Employers and employees may also be exposed to market and political pressures over which they have little or no control.

It is argued that trade unions should demonstrate a form of social responsibility. Union social responsibility can be defined as "the responsibility of a union to look after the interest of the wider economy beyond the interest of the union itself".[64] However, it does not entail that trade unions should not seek to improve the terms and conditions of employment of their members. Rather, it is a question of whether the union looks after its members' interests now as well as later. It is a question which is especially relevant in times when industries, or the country as a whole, are in a distressed situation and job losses are evident, or the economy is in an ever greater downward spiral. It is not argued that trade unions should abandon negotiating with employers, but rather they should, for example, find an alternative to strikes in such a situation. It is commonplace that trade unions want to improve the employment conditions of their members:[65] It is proposed that trade unions should "*aim to improve the life of workers in a sustainable manner*".[66]

60 Chew & Soon-Beng 'Union Responsibility: A necessary Public Good in a Globalized World' 2010 *The International Journal of Comparative Labour Law and Industrial Relations* 435.
61 *Idem* 436.
62 *Ibid*.
63 Du Toit 'Industrial democracy in South Africa's transition' 1997 *Law, Democracy & Development* 43.
64 Chew & Soon-Beng 2010 *The International Journal of Comparative Labour Law and Industrial Relations* 436.
65 *Idem* 438.
66 *Ibid* (own emphasis).

The author, in order to determine what both sustainable and responsible trade unionism entails, proposes that it would be valuable to explore corporate governance and corporate social responsibility issues by way of an analogy. Corporate governance and social responsibility programmes play a significant role in the establishment and enforcement of basic labour rights, "especially in host countries that have little in the way of labour market regulation, or where to attract investment or for want of resources, minimum labour standards are not enforced".[67] The developments in the realm of corporate governance and social responsibility may serve to promote collective bargaining (to the extent that basic labour rights include the rights to organise and to bargain collectively), especially in environments in which the legislative environment remains hostile.[68]

It can be said that labour law originated by focusing on employment relations in order to regulate the conditions of tangible labour and to extend protection to workers' physical bodies; it then evolved to protect "employment" and to organise workers collectively within the enterprise (which is the economic *locus* of decision-making) to the point where workers' interests are taken into account, as well as their level of input in decision-making.[69]

Companies, for example, should offer an opportunity to align their expectations, ideas and opinions with those of other stakeholders on certain issues.[70] The same can be said about trade unions. In the same way that companies should consider the legitimate interests of employees (as pointed out in the King Report on Corporate Governance for South Africa in 2009 (*King III*)), trade unions, as stakeholders, should consider the "legitimate interests" of their members at the negotiating table. An important responsibility resting on the shoulders of trade unions is that they should ensure that existing employees are gainfully employed.[71]

Sustainable development is significant here. An underlying philosophy of *King III* is that companies should be regarded as good corporate citizens in that they should subscribe to the sustainability considerations

67 Van Niekerk & Smit (eds) 10.
68 Ibid.
69 Morin 'Labour law and new forms of corporate organization' 2005 *International Labour Law Review* 5 11.
70 *King Report on Corporate Governance for South Africa* in 2002 (Institute of Directors *King Report II*) 110–111.
71 Le Roux 'The purpose of labour law: Can it turn green?' in Malherbe & Sloth-Nielsen (eds) *Labour Law into the Future: Essays in honour of D'Arcy du Toit* (2012) 240.

that are rooted in the Constitution.[72] Sustainability[73] encompasses an inclusivity of stakeholders (which is essential in order to achieve sustainability), innovation,[74] fairness and collaboration,[75] as well as social transformation and redress.[76] The manner in which a corporation treats its employees is also important. The principle of fairness is central for representative trade unions to ensure that employers treat the workers in a fair manner. Fairness is a key principle in addressing the issue of social injustice.[77] Social injustice is unsustainable and is counter-productive.[78] Fairness, thus, plays an important role in that society is not exclusively concerned with the maximisation of aggregate wealth but also with the equality of its distribution.[79]

Economic justice is, mostly, ignored in mainstream corporate law: When "people use bargained-for exchange to distribute goods, the weaker bargainer will be less able to extract concessions from the other".[80] Labour, through trade unions, makes it possible for workers to have a form of economic justice. It is clear that even if the less-well-off party is marginally better off, the more powerful party to the contract will tend to be much better off: Unless there is "*some explicit constraint on the ability of corporations to pass along the lion's share or profit to shareholders, the nation's inequality will worsen over time*".[81] It is important for trade unions to take note not only of labour law when they bargain on behalf of workers, but also of certain corporate laws which extend certain rights to workers.

72 Sustainability of a company means 'conducting operations in a manner that meets existing needs without compromising the ability of future generations to meet their needs. It means having regard to the impact that the business operations have on the economic life of the community in which it operates. Sustainability includes environmental, social and governance issues' (*King Report on Corporate Governance for South Africa* in 2009 (Institute of Directors *King Report III*) 60 (available from www.iod.com).

73 Institute of Directors *King Report III* 13.

74 Innovation will include new ways in which companies are doing things and will include for example profitable responses to sustainability (Institute of Directors *King Report III* 13).

75 Collaboration, for example, should not amount to 'anti-competitiveness' (Institute of Directors *King Report III* 13).

76 Social transformation and redress from 'apartheid' are important and should be integrated within the broader transition to sustainability because by integrating sustainability and social transformation 'in a strategic and coherent manner will give rise to greater opportunities, efficiencies, and benefits, for both the company and society' (Institute of Directors *King Report III* 13).

77 Institute of Directors *King Report III* 13.

78 *Ibid*.

79 Greenfield 'New principles for corporate law' 2005 *Hastings Business Law Journal* 109-110.

80 *Idem* 111.

81 *Ibid* (own emphasis).

Corporate law is well-suited and is an efficient means to promote fairness and to redistribute wealth and income, more so than other areas of regulation.[82] A stakeholder-oriented corporate law "would work at the initial distribution of the corporate surplus and would benefit stakeholders up and down the economic hierarchy".[83] If fairness is taken as seriously as a value, a corporate law framework, that does not promote fairness, cannot be blindly accepted.[84] Corporate governance should focus on procedural fairness (rather than trying to reach agreement *ex ante* about substantive fairness): Its crucial objective *is* "*to create methods of decision-making*" that offer procedural fairness among the various stakeholders.[85] In order to make it a real possibility that a corporation serves its stakeholders by creating wealth in a sustainable manner and shares the wealth in an equitable way, the management (and trade unions) need to be subject to different constraints. Good corporate governance, of which the advancement of sustainability is a fundamental component, has the potential not only to benefit the owners of the corporation but also those whom they employ.[86] Trade unions, like management, should consider sustainability issues when they negotiate.

It can, at a basic level, be argued that employees would like corporations (as employers) to fulfil their basic needs, such as the payment of a fair wage, the provision of safe working conditions, job security, future career opportunities, *et cetera*.[87] A decent work agenda should be promoted: Four core values, namely, the opportunity to work, the right to freedom of association, social protection, and "voice" are important.[88] In this regard it is important to mention the International Labour Organisation's (ILO) thinking on the relationship between decent work and sustainability:[89]

> The world needs more and better jobs, especially in societies suffering from widespread poverty, and these jobs must have the quality of sustainability. Decent work for sustainable development means that in social terms, such jobs must be open to all equally and the related rewards have to equitable. Inequality and discrimination provoke frustration and anger, and they are a recipe for social dislocation and political instability. Extending opportunities for decent work to more people is a crucial element in making globalization

82 *Ibid*.
83 *Idem* 112.
84 *Ibid*.
85 *Idem* 113 (own emphasis).
86 Le Roux 'The purpose of labour law: Can it turn green?' in Malherbe & Sloth-Nielsen (eds) *supra* n 68 at 242.
87 *Ibid*.
88 The concept decent work 'is based on the understanding that work is not only a source of income but more importantly a source of personal dignity, family stability, peace in community, and economic growth that expands opportunities for productive jobs and employment' (ILO 2010 www.ilo.org). See also in this regard Cohen & Moodley 'Achieving "decent work" in South Africa' 2012 *PER* 320-569.
89 ILO 'Toolkit for Mainstreaming Employment and Decent Work' (2008) available from http://www.ilo.org

> more inclusive and fair. In economic terms, jobs have to be productive and able to compete in a competitive market. And environmentally, they must involve the use of natural resources in ways that conserve the planet for future generations, while being safe for working women and men and for the community.

Le Roux (in an exploratory paper) asks the question: "What does this [sustainability] imply for unions (and also employers), assuming that they do adopt the concept?"[90] Le Roux examines the possibility of trade unions adopting the concept of sustainability and how sustainable employment can be achieved. She points out that trade unions "will have to be mindful of the environment in their day-to-day operations, but sustainability ought to become the basis of their decision-making and, more importantly, the basis on which they bargain".[91] Le Roux stresses the importance of sustainability as well as the achievement of sustainable employment as follows:[92]

> While the best and immediate financial interests of their members will probably remain at the top of the bargaining agenda for unions, the proposed approach will require all stakeholders to consider not only how the wage bargain can feed into sustainability, but also how the bargaining process can add value to all five capitals [financial, human, social, environmental and manufactured] … This may mean including sustainability issues (in the deep green sense), but more specifically sustainable employment, on the bargaining agenda. The details of sustainable employment will have to be developed over time, but examples include employer subsidies for the use of public transport as an incentive for car owners to use public transport, incentives for other energy-saving techniques by employees (instead of a higher percentage remuneration increase), work/life cycle incentives, and avoiding demands (for example, remuneration increases) which are simply not sustainable in particular economic climates and that will inevitably, if agreed to result in retrenchments and possibly encourage employers to mechanise where this was not necessarily planned. Sustainable employment may also mean developing social networks which advance social capital without necessarily advancing the wage bargain, such as training and education programmes for employees and even their families. Such an approach may also mean, if the transience of employment is indeed as intrinsic as suggested above, that it may be necessary to shift from employment security to employability as an underlying objective of employment (for example, re-skilling provided for by employers and employer assistance with post-employment schemes, such as the establishment of a co-operative that continues to provide a service to the employer). The important point is that sustainable employment will require all parties concerned to harness sustainability levels, including 'the self', 'the partnership' (employee/employer relationship) and 'the environment', and to abandon short-term goals for long-term benefits.

90 Le Roux 'The purpose of labour law: Can it turn green?' in Malherbe & Sloth-Nielsen (eds) *supra* n 68 at 242.
91 *Ibid*.
92 *Idem* 242-243.

Le Roux (in a later article)[93] acknowledges that the "decent work" agenda of the ILO was omitted and asks the question: "Does the fact that work is decent imply that it is also sustainable?"[94] She finds that there is a close interface between decent work and sustainable work, but that they are "probably not always the same thing": Decent work is "key to sustainable work, but in order to be sustainable, work should, in addition to being decent, also have an element of longevity or durability".[95] Sustainable work, it appears, at a micro level (while not guaranteeing the regularity of income associated with waged employment) may "hold the prospect of an 'ongoing earnings floor', personal growth, and empowerment".[96]

In view of the above, it is argued that trade unions that seek to improve the life of workers in a sustainable manner should be "macro-focused".[97] The aim of such "macro-focused" trade unions would be "to set wages at levels that would maximise employment, which is based on the competitiveness of the firms".[98] Such trade unions will also work closely with firms and government in order to achieve such competitiveness.[99]

A problem faced by macro-trade unions is the issue of free riders. The problem of free riders is addressed in South Africa by the so-called "closed-shop agreements" and "agency-shop agreements", in which either all employees, that work for an employer, are members of a majority representative trade union or non-members are forced to pay union membership fees.[100] This practice addresses the issue of the survival of trade unions and enables a trade union to promote the interests of workers in a responsible manner.

It is thus argued, with regard to responsible unionism, that elements of responsible corporate citizenship should be applied to trade unions in evaluating whether or not they act in a responsible manner. Trade unions are equipped with huge amounts of social, economic and political power and need to be responsible when negotiating with employers, and other important role players and social partners, about the livelihoods of the most vulnerable workers. They are entrusted with a huge responsibility to care about the terms and conditions of employment but also to bargain from a sustainability perspective.

From the meaning attributed to corporate citizenship in *King III*, it is evident that responsible corporate citizenship implies "an ethical relationship between the company and the society in which it operates"

93 Le Roux 'A Social Economy and Sustainability: Is there Potential for an Interface?' 2013 *Obiter* 512-513.
94 *Idem* 519.
95 *Ibid.*
96 *Ibid.*
97 Chew & Soon-Beng 2010 *The International Journal of Comparative Labour Law and Industrial Relations* 438.
98 *Ibid.*
99 *Ibid.*
100 Ss 25 & 26 of the LRA.

and, as responsible corporate citizens of the societies in which they do business, "companies have, apart from rights, also legal and moral obligations in respect of their economic, social and natural environments".[101] As a responsible corporate citizen, the company should protect, enhance and invest in the wellbeing of the economy, society and the natural environment.[102] It is proposed that a responsible trade union should demonstrate the same traits if they, too, are to be responsible citizens. When bargaining or negotiating, they should take into account their various freedoms and rights, while also protecting, enhancing and investing in the wellbeing of the economy, society and the natural environment. It is important that trade unions take note of both their legal and moral obligations.

4 Realities and Problems Faced by Trade Unions

4 1 Recourse to Lock-out and Replacement Labour

In a strike, employers may resort to negotiation with employees or to a lock-out.[103] Employers can utilise replacement labour as a bargaining tool. Section 76(1)(b) of the LRA provides that an employer can make use of replacement labour only when the lock-out is in response to a strike. Strike action can lose its edge in a depressed economy where jobs are scarce and there is a large pool of unemployed people so that employers can make use of replacement labour or scab labour when employees strike. However, an employer is prohibited from taking into employment any person to continue or maintain production during a protected strike if the whole or part of the employer's services has been designated a maintenance service,[104] or to perform the work of any employee who is locked out, unless the lock-out is in response to a strike.[105] This recourse is only available to the employer when the lock-out is in response to a strike.[106]

4 2 Beyond the Scope of Collective Bargaining

A particular problematic instance relates to essential services and, in general, collective bargaining in the public sector. If the right to strike is limited (as is the case in essential services), employee participation arguably becomes even more important.[107] In South Africa the number of unprotected strikes in the public sector, including in essential sectors such as health care and electricity services, indicates that neither the

101 Institute of Directors *King Report III* 117.
102 *Ibid*.
103 Qotoyi & Van der Walt 'Dismissals within the Context of Collective Bargaining' 2009 *Obiter* 67.
104 S 76(1)(a) of the LRA.
105 S 76(1)(b) of the LRA.
106 S 76(2) of the LRA.
107 Essential, minimum and maintenance services are regulated in ss 70-75 of the LRA.

collective bargaining model nor the dispute resolution system works effectively in these instances. Since 2007, collective bargaining in South Africa has become increasingly adversarial: "[A] decline in negotiating capacity, the re-emergence of non-workplace issues negotiations, and the rise of general mistrust between the parties"[108] are key factors contributing to the situation.[109] Demands for the inclusion of social benefits, like medical aid schemes and the payment of transport and housing allowances, are on the increase.[110] Workers seek not only equality in the workplace but also social justice (in the wide sense falling outside the ambit of collective bargaining) in order to satisfy socio-economic conditions and seek the adequate delivery of social services.[111]

The absence of a mutually acceptable benchmark to target wage increases, is regarded as a contributing factor furthering the difficulty in resolving wage disputes.[112]

4 3 Long Term Collective Agreements

In order to contribute to a stable bargaining climate, the trend is to negotiate multi-year (often up to three year) collective agreements.[113] These have become more prevalent in many sectors.[114] Long term-agreements are preferred by employers most notably in the steel and engineering, mining and automobile sectors to "ensure labour stability in the short/medium term".[115] Rivalry within and between trade unions affect dispute resolution in many sectors: "[T]rade union leaders facing a challenge to their position may be pressured into being less conciliatory in negotiations to ward off any criticism that they are insufficiently militant".[116] Traditional collective bargaining in which "deep-seated antagonism rather than any form of partnership or dialogue operates to solve the dispute" results in the parties going back and forth with high demands and low counter-offers with the negotiations resembling no more than a series of "perfunctory motions".[117] After a period of back and forth, the parties "incrementally remove non-wage related issues from the table", but it becomes increasingly difficult to bridge the gap in their positions; especially in relation to monetary demands.[118] The

108 National Planning Commission (2012) par 34.
109 Benjamin 'Beyond Dispute Resolution: The Evolving Role of the Commission for Conciliation, Mediation & Arbitration' 2014 *ILJ* 3.
110 *Idem* 4.
111 Kahn 2012 A *Chance to Reassess our System of Industrial Relations*' http://www.ccma.org.za/News.asp?L1 = 37.
112 Benjamin 2014 *ILJ* 4.
113 *Ibid*.
114 *Ibid*.
115 *Ibid*.
116 *Ibid*.
117 Davis & Le Roux 2012 *Acta Juridica* 319-320.
118 *Idem* 320.

parties resort to power-play to put pressure on each other: In the hand of trade unions the end result is, invariably, full-blown strike action.[119]

4 4 Violent and Lengthy Strike Action

Strike action sometimes becomes violent. Benjamin points out that in recent years industrial action "has been characterized by violent and destructive behaviour, as well as 'an observable contempt of the LRA and court orders'".[120] The use of collective violence, aimed at the employer, non-striking workers or the general public "to strengthen a bargaining position relative to the employer", has been normalised to such an extent that it has been established as a tradition.[121] It is submitted that a violent strike is not "functional to collective bargaining as it is not conducive to bargaining in good faith".[122] It is clear that the right to strike does not offer striking employees a licence to engage in criminal and unruly conduct and violence during a strike should be regarded as "an abuse of the right to strike".[123] Violent strikes are counterproductive of worker interests 'in that workers do not have the resources to sustain their strikes for any protracted period of time'.[124] Further, the strike "costs employers large amounts in damage to property, the expense of hiring private security firms, and the costs involved in litigation".[125]

A possible solution to the problem of lengthy strikes, and/or violent strikes, lies in a call to reintroduce strike ballots, evident in the initial amendment to the LRA in 2012.[126] With strikes under the spotlight, it is necessary to consider whether balloting should be made compulsory or whether compulsory arbitration should be implemented (when strikes are too damaging), as well as what sanctions "can be meted out for the strike violence that now seems to be regarded as *de rigueur*".[127] These sanctions can include an award for damages based on violent or unlawful conduct, as well as withdrawing or cancelling the recognition of a trade union as a bargaining agent, and the consequential loss of statutory privileges, in cases where trade unions fail to take reasonable steps to control their members.

The amendment to section 64 of the LRA and the reintroduction of a ballot, before a protected strike or lock-out may commence, has not been included in the final version of Labour Relations Amendment Act 6 of

119 *Ibid*.
120 Benjamin 2014 *ILJ* 10.
121 *Ibid*.
122 Manamela & Budeli 2013 *CILSA* 323.
123 *Ibid*. See also *Transport & General Workers Union of Southern Africa v Ullman Bothers (Pty) Ltd* 1989 *ILJ* 1154 (IC); *Food & Allied Workers Union v National Co-operative Dairies Ltd* (2) 1989 *ILJ* 490(IC); *National Union of Metalworkers of SA v GM Vincent Metal Sections (Pty) Ltd* 1993 *ILJ* 1318 (IC).
124 Manamela & Budeli 2013 *CILSA* 323.
125 *Ibid*.
126 *Labour Relations Amendment Bill,* 2012.
127 Brassey 'Labour law after Marikana: Is institutionalized collective bargaining in SA wilting? If so, should we be glad or sad?' 2013 *ILJ* 834.

2014.[128] The introduction of strike balloting was intended to prevent industrial action if it enjoys only minority support due to the fact that violence or intimidation are more likely to occur under these circumstances. The change was proposed in response to the high levels of unprotected strike action as well as the unlawful acts of intimidation and violence that accompanied the strikes in recent years in South Africa.

Before calling for a strike or lock-out, a trade union or employers' organisation would have had to conduct a ballot of its members entitled to participate in the industrial action.[129] As a consequence, the strike or lock-out will be protected only if a majority of those who vote in the ballot vote in favour of industrial action.[130] The Labour Relations Act 28 of 1956 contained balloting requirements but these were not re-enacted in the LRA.[131] A principle reason for the omission was that the balloting requirements had given rise to "technical disputes over compliance and there was extensive litigation over this issue".[132] Such issues can be dealt with by providing a certificate of compliance issued by the Commission for Conciliation, Mediation and Arbitration ("CCMA"), a bargaining council or an accredited private agency which serves as proof that a ballot has been staged in compliance with the statutory requirements. Currently, legislation does not require trade unions to conduct strike ballots before notice of protected strike action is given. Benjamin points out that many unions "do retain balloting requirements in their constitutions but a failure to comply with these is not a basis for interdicting strike action".[133] Section 67(7) of the LRA provides as follows in this regard:

> The failure by a registered *trade union* or a registered *employers' organisation* to comply with a provision in its constitution requiring it to conduct a ballot of those of its members in respect of whom it intends to call a *strike* or *lock-out* may not give rise to, or constitute a ground for, any litigation that will affect the legality of, and the protection conferred by this section on, the *strike* or *lock-out* (own emphasis).

Balloting requirements were removed from legislation in 1995 owing to concern that they had provided "fertile soil for employers to interdict strikes and to justify dismissal of strikers in strikes that are technically irregular but otherwise functional to collective bargaining".[134] Strike balloting did not make it into the final version of the Labour Relations Amendment Act 6 of 2014.

It appears the legislature was trying to address the problem of the rise in unprotected strikes (note the various versions of the proposed LRA

128 The Labour Relations Amendment Act came into effect on 2015-01-01.
129 Memorandum of Objects of the *Labour Relations Amendment Bill,* 2012.
130 *Ibid*.
131 *Ibid*.
132 *Ibid*.
133 Benjamin 2014 *ILJ* 11.
134 Von Holdt 'Institutionalisation, strike violence and local moral orders' 2010 *Transformation* 135. See also Benjamin 2014 *ILJ* 11.

amendments). However, the problem lies deeper: Workers seem to use the right to strike as a tool to "fight injustices of inequality".[135]

Section 65[136] of the LRA (also provided for by the 2014 Labour Relations Amendment Act) was amended in order to eliminate the "anomalous distinction between disputes that can be adjudicated under the LRA in respect of which industrial action is currently restricted and those under other employment laws in respect of which there is no equivalent restriction".[137] Ngcukaitobi argues that the consequences of the strike law amendments are profound and that two concerns emerge as a consequence of the fact that the Labour Court is granted the power to suspend a strike (or picket) in appropriate circumstances, and may also suspend a lock-out or suspend an employer from engaging in replacement labour during a strike or lock-out.[138] The first concern is "whether [the amendment] will meet their stated objects of reducing the incidence of strike violence" and the second is "whether they are sufficiently tailor-made to address the true underlying socio-economic realities that lie behind strike violence".[139] It seems that neither of these concerns will be addressed.[140] At the stage when the balloting requirement was still included it was argued, even if the Bill passed into law, that it does not guarantee an end to unprotected violent strikes: All the proposed ballot requirement does is add additional administrative hurdles to the attainment of protected strike action.[141] The ballot requirement is viewed as a limitation on the power of trade unions "and generally, an encumbrance to workers' constitutionally entrenched right to strike", as well as prejudicing trade union attempts to exercise their right to strike.[142]

4 5 Liability of Trade Unions

Trade unions have to deal with the reality of liability. Bad faith negotiations, union rivalry, disorderly and violent conduct during strikes

135 Ngcukaitobi 'Strike law, structural violence and inequality in the platinum hills of Marikana' 2013 *ILJ* 843.

136 S 7 of the 2014 Labour Relations Amendment Act amends s 65 of the principal Act as follows –

(a) by the substitution in subsection (1) for paragraph (c) of the following paragraph:

(c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law and

(b) by the substitution in subsection (3) for paragraph (b) of the following paragraph:

(b) any determination made in terms of [the Wage Act] Chapter Eight of the Basic Conditions of Employment Act and that regulates the issue in dispute, during the first year of that determination.

137 Memorandum of Objects of the *Labour Relations Amendment Bill,* 2012.

138 *Ibid*.

139 Ngcukaitobi 2013 *ILJ* 845.

140 *Ibid*.

141 *Idem* 849-850.

142 *Idem* 845; see *idem* 851 for more detail regarding concerns with balloting.

as well as the promotion of, and participation in, wildcat and unprotected strikes are against the spirit of the LRA which aims to promote orderly collective bargaining and labour peace. Rycroft points out that strike action can take two forms:[143] First, a "conventional, non-violent strike action which is preceded by good faith negotiation" and second, a "violent strike action which is preceded by bad faith negotiation". Trade unions and their representatives (as indicated above) are responsible for how they conduct themselves during the collective bargaining process and should be responsible in the manner in which they promote the interests of their members and should take responsibility for their members during strike action. A more proactive measure, rather than the reactive and punitive mechanisms that are being utilised, should be sought.[144]

With reference to the responsibilities and liabilities of trade unions, two recent cases are discussed below. The first case, that of *SA Transport and Allied Workers Union v Garvis (City of Cape Town as Intervening Party and Freedom of Expression Institute as* amicus curiae),[145] illustrates how the responsibilities of trade unions can be extended in cases where they and their members elect to gather and take part in a public strike. The Constitutional Court had to look at the validity of section 11(2) of the Regulation of Gatherings Act[146] in order to determine whether the trade union would escape liability (under section 11(1)) for damage resulting from the actions of its members who vandalised and looted shops during their gathering. Per Mogoeng CJ, the court, with reference to section 11(1) and (2), held as follows:[147]

> The somewhat unusual defence created for an organization facing a claim for statutory liability appears to have been made deliberately tight. Gatherings, by their very nature, do not always lend themselves to easy management. They call for extraordinary measures to curb potential harm. The approach adopted by Parliament appears to be that, except in the limited circumstances defined, organizations must live with the consequences of their actions, with the result that harm triggered by their decision to organise a gathering would be placed at their doorsteps. This appears to be the broad objective sought to be achieved by Parliament through section 11. The common law position was well known when section 11 was enacted. The limitations of a delictual claim for gatherings-related damage in meeting the policy objective gave rise to the need to enact section 11 to make adequate provision for dealing with the gatherings-related challenges of our times.
>
> Parliament sought to ameliorate the impact of imposing liability on an organizer by providing for a viable, yet onerous, defence under section 11(2). The purpose was: (i) to provide for the statutory liability of organizations, so as to avoid the common law difficulties associated with proving the existence of a legal duty on the organization to avoid harm; (ii) to afford the organizer a

143 Rycroft *supra* n 43 at 16.
144 I*Ibid*.
145 2012 *ILJ* 1593 (CC).
146 Act 205 of 1993.
147 *SATAWU v Garvis* parr 38-39.

> tighter defence, allowing it to rely on the absence of reasonable foreseeability and the taking of reasonable steps as a defence to the imposition of liability; and (iii) to place the onus on the defendant to prove this defence, instead of requiring the plaintiff to demonstrate the defendant's wrongdoing and fault.

The court added that an organisation would escape liability only if the act or omission that caused the damage "was not reasonably foreseeable", and if it took reasonable steps within its power to prevent that act or omission.[148] An important issue is the fact that participation in assemblies and demonstrations should be unarmed and peaceful. In this context it is important to note the court's reasoning: Jafta J (Zondo AJ concurring) emphasised that in section 17 of the Constitution everyone "who is unarmed has the right to go out and assemble with others to demonstrate, picket and present petitions to others for any lawful purpose": Thus, a peaceful demonstration.[149] Four rights emerge from a plain reading of section 17: The right to assemble freely, to hold a demonstration, to hold pickets, and to present petitions.[150] The inner working of these rights can be summed up as follows:[151]

> In democracies like ours, which give space to civil society and other groupings to express collective views common to their members, these rights are extremely important. It is through the exercise of each of these rights that civil society and other similar groups in our country are able to influence the political process, labour or business decisions and even matters of governance and service delivery. Freedom of assembly by its nature can only be exercised collectively and the strength to exert influence lies in the numbers of participants in the assembly. These rights lie at the heart of democracy.

The Constitutional Court upheld the Supreme Court of Appeal's judgment and SATAWU's appeal was dismissed.[152]

A second case (although it does not deal with industrial action) serves as a useful illustration establishing the responsibilities of trade unions. In *Food & Allied Workers Union v Ngcobo*[153] a claim for damages was instituted against FAWU for its failure to perform the mandate which it accepted to represent its members before the CCMA, and the Labour Court. From the outset the court, per Ponnan JA and Plasket AJA (Malan and Tshiqi JJA concurring) noted that the claim of the respondents is

148 *Idem* par 42.
149 *Idem* parr 51-53. Rautenbach 'The liability of organisers for damage caused in the course of violent demonstrations as a limitation of the right to freedom of assembly' 2013 *TSAR* 160 addresses the following reality: 'We are, however, faced with the reality that section 17 protects only "peaceful and unarmed" assemblies, demonstrations and pickets, and the only way in which to minimise the effect of instinctive, 'definitional' limitation, is to interpret the 'peaceful and unarmed' broadly'.
150 *SATAWU v Garvis* par 120, as per Jafta J (Zondo AJ concurring).
151 *Ibid*.
152 The Court held that public interest 'trumps' the demand made by workers due to the fact that the public is entitled to be protected from 'the tyranny of the mob'.
153 2013 *ILJ* 1383 (SCA).

based not on delict, but on a breach of contract because of the alleged contract between the parties which imposed an obligation on FAWU and that it failed to perform in the manner contemplated by that contract.[154] The court added that after FAWU accepted the mandate, the principal duty of FAWU was to carry it out and, therefore, they were in breach of that duty when they failed to timeously refer the dispute to the Labour Court.[155] An order for twelve months compensation was made in favour of the respondents against FAWU.

5 Concluding Remarks

From the above it is evident that trade unions play an important role not only in the workplace, but also in society and in the economy. Socio-economic issues cannot be separated from issues directly related to the workplace; strikes in recent months years are evidence of this. The adversarial nature of collective bargaining does not help the situation. Frustrations arising out of poor service delivery, infighting between members of trade unions (including COSATU) as well as union rivalry, add to the problem, as do unrest and violent industrial action. Good faith bargaining, orderly bargaining and labour peace should be at the heart of dispute resolution and negotiation: These goals underlie the purpose of this paper. *SATAWU v Garvis* and *FAWU* v *Ngcobo* both illustrate the important role that trade unions play in the democratic processes, inside and outside of the workplace, and highlight the fact that trade unions have a responsibility towards workers and society at large – they are important agents not only when they represent workers but also in the promotion of stability in and outside the work environment.[156]

It is proposed that trade unions should act responsibly in engaging with other trade unions, role players and negotiating parties. As proposed in the article, issues, such as sustainability, accountability, and corporate citizenship, should be at the forefront of how trade unions negotiate: Negotiating long-term collective agreements for the future rather than short-term financial benefits. Job protection, beyond the risk of job losses or cuts, should be their concern. The employment relationship can never be an equal one: When trade unions negotiate or bargain they should bear in mind why they negotiate, on whose behalf they negotiate and whether their interests are in conflict with the interests of their members, society at large, as well as the economy. Although a novel idea, it is proposed that small changes in the manner in which negotiations are approached will, ultimately, have an impact on the end result. But it begs the question: Is responsible unionism a viable option in South African labour relations? In answering in the affirmative, is to suggest we have the tools. But how are these tools utilised?

154 *FAWU v Ngcobo* par 45.
155 *Idem* par 51.
156 See also Gericke 2012 *THRHR* 584 regarding the important role trade unions play.

Cooperation among the different social, economic and political partners is key.

The South African International Co-operation in Criminal Matters Act and the issue of evidence

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OPSOMMING

Die Suid Afrikaanse Wet op Internasionale Samewerking in Strafregtelike Aangeleenthede en die Kwessie van Getuienis

Suid Afrika het verskeie inisiatrewe aangeneem ten einde tesame met ander lande misdaad te bekamp. Een sodanige inisratief behels die aanname van die Wet op Internasionale Samewerking in Strafregtelike Aangeleenthede (International Co-operation in Criminal Matters Act ('ICCMA')) in 1996, weike wet ten doel het om getuienis lewering, die uitvoering van vonnisse in strafsake, en die konfiskering en oordrog van opbrengste voortspruitend uit misdaad te vergemaklik tussen Suid Afrika en buitelandse state. Die ICCMA bestaan uit vyf hoofstukke maar die oorgrote meerderherd van regspraak afkomstig van Suid Afrikaanse howe her gehandel met die hoofstuk wat betrekking het op die verkryging en toelaatboorherd van getuienis. Dit is gevolglike teen hierdie agtergrond wat hierdie artikel focus op die aspekte rakende getuienis wat deur die Suid Afrikaanse howe behandel is. Die doel van hierdie artikel is gevolglik om aan te toon hoe Suid Afrikaanse howe die bepairngs van die Wet rakende getuienis, geinterpreteer het. 'n Aanbeveling word gevolglik voorsien ten aansien van hoe artikel gewysig kan word.

1 Introduction

South Africa has adopted different initiatives to cooperate with other countries in the fight against crime. These have included the signing of bilateral agreements on issues such as mutual legal assistance in criminal matters[1] and extradition;[2] the ratification of multilateral treaties on

* I am grateful to Professor Israel Leeman for his comments on the earlier draft of this article. The usual caveats apply. Email: djmujuzi@gmail.com

1 Countries with which South Africa has signed treaties on mutual legal assistance in criminal matters include Canada, USA, Lesotho, Egypt, Algeria, Nigeria, France, China, and India. See http://www.justice.gov.za/ilr/mla.html (accessed 2014-01-13).

2 South Africa has extradition agreements with several countries including Botswana, Lesotho, Malawi, Swaziland, USA, Canada, Australia, Israel, Egypt, Algeria, Nigeria, China and India.

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issues such as corruption,[3] organised crime[4] and extradition;[5] and the enactment of domestic pieces of legislation such as those dealing with the collection of evidence from other countries[6] and those giving South African courts jurisdiction over offences committed outside South Africa.[7] In 1996 the South African legislature enacted the International Co-operation in Criminal Matters Act ('ICCMA').[8] In 1997 the Regulations under the ICCMA were promulgated to operationalise the Act.[9] The purpose of the Act is to 'facilitate the provision of evidence and the execution of sentences in criminal cases and the confiscation and transfer of the proceeds of crime between the Republic [of South Africa] and foreign States; and to provide for matters connected therewith'.[10] The South African Department of Justice and Constitutional Development has indicated that there is an increase in the number of requests for extradition and mutual legal assistance.[11] It appears that most of these requests come from African countries.[12] However, this information is

3 South Africa ratified the United Nations Convention against Corruption, United Nations Treaty Series vol. 2349 p 41; Doc. A/58/422 in November 2004.

4 South Africa ratified the United Nations Convention against Transnational Organised Crime in February 2004.

5 For example, South Africa acceded to the Council of Europe's Convention on Extradition in 2003 and ratified the SADC Protocol on Extradition in 2003.

6 See, for example, Documentary Evidence from Countries in Africa Act No 62 of 1993 and Foreign Courts Evidence Act No 80 of 1962.

7 See for example, the Prevention and Combating of Torture of Persons Act 13 of 2013 (which, *inter alia*, gives South African courts jurisdiction over the crime of torture committed outside South Africa) and the Protection of Constitutional Democracy Against Terrorists and Related Activities Act No 33 of 2004 (which gives South African courts jurisdiction over the offence of terrorism committed outside South Africa).

8 Act No 75 of 1996.

9 Regulations under the ICCMA GNR 1729 of 1997-12-19, *GG* No 18556.

10 Long title of the ICCMA.

11 'The Department dealt with 133 requests for extradition and mutual legal assistance cases during the year under review, compared to the 99 handled during the 2011/12 financial year. This is a clear indication of the intentions of the country to deal decisively with transnational crime'. See Annual Report of the Department of Justice and Constitutional Development 2012/2013 (August 2013) 33. Available at http://www.justice.gov.za/reportfiles/anr2012-13.pdf ; in its 2013/2014 annual report, the Department reported that 'during the year under review, the Department received 154 requests for extradition and mutual legal assistance, 58 of those requests did not comply with the Act and had to be referred back to the requestors. A total of 77 of 94 valid requests were processed within the prescribed time frames, translating into 82% achievement'. See Annual Report 2013/2014 at 70; available at www.gov.za/sites/www.gov.za/files/doj%20anr2013-14_a.pdf.

12 'During the year under review, the Directorate: International Legal Relations (Africa and South) received 131 requests for extradition and mutual legal assistance in criminal matters. Of these requests, 32 had to be returned to the respective states, as the requests did not comply with South Africa's domestic law. A total of 99 valid requests have been processed and channelled to the NPA and/or Interpol for execution'. See *South African Yearbook* 2012-2013 at 423; available at http://www.justice.gov.za/about/sa-yearbook/2012-13_chp15_sayearbook.pdf.

silent on the number of requests made by and to South Africa on the basis of the ICCMA. The ICCMA has five chapters: Chapter one deals with definitions; chapter two with mutual provision of evidence; chapter three with mutual execution of sentences and compensatory orders; chapter four with confiscation and transfer of proceeds of crime; and chapter five with miscellaneous issues. It is beyond the scope of this article to deal with all five chapters. The purpose of this article is to show how South African courts have interpreted the provisions of the ICCMA relating to the issue of evidence.

2 The Definition of 'Evidence'

The ICCMA defines 'evidence' to include 'all books, documents and objects produced by a witness'.[13] The ICCMA uses the word 'evidence' in some sections and 'information' in other sections and this has been the subject of debate before South African courts. In *Beheersmaatschappij Helling I NV and Others v Magistrate, Cape Town, and Others*, the High Court held that evidence 'is widely defined in the Act'.[14] Section 2(2) of the ICCMA empowers a judge, in chambers, or a magistrate to issue a letter requesting assistance from a foreign state for 'information' as stated in the letter of request for the purposes of an investigation relating to an alleged offence. As will be illustrated later, section 2(1) uses the word 'evidence' and not 'information'. Section 2(2) does not use the word 'evidence' but rather 'information'. However, section 5 of the ICCMA provides that 'evidence' obtained on the basis of a letter of request – whether issued on the basis of section 2(1) or 2(2) – is admissible. Therefore, when a letter of request is issued in terms of section 2(1), evidence is being sought but what is sought from a foreign state, on the basis of section 2(2), is not evidence, but information which is needed for the purpose of investigating whether or not the alleged offence was committed. Once that information confirms that the alleged offence was committed and it is adduced before a court for the purpose of prosecution, it becomes evidence. In other words, it mutates from information to evidence. In *National Director of Public Prosecutions v Jacob Gedleyihlekisa Zuma and Others*[15] one of the issues was the meaning of the word 'information' in section 2(2). The applicants argued that information obtained on the basis of section 2(2) should not be elevated to the level of evidence unless the person about whom that information was gathered had been given an opportunity to be heard in the process of collecting the information. The Court held that information 'does not simply mean knowledge gleaned or intelligence received' and that the legislature was aware of the differences between sections 5(5) and 2(1)

13 S 1.

14 *Beheersmaatschappij Helling I NV and Others v Magistrate, Cape Town, and Others* 2007 (1) SACR 99 (C) at 109. The reasoning in this case was endorsed in *S v Miller and Others* (SS13/2012) [2015] ZAWCHC 118 2015-9-2) par 54.

15 *The National Director of Public Prosecutions v Jacob Gedleyihlekisa Zuma and Others* (Case No 13569/2006) (2007-04-02).

and, further, that it 'did indeed envisage a situation that in the [later] phase evidence could be obtained'. The Court added that the definition of 'evidence' in the ICCMA was broad enough to encompass 'documents'.[16] The case went on appeal and the Supreme Court of Appeal held that:[17]

> The construction that the appellants place on s 2(2) would mean that once a criminal investigation has established that an offence has been committed, evidence in a foreign state to prove the commission of the offence may only be secured by the prosecution after a trial has commenced. In my view that would be an absurd result that could not have been intended by the legislature.
>
> A criminal investigation, in ordinary language, is conducted not only to inform the investigator whether an offence was committed, but also to gather evidence that will prove its commission in due course. I see no reason to give the word the restricted meaning that is contended for by the appellants. I think it follows that the word 'information' is similarly not confined to knowledge of whether an offence was committed, and least of all to knowledge that is as yet unknown, but extends to known facts recorded in documentary form that might provide evidence of the commission of the offence. That construction is supported by the provisions of s 5(2), which contemplates a request for assistance yielding evidence that might be admissible in subsequent criminal proceedings. In my view what is required to be shown under s 2(2) is only that a criminal investigation (which includes the gathering of evidence for a prosecution) is underway and that it is necessary to elicit the assistance of a foreign state to obtain information (which includes known facts in documentary form) for purposes of that criminal investigation. In my view the section plainly permitted assistance to be sought to obtain possession of the documents and authenticating statements that are now in issue.

The applicants appealed to the Constitutional Court. However, the Constitutional Court dismissed the appeal by holding, *inter alia*, that 'information is not restricted to new and/or unknown knowledge. It extends to any knowledge, known or unknown'.[18] The Constitutional Court added that '[t]o distinguish between information and evidence as the applicants did is therefore to draw a false distinction'.[19] Furthermore, the National Director of Public Prosecutions requested the Court to issue a letter of request so that fourteen original documents could be obtained from Mauritius for the purpose of prosecuting the applicants for corruption. However, one wonders if the court's approach would have been the same if the information in question could not easily be classified as a book, a document or an object.

16 *Idem* at 13.
17 *Thint (Pty) Ltd v National Director of Public Prosecutions and Others* [2007] SCA 138 (RSA); [2008] 1 All SA 229 (SCA) parr 13-14.
18 *Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions* 2008 (2) SACR 557 (CC); 2009 (1) SA 141 (CC); 2009 (3) BCLR 309 (CC) par 38.
19 *Idem* par 39.

It would appear that if, in a letter of request, the South African authorities request a foreign state for assistance in searching for and seizing 'documentation' and anything that does not fall squarely within the definition of 'documentation' is obtained and adduced in evidence, its admissibility could be challenged successfully in a South African court. In *Beheersmaatschappij Helling I NV and Others v Magistrate, Cape Town, and Others* the letter of request from the Dutch authorities requested the South African authorities to assist in gathering information that was needed in the investigation of an alleged crime. A search warrant issued by a South African magistrate authorised the police to search for and seize the relevant documentation. In executing the warrant, the police seized computer hardware, software and peripherals. In holding that the search and seizure were invalid, the High Court held that '[b]y no stretch of the imagination could all the computer hardware, software and "peripherals" mentioned in Annexure A to the ... search warrants be classified as "documentation"'. The warrants merely authorise the police 'to search' certain persons and premises and 'to seize the said documentation as per Annexure A if found'.[20]

3 South African Court Issuing a Letter of Request: Section 2 of the ICCMA

Section 2 of the Act provides that:

(1) If it appears to a court or to the officer presiding at proceedings that the examination at such proceedings of a person who is in a foreign State, is necessary in the interests of justice and that the attendance of such person cannot be obtained without undue delay, expense or inconvenience, the court or such presiding officer may issue a letter of request in which assistance from that foreign State is sought to obtain such evidence as is stated in the letter of request for use at such proceedings.

(2) A judge in chambers or a magistrate may on application made to him or her issue a letter of request in which assistance from a foreign State is sought to obtain such information as is stated in the letter of request for use in an investigation related to an alleged offence if he or she is satisfied – (a) that there are reasonable grounds for believing that an offence has been committed in the Republic or that it is necessary to determine whether an offence has been committed; (b) that an investigation in respect thereof is being conducted; and (c) that for purposes of the investigation it is necessary in the interests of justice that information be obtained from a person or authority in a foreign State.

(3) Subject to subsection (4), a letter of request shall be sent to the Director-General for transmission – (a) to the court or tribunal specified in the letter of request; or (b) to the appropriate government body in the requested State.

(4)(a) In a case of urgency a letter of request may be sent directly to the court or tribunal referred to in subsection (3)(a), exercising jurisdiction in the

20 *Beheersmaatschappij Helling I NV and Others v Magistrate, Cape Town, and Others supra* n 14 at 115.

place where the evidence is to be obtained, or to the appropriate government body referred to in subsection (3)(b).

(b) The Director-General shall as soon as practicable be notified that a letter of request was sent in the manner referred to in paragraph (a) and he or she shall be furnished with a copy of such a letter of request.

Most of the jurisprudence that has emerged from South African courts has dealt with section 2 of the ICCMA. There is a distinction between the procedure in section 2(1) and that in section 2(2). This distinction has been emphasised in different court cases. In *Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions* the Constitutional Court held that '[t]he meaning of the section [2(1)] is clear: the letter of request is issued in court and not by a judge in chambers or a magistrate. The application is therefore made to the court by the investigator during, and not outside of, the criminal proceedings'.[21] The Court added that under section 2(2), an application is made outside court proceedings 'before a judge in chambers or a magistrate, thereby permitting a request to be made even before commencement of criminal proceedings and during investigations'.[22] The Court added that:[23]

> For a letter of request to be granted, it is required that the judge or magistrate be satisfied that each of the jurisdictional requirements under section 2(2) has been met. Save for the question as to whether or not the information sought is necessary in the interests of justice, which under subsection 2(2)(c) is determined in the discretion of the judicial officer of the court, all the jurisdictional requirements are facts which must be proved.

In *National Director of Public Prosecutions v In Re: An Application for the Issuing of a Letter of Request in terms of Section 2(2) of the International Co-operation in Criminal Matters Act No 75 of 1996, Ex Parte*[24] the High Court held that there is 'a clear distinction between section 2(1) and section 2(2) of the Act … "very different requirements, very different processes and different consequences attach to the two processes"'.[25] The Court added that:[26]

21 *Idem* par 26.
22 *Idem* par 27.
23 *Idem* par 29. During the debates in Parliament on the ICCM Bill, one Member of Parliament submitted that 'the Bill … deals with improving co-operation between South Africa and other countries in obtaining evidence on criminal offences. The most important innovation in this law is to try get around the rather cumbersome process of taking evidence on commission. The law now provides for judicial officers to issue a letter of request for evidence and for a speedy procedure to obtain that evidence from overseas'; submission by Mr WA Hofmeyr *Debates of the National Assembly (Hansard)* Third Session First Parliament, 15 January to 7 November (1996) at 4997-4998.
24 *National Director of Public Prosecutions v In Re: An Application for the Issuing of a Letter of Request in terms of Section 2(2) of the International Co-operation in Criminal Matters Act No 75 of 1996, Ex Parte* (71/07/01) [2007] ZAGPHC 197 (2007-09-14).
25 *Idem* 8.
26 *Ibid*.

> Section 2(1) must be followed when proceedings are before a court. The state can make use of the provisions of section 2(2) of the act when there are no proceedings before a court and when the state wants to gather information in order to decide whether to bring such proceedings before a court. In the section 2(1) proceedings the person involved in the proceedings before the court has an interest in the application. In the section 2(2) application the person whose affairs are being investigated has no interest in the investigation because the investigation as such may not lead to proceedings before a court. Once the investigation does lead to proceedings before a court the provisions of section 5 of the act apply.

The distinction between section 2(1) and section 2(2) means that it is crucial that the legal status of the individual in question is clearly understood. If the individual in question is an accused, then section 2(1) is applicable. In South African law, an accused has a right to a fair trial which is guaranteed under section 35(3) of the Constitution. It is against that background that an accused has an interest in whether or not a letter of request should be granted in terms of section 2(1). If the individual is a suspect, section 2(2) of the ICCMA is applicable. If a matter is struck from the court's roll before the individual pleads to the charge or charges, a letter of request has to be issued on the basis of section 2(2) and not section 2(1).[27] The Constitutional Court held that '[o]nce a case is struck from the roll, the case terminates and is no longer pending. There is no guarantee that the criminal proceedings will be reinstated. Removal of a matter from the roll is therefore abortive of the currency of the trial proceedings'.[28]

The Court added that whether or not criminal proceedings are pending against the individual is an objective fact and that '[i]t cannot be said therefore that once the matter had been struck from the roll, the proceedings were still pending'.[29] It does not matter whether or not the matter was struck from the roll due to the prosecutor's inability to proceed with the prosecution. What matters is that there are no criminal proceedings pending against the person. It is submitted that if the charges are withdrawn on the basis of section 6(a) of the Criminal Procedure Act ('the CPA'),[30] the individual, as is the case where the case is struck from the roll by the court, ceases to be an accused and a letter of request has to be issued on the basis of section 2(2). The Supreme Court of Appeal held that the word 'proceedings', as used in section 2(1) of the ICCMA, means 'the trial of a person on a criminal charge, which commences when the person who stands accused is called upon to plead

27 *Ibid*.
28 *Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions supra* n 18 at par 41.
29 *Idem* par 43.
30 Act 51 of 1977; s 6(a) provides that the Director of Public Prosecutions or any prosecutor, whether public or private, may 'before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge'.

to the charge'.[31] Therefore, even if a person has been indicted but the trial has not yet commenced – that is, he has not pleaded to the charges against him – that person is not an accused and there are no proceedings.[32] Section 2(1) does not oblige a court, before which the proceedings are pending, to issue a letter of request. In *S v Okah*[33] the Court emphasised the fact that it had the discretion to issue a letter of request to obtain evidence from abroad.[34] If the accused refuses to call witnesses or evidence from abroad, a court cannot 'disregard the accused's election and superimpose upon the accused its own election by issuing a letter of request *mero motu* calling for the evidence of such witnesses'.[35] This means that unlike cases where the witnesses are based in South Africa and the court can invoke its power to subpoena witnesses on the basis of section 186 of the CPA,[36] in cases where the defence witnesses are based abroad and the accused objects to the introduction of evidence in court, a court cannot call for that evidence.

31 *Thint (Pty) Ltd v National Director of Public prosecutions and Others supra* n 17 at par 10.

32 *Ibid*.

33 *S v Okah* (Case No: SS94/11) (2013-03-20).

34 *Idem* par 32; see also *S v Basson* 2007 (1) SACR 566 (CC) parr 85-86, where the Constitutional Court held '[t]he State applied for the Court to allow it to call Mr Buffham as a witness as, allegedly, his evidence would have seriously contradicted that of the respondent who had testified that Mr Buffham was an employee of the financial principals who had channelled funds to the respondent. The Court would have been entitled to call Mr Buffham in terms of the [ICCMA]if it considered that his evidence was "necessary in the interests of justice". However, the Court refused to call Mr Buffham, but drew conclusions regarding his credibility without having heard him. To quote the learned Judge: "Yes, Buffham was a wheeler and dealer if you ever saw one". The State argued that this comment and the failure to call Mr Buffham gave rise to a reasonable apprehension of bias. We cannot agree. The Judge had a discretion as to whether to take steps to call Mr Buffham. In the exercise of that discretion, he had to consider whether Mr Buffham's evidence was 'necessary in the interests of justice'. It is clear that from other evidence the Judge had heard concerning Mr Buffham, he doubted his credibility which informed his decision that Mr Buffham's evidence was not necessary in the interests of justice'.

35 *S v Okah supra* n 33 at par 37.

36 S 186 of the CPA provides '[t]he court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case'. In *S v Basson* (*supra* n 34 at par 75), the state argued, *inter alia*, that the presiding judge has been biased against it as he had failed to invoke section 186 to call three witnesses. The Constitutional Court referred to section 186 of the CPA and held that 'it is for the Court to determine whether the evidence of the witnesses is "essential to the just decision" of the case. In considering this, the Court was entitled to consider the right of the accused that the trial be concluded within a reasonable time. It was further relevant that the State sought that the evidence from these witnesses be received on commission which might have precluded Dr Basson from being present during their testimony and would have been very costly'.

This raises the issue of whether there are any circumstances in which a court may be obliged, in the interest of justice, to call for such evidence. For example, if the accused is unrepresented and does not appreciate the likely grave consequences of not calling such an important witness. It is argued that section 2(1) of the ICCMA does not bar a court from issuing a letter of request *mero muto* for the witness who is based abroad to give evidence on the basis of that letter. This is so because unlike section 2(2), where a court can only issue a letter of request on the basis of an application made to it, a court can exercise its discretion, without such application, to issue such a letter.[37] Section 2(1) of the ICCMA allows a court to issue a letter of request 'if it appears' to that court that the examination of a witness in a foreign country 'is necessary in the interest of justice'. In *S v Basson*, the High Court held that section 2(1) 'deals with witnesses in foreign countries. It cannot be construed … as only dealing with cases where the witness is temporarily unavailable through illness or some other mishap'.[38] Although in all cases that have been decided by South African courts the witnesses were permanently resident abroad, section 2(1) applies whether the witness is temporary or permanently in a foreign country and if his attendance cannot be obtained without undue delay, expense or inconvenience. The witness in question could be a South African resident or citizen or a foreign citizen.

As regards the issue of whether there are circumstances in which a court can exercise its discretion to call a witness even if the accused has not applied for that witness to be called or is opposed to the calling of such witness, although according to South African law a judge is generally not supposed to 'descend into the arena', in other words, should base his decision on the evidence led by the parties to the proceedings, it is argued that there could be circumstances where a judge may be justified in issuing a letter of request for evidence that could exonerate the accused to be brought from abroad if he thinks it is necessary in the interest of justice for such evidence to be before the court. The judge might come to know of the existence of such evidence through the evidence led by the prosecution. The High Court has held that '[t]he prosecutor is under the legal duty to present all relevant evidence to the court, even if it damages the State's case'.[39] If the accused is represented, and the prosecutor knows of evidence or a witness that might weaken the state's case and strengthen that of the accused, he has a duty to disclose such information to the accused's lawyer. The Supreme Court of Appeal in *S v Van der Westhuizen* held, *inter alia*, that:[40]

> [I]f there is evidence which the prosecutor knows or ought reasonably to suspect is or may be destructive of the State case, or which tends or might tend to support the defence case, and which the prosecutor knows or ought

37 In *S v Basson* 2000 (2) SACR 188 (T) at 193, the Court observed that '[t]he court has a discretion to issue a letter of request when it "appears ... that the examination ... of a person ... is necessary in the interest of justice"'.
38 *Idem* at 193.
39 *S v Mofokeng* 2004 (1) SACR 349 (W) par 22.
40 *S v Van der Westhuizen* 2011 (2) SACR 26 (SCA) par 13.

> reasonably to suspect is not known to the defence, it is the prosecutor's duty to bring this evidence specifically to the attention of the accused's legal representatives.

It is submitted that even if such witness is based outside the country, the prosecutor has a duty to disclose his presence to the accused's lawyer. However, if the accused insists that the witness in question should not be called to give evidence, his lawyer should not call such witness. The defence lawyer has to act in accordance with his client's instructions.[41]

3 1 Interests of Justice

Section 2(1) of the ICCMA provides that a court may issue a letter of request if it 'is necessary in the interests of justice'. However, the ICCMA does not stipulate the factors that a court has to consider in determining whether the information sought is necessary in the interests of justice. The Constitutional Court held that:[42]

> Whether the information sought is necessary in the interests of justice will derive from the circumstances of each case. A determination of the interests of justice must take into account and balance the relevant rights, duties and interests involved … [I]ndividuals who may be affected by the issue of letters of request possess constitutional rights which must be respected. On the other hand, the public has an interest in the effective prosecution of crime and the state thus bears a duty to take all reasonable and lawful steps to obtain information necessary for the effective prosecution of crime. What is necessary in the interests of justice must be determined in the exercise of the court's discretion taking into account the surrounding facts and circumstances of the case.

In *S v Basson*,[43] the Court dismissed an application for a letter of request for evidence to be obtained from the United Kingdom because the evidence in question was 'not necessary. It can only be said to have the potential of being useful'.[44] The Court outlined some of the factors that could be considered in determining whether or not it was necessary in the interest of justice to issue a letter of request:[45]

> (1) Although the State normally has an unfettered discretion as to who is to be called as a witness, in matters of this kind the court has limited powers to prescribe to the State, or to whoever brings such an application, that it may not avail itself of the evidence of a particular witness.
> (2) The evidence which the witness in question can give must be: (1) necessary, (2) relevant, and (3) admissible.

41 For the role of the defence lawyer towards his client, see *S v Mofokeng supra* n 39.
42 *Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions supra* n 18 at par 30.
43 *S v Basson* 2001 (1) SACR 235 (T).
44 *Idem* at 240.
45 *Idem* at 236.

(3) The court may look at the reasons for the witness' inability or refusal to testify at the trial and may draw inferences therefrom.
(4) Where the State is the applicant, the court is entitled to look at the probable expenses which the State, and therefore the taxpayer, will have to incur. If it will be substantial, it will not be wrong to compare the probable weight of such evidence to the prospective expenses. Unless the expenses are clearly justified, the court can regard the expenses as a factor negative to the applicant.
(5) The court must weigh up the prejudice which the applicant will suffer, if the request is not granted, against the prejudice which the respondent will suffer if the request is granted.

The Court concluded that it would not be in the interests of justice to issue a letter of request because of, *inter alia*, the little value that the evidence in question would add to the trial, the heavy cost involved in acquiring such evidence, and the fact that the accused's trial would be delayed. In *S v Basson*[46] the prosecution applied for a letter of request to be issued to the United States of America ('USA') authorities to have some state witnesses who were living in the USA and unwilling to come to South Africa, examined. The Court, in issuing that letter of request, held that:[47]

> The main consideration is the interests of justice. The qualification that it cannot be obtained without undue delay, expense or inconvenience, merely gives an indication under what circumstances a court will exercise the discretion. The fact that the witness refuses to come to this country will definitely cause an undue delay in terms of the section.

In *S v Basson*[48] the Court seems to suggest that one of the ways in which the cost involved in obtaining evidence from abroad, when the witness refuses to come to South Africa and testify, is for the presiding judge to be appointed as one of the commissioners. Hartzenberg J, in recommending that he should be appointed as commissioner, reasoned that '[i]f I am appointed as commissioner, the extra expenses relating to the making of a video recording can be avoided and, more importantly, the tedious process of informing the court what happened at the interrogation, together with extra costs caused by the days spent thereon, can also be avoided'.[49] However, the Court was aware of some of the challenges that are associated with the presiding judge being appointed as a commissioner.

The relationship between section 2 of the ICCMA and other pieces of legislation is worth mentioning. The case of *Lawrence Goldberg and Another v Magistrate R Boshoff NO and Another*[50] dealt with the

46 *S v Basson supra* n 37.
47 *Idem* at 193.
48 *Ibid*.
49 *Idem* at 198.
50 *Lawrence Goldberg and Another v Magistrate R Boshoff NO and Another* (Case No. 09/53076) [2010] ZAGPJHC 164 (2010-7-30).

relationship between sections 2(1) and 31[51] of the ICCMA and section 158 of the CPA. Section 158 of the CPA provides that:

> (1) Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.
> (2)(a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.
> A court may make a similar order on the application of an accused or a witness.
> (3) A court may make an order contemplated in subsection (2) only if facilities therefor are readily available or obtainable and if it appears to the court that to do so would – (a) prevent unreasonable delay; (b) save costs; (c) be convenient; (d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; (e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is ...
> (4) The court may, in order to ensure a fair and just trial, make the giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness.

Relying on sections 2(1) and 31 of the ICCMA, and section 158 of the CPA, the magistrate granted the state's application that the authorities in the United Kingdom should be requested to secure:[52]

> [T]he attendance of the ... witnesses at a venue in the United Kingdom from where the court ... sitting in [South Africa], would receive their evidence by means of electronic media equipment. The witnesses [were] to be examined, cross-examined, and re-examined by electronic means from the courtroom in [South Africa].

The issue before the High Court was whether the magistrate could legally issue a letter of request in terms of which witnesses in a foreign state would be examined, cross-examined and re-examined by electronic means from a courtroom in South Africa.[53] The High Court held that:[54]

> The learned regional magistrate has no authority, either in terms of the provisions of s[ection] 2(1) of the ICCMA or in terms of the provisions of s[ection] 158 of the CPA, to issue a letter of request in which the relevant authorities in the United Kingdom are requested to arrange and facilitate the attendance of witnesses at a venue in the United Kingdom from where they,

51 S 31 states: 'Nothing in this Act contained shall be construed so as to prevent or abrogate or derogate from any arrangement or practice for the provision or obtaining of international co-operation in criminal matters otherwise than in the manner provided for by this Act'.
52 *Lawrence Goldberg and Another v Magistrate R Boshoff NO and Another supra* n 50 at par 2.
53 *Idem* par 4.
54 *Idem* par 13.

> by electronic means, would give their evidence at the proceedings in the court a quo. Such power and procedure cannot be read into the clear wording of these statutory provisions.

The Court added that:[55]

> The relevant provisions of the ICCMA permit the examination at proceedings in the foreign state of a person who is in the foreign state, if the evidence of such person is 'necessary in the interests of justice' in the proceedings before a court of this country and 'the attendance of such person cannot be obtained without undue delay, expense, or inconvenience'. Judicial authorisation to request this form of assistance from a foreign state is required and is given when a court issues a letter of request …
>
> The provisions of s[ections] 158(2) – (5) of the CPA concern the giving of evidence by an accused or by a witness through closed circuit television or similar electronic media at local proceedings in a criminal court and the circumstances under which the court may order that the evidence be given through such media. These provisions do not permit a procedure for the taking of evidence across borders by electronic means at a local criminal trial. Nothing in these subsections suggest an '... arrangement or practice for the provision or obtaining of international co-operation in criminal matters' as was submitted to us by the second respondent's counsel.

It is clear that although there could be circumstances in which courts may rely on the provisions of other pieces of legislation to implement a relevant section of the ICCMA, care should be taken to ensure that they do not invoke provisions that were designed exclusively for local application. In *S v Basson*, the Court held that South African courts can request that the questioning of a witness in terms of section 2(1) in a foreign country be conducted in accordance with South African procedure.[56] However, in *Lawrence Goldberg and Another v Magistrate R Boshoff NO and Another*, the Court held that:[57]

> The law and procedure of the foreign state apply to the proceedings at the examination of the witness abroad. Such proceedings at which the witness is examined are not proceedings of the court which issued the letter of request. The evidence obtained at such proceedings is admitted as evidence by the court which issued the letter of request '... in so far as it is not inadmissible at such proceedings.

The Court in *S v Basson* based its above conclusion on information supplied to it by a witness from the USA who stated 'that this Court can request the district court to order that the South African procedure is to be followed'.[58] It is against that background that the Court held that:[59]

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55 *Idem* parr 15-16.
56 *S v Basson supra* n 37 at 196.
57 *Lawrence Goldberg and Another v Magistrate R Boshoff NO and Another supra* n 50 at par 15.
58 *S v Basson supra* n 37 at 196.
59 *Ibid*.

> It seems obvious to me that the witnesses of necessity will be entitled to all protection according to the United States law. On the other hand the questioning of the witnesses will have to accord with the South African procedure and law of evidence to be admissible at the hearing.

In my opinion, the judgement in *Lawrence Goldberg and Another v Magistrate R Boshoff NO and Another* reflects the correct legal position. If the procedure in the foreign country does not meet international minimum standards relating to the examination of witnesses for the purpose of a prosecution, the admissibility of such evidence could successfully be challenged in a South African court. As mentioned earlier, section 2(2)(b) of the ICCMA provides that a judge in chambers or a magistrate may issue a letter of request if he or she is satisfied 'that an investigation in respect thereof is being conducted'. It would appear that this provision is broad enough to empower a judge or magistrate to issue a letter of request even if the investigation is being conducted outside South Africa.

4 Letters of Request from Foreign Countries to South Africa

Section 7 of the ICCMA provides that:

> (1) A request by a court or tribunal exercising jurisdiction in a foreign State or by an appropriate government body in a foreign State, for assistance in obtaining evidence in the Republic for use in such foreign State shall be submitted to the Director-General.
> (2) Upon receipt of such request the Director-General shall satisfy himself or herself – (a) that proceedings have been instituted in a court or tribunal exercising jurisdiction in the requesting State; or (b) that there are reasonable grounds for believing that an offence has been committed in the requesting State or that it is necessary to determine whether an offence has been so committed and that an investigation in respect thereof is being conducted in the requesting State.
> (3) For purposes of subsection (2), the Director-General may rely on a certificate purported to be issued by a competent authority in the State concerned, stating the facts contemplated in paragraph (a) or (b) of the said subsection.
> (4) The Director-General shall, if satisfied as contemplated in subsection (2), submit the request for assistance in obtaining evidence to the Minister for his or her approval.
> (5) Upon being notified of the Minister's approval the Director-General shall forward the request contemplated in subsection (1) to the magistrate within whose area of jurisdiction the witness resides.

In *Thatcher v Minister of Justice and Constitutional Development and Others*[60] the Court held that the Minister's decision in terms of section 7 'is not a purely legal exercise'. It involves the application of the laws of

60 *Thatcher v Minister of Justice and Constitutional Development and Others* 2005 (1) SACR 238 (C).

both the requesting state and South African.[61] The Court added that section 7 'does not require the requesting state to motivate or substantiate its request. Provided it is a genuine request made in good faith it should, and would in all probability, be accepted as such'.[62] If the Director-General is satisfied that proceedings have been instituted in a court or tribunal in the requesting state, he does not have to consider the second ground in section 7(2).[63] The Director-General's function, in terms of section 7(2), is 'purely administrative'.[64] All the Director-General is required to do is to arrange for the request and supporting documentation to be sent to the Minister. He is 'not required to consult with or advise [the Minister], but merely to await [the Minister's] decision for the purpose of conveying it … to the magistrate'.[65] In deciding whether or not to approve the request from a foreign country, the Minister may have 'regard to political and foreign policy considerations'.[66]

Sections 28 and 29 of the ICCMA empower the Minister and the Director-General, respectively, to delegate any function conferred upon them to an official of the Department of Justice. In *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others*[67] one of the issues before the Constitutional Court was whether the Director-General's delegation of his authority, in terms of section 7(5), of the ICCMA to a Deputy Chief State Law Adviser was valid. The Court held that the delegation in question was lawful because it met the requirements of section 29 of the ICCMA and that the applicant who challenged the delegation had failed to prove that the Director-General did not 'have the proper substantive delegating authority'.[68] As will be shown shortly, case law indicates that South Africa has received letters of request on the basis of section 7 from countries, such as Equatorial Guinea, The Netherlands and Germany.

For a letter of request to be issued, section 7(5) requires that the request be approved by the Minister of Justice unless the Minister delegates that responsibility to an official in the Department of Justice in accordance with section 28 of the ICCMA. Section 28 empowers the Minister to delegate to an official of the Department of Justice any function conferred upon him or her by the ICCMA, except the function of making regulations in terms of the Act. In *Beheersmaatschappij Helling I NV and Others v Magistrate, Cape Town, and Others* the High Court

61 *Idem* par 52.
62 *Idem* par 58.
63 *Idem* par 60.
64 *Ibid*.
65 *Idem* par 62.
66 *Idem* par 76; see also par 81.
67 *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others* 2013 (2) SACR 443 (CC).
68 *Idem* par 65.

explained why the legislature entrusted that responsibility to the Minister. The Court held that:[69]

> Moreover, there is, it seems to me, a need for such requests, before being blindly complied with by the police or the prosecuting authorities, first to be considered and approved at a higher level. There may well be, and probably are, countries … with which co-operation in these matters may be considered (at ministerial level) to be unwarranted or undesirable for a variety of reasons, for example, because the system of criminal justice in those countries is disturbingly inadequate, or because of their refusal or failure to reciprocate in the past with assistance to South Africa. In such cases, reluctance on the part of our authorities to devote precious resources to assisting foreign States would be understandable and justifiable (in the present case, according to lists of names attached to the search warrants, it was envisaged that no less than 39 members of the South African Police Service, including ten commissioned officers, would take part in the searches: whether as many as that actually did so, does not appear). Moreover, the offences being investigated by the Dutch authorities appear to be of a predominantly fiscal nature. Historically, one State has, generally speaking, been loath to assist another to recover taxes allegedly due to the latter by, eg extradition. All of these are considerations which, no doubt, weighed with the Legislature when it passed s 7 of the Co-operation Act.

The above raises at least one critical issue – the role of the court in giving effect to the Minister's approval of a request for evidence to be obtained and transferred to a foreign country on the basis of section 7. The Court held that the Minister may refuse to approve such request if he believes that the criminal justice system in the requesting state is disturbingly inadequate. It is not enough that the criminal justice system in the requesting state is inadequate; it has to be shown that the criminal justice system in a given country is disturbingly inadequate. One of the factors that the Minister may consider in such a case is whether there are reports from credible sources, such as international human rights bodies, that the criminal justice system in the requesting country is of such a nature that basic international fair trial norms are not complied with. However, the Minister's decision is a policy and political one and he may not concern himself with the adequacy or otherwise of the criminal justice system in the requesting state. This brings me to the question of the role of the courts in reviewing the Minister's approval.

In *Thatcher v Minister of Justice and Constitutional Development and Others*, the Minister's approval for a letter of request from Equatorial Guinea was challenged. After the Minister had approved the letter of request, the applicant was subpoenaed by a magistrate to answer some questions which were attached to the letter of request (interrogatories). The answers to the questions were needed as evidence for the prosecution of foreign nationals – including eight South Africans who were on trial in Equatorial Guinea for allegedly trying to overthrow the government. The applicant argued, *inter alia*, that 'no assistance should

69 *Beheersmaatschappij Helling I NV and Others v Magistrate, Cape Town, and Others supra* n 14 at 110.

have been afforded Equatorial Guinea in the conduct of its case against the eight South Africans ... in that they could not be expected to obtain a fair trial there'.[70] He added that the answers to the questions could also be used to motivate for his extradition to stand trial in Equatorial Guinea for allegedly financing the alleged attempted coup and that if extradited, 'his trial ... would not be in accordance with the requirements of customary international law'.[71] The respondents argued that:[72]

> [D]iplomatic protection had been furnished to the South African accused. During 'sensitive and diplomatic negotiations' the delegates from South Africa had received assurances from Equatorial Guinean authorities that South African nationals would, in accordance with 'the international standard of justice', have a fair trial and would not be subjected to torture. A South African delegation had in fact monitored the trial and was satisfied that it was fair.
>
> In any event ... the existence of negative reports on the human rights situation in Equatorial Guinea did not entitle the South African government to scrutinise the human rights record and criminal justice system of every country requesting it for information in a criminal trial or investigation. This would be contrary to the spirit of international co-operation prevailing between South Africa and such country.

The Court held that the Director-General:[73]

> [W]as not required to take cognisance of the merits or demerits of the trial procedures in Equatorial Guinea or of the penal provisions (including the death penalty) which might be applicable in the event of a conviction. Nor was it necessary for him to give consideration to the alleged link between the applicant and the attempted *coup*, or to whether it might be in the interests of justice, or of the accused, to grant assistance.

The Court added that as is the case with the Director-General:[74]

> It was ... not necessary for the [Minister] ... to satisfy herself that it would be 'in the interests of justice and in order to permit the accused to benefit from a fair trial' ... to approve the request. If, of course, she had suspected that the trial in Equatorial Guinea was unfair and would in all probability result in grave injustice for the accused, she would have been required to take account of this in making her decision.

As regards the likelihood that the evidence obtained from the applicant would be used at a trial at which the accused could be sentenced to death – in the light of the fact that South Africa had not sought the necessary assurance from Equatorial Guinea that the death penalty will not be imposed – the Court held that:[75]

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70 *Thatcher v Minister of Justice and Constitutional Development and Others supra* n 60 at par 9.
71 *Idem* par 10.
72 *Idem* parr 30-31.
73 *Idem* par 60.
74 *Idem* par 75.
75 *Idem* par 96.

> Although Equatorial Guinea had given no undertaking that the death penalty would not be imposed if there should be a conviction, 'political assurances' had been given that the authorities would, in the event the death penalty was imposed, look favourably on a request to commute such penalty. In view of the rapidly improving co-operation between the two countries a positive outcome could be expected.

At least two concerns emerge from the above holding of the court. First, the fact that the Director-General and the Minister of Justice are not required to investigate whether or not the evidence being sought could be used at an unfair trial means that there is a risk that South Africa could consciously or unconsciously send evidence to a foreign state which could be used to dignify a trial that falls below internationally acceptable standards. Secondly, there is a danger that such evidence could be used at a trial at which the offenders faced a real risk of being sentenced to death, yet South Africa had abolished the death penalty. The judgement leaves open the possibility of challenging both the Director-General and the Minister's decisions if there is evidence that the handing over of evidence, to another country, would contribute towards a 'grave injustice' against the accused. The Minister's approval of the request could be challenged on the ground that it was irrational and unreasonable.[76]

In order to challenge the Minister's approval in terms of section 7, a person, whether natural or juristic, does not have to be based in South Africa or be a South African citizen or resident. In *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others*,[77] the applicant, a company registered in the United Arab Emirates, challenged the Minister's decision to approve a letter of request from the Belgian authorities requiring the applicant's courier to produce some documents needed to investigate a Belgian company and citizen for tax fraud. The documents were to be seized and copies thereof sent to Belgium. The applicant argued that the seizure of the documents would violate his confidentiality and right to privacy. One of the arguments against the application was that the applicant was not registered in South Africa and, therefore, did not have *locus standi* before a South African court to challenge the validity of the Minister's approval. The Supreme Court of Appeal held that for a person to institute legal proceedings in a South African court, that person 'must have a direct and substantial interest in the right which is the subject-matter of the litigation'.[78] The Court held that the applicant had *locus standi* because it had 'a protectable interest in this country, [and was] seeking to protect that interest before a South

76 *Freedom Under Law v National Director of Public Prosecutions and Others* [2013] 4 All SA 657 (GNP) parr 127-129, where the High Court dealt with the circumstances in which a decision could be challenged for being illegal, irrational or unreasonable. See also *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA); 2014 (2) SACR 107 (SCA); [2014] 4 All SA 147 (SCA).

77 *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others* 2013 (1) SACR 323 (SCA).

78 *Idem* par 13.

African court'.[79] However, the Supreme Court of Appeal's holding on the issue of standing was reversed by the majority in the Constitutional Court who held that the applicant lacked standing under both section 38 of the Constitution[80] and common law, as it failed to demonstrate that the disclosure of the relevant documents to the Belgian authorities would affect it in 'any demonstrable way'.[81] Therefore, to be successful, any person challenging the Minister's decision to approve a letter of request from a foreign state, must have a demonstrable interest either at common law or in terms of section 38 of the Constitution. However, a person who fails to convince a court that he has standing on the basis of section 38 of the Constitution, will find it difficult to convince the court that he has standing at common law. The Constitutional Court held that the common law parameters on standing are 'more restrictive' compared to the section 38 parameters.[82]

The ICCMA is silent on whether a search warrant may be issued to obtain evidence on the basis of a letter of request sent to South Africa in terms of section 7. In *Beheersmaatschappij Helling I NV and Others v Magistrate, Cape Town, and Others*, Dutch authorities requested evidence from South Africa for the purpose of investigating the commission of an alleged offence in The Netherlands. The magistrate, in accordance with section 7 of the ICCMA and sections 20 and 21 of the CPA (these sections will be outlined below), issued warrants for the police to search the applicants' premises and seize the relevant articles. The applicants argued that '[n]othing is said in the Act [(the ICCMA)] about searches or seizures ... [meaning] that searches and seizures were not intended to be governed by the Act'.[83] The Court held that:[84]

> [I]t does not necessarily follow from the fact that the Co-operation Act is silent on the subject of searches and seizures that the Legislature did not intend the Act to apply also to evidence obtained by those means. Sections 20 and 21 of the Criminal Procedure Act already provide machinery for the application for and issue of search warrants: it may well be that the Legislature considered that machinery to be adequate as it stood for use in conjunction with s 7 of the Co-operation Act and was content to leave it so. There is no incompatibility between the relevant provisions of the two Acts, viz s 7 of the

79 *Idem* par 14.

80 S 38 of the Constitution provides that 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are – (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members'.

81 *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others supra* n 67 at parr 40-44.

82 *Idem* par 45.

83 *Beheersmaatschappij Helling I NV and Others v Magistrate, Cape Town, and Others supra* n 14 at 109.

84 *Ibid*.

> Co-operation Act, on the one hand, and ss 20 and 21 of the Criminal Procedure Act, on the other.

The above decision shows that although section 7 of the ICCMA, in particular, and the ICCMA in general, are silent on the issue of search and seizure for the purpose of giving effect to a foreign letter of request, a search and seizure warrant may be issued by a South African court if the magistrate is of the view that that is the best way to give effect to a foreign letter of request. However, the search and seizure warrant must comply with South African law for the evidence in question to be handed over to the requesting state. If a court upholds a challenge to the validity of the search and seizure warrant, the court can make an order that the seized evidence not be handed over to the authorities of the foreign state.[85]

It is important that the request from the foreign state is as clear as possible regarding the kind of evidence being sought from South African authorities. In *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others* one of the arguments before the Constitutional Court was that the request was 'overbroad and vague', in the sense that it 'fail[ed] to explain the offences of which [the company being investigated] is suspected, and the terms of the Request, such as "all relevant documents" and "all invoices and diamond transports", are overbroad'.[86] In rejecting this argument, the Court held that:[87]

> The Request is sufficiently detailed with regard to the crimes allegedly committed by [the company being investigated], the factual background to the allegations and the purpose for which Belgian authorities seek documents from [the courier]. Moreover, Tulip's arguments about overbreadth are undercut by the fact that the Request and subpoena yielded only a total of 18 responsive documents. This is hardly a burdensome and unwieldy volume. It does not appear that [the courier] had any difficulty ascertaining which documents in its possession were responsive to the subpoena.

It is argued that if a request is not sufficiently detailed with regard to the relevant information, it could successfully be challenged on the basis that it is overbroad and vague. This is the spirit of the conclusion by the Constitutional Court highlighted above.

Section 7(5) provides that after the Minister's approval, the request in question should be forwarded 'to the magistrate within whose area of jurisdiction the witness resides'. Section 7(5) should be read with section 8 which provides that:

> (1) The magistrate to whom a request has been forwarded in terms of section 7 (5) shall cause the person whose evidence is required, to be subpoenaed to appear before him or her to give evidence or to produce any book, document or object and upon the appearance of such person

85 *Ibid*.
86 *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others supra* n 67 at par 66.
87 *Ibid*.

> the magistrate shall administer an oath to or accept an affirmation from him or her, and take the evidence of such person upon interrogatories or otherwise as requested, as if the said person was a witness in a magistrate's court in proceedings similar to those in connection with which his or her evidence is required: Provided that a person who from lack of knowledge arising from youth, defective education or other cause, is found to be unable to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in the proceedings without taking the oath or making the affirmation: Provided further that such person shall, in lieu of the oath or affirmation, be admonished by the magistrate to speak the truth, the whole truth and nothing but the truth.
>
> (2) A person referred to in subsection (1) shall be subpoenaed in the same manner as a person who is subpoenaed to appear as a witness in proceedings in a magistrate's court.
>
> (3) Upon completion of the examination of the witness the magistrate taking the evidence shall transmit to the Director-General the record of the evidence certified by him or her to be correct, together with a certificate showing the amount of expenses and costs incurred in connection with the examination of the witness.
>
> (4) If the services of an interpreter were used at the examination of the witness, the interpreter shall certify that he or she has translated truthfully and to the best of his or her ability, and such certificate shall accompany the documents transmitted by the magistrate to the Director-General.

If the request in question is forwarded to a magistrate in whose area of jurisdiction the witness does not reside, such magistrate does not have jurisdiction over the matter. This means, *inter alia*, that the witness cannot be prosecuted for failure to appear before that magistrate and that the evidence that such magistrate has elicited from a witness would have been obtained illegally.[88] In *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others* the Constitutional Court was divided on, *inter alia*, the issue of whether the magistrate to whom the request had been forwarded was the right magistrate. The majority held that he was.[89] What is important to note about this case is that failure to forward the request to the magistrate, in whose jurisdiction the witness resides, taints the process and the evidence gathered through the process. Whether or not a witness resides at a particular place will depend on the facts of the case.

For a subpoena issued on the basis of sections 7 and 8 to be valid, it must be issued by the magistrate in whose area of jurisdiction the witness resides As Jafta J held in *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others* '[i]t is not any magistrate who has the power, but a magistrate of the area in which the witness resides'.[90] It is also critical that the document indicating that a request

88 S 10 of the ICCMA makes it an offence for a witness who has been subpoenaed to fail to appear before a magistrate.

89 *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others supra* n 67 at parr 47-48.

90 *Idem* par 107.

was forwarded to the magistrate on the basis of section 7(5) should make it 'clear that the request on which [the] magistrate ... acted was forwarded to him by the Director-General as required by s 7(5), or by someone else'.[91] This is important, *inter alia*, for the person who is affected by the letter of request to determine whether or not the person who forwarded the request to the magistrate was clothed with such authority. If that person was not authorised to forward such request to the magistrate, he would have acted illegally and the action could be challenged successfully for flouting the principle of legality. It should be recalled, as the High Court stated in *Freedom Under Law v National Director of Public Prosecutions and Others,* that a 'legality review… is concerned with the lawfulness of the exercise of public power. Decisions must be authorised by law and any statutory requirements or preconditions that attach to the exercise of the power must be complied with'.[92]

Another important factor is the extent to which a magistrate can rely on other pieces of legislation to execute his or her duties under section 8 of the ICCMA. In *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others*,[93] one of the issues before the Constitutional Court was whether the magistrate had acted legally by subpoenaing the witness on the basis of section 205 of the CPA. The magistrate issued a subpoena for the applicant's courier to appear before him and be examined, or to produce the relevant documents if he did not want to be examined. The subpoena was issued on the basis of section 205 of the CPA[94] instead of section 8 of the ICCMA. The applicants argued, *inter alia*, that the subpoena had been issued unlawfully because it was based on section 205. The majority decision observed that '[i]t is clear that the magistrate deliberately and intentionally relied on s[ection] 205. This was no administrative error. However, the question that

91 *Idem* par 112.

92 *Freedom Under Law v National Director of Public Prosecutions and Others supra* n 76 at par 126.

93 *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others supra* n 67.

94 S 205(1) of the CPA provides that 'A judge of a High Court, a regional court magistrate or a magistrate may … upon the request of a Director of Public Prosecutions or a public prosecutor authorized thereto in writing by the Director of Public Prosecutions, require the attendance before him or her or any other judge, regional court magistrate or magistrate, for examination by the Director of Public Prosecutions or the public prosecutor authorized thereto in writing by the Director of Public Prosecutions, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the Director of Public Prosecutions or public prosecutor concerned prior to the date on which he or she is required to appear before a judge, regional court magistrate or magistrate, he or she shall be under no further obligation to appear before a judge, regional court magistrate or magistrate'.

remains to be answered is the effect of this reliance'.[95] The majority held that:[96]

> The empowering provision in this instance is s[ection] 8 of the Co-operation Act. This is the prism through which a magistrate's power to issue a subpoena in the context of mutual legal assistance must be viewed. Section 8(1) provides that a magistrate must ensure that a person whose evidence is required appear before him or her under oath. Section 8(2) describes the manner in which that person may be subpoenaed. The focus of this aspect of review proceedings must therefore be s[ection] 8(2). This section is not specific about exactly how a magistrate should issue the subpoena. It is silent as to the penalties of non-compliance with a subpoena. One is inclined to think there is an omission in the section. However, the section is specific in stating that such a person must be subpoenaed in the same manner as they would be subpoenaed to appear in a magistrates' court. Therefore this court must determine whether s[ection] 8 is sufficient to independently empower and enable a magistrate to exercise his or her power in issuing a subpoena.
>
> Section 8 is not independently sufficient to allow magistrates to issue subpoenas in instances of mutual legal assistance. The language of s[ection] 8(2) is broad. It envisages magistrates using the ordinary mechanisms they employ when issuing subpoenas. Section 205 is such a mechanism. That these mechanisms were never engineered to be used in the general scheme of mutual legal assistance in terms of the Co-operation Act explains the inconsistencies that arise when these mechanisms are used to fulfil an objective in terms of the Co-operation Act.

However, the minority came to a different conclusion. They held that:[97]

> The process authorised by s[ection] 8 of the Co-operation Act is materially different from the one permitted by s[ection] 205 of the Criminal Procedure Act. Members of the National Prosecuting Authority play no role in a s[ection] 8 process. In fact the section does not refer to them at all. In a s[ection] 8 process the examination of the witness is conducted by the magistrate who takes the evidence. At the completion of the process the magistrate is obliged to submit to the Director-General a certified copy of the record. A person subpoenaed under s[ection] 8 must appear before the magistrate on the appointed date for the purpose of giving evidence. He or she cannot avoid appearing by submitting an affidavit. He or she has to take an oath or affirmation before the magistrate who takes the evidence which must be tendered orally. Therefore a process mandated by s[ection] 205 of the Criminal Procedure Act cannot be equated to the process authorised by s[ection] 8 of the Co-operation Act. The two processes are like chalk and cheese. Section 205 of the Criminal Procedure Act does not confer the power to take evidence in terms of a request submitted to a magistrate under s[ection] 7(5) of the Co-operation Act.

95 *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others supra* n 67 at par 49.
96 *Idem* parr 50-51.
97 *Idem* parr 118-119.

Another issue that has been dealt with is the relationship between section 7 of the ICCMA and sections 20 and 21 of the CPA. Section 20 of the CPA provides that:

> The State may, in accordance with the provisions of this Chapter, seize anything – (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere; (b) which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere; or (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.

Section 21 provides that the articles referred to in section 21 may be seized on the basis of a search warrant issued by a magistrate or justice of the peace or by a judge or any judicial officer presiding at the proceedings. It is clear that section 7 of the ICCMA does not mention that the magistrate in question has the power to issue a search and seizure warrant. As mentioned above, the magistrate in *Beheersmaatschappij Helling I NV and Others v Magistrate, Cape Town, and Others* held that section 7 of the ICCMA is not incompatible with sections 20 and 21 of the CPA.[98]

However, the search and seizure warrants must comply with South African law for them to be valid and for the evidence in question to be legally handed over to the authorities of a foreign country. For example, they should not be 'too vague and too broad'.[99] The Constitutional Court in *Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions*[100] discussed, in detail, the requirements that have to be met for a search warrant to be valid. The above case law shows that there is nothing in the ICCMA which bars a magistrate from invoking a provision of another piece of legislation to implement the ICCMA. It is submitted that what, however, is critical is that in invoking another piece of legislation, as a tool to help give effect to any provision of the ICCMA, a magistrate should clearly explain why he or she decided to invoke the mechanism of that other piece of legislation instead of relying exclusively on the provisions of the ICCMA and the relevant regulations. If the ICCMA and the relevant regulations are unhelpful, then the magistrate is justified to invoke a procedure in another relevant piece of legislation. The reason behind taking such a decision should be explained fully.

98 *Beheersmaatschappij Helling I NV and Others v Magistrate, Cape Town, and Others supra* n 14 at 109.

99 *Idem* at 116.

100 *Thint Holdings (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC).

5 Admissibility in South African Courts of Evidence Obtained from Abroad

Section 5 of the ICCMA deals with the admissibility of evidence obtained from abroad based on a letter of request. It provides as follows:

> (1) Evidence obtained by a letter of request shall be deemed to be evidence under oath if it appears that the witness was in terms of the law of the requested State properly warned to tell the truth.
> (2) Evidence obtained by a letter of request prior to proceedings being instituted shall be admitted as evidence at any subsequent proceedings and shall form part of the record of such proceedings if – (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings; or (b) the court, having regard to – (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) any prejudice to any party which the admission of such evidence might entail; and (v) any other factor which in the opinion of the court should be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.
> (3) The provisions of subsection (2) shall not render admissible any evidence which would be inadmissible, had such evidence been given at the subsequent proceedings by the witness from whom it was obtained.
> (4) Evidence obtained by a letter of request after the institution of proceedings shall form part of the record of such proceedings and shall be admitted as evidence by the court or presiding officer which issued the letter of request in so far as it is not inadmissible at such proceedings.

At the admissibility stage, there is a difference between evidence obtained from abroad based on a letter of request issued after proceedings have been instituted (under section 2(1)) on the one hand, and evidence obtained from abroad prior to proceedings being instituted (under section 2(2)) on the other. For the evidence obtained from abroad prior to proceedings being instituted, one of the requirements in section 5(2) has to be complied with. A provision which is more or less similar to section 5(2) of the ICCMA appears in the Law of Evidence Amendment Act regulating the admissibility of hearsay evidence (section 3(1)).[101] The author is not aware of any case in which a South African court has

101 S 3(1) of the Law of Evidence Amendment Act (No 45 of 1988) provides that 'Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings unless (a) – each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings; (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or (c) the court, having regard to – (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of

interpreted section 5(2) of the ICCMA. However, there are cases where courts have referred to section 5(2). For example, in *Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions* the Constitutional Court held that:[102]

> [T]he admissibility of any documents obtained under section 2(2) at the criminal trial falls to be determined in the light of section 5(2) of the Act. That section regulates the approach the court must take in relation to admissibility. One of the factors to be taken into account is any prejudice to any party which the admission of such evidence might entail.

It is argued that the same principles that have been developed by South African courts on the relevant paragraphs of section 3(1) of the Law of Evidence Amendment Act, could be applied when interpreting section 5(2) of the ICCMA. For example, the Supreme Court of Appeal held that section 3(1)(c) of the Law of Evidence Amendment Act, which allows courts to admit hearsay evidence in the interests of justice, gives courts a wide discretion to admit hearsay evidence.[103] In *Giesecke and Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* the Supreme Court of Appeal held that:[104]

> The section requires that the court should have regard to the collective and interrelated effect of all the considerations in paras (i) – (iv) [sic] of the section and any other factor that should, in the opinion of the court, be taken into account. The section thus introduces a high degree of flexibility to the admission of hearsay evidence with the ultimate goal of doing what the interests of justice require.

It is argued that section 5(2) of the ICCMA also introduces a high degree of flexibility to the admission of evidence, obtained by a letter of request prior to proceedings being instituted, at any subsequent proceedings with the ultimate goal of doing what the interests of justice require. There are two grounds upon which a court is allowed to admit evidence obtained by a letter of request prior to proceedings being instituted: One, if each party to the proceedings against whom the

justice'. One of the differences between s 5(2) of the ICCMA and s 3(1)(c) of the Law of Evidence Amendment Act is that the latter provides for seven factors that a court has to consider in deciding whether or not to admit the evidence in question and the former provides for five factors.

102 *Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions supra* n 18 at par 45; see also *The National Director of Public Prosecutions v Jacob Gedleyihlekisa Zuma, Thint Holdings (Southern Africa) (Pty) Ltd and Thint (Pty) Ltd supra* n 15.

103 *President of the RSA and Others v Mail and Guardian Ltd* 2011(2) SA 1 (SCA) par 16.

104 *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 (2) SA 137 (SCA) par 31; see also *Jimmy Sebone Seemela v S* [2015] ZASCA 41 (2015-3-26) par 12 'For many years our law knew a rigid exclusionary rule which allowed specific exceptions but no relaxation. Now there is no exclusion as such. Hearsay evidence may now be accepted subject to the broad, almost limitless criteria set out in s 3(1).'

evidence is to be adduced agrees to the admission of the evidence at such proceedings; or, two, if the court, after considering the factors outlined section 5(2)(b), is of the view that it is in the interests of justice to admit such evidence. It would appear that the general rule is that evidence obtained by a letter of request prior to proceedings being instituted is not admissible at the subsequent proceedings. Section 5(2)(b) creates exceptions to that general rule. The two exceptions are mutually exclusive: If the relevant parties agree that evidence should be admitted in terms of section 5(2)(a), the court does not have to invoke section 5(2)(b); if the relevant parties object to the admission of such evidence, then the court has the discretion to invoke section 5(2)(b).

Evidence obtained from abroad is not automatically admissible in South Africa. Its admissibility could still be challenged by the accused. This is evident from sections 5(3) and (4) of the ICCMA and, of course, section 35(3)(i) of the Constitution which provides that an accused has the right 'to adduce and challenge evidence'. In *Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions* the applicants argued that:[105]

> [A]lthough the right to cross-examine is a fundamental right, under section 2(2) a person who is subsequently accused has no right to challenge and adduce evidence by means of cross-examination of a witness from abroad. An accused ... can only challenge under section 5(2) of the Act the admissibility of evidence already taken.

The Court held that:[106]

> The trial court will still need to determine the relevance, admissibility and cogency [of the documents obtained from abroad]. It is then and there that the applicants will have the full opportunity to engage with the prosecution and challenge the admissibility of the evidence. Of particular importance ... is that under section 5(2)(b) of the Act and in terms of the Constitution, in particular subsections 35(3) and 35(5), the trial court will surely ensure that the fair trial rights of the applicants are protected.

In the author's view, the court did not directly address the applicants' concern. The issue was not whether the applicants would have the opportunity to challenge the admissibility of the evidence in question or not. The applicants knew that they could indeed challenge the admissibility of such evidence on the basis of section 5(2) of the ICCMA. Their concern was that the accused would not have had the opportunity to cross-examine the witness in question. Practically, this evidence amounts to hearsay evidence. However, the South African Constitution does not confer on an accused an express right to cross-examine state witnesses. Section 35(3)(i) provides that the accused has the right to

105 *Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions supra* n 18 at par 57.

106 *Idem* par 58.

adduce and challenge evidence. Section 35(3)(i) has been interpreted by the courts as conferring on the accused the right to cross-examine state witnesses.[107] Furthermore, an investigation in terms of section 2(2) of the ICCMA is carried out before the person in question becomes an accused. He could be a suspect, an arrested person or a detained person but that does not mean that he has the right to cross-examine witnesses. Sections 35(1) and (2) of the South African Constitution do not confer on an arrested person a right to challenge evidence. This right is only available to an accused person. Section 30 of the ICCMA provides that:

> Any deposition, affidavit, record of any conviction or any document evidencing any order of a court, issued in a foreign State, or any copy or sworn translation thereof, may be received in evidence at any proceedings in terms of a provision of this Act if it is — (a) authenticated in the manner in which foreign documents are authenticated to enable them to be produced in any court in the Republic; or (b) authenticated in the manner provided for in any agreement with the foreign State concerned.

Section 30 seems to be straight-forward but what is not clear is the extent to which a 'record of any conviction' of a court in a foreign state could be put to use by a South African court. Such a record could be used, for example, at sentencing as an aggravating factor by showing that the accused has a previous conviction.[108]

107 In *S v Msimango and Another* 2010 (1) SACR 544 (GSJ) it was held that (par 27) 'the right of an accused person to adduce and challenge evidence as enshrined in s 35(3)(i) of the Constitution, undoubtedly includes the right to cross-examination… [T]here was overwhelming and persuasive authority for this proposition… [T]he fact that s 35(3)(i) of the Constitution does not expressly or implicitly refer to cross-examination, to exclude such right would amount to a too narrow and simplistic interpretation of the section'; see also *S v Ngudu* 2008(1) SACR 71(N) par 24.

108 S 271 of the CPA provides that '(1) The prosecution may, after an accused has been convicted but before sentence has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused. (2) The court shall ask the accused whether he admits or denies any previous conviction referred to in subsection (1). (3) If the accused denies such previous conviction, the prosecution may tender evidence that the accused was so previously convicted. (4) If the accused admits such previous conviction or such previous conviction is proved against the accused, the court shall take such conviction into account when imposing any sentence in respect of the offence of which the accused has been convicted'. See also s 272 which allows a prosecutor to adduce evidence of a previous conviction in a foreign state. For a discussion of the issue of the recognition of foreign conviction in South Africa, see Mujuzi 'Legal Pluralism and Using Foreign Previous Convictions or Criminal Records For The Purpose Of Sentencing: Implementing Article 41 of the United Nations Convention against Corruption in South Africa' 2014 *The Journal of Legal Pluralism and Unofficial Law* 338-356.

6 Illegally Obtained Evidence for Use in a Foreign State

Evidence which has been obtained on the basis of the ICCMA has to be obtained legally otherwise the process that was followed to obtain it will be challenged successfully before a court of law. For example, if the evidence was obtained on the basis of a search and seizure warrant, such warrant must have been issued and executed legally. As mentioned earlier, a search warrant, in terms of South African law, has to meet certain requirements for it to be valid. One issue that has to be examined relates to which remedy is at the disposal of a person who is being investigated in a foreign country when evidence, which was transferred to such country, was obtained unlawfully in South Africa? This issue arose in *Beheersmaatschappij Helling I NV and Others v Magistrate, Cape Town, and Others*. In this case, the High Court found that the search and seizure warrants that had been issued by a magistrate to gather evidence that had been requested by the Dutch authorities were invalid for being too vague and too broad. The Court also held that the evidence in question had been gathered illegally.[109] Because the evidence in question had already been sent to the Dutch authorities, the South African authorities argued that 'the matter was moot and academic inasmuch as the electronic data and copies of the documents which they sought had already been handed over to the Dutch authorities, and there was no order which this Court could make to undo that'.[110] The Court held that there was evidence that the application before it 'may well have an influence on the' proceedings that were pending in The Netherlands against the applicants.[111] It is against that background that the Court relied on the jurisprudence of the Constitutional Court,[112] and held that the relief sought by the applicants was not moot.[113] However, unlike in *Mohamed and Another v President of the Republic of South Africa and Others*[114] where the Constitutional Court expressly ordered that its

109 *Beheersmaatschappij Helling I NV and Others v Magistrate, Cape Town, and Others supra* n 14 at 116.

110 *Idem* at 118.

111 *Ibid*.

112 *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC). In this case, the South African authorities had surrendered the applicant to the USA where he was prosecuted for terrorism which offence attracted the death penalty, without obtaining assurances from the USA that the applicant would not be sentenced to death or, if sentenced to death, that the death sentence would not be executed, even though the death penalty has been found to be unconstitutional in South Africa.

113 *Beheersmaatschappij Helling I NV and Others v Magistrate, Cape Town, and Others supra* n 14 at 119.

114 *Mohamed and Another v President of the Republic of South Africa and Others* supra n 112.

judgement should be brought to the attention of the relevant court in the USA,[115] in this case the Court did not make an express order that its judgement should be brought to the attention of the Dutch court. In this case there was evidence that the Dutch court was waiting for the outcome of the application before deciding whether or not to use the evidence in question. What emerges from this case, is that there is a danger that evidence from another country may be obtained in a manner that violates the laws of that country. For the victim of such violations to prevent the evidence from being used in a foreign country, he should challenge, in the courts of the country from where evidence has been obtained, the validity of the process that was followed to obtain it. Failure to do so means that that evidence may be admitted in a foreign country. However, courts in the country to which that evidence has been sent should be willing to respect the decisions of the courts in the countries from which that evidence has originated. The test to be used is not whether the evidence was gathered in a manner that would have complied with the laws of the country to which it has been transferred. The question should be whether the evidence was gathered in a manner that complied with the laws of the country from which it has originated. This would discourage law enforcement officers from disregarding the laws of other countries in the process of gathering evidence.

7 Human Rights in the Context of the ICCMA

The transfer of evidence from one country to another will almost always involve human rights. This is inevitable in the light of the fact that two different legal systems could provide for different laws and procedures that have to be followed to gather evidence. When these systems meet at some point, tension is sometimes inevitable. In the event that something goes wrong in the process, it will be necessary to address human rights. The ICCMA provides for some rights and privileges of witnesses. Section 9 provides that:

> (1) In respect of the giving of evidence or the production of any book, document or object at an examination in terms of section 8, the law relating to privilege as applicable to a witness giving evidence or subpoenaed to produce a book, document or object in a magistrate's court in similar proceedings, shall apply.
> (2) Where a witness at such an examination claims privilege on the ground that he or she could not have been compelled to give the particular evidence in criminal proceedings in the requesting State, the magistrate shall record the witness' objection and may postpone the proceedings in order to obtain from a competent authority in the requesting State an intimation as to whether or not the witness could in criminal proceedings in the requesting State be compelled to give the evidence in question.

115 The Constitutional Court ordered that '[t]he Director of this Court is authorised and directed to cause the full text of this judgment to be drawn to the attention of and to be delivered to the Director or equivalent administrative head of the Federal Court for the Southern District of New York as a matter of urgency'.

(3) Where a witness' claim to privilege is not recognised by a competent authority in the requesting State the magistrate shall reject his or her objection and proceed to take the evidence.
(4) Any person required to give evidence at an examination under section 8 shall be entitled to payment of such expenses and fees as are payable to witnesses in a magistrate's court in proceedings similar to those in connection with which his or her evidence is required.

In interpreting and applying section 9(1), it should be recalled that the South African law of evidence provides for different privileges that a witness can invoke to refuse to give evidence. These include state and private privileges.[116] One such privilege is legal professional privilege. Legal professional privilege is fundamental to the realisation of the right to a fair trial. In *Thint (Pty) Ltd and Another v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* the Constitutional Court held that 'the right to have privileged communications with a lawyer protected is necessary to uphold the right to a fair trial'.[117] Therefore, a lawyer who has been subpoenaed to give evidence may invoke legal professional privilege and decline to give such evidence. However, a person who is subpoenaed to give evidence on the basis of section 8 of the ICCMA cannot refuse to give evidence because of the fact that the evidence in question could be used at his pending trial, either in South Africa or in the requesting country (should he be extradited to that country). Such a person may also not invoke his right to not incriminate himself as the reason for not giving evidence on the basis of section 8 of the ICCMA. If the evidence he has given at the section 8 examination is used at his subsequent trial, he has the right to challenge its admissibility in terms of section 35(5) of the Constitution.[118] In terms of section 35(5) of the Constitution, a court must exclude evidence obtained in a manner that violates any right in the Bill of Rights if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.[119] A person's right to human dignity is not violated simply because a court has accepted an application for a letter of request to be issued in terms of section 2(2) of the ICCMA. The Constitutional Court has held that '[t]he right to dignity however, does not necessarily extend to the right not to

116 Schwikkard & Van der Merwe *Principles of Evidence* (2010) 123-178; Zeffertt & Paizes *The South African Law of Evidence* (2009) 573-708.
117 *Thint (Pty) Ltd and Another v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others supra* n 100 at par 184.
118 *Thatcher v Minister of Justice and Constitutional Development and Others supra* n 62 at parr 83-94. S 35(5) of the Constitution provides that: 'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice'.
119 For a detailed discussion of case law from South African courts interpreting section 35(5) see Schwikkard & Van der Merwe 181-266; Zeffertt & Paizes 711 – 775.

be named as a suspect, once there is a reasonable suspicion that a crime has been committed'.[120]

Section 9(2) deals with the issue of competence and compellability of witnesses. In the South African law of evidence, the general rule is that everyone is a competent and compellable witness.[121] In *S v Dladla*, the High Court held that 'everyone is presumed to be a competent and compellable witness'.[122] In the same case, the Court drew a distinction between a competent witness, on the one hand, and a compellable witness, on the other: 'A witness is competent if he or she may lawfully give evidence. A compellable witness is one who is competent and in addition can be forced to testify under the pain of punishment in terms of section 189 [of the CPA]'.[123] In some countries, a spouse of the accused is a competent but not compellable witness for the prosecution.[124] Therefore, if the evidence being sought from South Africa is for the purpose of prosecuting that person's spouse, he/she can invoke section 9(2) to refuse to give evidence. A witness who is subpoenaed to give evidence is entitled to payment of expenses and fees incurred to enable him to appear before the court to give evidence.[125]

Section 12 of the ICCMA provides that:

> No witness residing in a foreign State and who attends a court or tribunal in the Republic shall, while so attending, be liable to be arrested in the Republic on any civil warrant for debt or on a criminal charge for the commission of an offence incurred or allegedly committed in the Republic, before his or her arrival in the Republic for the purpose of his or her attendance of such court or tribunal.

It is submitted that the rationale behind section 12 is to encourage people, who would otherwise not have come to South Africa to give evidence, to come to South Africa and give evidence without fear of being arrested. However, some witnesses seem to have not taken advantage of

120 *Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions supra* n 18 at par 50.

121 S 192 of the CPA provides that '[e]very person not expressly excluded by this Act from giving evidence shall, subject to the provisions of section 206, be competent and compellable to give evidence in criminal proceedings'.

122 *S v Dladla* 2011(1) SACR 80 (KZP) par 10.

123 *Ibid*.

124 See, for example, s 217 of the Botswana Criminal Procedure and Evidence Act; *R v Mathaba* [1989] LSCA 51 (on the position in Lesotho); *Nalungwana and Another v People* (S.C.Z. Judgment No. 7 of 1986) [1986] ZMSC 6 (25 February 1986); (1986) Z.R. 28 (S.C.) (for the position in Zambia); *R v Hallett* [2013] NZHC 1076 (14 May 2013) (for the position in New Zealand) and *Sesawo s/o Kermesi v Uganda* [1978] UGCA 3 (on the position in Uganda).

125 Ss 9(4) & 11 (2).

section 12.[126] For the witness to benefit from the protection offered under section 12, such witness has to be residing in a foreign country. The ICCMA does not define what it means to be residing in a foreign country. Case law on this issue will be helpful. In *Mayne v Main*[127] the Supreme Court of Appeal held that:[128]

> [O]ne needs ... to adopt a common sense and realistic approach when deciding whether, having regard to all the relevant circumstances, a person can be said to be residing at a particular place ... This is all the more so because of modern day conditions and attitudes and the tendency towards a more itinerant lifestyle, particularly amongst business people ... Not to do so might allow certain persons habitually to avoid the jurisdictional nets of the courts and thereby escape legal accountability for their wrongful actions.

The Court added that 'there can be no quibble' with the argument that 'residence connotes some acceptable degree of permanence and stability'.[129] Therefore, in determining whether or not the witness in question benefits from the section 12 protection, the above holding by the Supreme Court of Appeal is useful. The seriousness or otherwise of the offence does not matter. This means that even if there is a warrant for that person's arrest for offences such as rape, murder, treason, drug trafficking, and torture – provided that the warrant was issued by South African authorities – it would be illegal for such person to be arrested in South Africa. It is argued that if there is a warrant of arrest for that person from Interpol, for instance, or from another country for an offence committed outside South Africa, South Africa can lawfully execute that warrant and have that person arrested notwithstanding section 12. This is because the offence for which the person is being arrested was not allegedly committed in South Africa. If such a person commits an offence after his arrival in South Africa, he does not enjoy the protection offered by section 12. If he has been arrested for an offence committed after his arrival to give evidence in South Africa, he cannot be prosecuted for the offence for which he would not have been arrested on the basis of section 12.

Section 3 of the ICCMA provides that:

> (1) Where a letter of request has been issued in terms of section 2(1), any party to such proceedings may, provided that it is permitted by the law of the requested State – (a) submit interrogatories which the court or presiding officer issuing the letter of request may attach to the letter of request; or (b) appear at the examination, either through a legal representative or, in the case of an accused who is not in custody or in

126 In *S v Basson supra* n 37 at 194, it is stated that the witness in question had been in South Africa and questioned by South African authorities before he went back to the USA. When he was called by the prosecution to come back to South Africa and give evidence at the accused's trial, he refused. A letter of request had to be issued for his evidence to be obtained on the basis of s 2(1).

127 *Mayne v Main* [2001] 3 All SA 157 (A).

128 *Idem* par 6.

129 *Idem* par 7.

the case of a private prosecutor, in person, and may examine, cross-examine and re-examine the witness.

(2) Where a letter of request has been issued in terms of section 2(2), the person in charge of the investigation relating to the alleged offence may, provided that it is permitted by the law of the requested State – (a) submit interrogatories which the judge or magistrate issuing the letter of request may attach to the letter of request; or (b) appear at the examination and question the person concerned.

(3)(a) Where proceedings have been instituted and the application for a letter of request is made by the State the court or presiding officer may as a condition of the letter of request order that the costs of legal representation for the accused be paid by the State.

(b) Notwithstanding the fact that a presiding officer has made an order contemplated in paragraph (a), he or she may, if he or she is of the opinion that a refusal by the accused to admit the evidence obtained by means of the letter of request is unreasonable and unjustifiable, at the conclusion of the proceedings make such order against the accused as to the costs of sending the letter of request and all proceedings to give effect thereto as he or she may reasonably deem appropriate.

Sections 3(1)(a) and (b) give parties to the proceedings an opportunity to ask the relevant questions of a witness in a foreign state. In terms of section 3(1)(b), any party to the proceedings is allowed to examine, cross-examine and re-examine the witness. Section 3(3)(b) appears to be problematic in that it could be used to threaten the accused's constitutional right to challenge evidence which is guaranteed under section 35(3)(i) of the Constitution. It should be recalled that the right to adduce and challenge evidence is one of the non-derogable rights in the South African Constitution.[130] Section 3(3)(b) gives the presiding officer a discretion to impose what could be a heavy financial burden on the accused if he is of the view that the accused's refusal to admit the evidence in question was unreasonable and unjustifiable. The accused, because of the danger of conviction, should have the opportunity to challenge any evidence on any ground without fear of incurring financial penalties for challenging such evidence. If the presiding officer comes to the conclusion that the accused's submissions are unfounded, he should reject them and admit the evidence in question without making an order for the accused to reimburse the state for gathering the evidence that was used at the accused's prosecution. Even if the accused was represented by a lawyer at the examination of a witness in a foreign country, that, in itself, should not be invoked as a ground to hold that his opposition to the admission of evidence was unreasonable or unjustified.

Whether or not a person, who runs the risk of being prosecuted on the basis of the evidence being sought in terms of the ICCMA, has the right to challenge the validity of the search warrants issued in terms of section 2(2) is still unsettled. In *Thint (Pty) Ltd v National Director of Public Prosecutions and Others* the Supreme Court of Appeal held that 'a person who is at risk of prosecution if a warrant for search and seizure is

130 See Constitution of the Republic of South Africa 1996 (Table of Non-Derogable Rights).

executed has standing to challenge the validity of the warrant for that reason alone. That being so it also cannot afford him or her standing to challenge the validity of a letter requesting that such a warrant be issued'.[131]

However, on appeal the Constitutional Court held that:[132]

> The Supreme Court of Appeal concluded that the applicants did not have standing to challenge the issue of the letter of request. It concluded that the process of obtaining information is a preliminary process that does not affect the rights of the applicant. In our view, this is a matter that does not need to be decided in this case and we accordingly refrain from doing so. We should note, however, that our Constitution has adopted a broad approach to questions of standing. We wish to make it clear that we are not persuaded that the approach of the Supreme Court of Appeal is necessarily correct given our constitutional approach to standing and we leave this question open for consideration in another case.

In *Mudaly v Gwala and Others,* in which the applicant challenged the validity of two search and seizure warrants on the basis that he ran the risk of prosecution, the High Court referred to the above two decisions and observed that '[t]he superior courts are divided as to whether a person has standing to challenge the validity of a search and seizure warrant, merely because he or she risks prosecution'.[133] The High Court followed the Constitutional Court's reasoning.[134] In *Reuters Group PLC and Others v Viljoen NO and Others*,[135] the prosecutors promised the applicants that they would not request the United Kingdom authorities for assistance to force the applicants to hand over video footage that was needed for the purpose of prosecuting murder suspects, but went ahead and invoked section 31 of the ICCMA and requested the United Kingdom authorities to acquire the necessary evidence from the applicants. The Court held that the prosecutor's conduct was unconstitutional, *inter alia*, for not giving the applicants the opportunity to be heard before they requested the United Kingdom authorities to assist them in obtaining the video footage. This is due to the fact that the applicants had a legitimate expectation that they would be informed.

8 Conclusion

This article has highlighted the issues that South African courts have dealt with in implementing some of the sections of the ICCMA – those sections

131 *Thint (Pty) Ltd v National Director of Public Prosecutions and Others supra* n 17 at par 19.

132 *Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions supra* n 18 at par 47.

133 *Mudaly v Gwala and Others* 2011 (1) SACR 302 (KZD) par 2. This case was not concerned with the ICCMA.

134 *Mudaly v Gwala and Others supra* n 133 at par 20.

135 *Reuters Group PLC and Others v Viljoen NO and Others* 2001 (2) SACR 519 (C).

that are relevant to obtaining and admitting evidence. In particular, it dealt with how 'evidence' is defined in the ICCMA and how courts have applied that definition; the circumstances in which South African courts have issued letters of request to other countries and the conditions that have to be met for such letters to be issued; the meaning of the term 'interests of justice' as one of the factors that have to be in place before South African courts issue a letter of request; the procedure that has to be followed in dealing with letters of request from foreign countries; the admissibility of evidence, in South African courts, obtained from abroad on the basis of letters of request; the question of whether evidence obtained from South Africa illegally may be used in a foreign country; and human rights in the context of the ICCMA. It is recommended that section 7 of the ICCMA should be amended to be framed in the same manner as section 7 of the Namibian ICCMA[136] for the reasons given below. There are several differences between section 7 of the ICCMA and section 7 of the Namibian ICCMA. Section 7 of the Namibian ICCMA provides that:

> (1) A request by a court or tribunal of competent jurisdiction in a foreign State, or by an appropriate government body in a foreign State, for assistance in obtaining evidence in Namibia for use in that State shall be submitted to the Permanent Secretary or, in a case of urgency, directly to the magistrate's court within whose area of jurisdiction the person whose evidence is required resides or is.
> (2) When a request from a foreign State for assistance in obtaining evidence in Namibia is in terms of subsection (1) received – (a) by the Permanent Secretary shall forward such request to the magistrate's court within whose area of jurisdiction the person whose evidence is required resides or is; (b) by such a magistrate's court, the Permanent Secretary shall without delay be notified thereof in writing by the clerk of the court and be furnished with a certified copy of such a request.
> (3) Upon receipt of by a magistrate's court of a request contemplated in subsection (1), that court shall satisfy itself – (a) that the proceedings have been instituted in a criminal court or tribunal of competent jurisdiction in the requesting state concerned; or (b) that – (i) there are reasonable grounds for believing that an offence has been committed in that requesting state or that it is necessary to determine whether an offence has been committed; and (ii) an investigation in respect of thereof is being conducted in that requesting State.
> (4) For the purposes of subsection (3), a court may rely on a certificate purporting to be issued by any competent authority of the requesting State concerned, stating the facts contemplated in paragraph (a) or (b) of that subsection.

The differences between the two provisions are as follows. First, in the ICCMA, a request must be sent to the Director-General. In the Namibian ICCMA, a request shall be submitted to the Permanent Secretary, except that in a case of urgency, the request may be sent directly to the magistrate's court within whose area of jurisdiction the person, whose evidence is required, resides or is. The Namibian ICCMA is thus more

136 International Co-operation in Criminal Matters Act No 9 of 2000.

flexible and accommodating of urgent situations. Secondly, unlike in the South African legislation where the Director-General is required to satisfy him or herself that one of the conditions in section 7(2) have been met, in the Namibian legislation, the Permanent Secretary's role is to forward the request to the magistrate in whose area of jurisdiction the witness resides or is, and it is the magistrate court's duty to satisfy itself that the requirements of section 7(3) have been complied with. This is an important distinction as the question of whether or not the requirements in section 7(3) of the Namibian ICCMA have been met is answered by a judicial officer as opposed to a member of the executive in South Africa. In Namibia, unlike in South Africa, policy and political considerations have a very limited, if any, role to play in deciding whether or not to afford assistance to a foreign country on the basis of section 7. Thirdly, under section 7 of the ICCMA, a request can only be forwarded to the magistrate in whose area of jurisdiction the witness 'resides'. However, under section 7 of the Namibian ICCMA, a request is forwarded or sent to a magistrate in whose area of jurisdiction the witness 'resides or is'. The distinction between where a person 'resides' and where a person 'is', is critical because, residency connotes some degree of permanency or stability. On the other hand, if a person 'is' in a given area it does not mean that he is permanently situated there.

What is wrong with modern unjustified enrichment law in South Africa?

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OPSOMMING

Wat Skort met Onreverdige Verryking in die Modern Suid Afrikaanse Reg?

Onlangse ontwikkelings op die terrein van onregverdige verryking in die Suid Afrikaanse reg het daarop gedui dat die Romeinse reg, wat die basis vorm van verrykings aanspreeklikheid, drasties getransformeer, en selfs totaal verander behoort te word ten gunste van 'n nuwe paradigma van vereistes. In dieselfde asem word voorgestel dat verryking nie meer onderdanig aan die ander *obligations,* te wete kontrakte- en deliktereg, gestel behoort te word nie, en dat dit 'n selfstandige derde been van die verbintenisreg behoort te vorm. Deur gehoor aan hierdie hervorming te gee sal egter impliseer dat die belangrike vereiste van verarming buite rekening gelaat kan word, en ook dat grondbeginsels van die verrykingreg, soos byvoorbeeld die reverdigheids- en die ekwiteitsbeginsel, verlore mag gaan. Die moontlikheid om die *condictiones* gedeeltelik of volledig te vervang word ook deur sommige kontemporêre skrywers ondersoek. Die belangrikste protagonis vir hierdie hervormings is Visser wat dit in sy boek *Unjustified Enrichment* uiteensit. In teenstelling hiemee wil hierdie artikel argumenteer dat die Romeinse reg 'n uitstekende en voldoende basis vorm vir die ontwikkelings wat op die terrein van die verrykingsreg voorgestel word. Die artikel wil verder argumenteer vir die behoud van die regverdigheids grondslag, soos ontwikkel deur die Romeinse-en gemene reg, as eerste beginsel van die verrykingsreg. Hiervoor word die regs-historiese metode aangewend. Hierdie metode toon nie die Romeinse reg tekste binne die konteks van die *Corpus Iuris Civilis* aan nie, maar eerder binne die konteks waarin hulle deur die klassieke juriste oorspronklik geskryf is. Die gevolg hiervan is dat die tekste veel meer kontekstueel uitgelê kan word. Sonnekus se boek *Ongegronde Verryking in die Suid Afrikaanse Reg* asook Du Plessis se boek *The South African Law of Unjustified Enrichment* word ook bespreek. Om die argumente af te sluit sal twee spesifieke probleme in die verrykingsreg oorweeg word. Ten eerste sal die afwatering van die wederkerigheids beginsel in die verrykingsreg, bespreek word, gevolg deur 'n analise van die verslapping van die *par delictum* reel in die Suid Afrikaanse reg. Daar word geargumenteer dat daar in beide hierdie gevalle meer indringende dringeder teoretiese herstelwerk aan die foutiewe interpretasiese van die howe gedoen behoort te word, eerder as om die Romeinse reg te probeer hervorm deur dit te vervang met regsbeginsels wat afkomstig is vanuit kontinentale gekodifiseerde stelsels wat onversoenbaar met ons reg is. Daar word ten slotte oorweging gegee aan die feit dat indien bogenoemde foute slegs deur wetgewing reggestel kan word, dit oorweeg behoort te word dat die gemene reg slegs hervorm kan word binne die fundamentele grondbeginsels van die onregverdige verrykingsreg.

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1 Introduction

Unjustified enrichment law has always been the stepchild of the law of obligations in South African law. After the unfortunate judgment of *Nortje v Pool NO en 'n Ander,*[1] where the South African Appellate division, by a majority of one, decided against accepting a general action for unjustified enrichment, the South African law of unjustified enrichment languished in a stagnant pool for more than 30 years.

This all changed when Peter Birks, the Regius Professor of Civil Law at Oxford, woke this area of the law from its slumbers when he suggested a fresh approach to the chaotic English law system of restitution by providing a more rational structure or taxonomy to bring the English common law system into the modern world.[2] This made the English system much more workable and intelligible, and led to a worldwide reappraisal of unjustified enrichment law in both civil and common law systems.

South Africa was not unaffected. Recent developments in the South African law of unjustified enrichment have seen the rise of the view that the classical Roman law basis of enrichment should be radically overhauled and even discarded in favour of a new set of categories setting out how enrichment liability would arise; in the process, enrichment would be elevated to the status of being a third branch of the law of obligations, along with contract and delict. By doing this, however, the requirement of impoverishment would be abandoned, the primacy of the principles of equity and fairness would be lost, and the old Roman law *condictiones*, partially or altogether, thrown out. The main protagonist for this view is Visser, whose book on unjustified enrichment sets out this proposal.[3] This article attempts to show that, on the contrary, the classical Roman law provides a perfectly adequate base from which to develop the law of unjustified enrichment. The paper will further consider the landmark case of *McCarthy Retail v Shortdistance Carriers*[4] and how it represents a move towards the creation of a general action for enrichment liability in South Africa. Sonnekus and Du Plessis's scholarly works on unjustified enrichment law in South Africa,[5] which both argue for the retention of the traditional approach to unjustified enrichment, will also be considered.

What must be emphasised at the outset is that the present state of our unjustified enrichment common law, and its development in recent years, can only be described as chaotic. This is primarily attributable to the meddling of our courts and the, at times, incorrect interpretations that they have given to common law principles. In view of this, the

1 1966 (3) SA 96 (A).
2 Birks *Unjust Enrichment* (2005) 39.
3 Visser *Unjustified Enrichment* (2008) 3-54.
4 CC 2001 (3) SA 482 (SCA).
5 Sonnekus *Unjustified Enrichment in South African Law* (2008); Du Plessis *The South African Law of Unjustified Enrichment* (2012).

question must be raised whether it is not time to clean up our unjustified enrichment jurisprudence with clear and precise legislation.

The main thrust of the paper, however, is to indicate that major problems in our unjustified enrichment law exist and need to be addressed; attempting to tidy up the law through legislation in order to address these issues is certainly preferable to ripping out the law's historical roots and replacing them with Visser's new typology, which he has harvested from the codified German law. Specifically, two major problem areas will be considered. The first of these is the relaxing of the principle of reciprocity in the law pertaining to contracts and enrichment, and the second is the relaxation of the *par delictum* rule. As recently as November 2011, the Constitutional Court, through the majority decision by Moseneke DCJ in the case of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,[6] decided that it was desirable to develop the common law principles of contract law, and by implication unjustified enrichment, by infusing them with principles such as good faith and *ubuntu*. This paper will, therefore, argue that in keeping with this judgment, contractual reciprocity and the *par delictum* rule are the two areas of the common law that should be reformed rather than trying to adopt a liability matrix, and if a general action for unjustified enrichment is to be legislated, that these two areas should be reflected in such legislation.

To support this argument, leading cases concerning these two areas of law will be analysed to make the point that our courts have been compromising centuries of case law by ignoring these principles.

The first area of enrichment jurisprudence that should be reformed is the relaxation of the principle of reciprocity (*pacta sunt servanda est*). This is the foundational basis of any contract, and yet our courts have frequently deviated from it to enter the arena and, in the name of public policy or considerations of equity or pragmatism, altered the parties' contractual terms. Two of the most prominent of these cases, *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*[7] and *Thompson v Scholtz*,[8] will be returned to later in this paper.

The second area of enrichment jurisprudence that is in great need of reform is the relaxation of the *in pari delicto potior est conditio possidentis*[9] rule when money or property has been transferred illegally or immorally and the *condictio ob turpem vel iniustam causam* is available as the remedy. This is an ancient remedy which was well known to classical Roman jurists. The rule was, according to Visser,[10] De Vos,[11]

6 2012 (1) SA 274 D (CC).
7 1979 (1) SA 391 (A).
8 1999 (1) 232 (A).
9 A *condictio* available to plaintiffs if they can show that their involvement was free from turpitude.
10 Visser 447.
11 De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (1971) 148.

and De Wet & Van Wyk,[12] very dogmatically applied in the Roman-Dutch law but relaxed in a string of controversial South African court decisions.[13] This development was not universally followed by the courts.[14] It is not only sound legal theory not to deviate from fixed and ancient legal principles, but it is bad practice to do so in the name of 'public policy' and, worse, to do so without any established criteria existing with which to judge when the relaxation may be applied. As a consequence, these deviations have been done casuistically, on a case by case basis, which can only lead to the exchange of legal certainty for instability. This dangerous tendency by our courts should rather be reformed than looking for a new place, in our division of law subjects, for enrichment law.

This paper argues that there is a far more pressing need to remedy these instances of laxity on the part of our courts than to start tinkering with the classical Roman civil law and replacing it with a totally new set of legal principles. If legislation is being considered to remedy these and many other uncertainties in enrichment liability, it should be done while respecting the foundational principles of enrichment jurisprudence.

In this regard, it should be emphasised that Roman unjustified enrichment law rested on the philosophical foundations of equity and fairness, as can be shown using a comparative legal-historical method to analyse the four central texts about unjustified enrichment from the Digest of Justinian, and more especially, to read them in their true contexts in the original works of the classical Roman jurists, using the Palingenesia of Otto Lenel. These four texts are two by Pomponius, in D: 12:6:14 and D: 50:17:206, and two texts – by Ulpian in D: 12:7:1:3 and Marcian in D: 25:2:25 – which restrict the wide application of Pomponius' texts by limiting them to unjustified actions or enrichment without cause. From this analysis it becomes clear that equity and fairness were always at the root of corrective unjustified enrichment.[15]

12 De Wet & Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1978) 81.

13 *Jajbhay v Cassim* 1939 AD 537; *Visser v Rousseau* 1990 (1) SA 139 (A); *Klokow v Sullivan* 2006 (1) SA259 (SCA).

14 The relaxation was not allowed in *Mamoojee v Akoo* 1947 (4) 733 (N); *Henry v Banfield* 1996 (1) SA 244 (D); *Jorddan v Penmill Investments* 1991 (2) SA 430 (E); *Masekop v Maseko* 1992 3 (SA) 190 (W); and *Parbhoo v Spilg* 1990 2 (SA) 398 (W).

15 Serfontein 'The Re-establishment of Equity and Fairness as the Founding Principles of Liability for Unjustified Enrichment in South African Law' 2012 *Fundamina* 56-61. See Serfontein 2012 *Fundamina* for an in-depth analysis of these four texts.

2 Birks: A New Typology for Unjustified Enrichment Worldwide: A Model for South African Legislation?

For many years the English common law struggled to come to grips with the concept of restitution, and more recently with unjust enrichment. The common law, as we all know, is a magnificent creation of two thousand years of wisdom by the lawyers and, more specifically, the judges of England. As such it was based on piecemeal development without the benefit of an overarching theoretical framework that these and similar concepts enjoyed in the civilian tradition. The result was an ill-defined patchwork of casuistic jurisprudence based on the unsure footing of hundreds of cases that came before the English judges, where restitution was pleaded as the best remedy available. Most English academics and judges struggled on with this ragbag of jurisprudence rather than carrying out a comparative study to see how the civilian tradition coped with the same vexing questions, coming to a much more elegant solution by using the ancient *condictiones* of the Roman law and abstracting those principles into the concept of unjustified enrichment. Only one academic had the insight to do this – dragging the English common law into the twenty-first century by acknowledging the existence of unjust enrichment within the boundaries of restitution in the common law.

This academic was the late great Birks, Regius Professor of Civil Law at Oxford. After years of denial that there was a problem with the English law of restitution, Birks, towards the end of his very short life, wrote a work on unjust enrichment in which he explained the concept to the common law tradition. By suggesting such a fresh approach for the chaotic English law system of restitution, Birks provided a more rational structure that could bring the English common law system of restitution into the modern world.[16] He made this startling advance by first of all differentiating between unjustified enrichment and restitution. He defined unjustified enrichment as:[17]

> [T]he law of all events materially identical to the mistaken payment of a non-existing debt. Such payment gives rise to a right to restitution. The law of restitution is the law of gain-based recovery.

Gain-based recovery is different from loss-based recovery, which is called 'compensation'. Restitution, although sharing characteristics of gain-based recovery with unjustified enrichment, is, however, not the same as unjustified enrichment. Birks goes further to distinguish between unjustified enrichment and restitution by indicating that contractual restitution is not unjustified enrichment. In English law this kind of restitution can be compared with '*mutuum*' in Roman law and is distinct

16 Birks 39.
17 *Idem* 1.

from unjustified enrichment. Another instance of distinction is the English restitution of gain-based recovery for wrongs. Birks quotes two well-known cases to illustrate this distinction – *Boardman v Phipps*[18] and *Attorney-General v Blake*.[19]

After this ground-breaking distinction, Birks went on to structure the concept of unjustified enrichment in the common law, and insisted on the change from restitution to unjustified enrichment – from the morass of common law restitutionary jurisprudence to the clear and concise definition of unjustified enrichment in terms of the civil law. He emphasised that unjust enrichment was an independent event and not only a response, as in the restitution tradition. This made the English system much more workable and intelligible, and caused a worldwide reappraisal of unjustified enrichment law in both civil and common law systems.

This resulted in the reorganisation of the contemporary common law of unjustified enrichment around five core questions. These questions are: One, was there enrichment of the defendant, and two was the enrichment at the plaintiff's expense? If this is answered in the affirmative, then, three, was the enrichment of the defendant unjust, and if so, what right does the plaintiff have against such unjust enrichment? Lastly, one must ask which defences, if any, are available to the defendant in such circumstances. The similarities with Roman unjustified enrichment law are clear to see.

The first question that comes to mind if one studies the suggestions made by Birks, of course, is whether this typology will work as a basis for any suggested South African enrichment legislation? This question can be answered in the affirmative, with three qualifications. Firstly, the South African legislation should make provision for the acceptance of a general enrichment action in the proposed legislation. This will imply that the richness and diversity associated with the Roman law *condictiones* will disappear, but it will accommodate a much wider range of enrichment litigation and liability than before. Additionally, the principle of subsidiarity, usually associated with enrichment liability, will have to be abandoned. The typology suggested by Birks would only work if unjustified enrichment is seen as an independent event and not something dependent on an obligation, acting as a catalyst before it can come into operation. Finally, equity, the ancient basis of enrichment,

18 1967 2 AC 46 (HL). This is a case of restitution of gain-based profit based on a wrong from a breach of a fiduciary duty. A solicitor used his position, as an adviser to a trust, and his own money to substantially increase not only the trust's shareholding in a company, but also the profit in the company for the shareholders in the company.

19 2000 1 AC 268 (HL). In this case, a defector from the British Secret Service wrote his autobiography and so breached the terms of his service contract. The Attorney-General successfully obtained an injunction to prevent the royalties from the book being paid to him in Moscow. This was not unjustified enrichment but rather gain-based restitution flowing from a wrong due to the breach of contract.

would have to be abolished and enrichment would have to be recognised as an autonomous legal fact and not one designed specifically to address unjust or inequitable situations. Coupled with this is the fact that, logically, impoverishment would no longer be required in South African law.

Should all these requirements be met, it may be possible to use Birks' typology as a guideline in drafting South African enrichment legislation. However, the ideal would be to combine Birks' excellent typology with some of the present requirements of South African enrichment liability, such as subsidiarity and equity. Impoverishment is more arbitrary and, perhaps, could be sacrificed in the name of legal certainty when legislation is considered.

This radical departure from the common law by Birks not only caused a revolution in common law jurisdictions, but also in civil law jurisdictions – not even South Africa was spared the effects. This resulted not only in a string of dramatic judgments by our Supreme Court of Appeal, but also in no less than three textbooks being published after a drought of 30 years since the appearance of the standard work on the subject by de Vos in 1968.[20]

3 Daniel Visser on the Reform of Unjustified Enrichment in South Africa

Visser states[21] that, in South Africa, we should add a third branch to the traditional division of obligations,[22] and this should be for unjustified enrichment.[23] Through this book, Visser brought a similar revolution to South African jurisprudence as Birks did in the United Kingdom. The book 'draws on a rich and diverse legal heritage, and provides a

20 De Vos 11.
21 Visser 88-89.
22 Gaius, the famous second century teacher and jurist of Roman law divided obligations into three constituent parts. Contract, delict, and what he called *ex variae causae figuris civilis iuris:* G 3:119 a. Gaius divides obligations first into two main divisions, namely civil obligations – enforceable by action, and natural obligations – unenforceable by civil action but nevertheless with some legal effect. Later Gaius divided obligations into either contract or delict and finally 'a variety of figures from the civil law'. Three hundred years after this somewhat haphazard classification by Gaius, the great codification labours of Justinian I, under the careful eye of Tribonius, made the following classification of obligations: Contracts, delicts, quasi-contracts and quasi-delicts (Inst 3:13:2). Justinian's Institutes makes this seemingly arbitrary four-fold classification after stating somewhat more convincingly that the *summa divisio* of all obligations are either civil or praetorian. The figure of unjustified enrichment was placed either under *ex variae causae figuris* or quasi-contracts and quasi-delicts.
23 'This book remains faithful to that tradition in its attempt to give both an accurate description of, and a new start to, this third branch of the law of obligations' (Visser v).

comprehensive and clearly structured exposition and an in-depth evaluation of the South African law of unjustified enrichment'.[24]

The revolutionary nature of the work is to substitute the traditional Roman *condictiones* with a new organisational scheme for enrichment liability which, it would appear, wants to do away with impoverishment as a requirement for unjustified enrichment and suggests we move closer to a general action for unjustified enrichment in South Africa. Besides the loss of the requirement of impoverishment and the rich jurisprudence surrounding the application of the *condictiones*, the new system is not dependent on the rich equity philosophy that has always surrounded unjustified enrichment.[25]

Visser does not consider the traditional organisation of enrichment liability in South Africa compatible with a modern system of law. He finds the Roman law *condictiones* primitive, difficult, and almost impossible to understand.[26] He wishes to open up the actions for unjustified enrichment – even to the extent that South Africa would have a general enrichment action that removes the traditional requirements of the obscure Roman law *condictiones*. The vehicle he uses to achieve this can be found in the German law and, specifically, in the well-known Wilburg/ Von Caemmerer typology.[27] He expands the primitive old categories into more open-ended or porous groups which are not based on equity, but rather on how the unjustified enrichment came about – in this, the influence of Birks on Visser's thinking can clearly be seen.[28]

In general, Visser wants enrichment liability to be divided into two main groups of acts which give rise to such liability. The first instance is the situation where the enrichment occurred due to a transfer of money, goods or services. The transfer, to establish unjustified enrichment liability, must be in error, under compulsion or protest, or must take place in terms of an illegal contract or an obligation that does not materialise – in short, a transfer *sine causa*. The second class of liability acts consists of instances which, in any other way, give rise to enrichment liability. These other acts include enrichment through encroachment and through outlays by another. Outlays by another can further be divided into expenditure, as a result of managing the affairs of another, and expenditure on the object of another.[29]

Visser is of the opinion that although this new typology is foreign to South African law, originating in German and not civilian law, it is preferable to the civilian model due to its better organisational structure

24 www.jutlaw.co.za (2008-04-30); advertising material for Visser *Unjustified Enrichment* on first publication.
25 Du Bois (ed) *Wille's Principles of South African Law* (2007) 1055-1057.
26 Visser 10-27.
27 Wilburg *Die Lehre von der ungerechtfertigten Bereicherungnach Osterreichischem und Deutschem Recht. Kritik und Aufbau* (1934) 113.
28 Visser 78-85.
29 Du Bois (ed) 1057.

and because it will lead to a reduction in the large and diverse number of remedies currently available and, further, because the new organisational plan does not conflict with South African law. Although one can understand this argument, due to the masterful way in which Visser has integrated German models of unjustified enrichment law into South African enrichment law, the fact remains that German law is not the common law of South Africa in the same way that Roman-Dutch law is, and it would have been preferable had he found a fresh model of unjustified enrichment liability for South Africa within the confines of Roman-Dutch law.

Therefore, this paper argues that instead of looking to German, Scottish and English law to reform our historically-orientated law of unjustified enrichment, we should develop and, if necessary, extend the law in terms of our legal system's Roman-Dutch foundations. The great loss of Visser's new organisational matrix is that it moves away from the foundational principles of unjustified enrichment, namely equity and fairness. However compelling and organisationally attractive it might be to neatly gather unjustified enrichment into a third branch of obligations and then create a new open-ended matrix for enrichment liability, it simply cannot happen without taking cognisance of the origins and development of the foundations of unjustified enrichment. If one could change the organisational matrix of the civil law with the stroke of a pen – by creating an additional branch of obligations – why could one not then also create space for the law of damages as part of obligations? This wholesale tinkering with divisions created by Gaius and Justinian, and confirmed by Grotius, should only be altered under extreme circumstances. Legal certainty and confidence in millennia of judge-made law cannot simply be shifted aside in favour of a practical and organisationally attractive system developed in a continental legal system that has already been codified for many decades. In South Africa, the Roman civil law is still a primary source of our law, including our private law, and if we wish to be creative with our law of unjustified enrichment we should go back to the classic Roman law and not dabble with foreign systems.

In his book, Visser pays lip service to the foundational principles of enrichment and the principles of judicial law-making, and while he mentions and even analyses them thoroughly, his hidden agenda surfaces in descriptions such as 'our society must be responsive to modern commercial demands'.[30] This is followed by a discussion of corrective and distributive justice and the role that the South African Constitution plays in these concepts. This, perhaps, is a jump too far. The constitution is loosely based on the values of dignity, equality and freedom. This is not the same as the concepts of equity and fairness described in the works of the classic Roman jurists. While one has to admit that there are similarities between the constitution and its underlying values and the foundational principles of unjustified

30 Visser 449-450.

enrichment, the former is a political statement wishing to provide guidelines for the public law protection of rights, whereas the foundational principles of unjustified enrichment are essentially a balanced mechanism rectifying the excesses or shortcomings of private law – that is, the sacrosanct relationship of individuals within an obligation.

Many commentators are critical of Visser's interpretation of the views of Schutz JA in particular and, more generally, of his disjointed treatment of the decision in *McCarthy Retail v Shortdistance Carriers*.[31] Visser's views on these matters are scattered rather than focused, and suffer from admiration rather than critical analysis. Views on this precedent-breaking case are as varied as the views on the desirability of a general action for enrichment in South Africa. It is submitted that although the *McCarthy Retail v Shortdistance Carriers* case is, as yet, the best example of the almost imperative need for a general enrichment action, this area of law should be developed incrementally and not twisted beyond recognition to accommodate a comfortable, modernist, matrix paradigm based on German law. Rather, it should be subject to the gentle bending and stretching of the ambit of the *condictiones*, as judges have been doing since the first century AD. Perhaps Schutz JA was correct when he held that:[32]

> A more daunting consequence of acceptance [of a general enrichment action] is the possible need for a re-arrangement of old-standing rules. Are the detailed rules to go and new ones to be derived from a broadly stated general principle? Or are the old ones to stand, and be supplemented by a general action which will fill the gaps? I would support the second solution.

To use German law and graft upon our uncodified Roman law tradition, an entirely new approach to unjustified enrichment liability is perhaps too much for our judges to digest. Despite the undiluted veneration one must have for Visser's *magnum opus*, one should heed the warning against enrichment imperialism from other commentators, who caution us to return to the well-worn traditional path of the *condictiones* jurisprudence.[33]

4 Sonnekus: Creating a New Lexicography for Enrichment Liability in South African Law

In a rigorous and scholarly work, Sonnekus introduced us to a first reworking of the unjustified enrichment landscape since the last appearance of the magisterial work of De Vos in the late sixties.[34] The work by Sonnekus first appeared in Afrikaans, slightly ahead of Visser's

31 2001 (3) SA 482 (SCA).
32 *Idem* parr 488 B-D.
33 Lewis 'Daniel Visser "Unjustified Enrichment"' 2008 *SALJ* 462-467.
34 De Vos 5-57.

book.[35] It would have been extremely interesting to see this commentator's views on Visser's new approach to unjustified enrichment. Sonnekus starts his work with the foundational premise that enrichment has a correctional function, where equity has, over centuries, been shaped and moulded to form a practical paradigm for restitution or enrichment liability. From this ancient foundation of enrichment liability, the principle of subsidiarity, or as Sonnekus calls it, an action of last resort, was developed. This principled view firmly places Sonnekus in the classic school of thought that enrichment cannot be a revolutionary 'third' independent arm of the law of obligations, as suggested by Visser.[36] Most practitioners and academic commentators preferred the more familiar structure of Sonnekus' work, as opposed to the more speculative and unknown, as well as revolutionary, nature of Visser's matrix.[37]

Following the trend and methodology set by De Vos, the work of Sonnekus is also divided into two parts, the first being the general principles and generic requirements of enrichment, and the second being a discussion of the *condictiones.* Without being too imaginative, one can read into this division a particular view of enrichment, further confirming that Sonnekus may not be an enthusiastic supporter of the new matrix for founding enrichment liability suggested by Visser. He cleverly steers clear of the debate concerning the necessity of a general enrichment action by analysing the generic South African requirements for enrichment.[38] Sonnekus, as a classicist and traditional scholar steeped in the civilian tradition, clearly does not support a transfiguration of the *condictiones* into a foreign template where the requirement of impoverishment might be abandoned. It should also be noted that Sonnekus is a leading authority in South Africa on Roman-Dutch as well as German law. Yet he is flexible about the evolutionary changing of the working of the *condictiones*. He does not consider enrichment liability to be cemented in the *condictiones* as the only key to liability and excluding all other modern possibilities, but Sonnekus does allow for public policy to sometimes deny a claim of the plaintiff or to redefine the defendant's obligations.[39]

As already alluded to, Sonnekus is one of the leading scholars on European law in South Africa and his work is distinguishable by the expert and self-assured manner in which he applies legal comparative

35 The Afrikaans version of this book (Sonnekus *Onregverdige Verryking in die Suid Afrikaanse Reg*) was published in 2007.
36 Sonnekus 36.
37 Miller 'Unjustified Enrichment in South African Law' 2010 *Advocate* 49.
38 In this regard he spends a lot of time and space in discussing the apparent conflict between older case law such as *Nortje v Pool NO* 1966(3) SA 96 (A) and more recent developments in South African enrichment jurisprudence such as *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd* 1996 (4) SA 19 (A); *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA); and *Kudu Granite Operations v Caterna* 2003 (5) SA 193 (SCA).
39 Sonnekus v-vi.

methods to enhance the South African law of enrichment. One would expect the excellent use that he makes of continental systems, such as Dutch and German law, but what is utterly surprising about his approach, is the imaginative use of English law – applying it to empower South African jurisprudence. English law is the foundation of all common law systems world-wide not based on Roman civil law, which is the author's natural intellectual habitat. Sonnekus' comparative method proves that one can retain the traditional *condictiones* from Roman law as a basis for enrichment liability and yet make use of foreign legal systems to gently massage and sophisticate one's own system. The fact that Visser makes liberal use of the German system of enrichment to develop his new matrix for enrichment liability could therefore, by implication, be condoned by Sonnekus in the name of a greater unification of the law of enrichment.

Only two problematic theoretical objections remain against the large-scale adoption of German or continental law into the South African law of enrichment; namely that we still stringently require impoverishment in our law of enrichment liability and, secondly, that modern German law is based on a codified system of law whereas in South Africa we rely on classical Roman civil law, which was not codified before the *Corpus Iuris Civilis*. These objections are not fatal, and should rather be seen as a warning against a wholesale adoption of codified foreign law into our uncodified system. There is no compelling reason for such integration due to the fact that the same, or even better, results can be obtained by a sensitive and intelligent application of Roman civil law principles.

5 The Views of Du Plessis

The latest addition to our unjustified enrichment jurisprudence is the book by Jacques du Plessis, *The South African Law of Unjustified Enrichment*, published early in 2012.[40] This work follows the traditional approach to unjustified enrichment law in South Africa by first providing a meticulous and thorough analysis of the ancient principles of unjust enrichment. It presents the reader with two introductory chapters concerning the basic features and general requirements for liability in South African unjustified enrichment law. This is followed by a comprehensive and rigorous analysis of the five well-known *condictiones* in South African law. According to Du Plessis, however, these traditional pigeonholes of unjustified enrichment law do not always satisfy modern situations, and the unjustified enrichment jurisprudence ought to be expanded; if not to a full-blown general action, then at least to include some modern categories of unjustified enrichment liability. These include enrichment imposed on another and by taking from another, or infringement of another's rights.

40 Du Plessis 1-22.

From a legal-political point of view, Du Plessis is of the opinion that our enrichment jurisprudence should be reformed and, to this end, he suggests that there are three avenues which one could go down to reform South African enrichment law. The first possibility suggested by Du Plessis is that of a subsidiary, residual general enrichment action. In terms of this route, the general enrichment action will only be activated if the traditional existing enrichment actions cannot be employed. This was the situation in South African and Roman-Dutch law before the *Nortje v Pool* case and, according to Du Plessis, the preferred option expressly or tacitly held by the South African judiciary. The advantage of this route is that it will not be disruptive or create uncertainty in the legal traffic, but the disadvantage in the long term is that South African enrichment law will follow a dual-track approach which might eventually lead to confusion and misinterpretation.

The second route suggested by Du Plessis is the acceptance of a true general action detached from the traditional actions. In terms of this option, there will only be one general enrichment action, absorbing both the traditional grounds for enrichment liability and any new ground that may be created in modern South African law. This route is not favoured by Du Plessis as it would create legal uncertainty and also because such a course of action has not been without problems in the United States and various other continental jurisdictions. From a legal-historical perspective, this approach would be a disaster.

The final option available is a true general action which is still linked to the traditional actions. This link would be a reference to the rules and divisions of the traditional actions to inform the content of the general action – a true hybrid general action. The same complication exists for this route as for the second one – if it is not carefully managed by the judiciary, it may develop into a dual-track jurisprudence which will ultimately result in a melt-down of all the traditional actions into an unsatisfactory and cumbersome general enrichment action.

The analysis of Du Plessis should be welcomed. The only shortcoming is that he does not recognise the foundational principle of unjustified enrichment, namely equity and fairness. All the Roman authorities start off by emphasising this in the Digest. Pomponius (D: 50:17:206) states that according to natural law, it is equitable that nobody enriches himself at the expense of another. Paul (D: 12:6:15pr) talks of natural law as the source of unjustified enrichment and for Celsus and Ulpian (D: 12:4:3:7), natural equity is the guiding principle for unjustified enrichment. Celsus (D: 12:1:32) invokes the good and the equitable as the basis for unjustified enrichment actions. According to Paul (D12:6:65:4), fairness and equity is the foundation of unjustified enrichment principles and Papinianus (D: 12:6:66) calls it the good and natural. Good faith plays a role according to Africanus (D: 23:3:50), whereas Marcianus (D25:5:25) found his rule in the *ius gentium*. To ignore this when you are analysing routes to develop modern unjustified enrichment jurisprudence is a major shortcoming.

However, it is the point of this paper to argue that despite the interesting developments that the authors above discuss, it is not the finding of new grounds for unjustified enrichment that is the most pressing reform that is needed – the judicial reform of the principle of reciprocity, or the *exceptio non adimpleti contractus*, and the application of the *par delictum* rule in the law of contract that poses far greater problems for modern South African unjustified enrichment jurisprudence. The only way to remedy this situation once and for all is, of course, through new legislation, but this would have to specifically ensure that the equitable nature of enrichment liability is preserved – something that Visser does not provide for in his proposed new matrix.

6 The Greater Problems with Enrichment Law

In contrast to this return to the original sources and principles, and in the wake of cases such as *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd*,[41] *McCarthy Retail Ltd v Shortdistance Carriers*[42] and *Kudu Granite Operations v Caterna*,[43] Visser suggested a new matrix for unjustified enrichment, based on German law, which groups enrichment liability under three headings: Enrichment by transfer, enrichment through the invasion of rights, and enrichment due to outlays.[44] The weakness of this scheme is that in its thrust to create a new typology for enrichment liability, it has lost the primacy of equity and fairness as founding principles of enrichment liability and it also necessitates the abandonment of impoverishment as an integral part of the requirements for unjustified enrichment. This was criticised by Lewis J of the Supreme Court of Appeal and contradicted, by implication, by other commentators such as Sonnekus, who suggested following the traditional way of applying the *condictiones* as the basis for enrichment liability.

What is the conclusion that can be drawn from all these arguments and viewpoints? Well, certainly, that a legal doctrine such as enrichment can never be removed from its foundational principles and be expected to stay the same. If you change equity and fairness as the first principles or foundations of enrichment liability, the whole structure will become less stable. Perhaps one should let sleeping dogs lie and accept the traditional *condictiones* as the primary basis for liability, possibly with a residual general action introduced by legislation, and look elsewhere to cure the ills of modern unjustified enrichment jurisprudence.

Although the above deliberations about a new matrix, or new routes, for unjustified enrichment liability in South African law are very interesting and challenging, one must ask the pertinent question whether

41 *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd supra* n 38.
42 *McCarthy Retail Ltd v Shortdistance Carriers supra* n 38.
43 *Kudu Granite Operations v Caterna supra* n 38.
44 Visser 76-85.

these considerations are the most important problems facing enrichment jurisprudence in South African law? Is a thorough analysis of the contemporary ills of enrichment law not higher on the agenda than a new matrix or alternative routes for the development of enrichment liability in South African law? One can immediately refer to two aspects of modern enrichment law that should rather be remedied than to invent an entire new matrix for liability. The first is the relaxing of the principle of reciprocity in enrichment jurisprudence, as was done in the case of *BK Tooling (Edms) Bpk v Scope Precision Engineering*,[45] and the second is the relaxation of the *par delictum* rule, as was done in the case of *Jajbhay v Cassim*,[46] when money or property had been transferred illegally or immorally, with the *condictio ob turpem vel iniustam causam* as remedy.[47]

The principles that govern the reciprocity of contracts, being *pacta sunt servanda est*,[48] are the foundational basis of any contract and should they not be adhered to, the *exceptio non adimpleti contractus*[49] would be available to the wronged party.[50] The source and language of this well-known *dictum* deserves comment. It comes from the Codex of the Emperor Justinian's codification, which implies that it was legislation, considered by Tribonius, worthwhile of being taken up in the codification of 527 AD. It is, therefore, not merely a useful practical saying but a piece of valid legislation contained in the *Corpus Iuris Civilis*. The language is also interesting – the form of the verb is a gerundive which indicates that it is imperative. During the last few decades, the courts have relaxed these principles in the name of public policy and equitable considerations without having regard to the first principles of the law of contract and enrichment. In both *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*[51] and *Thompson v Scholtz*,[52] the court violated the above principles to reach what they called an equitable and pragmatic solution.

Where one side of a reciprocal agreement undertakes to deliver before or together with the other party and subsequently fails to do so, the innocent party may withhold performance with the *exceptio non adimpleti contractus*. With part performance, the question of equity and fairness concerning what has been delivered and what has been used of the already delivered performance immediately comes to the fore. The courts, in the past, have ventured into the future to manipulate the

45 1979 (1) SA 391 (A).
46 1939 AD 537.
47 Zimmermann & Visser *Southern Cross Civil Law and Common Law in South Africa* (1996) 542-549.
48 *Pacta conventa omnimodo observanda sunt*: (Valid) agreements are in all respects to be observed (Cod. 2.3.29.1).
49 The party claiming performance (instructor) under a contract can defend himself against the defaulting party (contractor) who did not complete or completed his performance unsatisfactorily with this *exceptio* by withholding his own performance (payment) until the other party (contractor) performs or performs satisfactorily.
50 De Wet & Van Wyk *Kontraktereg en Handelsreg* (1992) 180.
51 1979 (1) SA 391 (A) 415.
52 1999 (1) (SA) 232 (SCA).

contract price and order payment of a reduced price. The way in which the court does this is to take the original contract price and reduce it pro rata in so far as the innocent party has had benefit from the already performed part of the contract. This discretion of the court is subjective and not market-related and should be avoided at all costs. Visser, De Wet and Van Wyk consider this reduced price to be an enrichment action. Voet hints at an enrichment action being available to the performing party to claim back what has already been partially delivered to the other party.[53]

The requirements to push the enrichment action into operation are: The contract must be cancelled to satisfy the requirement of *sine causa*, the obligations created by the contract must be extinguished, and a duty to return must be created. The enrichment action then falls, *ex lege,* on the party that has only performed in part, where that performance is being utilised to the benefit of the other party. The great benefit of this interpretation of the reciprocity of contract is that the solution is obtained via objective, established unjustified enrichment criteria and not subjective, discretionary judicial interference that may lead to judicial imperialism and corruption. Du Plessis is sceptical about using the enrichment action in these circumstances, and indicates that neither Voet nor the case law insists on this, even though he agrees that there are problems with quantification if an enrichment action is not utilised.[54] De Wet & Van Wyk[55] state that Voet does not envisage an unjustified enrichment action here because the calculation of the amount claimed must be done according to unjustified enrichment principles, which differ dramatically from contractual principles. This argument is sound, but not as an argument against using an enrichment action; rather, it should be seen as support for the use of an enrichment action instead of resorting to judicial discretion.

The relaxing of these principles by the judiciary may result in a pragmatic solution, but it tampers with the very fibre of our enrichment jurisprudence and should be discouraged. What the courts did in the *BK Tooling* and *Thompson v Scholtz* cases was to advantage the party who had breached the contract. This neither satisfies the requirements of equity or fairness, nor those of basic logic and theoretical purity. The relaxation of first principles to accommodate a situation where there is either partial performance and complete performance is impossible, or the parties are unwilling to complete performance, should urgently be addressed. The courts erred in deciding to intervene by ruling, in the one case, that a reduced contract price could be paid and, in the other, that there could be a remission of rent in a lease of land, and this should immediately be rectified rather than creating an entire new matrix for enrichment liability.

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53 Voet *Commentarius Ad Pandectas* (1956) 19:2:40l; translated into English by Gaine.
54 Du Plessis 94.
55 De Wet & Van Wyk 181.

The above violations of contractual principles, which could lead to claims for unjustified enrichment if the contracts were to be abandoned, did not find universal acceptance in South African law. Visser,[56] the Law Commission[57] and Burrows[58] are all in agreement that the relaxation of the strict rules of reciprocity will endanger the theoretical framework of both contractual and unjustified enrichment remedies.

A more recent case where the reciprocity of contracts was, once again, examined is in the case of *Thompson v Scholtz*.[59] Unfortunately, the Supreme Court of Appeal wasted this opportunity to rectify the situation concerning the enrichment claim that should have been allowed instead of once again applying judicial imperialism by entering the forum and the sanctity of contract by contracting on behalf of the litigating parties. This case further developed the rules of reciprocity of contract and the application of the exception *non adimpleti contractus*. Here, as in the *BK Tooling* case, the limits of the reciprocity of a contract, for work done by an independent contractor, had to be decided by the court where there was a near impossibility of mathematically calculating the cost of restoration. The seller of a farm, including the farmhouse, only gave full enjoyment of the entire property (the farm and the house) some five months after transfer of the farm – in other words, the seller enjoyed occupation of the farmhouse for five months after transfer of the property. Instead of solving this problem by finding that the seller was enriched with five months' rental (*sine causa*, as there was no lease contract in place), the court decided to grant an ancient remedy of remission of rent in a lease of land contract. This is a fiction, as there was never a lease contract entered into. The so-called 'remission' is calculated by the court on the vague and ill-defined basis of 'what is fair in the circumstances'. The court confirmed that they did not consider this to be an enrichment action, as was the case in *Hauman v Nortje*,[60] where the decision was supported by many commentators.[61] Visser, however, is correctly of the opinion that an unjustified enrichment action should have been used in the *Thompson v Scholtz* case.[62]

This slow erosion of one of the fundamental principles of the law of contract in South Africa is not reflected in comparative foreign jurisdictions. In the English common law such a move is frowned upon,[63] and it is submitted that the current South African trend is incorrect and should be reversed at all costs. There should be a return to the strict

56 Visser 552-556.
57 UK Law Commission *Report on Pecuniary Restitution on Breach of Contract Number 121* (1983).
58 Burrows *Modern Law Review* (1984) 76-83.
59 1999 (1) (SA) 232 (SCA).
60 1914 AD 293.
61 De Wet & Van Wyk 182.
62 Visser 'Rethinking Unjustified Enrichment: A Perspective of the Competition between Contractual and Enrichment Remedies' 1992 *Acta Juridica* 231-236.
63 Burrows 79.

purity of principle of reciprocity of contract, especially where the possibility of an enrichment action makes this possible.

The second area of enrichment jurisprudence that is in great need of reform is the relaxation of the *in pari delicto potior est conditio possidentis* rule,[64] which means that where the plaintiff and the defendant are both tainted, then the position of the defendant is stronger and the plaintiff must fail when money or property has been transferred illegally or immorally.[65] If the plaintiff is not tainted with dishonour, the *condictio ob turpem vel iniustam causam* is available to him as the remedy for enrichment or restitution.[66] From an illegal agreement there can come no obligation. The agreement is without force and neither of the parties can sue the other in terms of the contract *ex turpi vel iniustam cause non oritur actio.* Due to the illegal nature of the agreement, there is no contract *(sine causa)* and if there was performance, in terms of this void contract, there can be restitution in terms of the enrichment *condictio ob turpem causa*. The exception remaining that where it would be scandalous for the plaintiff to perform, he or she will not be entitled to restitution or enrichment.[67] The *pari delicto* rule is an ancient remedy which was well known to classical Roman jurists.[68] According to Visser[69] and De Vos,[70] the rule was very dogmatically applied in Roman-Dutch law[71] and this was correctly followed in earlier South African case law,[72] but was relaxed in a string of controversial South African court decisions.[73] The most famous and well known of these cases is the case of *Jajbhay v Cassim*.

This case considered whether, and on what grounds, a court could relax the *par delictum* rule when a party brings an action for the enforcement of a transfer of money or property in terms of an illegal agreement under the *condictio ob turpem vel iniustam causam.* Whereas the case centred on the *par delictum* rule (*in pari delicto potior est conditio defendentis* (*possidentis*)), it is expedient to outline the *condictio ob turpem vel iniustam* action since the decision considered the *par delictum* rule in reference to the *condictio ob turpem vel iniustam* action.

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64 A *condictio* available to plaintiffs if they can show that their involvement was free from turpitude.

65 Aquilius A series of articles on 'Immorality and illegality in contract' *SALJ* 1941 337; 1942 20 & 1943 59.

66 Visser 447-453.

67 D:12:5:3; D:12:5:4 & D:12:5:8.

68 Zimmermann *Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 847; D:12:5.; Codex 4:7.; Codex 4.9.

69 Visser 447.

70 De Vos 23-163.

71 De Groot 'Inleidinge tot de Rooms Hollandse Rechtsgeleertheid' 3:1:41 and 3:30:17. Voet *supra* n 53 at 2:5:2.

72 *United Providence Association Company v Vivian* 1930 CPD 345; *Affhauser v McLeod* 1909 TS 827; *Van Staden v Prinsloo* 1947 (4) SA 843 (T).

73 *Jajbhay* 537; *Visser v Rousseau* 1990 (1) SA 139 (A); *Klokow v Sullivan* 2006 (1) SA259 (SCA); *Afrisure CC v Watson NO* 2009 (2) 127.

The *condictio ob turpem vel iniustam* allows a party, to an illegal agreement, to sue for the return of anything that may have been delivered by way of performance under the illegal agreement on the basis of unjustified enrichment.[74] This is only permitted in specific circumstances – the general rule is that a party to an illegal agreement cannot sue on the agreement as it is void.[75] A successful institution of the *condictio* is dependent on satisfying the *par delictum* rule.[76] This rule sets out that a plaintiff must demonstrate that their involvement in the illegal agreement is free from turpitude (that is, they did not act dishonourably by performing in terms of the illegal contract).[77]

In this case, the appellant, Jajbhay, was the registered holder of a licence which entitled him to occupy a stand at a location in Johannesburg. In contravention of the law in force, Jajbhay knowingly sub-let the property to the respondent, Cassim, who then took possession unlawfully.[78] During the currency of the sub-lease, Jajbhay brought an action to the Transvaal Provincial Division ('TPD') seeking the ejection of Cassim from his property on the basis of the illegality of the sub-lease and the consequent unlawfulness of Cassim's occupation of the stand.[79] The ejection application was refused by the TPD and Jajbhay lodged an appeal in the Appellate Division seeking the restoration of the possession of his stand. Before the Appellate Division, Jajbhay argued, in terms of the *condictio ob turpem causam*, that since he was the lawful occupier of the stand, and as the sub-lease was void on grounds of illegality, his claim to possession of the stand ought to be enforced since Cassim had no title to possession as sub-lessee.[80]

The court's approach was first to underline that since the sub-lease was not merely void but void due to illegality, further investigation was required before making a determination on Jajbhay's claim.[81] The court pointed out that Jajbhay had to show that he 'came into court with clean hands'; that is, that if he was a party to the illegality, he could not recover the possession he claimed.[82] The court found that Jajbhay had indeed been party to the illegality that voided the sub-lease, applied the *par delictum* rule, and dismissed the appeal.[83]

In considering whether to apply the *par delictum* rule, the court stated that where it is shown that the rule's application will lead to injustice or where applying the rule may be contrary to public policy, the rule should not be rigidly enforced.[84] Turning to English jurisprudence, the court

74 Du Bois (ed) 1064.
75 *Jajbhay* 541.
76 *Ibid*.
77 *Idem* 544.
78 *Idem* 546.
79 *Ibid*.
80 *Idem* 547.
81 *Ibid*.
82 *Idem* 548.
83 *Idem* 557.
84 *Idem* 550.

noted that English law permits the non-application of the *par delictum* rule in circumstances where it would be in the public interest to prevent the enforcement of a contract entered into for an illegal purpose as well as in other exceptions extracted from decided cases.[85] Specifically, English courts would not enforce the rule where a contract is made illegal by a statute which has the object of protecting a particular class of persons to which the party seeking the non-application of the rule belongs.[86] The court highlighted a test in English law that was used to determine the enforcement of the *par delictum* rule.[87] This test set out that where the plaintiff can show that his claim to recover possession was not connected to the illegal contract, or that recovery did not rely on the illegal contract, the rule would not be enforced.[88] The court stated that its approach would avoid the listing of exceptions, as in English law, and narrowed its analysis to the suitability of this latter test to South African law.[89] The court found this test to be of little utility, principally because it was designed for obligations that arose not from an illegal contract but from a contract collateral to an illegal contract.[90] Jajbhay's claim fell squarely within the enforcement of obligations arising from the illegal contract concluded with Cassim.[91] In addition, the court rejected this test on the basis that it could lead to confusion and uncertainty in its application in South African courts.[92] This was due to the fact that the test allowed for an inordinately wide interpretation of what reliance on, and connection to, an illegal contract could mean. Although the court recognised that the *par delictum* rule ought not to be enforced rigidly, it, nonetheless, left the determination of the circumstances in which it would not be enforced to the circumstances particular to specific cases and considerations of public policy.

This development was not universally followed by the courts[93] or the commentators on this issue.[94] Du Plessis defends this broad and vague test, followed in the *Jajbhay* case, by indicating that the legal certainty so secured comes at a high price, where the tainted transferor is not able to claim either performance or restitution.[95] Despite this viewpoint, it is sound legal theory not to deviate from fixed and ancient legal principles and bad practice to do so in the name of 'public policy' and, worse, to do

85 *Idem* 553.
86 *Ibid*.
87 *Idem* 554.
88 *Ibid*; Watermeyer JA referred to *Farmer's Mart Ltd v Milne* 1915 AC 106.
89 *Ibid*.
90 *Idem* 555.
91 *Ibid*.
92 *Ibid*.
93 The relaxation was not allowed in *Mamoojee v Akoo supra* n 14; *Henry v Banfield supra* n 14; *Jorddan v Penmill Investments supra* n 14; *Masekop v Maseko supra* n 14; *Parbhoo v Spilg supra* n 14.
94 Visser 92. These authors are vehemently opposed to the judgment in *Jajbhay* and compare it with the common law position, finding it lacking and unsupported by common law principles. They are also of the opinion that the judgment will cause great uncertainty.
95 *Brandt v Bergstedt* 1917 CPD 344.

so without any established criteria existing with which to judge when the relaxation may be applied. As a consequence, these deviations have been done casuistically, on a case by case basis, which can only lead to the exchange of legal certainty in our common law for instability.

As indicated above, our courts are fortunately not in universal agreement about when, how and if the *par delictum* rule should be relaxed. Two examples of this can be found in the cases of *Mamoojee v Akoo*, and *Henry v Branfield*. In the earlier case, there was a sale of immovable property and the price of the property was dishonestly reflected to be lower than the price actually paid in order to avoid a, then, applicable fixed property profit tax. The court found the agreement illegal and void.

The more recent case concerned a fraudulent agreement between a Zimbabwean citizen and a South African citizen to avoid exchange control between their respective countries when the Zimbabwean emigrated to South Africa. The court dismissed the plaintiffs action as it considered this case to be a contravention of South African exchange control measures. The agreement, therefore, was null and void and payment could not be reclaimed. The *pari delicto* rule should not be relaxed if it places the plaintiff in a better position than where the agreement was sound and proper, or as encouragement to benefit from dishonest agreements. In *Jordan v Penhill Investments*,[96] a lease contract was entered into in contravention of the Group Areas Act.[97] The landlord applied for eviction of the unlawful tenants due to arrear rent which was in excess of the allowable rent under the Rent Control Act.[98] The unlawful tenants replied that they are not in arrears as they had paid all monies payable under the Rent Control Act. The plaintiff reacted by saying that the agreement was an offence and, as such, was void and not subject to the Rent Control Act. The tenants then invoked the *par delictum* rule, which placed them in the stronger position and prevented the plaintiff from evicting them. The plaintiff then asked the court to relax the rule which, correctly, was refused.

Du Plessis has designed a six-point matrix of criteria that the courts may in future take into consideration when considering a relaxation of the *pari delicto* rule.[99] He starts off by stating that discretion will be exercised in accordance with the extent to which performance has taken place. Partial performance, in most cases, will create an enrichment action which will call for the relaxation of the rule. With full performance, where the plaintiff has returned what he had received, the defendant will be enriched. In the second instance, the nature of the performance may also be relevant. The third consideration may be the interest of third parties, and the fourth is the relative degree of fault of the parties. The

96 1991 (2) SA 430 (E).
97 36 of 1966.
98 80 of 1976.
99 Du Plessis 206-207.

fifth criterion is the relationship between the parties, and the sixth allows for different degrees of relaxation of the rule depending on the purpose of the prohibition.

As is abundantly clear from this contrived matrix of criteria, that the courts might take into consideration when relaxing the *pari delicto* rule, is that the more you try to theorise about the relaxation of the rule, the deeper into a morass of uncertainty you sink. The law of unjustified enrichment should be brought back to the common law approach to the problem, in that no relaxation to the *pari delicto* rule should be tolerated. If the plaintiff and the defendant are both guilty of illegal or immoral conduct in coming to an agreement, that agreement is null and void and no recovery can be made or enrichment action instituted.

A contrary view is that of Eiselen,[100] who argues that moral turpitude should not play a role in sophisticated private law and enrichment law structures whatsoever. According to Eiselen, civil claims have lost their penal character, as this aspect is usually taken care of by criminal law. It is not the task or character of private or enrichment law to punish offenders or to protect public policy or morality – additionally, it would be preferable if the *pari delicto* rule were abolished altogether. He believes this would assist in developing our enrichment law to a greater level of sophistication, and further pave the way to the acceptance of a general enrichment action. Unfortunately, the courts have chosen to ignore this progressive solution advocated by Eiselen and continue to tamper with the principles of the common law instead of suggesting the replacement of an unworkable model with modern enrichment legislation where the *par delictum* rule will play no role.[101]

The dangerous tendency by our highest courts to relax the *pari delicto* rule should rather be reformed than to look for a new matrix and place for enrichment law in our division of obligations. The only sure way of attending to this is by drafting new legislation which removes the common law as the only source of enrichment liability, but ensures that all the foundational principles of enrichment liability are retained in that legislation.

7 Conclusion

The object of this article is to plead for a return to first principles in unjustified enrichment jurisprudence. These first principles were expounded by applying a legal-historical method to analyse the four famous texts from the Digest concerning unjustified enrichment. To contextualise these texts in their original settings, the work of Otto Lenel was used to look at the surrounding texts in the original classical Roman law textbooks. From this it became abundantly clear that equity and fairness were always at the root of corrective unjustified enrichment. This

100 Eiselen & Pienaar *Unjustified Enrichment A Casebook* (2008) 94-95.
101 *Klokow v Sullivan* 2006 (1) SA 259 (SCA).

approach was challenged in a new book on enrichment by Visser, in which he advocated for not only a new organisational matrix to establish unjustified enrichment, but also for enrichment to become an independent third branch of obligations next to contract and delict. This was criticised by Carole Lewis J and, by implication, Sonnekus. The final conclusion, to which this study then came, is that there are many other more pressing reforms needed in unjustified enrichment jurisprudence, where first principles have been violated, than the reforms suggested by Visser. Specifically, the relaxing by South African courts of the principle of reciprocity (*pacta sunt servanda est*) and of the *par delictum* rule, in the law pertaining to contracts and enrichment, undermine the foundations of our legal system. This is because the dogma and system of unjustified enrichment cannot function if the basic principles of that branch of law are agitated because it is based not on legislation, but on our common law.

It seems that the only way forward is to legislate the principles of unjustified enrichment into modern legislation. The strict proviso for such legislation is, however, that the subsidiary role of enrichment liability is strictly preserved, the requirement of impoverishment is abandoned, and equity is recognised as the foundational basis of unjustified enrichment law.

Angels and demons, innocents and penitents: An analysis of different "characters" within the penal discourse of apartheid South Africa 1980 to 1984 – Part Two

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OPSOMMING

Engele en Duiwels, Onskuldiges en Boete-doeners: 'n Analise van Verskillende 'Karakters' in die Gevangenis-diskoers van Apartheid Suid-Afrika (1980 tot 1984)

Wat ras, klas en geslag betref was daar vanaf koloniale tye af nog altyd 'n tweespalt in die Suid-Afrikaanse gemeenskap. In so 'n verskeurde samelewing is die openbare debat rondom 'n komplekse sosiale praktyk soos straf of gevangenisskap noodwendig deurspek met nuanse. Hierdie artikel ondersoek wyses waarop temas in die openbare debat rondom gevangenisskap in Suid-Afrika verskil van een kategorie van gevangenes tot die volgende. Die tydperk wat ondersoek word is die eerste helfte van die 1980s – 'n dekade waarin aansienlike krake in apartheid toegedien is; 'n tydperk waarin interne en eksterne opposisie teen die stelsel 'n hoogtepunt bereik het, en die owerhede met 'n 'algehele strategie' opgetree het. Elke draad van die ondersoekte diskoers onthul 'n ander 'karakter' in die oorkoepelende verhaal wat spruit uit die gevangenis-diskoers van die tyd. Die diskoers rondom die volgende vier kategorieë van gevangenes word ondersoek: wit manlike gevangenes, bende-lede in gevangenis, wit vroulike gevangenes, kinders. Die artikel bestaan uit twee dele – Deel Een fokus op die eerste twee kategorieë en Deel Twee op die laaste twee.

1 Introduction

As was pointed out in Part one of this article,[1] the purpose of this study is to examine several different 'characters' which emerge within the penal discourse of apartheid South Africa. The early 1980s were a particularly crucial time in the country's history, in many ways marking the beginning-of-the-end of the apartheid system. The period examined is particularly interesting from the perspective of penal discourse, since

1 Peté 'Angels and demons, innocents and penitents: An analysis of different 'characters' within the penal discourse of apartheid South Africa 1980-1984 - Part One' 2015 De Jure 55-74.

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the prisons were points at which the stresses and strains within the apartheid system became visible. Penal discourse, particularly as reflected in public debates, is important since it provides a clear indication of the ideological context within which the punishment of prisoners is taking place. It is submitted that a nuanced understanding of this ideological context will be helpful in understanding the dilemmas that face the South African penal system today. Ideological attitudes are deeply rooted and able to endure over many decades. True prison reform cannot be accomplished without understanding and transforming these deeply rooted ideological attitudes.

Part one of this article examined two 'characters' who formed part of the overall story which emerged from penal discourse in the first half of the 1980s – the white male prisoner (the 'penitent') and the prison gangster (the 'demon'). It was shown that these two characters occupied completely different conceptual spaces within the penal ideology of the time. It was pointed out that white male prisoners, segregated in their own prison, were seen as 'penitents' undergoing a period of enforced self-reflection and rehabilitation, which would enable them to be reabsorbed into white society, whereas prison gangsters were the 'demons' of the story, surrounded by a discourse of retributive punishment. In each case, historical parallels were drawn with penal debates which had taken place in colonial Natal many decades before, illustrating the resilience of penal ideology and casting light upon the debates taking place in the early 1980s.

Part two of this article will continue with this project. It will deal with a further two characters in the penal drama of the early 1980s, viz. 'fallen angels' (white female prisoners) and 'innocents' (children).

2 Fallen Angels - White Female Prisoners

This section of the article is concerned with the manner in which white female prisoners were represented in public discourse during the early 1980s. Black female prisoners did not feature in the public discourse surrounding prisons at this time. The 'invisibility' of black female prisoners within the public discourse is telling. Before proceeding to discuss the manner in which white female prisoners were represented in the public discourse during this period, it is worth commenting on the different challenges facing white and black women, as well as the 'invisibility' of black female prisoners within the penal discourse at this time. Writing in 1979 – at virtually the same time as the period under examination in this article – Cock drew attention to the 'three lines along which social inequality is generated – class, race and sex'.[2] Cock pointed out that while both black and white women in South Africa at this time were subjected to discrimination on the basis of sex, '[m]any white women [were] free to enjoy a considerable amount of leisure, or to lead

2 Cock *Maids and Madams – A Study in the Politics of Exploitation* (1980) 5.

economically productive lives outside the home, because of the availability of cheap, black domestic labour'.[3] This did not mean, however, that the discrimination and challenges faced by white women, within the particularly chauvinist and patriarchal society which existed in apartheid South Africa at this time, were insignificant. The position of white women in South Africa during the period in question was as follows:[4]

> More than half of white South African marriages are under community of property, whereby the husband acquires guardianship of the wife and she is considered a minor even if she is over 21. He holds the 'marital power', which means, for example, that a wife cannot enter into any binding contract, even a hire purchase agreement, or open a credit account without the prior permission of her husband. The Matrimonial Affairs Act, No. 37 of 1953 greatly alleviated the legal disabilities of married women. Since then the woman's earnings are protected, but her husband may still take possession of anything she may have bought with the money, unless she gets a court interdict against him. Also her husband's creditors can claim on her earnings for his debts, with the exception of liquor bills.

Of course, the oppression suffered by most black women at this time – due to the intersection of discrimination on the basis of sex, class and race – was far worse than that suffered by white women. As Cock points out:[5]

> An African woman married by customary union is considered a minor under the tutelage of her husband. She has no contractual capacity and cannot own property in her own right. If she owns wages these become the property of her husband ... Influx control is the core of the structure of legal constraints experienced by African women ... In South Africa, African women do not have what are considered basic rights throughout the world: that is, the right to live with their husbands and lead a normal kind of family life ... The government policy is that the African migrant labour force 'must not be burdened with superfluous appendages such as wives, children and dependants who could not provide service'. ... It is where there is a convergence between the systems of racial domination and sexual domination ... that the disabilities of African women are greatest.

In the more than three decades which have passed since the above was written, there has been much scholarly focus on the concept of 'intersectionality' – which concerns the way in which different systems and forms of discrimination and oppression (such as sex, race and class) intersect in a mutually reinforcing manner. The term 'intersectionality' was first adopted in 1989 by the critical race theorist Crenshaw.[6] While

3 *Idem* 240.
4 *Idem* 243.
5 *Idem* 244, 245 & 247.
6 See Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anitdiscrimination Politics' 1989 *The University of Chicago Legal Forum* 139-167; see also Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' 1991 *Stanford Law Review* 1241-1299.

it is beyond the scope of this article to conduct a detailed analysis of the concept, it should be kept in mind as a possible explanation for the virtual 'invisibility' of black female prisoners within the public discourse surrounding South African prisons during the early 1980s.[7] We turn now to a discussion of white female prisoners and the manner in which they were represented in the public discourse.

Adopting the penal discourse of colonial Natal as a point of comparison, it is possible to point to historical resonances within the strand of penal discourse relating to white female prisoners in the 1980s. Although white females did not enter the penal discourse of colonial Natal as prisoners – there being little mention in the public discourse about white female prisoners in the colony – they certainly do enter that discourse as a special category of victims.[8] The manner in which this special category of persons is conceived during colonial times as a category of victims, speaks directly to the discourse surrounding white female prisoners in the 1980s. As stated in previous work by this author:[9]

> The colonists saw themselves as being outnumbered and surrounded on all sides by warlike black savages, who had to be kept firmly under control if the safety of the white community was to be ensured. Any black challenge to white authority or civilisation had to be swiftly and severely dealt with to prevent it from developing into open rebellion. The kind of siege mentality displayed by the colonists may perhaps best be illustrated by reference to the periodic waves of public hysteria that swept through white ranks following assaults on white women by black men. The rape of a white woman by a black man was possibly the ultimate denigration of white authority and civilisation, and public reaction to such 'outrages' reached fever pitch on numerous occasions over the years. Again and again the colonists condemned imprisonment as far too lenient a punishment for the perpetrators of 'outrages'.

7 It is not only in South Africa that black women have been rendered 'invisible' by the intersection of multiple layers of oppression and discrimination. For example, Brown comments as follows in relation to the American criminal justice system: 'The legal community has overlooked the impact of the intersectionality of race and gender, and the criminal justice system suffers from the same dilemma. Law enforcement, the government, and research institutions measure "gender" as "white women" and "race" as "African-American men". African-American women remain invisible until the policies being pursued have had a devastating impact on their lives' see Brown 'The Intersectionality of Race, Gender and Reentry: Challenges for African-American Women' 2010 *American Constitution Society for Law and Policy* 3.

8 It is interesting to note that, at the time the Natal Prison Reform Commission delivered its report in June 1906, there were so few white female offenders that the Commission recommended that they be placed under the care of 'approved private institutions' instead of being sent to gaol; see *Natal Government Gazette* of 1906-06-05 *Government Notice* 344: Report of the Prison Reform Commission – par 74(10).

9 Peté 'Punishment and Race: The Emergence of Racially Defined Punishment in Colonial Natal' 1986 *Natal University Law and Society Review* 105.

It is clear that, during colonial times, white women were regarded as representatives of all that was best in and most sacred to the 'white race'. As a category, white women played an important part in the formation of white identity – including the conception of whites as torch bearers of civilisation in a dark continent. The ideas surrounding white womanhood and what it stood for, formed the apex of a much larger ideological construction around what it meant to be 'white' or 'European' in the Colony of Natal.[10]

Shifting from the colonial period to that of late apartheid, it is interesting to note that the discourse surrounding white female prisoners in the 1980s retains a significant flavour of the debates referred to above. The patriarchal underpinnings of the apartheid system, as well as the political and ideological assumptions at work within powerful factions of the white elite, are often clearly on display in newspaper articles dealing with this category of prisoners in the early 1980s, particularly in articles which appeared in the conservative Afrikaner press. For example, *Die Volksblad* published an article in 1980 discussing the daily lives of white women in Kroonstad prison. Not afraid to 'wear its heart on its sleeve', the article is characterised by the use of highly emotive language. Just beneath the surface of the earnest discussion about the experiences of white female prisoners, lies the unspoken assumption that white women are the guardians of civilised values on a dark continent, the sacred keepers of the flame of Christian civilisation.[11] The article is filled with empathy and pathos and one can almost hear violins playing in the background as the daily lives of these 'fallen angels' are described:[12]

> When a women finds herself in prison, it is essential that a consistent effort be made by the authorities to appreciate the extent of her humiliation and

10 See also Morrell 'From Boys to Gentlemen: Settler Masculinity in Colonial Natal 1880–1920' 2001 *UNISA Press* 160.

11 Indeed, this patriarchal tone harks back to colonial times; see, for example, Peté & Devenish 'Flogging, Fear and Food: Punishment and Race in Colonial Natal' 2005 *Journal of Southern African Studies*10-11.

12 The words used were: 'Met die vrou wat in die gevangenis beland, word voortdurend gepoog on begrip te toon vir haar vernedering, berou en verse. Sy bly vrou, en dit is belangrik in haar behandeling en opleiding. Dit is ook wat n mens die eerste opval wanneer jy instap by die afdeling vir vrouegevangenes op Kroonstad: die gevoel van vroulikheid, die netheid, die rustigheid in die lug. Die lang gange het byna die sereniteit van 'n hospital … In die groot, sonnige naaldwerkkamer is die blanke vroue met vlytige en knap hande besig, en handel gedempte gesprekke oor allegaagse dinge. Hulle is netjies, vroulik en ontspanne. Elke vrou het n rok aan wat sy self na eie smaak en voorkeur in die gevangenis gemaak het. Van eenvormige, vormlose gevangenisdrag is daar nie sprake nie … [I]n die selle – elke blanke vrouegevangene op Kroonstad het n enkelsel – sien jy die verlangens en begeertes. Eg vroulik en dikwels tot oordadigheid gevoer, is die versierings en kleur wat sy aanwend om die klein, kloustrofobiese vierkant agter die traliedeur te omskep in haar eie minipersoonlikheid… Die fotos op die staakkassie langs die staalkatel, die prente teen die mure, die kunsnaaldwerk-matjie voor die bed, die lappoppies en biblioteekboeke … Dis soos sy was van kleintyd af'; see *Die Volksblad* (1980-09-25) 'Vrou bly 'n vrou – ook in dié klein wêreld' 13.

> regret. She remains a woman, and that fact is important in determining the manner in which she is to be treated and trained. This is the first thing to strike you when you walk into the section reserved for women prisoners at Kroonstad: the feminine atmosphere, the order, the peaceful surroundings. The long corridors almost exude the serenity of a hospital ... In the spacious, sunny needlework room, white women are busy working with quick skilled hands, carrying on subdued conversations about everyday topics. They are neat, feminine and relaxed. Each woman is wearing a dress which she made in the prison according to her own preferences and taste. There is no sign of uniform, shapeless prison clothing ... In the cells – each white female prisoner at Kroonstad has a single cell – you see evidence of their longings and desires. The bits of decor and colour which she employs to transform the small, claustrophobic square space behind the barred cell door into a reflection of her own personality are authentically feminine and often excessive in character. The photographs on the metal cabinet next to the steel bed, the pictures on the walls, the artistic needlework mat in front of the bed, the rag dolls and library books ... It's been like this since her childhood.

The theme of white women prisoners as 'fallen angels' was to repeat itself three years later. In September 1983, *Die Vaderland* ran a series of four articles on life inside the Kroonstad prison for women. This prison housed all white female prisoners sentenced to more than two years imprisonment. Once again, the plight of these 'fallen angels' was described with great pathos and empathy, with an emphasis on the trauma and humiliation of their fall from grace – '[a]fter the stress and humiliation of the court case, her traumatic experience does not come to an end. On top of it all she now feels the fear of the unknown'.[13]

The image of white woman prisoners as fragile and emotionally vulnerable, desperately in need of the tender loving care of understanding prison personnel, is well illustrated in the following paragraph:[14]

> A woman is a person driven by feeling, who can at times become more emotional than a man. She does, however, have the comfort of knowing that she is being guarded and looked after by female warders, who are able to assist her if she encounters problems.

Predictably, the patriarchal assumptions inherent in comments about the nature of white women prisoners extended to a firm rejection of any form of 'deviant' sexuality. Readers of *Die Vaderland* were reassured, in the second article in the series on the Kroonstad women's prison, that 'lesbian relationships were almost impossible' in that prison.[15]

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13 The words used were: 'Na die spanning en vernedering van die hofsaak, hou haar traumatiese ondervinding nie op nie. Boonop het sy nou die vrees vir die onbekende'; see *Die Vaderland* (1983-09-26) 'Uit die gemenskap verwyder ...' 11.

14 The words used were: ''n Vrou is 'n gevoelsmens wat by tye meer emosioneel as n man kan raak. Sy het darem die vertroosting dat sy deur bewaarsters bewaak en versorg word wat haar kan help as sy probleme sou ondervind'; see *Die Vaderland supra* n 13 at 11.

15 See *Die Vaderland* (1983-09-27) 'Lesbiese verhoudings byna onmoontlik' 9.

The final instalment in the sugar coated series of articles in *Die Vaderland* made the Kroonstad women's prison sound more like some sort of health spa than a place of punishment. The article spoke of the range of facilities available to female prisoners in Kroonstad, including their own library (of course, said the article, love stories were the prisoners' favourite reading material) and prison radio station (which would play prisoners' requests). Prisoners could take part in a wide range of sporting activities (including netball, tennis, squash, badminton, and fitness groups) as well as a selection of cultural activities and crafts (including chess, macrame, batik, decoupage, clay modelling and crochet.) They were also treated to a movie once a week at the prison, could attend any one of a wide variety of church services in the prison on Sundays and could study by correspondence for an external qualification.[16] Clearly, Kroonstad women's prison was a world away from the antiquated and overcrowded facilities which accommodated the majority of South Africa's prison population. Furthermore, if the articles in *Die Vaderland* are taken at face value, it would seem that the ideological assumptions surrounding the treatment of white female prisoners – the creation of a homely, caring and stimulating environment within which to rehabilitate these traumatised 'fallen angels' – were very different to the assumptions surrounding the treatment of other categories of prisoners in South Africa.

At around the same time one of the more mainstream Afrikaans newspapers, *Rapport,* also published an article describing conditions at the Kroonstad prison for women. As in the previous articles discussed in this section, the language adopted in the *Rapport* article was that of a romantic soap opera. The tragedy of the 'fallen angel' was expressed in melodramatic terms and the prison was described as a place of healing, where these angels were to be nursed back to health. The sense of romantic tragedy which ran through the article was apparent from the drama of its title: 'Women in Prison – For them you weep inside.[17] The opening paragraph (the Afrikaans text is replete with the diminutive form used to indicate childlike affection) made the patriarchal attitude of those responsible for the article even more apparent:[18]

> A woman remains a woman, even in prison. She makes herself beautiful, titivates and makes her small cell cheerful with photos or a little plant - and even when the prison food is dished up, one can see that a woman was involved in its preparation ... There is a hairdresser, the women wear cheerful floral print dresses and little curtains hang in front of the windows.

16 *Die Vaderland* (1983-09-29) 'Tyd in die gevangenis is 'n dure les' 15.

17 *Rapport* (1983-10-23) 'Die vrou in die gevangenis – Vir húlle huil jy na binne' 10.

18 ''n Vrou bly 'n vrou, selfs in die gevangenis. Sy maak haar mooi, kikker en vrolik haar klein selletjie met foto's of 'n plantjie op – en selfs wanneer die gevangeniskos uitgeskep word, kan 'n mens die hand van 'n vrou daarin sien ... Daar is 'n haarkapsalon, die vroue dra vrolike geblomde rokke en voor die vensters hand gordyntjies'; see *Rapport supra* n 17 at 10.

The language used by the writer seems to indicate that women are regarded as the 'weaker sex' – sensitive, emotional, and ornamental. The writer seems deeply concerned with the inner nature of the female prisoners, a concern largely absent from the descriptions of male prisoners in a series of articles published in the same newspaper at the same time. The nurturing role of women as mothers is apparent in many of the descriptions provided:[19]

> But they remain people inside. Some of them are mothers, even grandmothers. Fortunately the Prisons Service remembers and understands this all too well. 'When one is forced to listen to the problems of some of these prisoners, woman to woman, sometimes one cannot but help shed a tear with them. But you cry inside, because you are not supposed to show your emotions', says Major Maureen Halgryn, the Commanding Officer of Kroonstad Women's Prison.

At one point in the article, the writer admits how strange it was for him – a man – to walk into a women's prison. His concern with the appearances of the women prisoners is, perhaps, revealing of the patriarchal attitudes prevalent during the apartheid period:[20]

> There are those who are impeccably groomed. Their hair and faces are cared for and made up as if they were on their way to a premiere. It's just that the prison frock would have been out of place there. Others look like the woman on the other side of the street, who is always leaning over her front gate so as not to miss anything. And really there are those that could have been your own mother or grandmother.

As far as prison labour for women is concerned, it is described as 'women's work', which is designed to rehabilitate the female prisoners and turn them into 'good' wives and mothers:[21]

> The women are kept busy with hand-and-needle work. Some are trained to be hairdressers and a few work in the kitchen. There are sufficient opportunities for study and those who wish to are able to become well qualified. Certain of the prisoners obtain outstanding results.

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19 'Maar dit is tog ménse wat daar binne is. Van hulle is ma's, selfs oumas. Gelukkig onthou en besef die Gevangenisdiens dit baie goed. "Wanneer 'n mens sommige van die gevangenes se probleme vrou-tot-vrou moet aanhoor, kan jy nie anders as om soms 'n traan saam met hulle te stort nie. Maar jy huil binnekant toe, omdat jy nie veronderstel is om jou emosies te wys nie", gesels maj. Maureen Halgryn, bevelvoerder van die Kroonstadse vrouegevangenis'; see *Rapport supra* n 17 at 10.

20 'Daar is dié wat jy deur 'n ring kan trek. Die hare en gesig is versorg en bewerskaf asof hulle op pad na 'n premiére toe is. Dis net dat die gevangenisrokkie nie heeltemal daar sou gepas het nie. Ander lyk soos die vrou oorkant die straat wat altyd oor die voorhekkie hang om tog niks te mis nie. En rêrig, daar is dié wat jou eie ma of ouma kon gewees het'; see *Rapport supra* n 17 at 10.

21 'Die vroue word besig gehou met hand – en naaldewerk, van hulle word as haarkapsters opgelei en 'n klompie werk in die kombuis. Daar is genoeg geleentheid vir studie en dié wat wil, kan hulle baie goed bekwaam. Van die gevangenes behaal dan ook skitterende uitslae'; see *Rapport supra* n 17 at 10.

For purposes of comparison, it is worth concluding this section by pointing to one tiny group of white female prisoners who were not painted as 'fallen angels' in terms of the general public discourse. This group consisted of white female political prisoners, of whom there were only a small number in the first half of the 1980s.[22] On 5 April 1984, *The Citizen* reported that Barbara Hogan, who had been sentenced in October 1982 to 10 year's imprisonment for treason, had brought an application in the Supreme Court concerning her conditions of detention. At the time of the report, Hogan was the first white woman, as well as the first white person since the Second World War, to be convicted of treason in South Africa. At that stage, Hogan was the only white female political prisoner in the country. As a white female political prisoner, Hogan seems to have occupied a fairly unique position within the South African penal system. On reading the report, it is clear that Hogan's conditions of detention at the Johannesburg prison were a world away from the 'homely' conditions described in reports about the Kroonstad Women's Prison, where 'normal' white female offenders were imprisoned. The main problem encountered by Hogan, at the time of this report, seems to have been the fact that she was utterly isolated, even to the extent of not being allowed outdoors to exercise during certain periods of her incarceration. This isolation, devoid of any form of life-affirming contact with fellow prisoners or with nature, seems to have had a negative psychological effect on Hogan. In her court papers, Hogan contended that she was being subjected to cruel and inhuman treatment, including the fact that she was being kept alone in a cell surrounded by other empty cells, and had been told that exercise in the open air was a privilege and not a right. On one occasion when she was told that she was not allowed to exercise outside, she had become hysterical and was taken to hospital where she

22 It is not the aim of this article to examine in detail the public discourse surrounding political detainees in the early 1980s. The focus of this article is on certain categories of prisoners within what may be termed the 'general' prison population, as opposed to the special category of 'political prisoners'. Political prisoners – in the strict sense of those detained for anti-apartheid activities, as opposed to the many thousands of South Africans who were imprisoned for infringing against social control legislation such as the pass laws – fell into a relatively small but distinct category within South Africa's penal system at this time. The public discourse surrounding this category of prisoners deserves separate treatment. It should be noted that an extensive 'prison literature' dealing with political detention during the apartheid period already exists. For example, see Blumberg *White Madam* (1962); First *117 Days* (1965); Jacobson *Solitary in Johannesburg* (1973); Lewin *Bandiet: Seven Years in a South African Prison* (1974); Kantor *A Healthy Grave* (1967); Pheto *And Night Fell: Memoirs of a Political Prisoner in South Africa* (1983); Sachs *The Jail Diary of Albie Sachs* (1966); Breytenbach *The True Confessions of an Albino Terrorist* (1984); Mandela *Long Walk to Freedom: The Autobiography of Nelson Mandela – Volume 1* (2002); Mandela *Long Walk to Freedom: The Autobiography of Nelson Mandela – Volume 2* (2003); Kathrada & Vassen *Letters from Robben Island: A Selection of Ahmed Kathrada's Prison Correspondence 1964-1989* (2000); Maharaj *Reflections in Prison: Voices from the South African Liberation Struggle* (2002); Naidoo & Sachs *Island in Chains: Indres Naidoo Prisoner 885/63 – Ten Years on Robben Island* (2000).

was kept under sedation for a week. She was only permitted one letter and one visit from her family per month.[23] Hogan's application to court appears to have resulted in an improvement in the conditions of her detention. In May 1984 Helen Suzman visited Pretoria Central Prison and spoke to a number of white female political prisoners, including Hogan. According to Suzman, the prisoners had no complaints about their treatment by the authorities and there had been no restriction on the questions she could ask them. She was quoted in a report in *The Natal Mercury* as follows:[24]

> The conditions are very satisfactory. The food is good and so is the medical and dental attention. I met the three white women political prisoners ... Barbara Hogan, Mrs Ruth Gerhardt and Jansie Lourens – in a sunny courtyard where there was a table tennis table and an exercise bicycle.

3 Innocents – Public Discourse on Children in Prisons

During both the apartheid and post-apartheid periods, the topic of children in South African prisons has raised much public interest.[25] This was not the case, however, during colonial times, at least as far as the colony of Natal was concerned. It was only towards the end of the colonial period, after the turn of the century, that a level of concern began to be expressed at the confinement of children in adult prisons.[26] Before this, references to children within the penal system were few and far between. There were, however, a few references to juvenile offenders in various prison rules and regulations, and the laws relating thereto. For example, Law 14 of 1862, which empowered the Lieutenant Governor to 'make Rules and Regulations for the Maintenance of Order in the Public Gaols of the Colony', provided that punishments in terms of such rules and regulations could not exceed ten days solitary confinement or twenty-five lashes and, additionally, that such punishment could not be imposed at all on civil prisoners, female prisoners or children under the age of twelve.[27] This implied, of course, that the framers of Law 14 of

23 *The Citizen* (1984-04-05) 'Hogan seeks order on jail treatment' 1.
24 *The Natal Mercury* (1984-05-14) 'A call for flexibility over parole' 3.
25 Public discourse on the issue of children in prison during the first half of the 1980s, at the height of apartheid, is traced later in this section. For details on the discourse surrounding children in prison during the post-apartheid period, see, in general, Peté 'The Politics of Imprisonment in the Aftermath of South Africa's First Democratic Election' 1998 *South African Journal of Criminal Justice* 51-83; Peté 'The Good the Bad and the Warehoused – The Politics of Imprisonment During the Run-up to South Africa's Second Democratic Election' 2000 *South African Journal of Criminal Justice*1-56; and Peté 'No Reason to Celebrate: Imprisonment in the Aftermath of South Africa's Second Democratic Election' (forthcoming).
26 This, perhaps, reflected a slow change in the ideology of white colonial society towards children in general.
27 S 1 of Law 14 of 1862 'Law to enable the Lieutenant Governor to make Rules and Regulations for the Maintenance of Order in the Public Gaols of the Colony'.

1862 (which, admittedly, was only a piece of empowering legislation) did not regard sentences of ten days solitary confinement or twenty-five lashes as being entirely beyond the pale for male prisoners above eleven years of age who had contravened prison disciplinary rules. When a common set of rules and regulations for the gaols in the Colony was eventually promulgated in 1870, the shocking punishments mentioned above were retained, but this time children under fifteen years of age (in addition to civil prisoners and females) were excluded.[28] Although the heavier punishments laid down in terms of the regulations – up to ten day's solitary confinement with half or full rations; or a whipping of up to twenty-five lashes – were permissible maximum punishments as opposed to being mandatory, and could only be imposed by the Resident Magistrate for serious breaches of prison discipline, they still induce a sense of shock when viewed from the perspective of the twenty-first century.[29] The idea of a fifteen-year old child being in prison and potentially subject to punishments of this sort was clearly not as disturbing to the colonial sensibility.

Prisoners, who would be considered children today, were also not spared hard labour during colonial times. Natal's prison regulations stipulated that, for the first three months of any sentence of hard labour, all male prisoners over fifteen years of age were to perform between six and ten hours of hard labour of the first class daily.[30] Hard labour of the first class was defined as labour at the treadwheel, crank, shot drill, capstan, stone breaking or any other form of labour appointed by the Lieutenant Governor with the advice of the Executive Council.[31] Male prisoners, under sixteen years old, and female prisoners who were sentenced to hard labour, were to perform between six and ten hours of hard labour of the second class daily.[32] Hard labour of the second class was defined as any form of labour appointed as such by the Lieutenant Governor with the advice of the Executive Council.[33]

However, it was only after the turn of the century, at the time of the Natal Prison Reform Commission which delivered its report in 1906, that there seemed to be any real interest in juveniles as a separate category of offenders. The exclusive 'Industrial Prison' proposed by the Commission for white prisoners, was to have a separate section for the treatment of white juvenile offenders, but only if there was a sufficient

28 'Rules and Regulations for the Gaols in the Colony' were laid down in the schedule to Law 6 of 1870 'Law for the Better Government of Public Gaols'.
29 See Reg XV of the 'Rules and Regulations for the Gaols in the Colony which were laid down in the schedule to Law 6 of 1870 'Law for the Better Government of Public Gaols'.
30 See Reg XVI of the 'Rules and Regulations for the Gaols in the Colony' which were laid down in the schedule to Law 6 of 1870 'Law for the Better Government of Public Gaols'.
31 S 10 of Law 6 of 1870 'Law for the Better Government of Public Gaols'.
32 See Reg XVII of the 'Rules and Regulations for the Gaols in the Colony' which were laid down in the schedule to Law 6 of 1870 'Law for the Better Government of Public Gaols'.
33 S 10 of Law 6 of 1870 'Law for the Better Government of Public Gaols'.

number of such prisoners to justify the expense. If not, the Commission suggested that:[34]

> Natal might follow the example of the Transvaal and Orange River Colony, in sending her [white] juvenile offenders to the Reformatory near Cape Town, where they are received at a charge of two shillings and sixpence per head per diem.

Another option mentioned by the Commission was the establishment of a 'Truant or Farm School' for white juvenile offenders, again if numbers justified:[35]

> The truant school is intended to meet the case of the undisciplined, disorderly, and backward boy; who, after some three months or so of appropriate moral and physical training, is released upon condition that his attendance at the ordinary school is exemplary.

In this way, through education and corrective treatment, it was hoped to keep white juveniles out of the penal system altogether. Interestingly, the Commission also recommended the use of 'hypnotic suggestion' to cure juveniles of the 'criminal disease', since this was regarded as another form of education.[36] However, as far as black juvenile offenders were concerned, the Commission adopted a completely different ideological approach. Of major concern to the Commission, which concerned black offenders in general, was that the prisons were being used as a means of social control. This meant that Natal's prisons were overcrowded with petty offenders against social control legislation.[37] One way of keeping black petty offenders out of prison was to employ corporal punishment as an alternative to imprisonment. Corporal punishment had long been seen as a suitable form of punishment for juvenile offenders, and it is interesting to note the Commission's recommendation that black adults be birched across the buttocks in a similar manner to juveniles, in order to make the punishment more humiliating and thus more effective:[38]

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34 See *Natal GG* of 1903-06-05 *Government Notice* 344: Report of the Prison Reform Commission – par 30.

35 *Idem* par 36.

36 *Ibid*.

37 For example, the Natal Prison Reform Commission stated that: 'The Natives are not only subject to their own special laws, of which there are many contraventions, but also to a number of artificial restraints and disabilities, chiefly when in towns, which go to swell the number of offences committed by them'; see Natal *GG* of 1903-06-05 Government Notice 344: Report of the Prison Reform Commission – par 67. The use of imprisonment as a social control mechanism was to become a major theme during apartheid; see in general Peté 'Holding up a mirror to apartheid South Africa: Public discourse on the issue of overcrowding in South African prisons 1980 to 1984 – Part One' 2014 *Obiter* 485-505 and Peté 'Holding up a mirror to apartheid South Africa: Public discourse on the issue of overcrowding in South African prisons 1980 to 1984 – Part Two' 2015 *Obiter* 17-40.

38 See *Natal Government Gazette* of 1906-06-05 *supra* n 34 at par 71.

> The Native has a strong sense of humour, and sees the ludicrous in many things; and, if no distinction were made between manhood and youth, the man who was treated as a boy would be subjected to much banter by his fellows, and would be less likely to forget it.

The Commission was of the opinion that prison was no place for black women or children, and recommended that petty offenders in these two classes be sent back to their kraals:[39]

> Released from the restraints of parental control, Native boys and girls too often abuse the personal freedom permitted in the towns to such an extent that they are fast becoming a nuisance, and developing dangerous criminal tendencies.

Thus, whereas white juvenile offenders would be placed under reformative supervision, black offenders in this category would either be subjected to corporal punishment or removed from the towns so that they could no longer constitute a threat to white society and 'civilization'.[40] At the very end of the colonial period, in terms of Act 23 of 1909, provision was made for the birching of juveniles convicted of petty offences instead of sending them to prison.[41] Finally, on 23 November 1909, the Attorney General of Natal informed the Natal Parliament that an industrial establishment for boys was to be situated in the old Police Quarters at Estcourt, which was to be the first in a series of similar institutions.[42] The end of the colonial period thus marks increasing interest in children as a special category of offenders who need to be kept out of adult prisons. In the years which followed, this was to become an increasingly important theme within South African penal discourse. Unfortunately, the sad phenomenon of juvenile offenders being confined in adult prisons was to remain a reality in South Africa well into the post-apartheid period.[43]

As far as the first half of the 1980s was concerned, it was towards the end of this period that public concern about children being confined in adult prisons came to the fore. In June 1984, alarm was expressed in the media at the number of infants and juveniles who were spending time in South African prisons, either because they had been sentenced to terms of imprisonment or because they were accompanying their mothers who had been sentenced to terms of imprisonment. It was revealed in Parliament, on 19 March 1984, that a total of 403 persons under eighteen years of age were serving terms of imprisonment, and a further 570 persons under eighteen years of age were in prison awaiting trial. Most of the persons serving terms of imprisonment (317 out of 403) were between seventeen and eighteen years of age, but one was as young as

39 *Idem* par 30.
40 *Idem* par 40.
41 Act 23 of 1909; '[t]o provide for boys being punished by whipping instead of imprisonment for minor offences'.
42 Natal Legislative Assembly Debates (1909) vol 42 512-513: Attorney General (1909-11-23).
43 See, in general, the scholarly works referred to in n 25 *supra*.

fourteen and seven others were between fifteen and sixteen. Included in the awaiting trial group were two ten-year-old girls, an eleven-year-old boy, seven twelve-year-olds, twelve thirteen-year-olds and twenty-nine fourteen-year-olds. As far as infants were concerned, it was revealed, during 1983, that no fewer than 3 415 babies had either been born in South African prisons, or had been admitted to prison with their mothers.[44] In an article entitled 'Spotlight on children in South Africa's jails', the *Rand Daily Mail* summarised concerns around this sensitive issue, *inter alia*, as follows:[45]

> Disturbing facts about the detention of children in South Africa have emerged during the current session of Parliament. They include the detention of two pre-school children for nearly three years while the authorities worked out their race classification, the imprisonment of two girls between the ages of 10 and 11 as unsentenced prisoners and the arrest of a 10-year-old child in Cradock on a charge of public violence. These grim facts are bad enough, but, even more disturbing, was that they were mostly black.

The *Rand Daily Mail* quoted the Opposition Spokesman for Justice, Mr David Dalling, as stating that: 'A caring government would ensure that children are not put into prisons, except where no other alternative exists'.[46] The *Rand Daily Mail* also pointed out that the Leader of the Opposition, Dr Frederik van Zyl Slabbert, had called on the Prime Minister, Mr PW Botha, 'to justify laws that caused the detention of mothers under the Pass Laws'.[47]

In December 1984, another wave of concern swept through the South African media on the issue of children in prison. This wave of concern was triggered by the release of a report which had been compiled by the Institute of Criminology at the University of Cape Town, entitled 'Children in Prison in South Africa'. The report had been commissioned by a Swiss-based organisation called Defence for Children International, and was compiled by the Director of the Institute of Criminology at the University of Cape Town, Professor Dirk van Zyl Smit, together with a researcher, Ms Fiona McLachlan, who was a Johannesburg Attorney.

The detention of children, in prisons designed for adults, was clearly an emotional issue which was bound to generate significant interest in the public media. A good example of the tone of the debate which followed is to be found in a report in *The Argus* entitled 'Many children detained in bleak adult prisons'.[48] The report begins with the following distressing statement: 'Many children are detained in "bleak" adult prisons and receive "basically the same" treatment as adult prisoners, a leading university criminologist has found'.[49] The report then went on to

44 *Cape Herald* (1984-06-23) '3 415 babies in jail last year' 4.
45 *Rand Daily Mail* (1984-06-28) 'Spotlight on children in South Africa's jails' 12.
46 *Ibid*.
47 *Ibid*.
48 *The Argus* (1984-12-20) 'Many children detained in bleak adult prisons' 35.
49 *Ibid*.

quote Van Zyl Smit in terms which made clear his evident frustration and distress at the fact that many South African children were being detained in conditions which were completely unacceptable:[50]

> It might be true that alternative facilities are not available for the detention of juveniles. Where this is the case something must be done about it ... Prisons everywhere are grim places, but especially horrifying are large, bare cells, designed for adults but filled with juveniles who look as though they belong somewhere else.

Different newspapers highlighted different aspects of the wide-ranging report. For example, the Afrikaans newspaper *Die Burger*, highlighted the fact that, according to the report, South Africa appeared to have a larger number of young people in prison than most other countries in the world. For this reason, courts needed to be discouraged from sentencing children under eighteen to terms of imprisonment.[51] An article in the *Rand Daily Mail* pointed to a recommendation by the authors of the report that many children who would usually end up in prison, first awaiting trial and then after conviction, could more suitably be dealt with by being classified by the courts in terms of the relevant legislation, as being 'in need of care'. This would remove the children concerned from the criminal justice system and no criminal conviction would be recorded.[52] An article in the *Eastern Province Herald* began by emphasising the conclusion of the researchers that there was 'little real protection for children in the criminal justice system', as well as their finding that the adult prisons in which most juvenile prisoners were held, were 'unsuitable for the detention of children', and that the potential consequences for juvenile political offenders were 'disturbing'.[53] *The Argus* highlighted the fact that, according to the report, juveniles in prison were afforded the same basic treatment as adults. For example, the report pointed out that juvenile prisoners could be tried and punished in the same manner as adult prisoners for contraventions of prison regulations: 'Punishments may entail the deprivation of one or more meals on any one day, corporal punishment of a maximum of six strokes for males, solitary confinement for up to 30 days, or a combination of solitary confinement with periods of reduced, spare and full diets'.[54] Clearly, most readers of *The Argus* would have been horrified at the thought of juveniles having to undergo certain of these punishments.

Certain newspapers included moving accounts of the conditions under which juveniles were detained, providing a disturbing glimpse into what life was like for juveniles in prison at this time. The *Eastern Province Herald*, for example, quoted from a section of the report in which Van Zyl Smit provided a first-hand account of the conditions in which juvenile prisoners were detained at Pollsmoor Prison near Cape Town. According

50 *Ibid*.
51 *Die Burger* (1984-12-19) 'Baie kinders met ma's in tronke' 19.
52 *Rand Daily Mail* (1984-12-19) 'Courts urged to help keep kids out of jail' 4.
53 *Eastern Province Herald* (1984-12-20) 'Children behind bars' 15.
54 *The Argus supra* n 48 at 35.

to Van Zyl Smit, sentenced juveniles at Pollsmoor were held in communal cells, with each cell holding around 25 children in total. He went on to describe the living conditions as follows:[55]

> They wear prison uniform. They sleep on the floor on mattresses about one-and-a-half centimetres thick. Each juvenile has four blankets. In each cell there is a toilet and wash basin. As far as recreation facilities are concerned, sentenced juveniles exercise twice a day for half-an-hour in a large bleak prison yard. In this (as all other stages of their detention) they are separated from adult prisoners. In the cell they had a kerrim board (a form of snooker) and dominoes. Library books were also on display above each juvenile's locker.

Van Zyl Smit pointed out that, with the relative large numbers of juveniles being detained, there was limited scope for the rehabilitation of juvenile offenders. He also pointed to the potentially negative influence on children of violent prison gangs.[56] In terms of the Correctional Services Act,[57] 'juveniles' were defined as persons under 21 years of age. This meant that juveniles under eighteen years old were confined with juveniles between eighteen and 21 years old. According to Van Zyl Smit, this latter category included 'many hardened criminals and tough gang members'.[58] Thus, there was a need for a separate classification of offenders aged between eighteen and 21 years of age. *The Argus* quoted the following deeply worrying statement made in the report:[59]

> No evaluation has been made of the long-term effect upon a juvenile confined to a cell dominated by violent and ruthless gangs. Assaults, stabbings, theft and homosexual rape are commonplace with prison gangs.

There was also some limited reporting on the effect that the political context at the time had on the detention of children. The *Eastern Province Herald* reported on comments by Van Zyl Smit pointing out that children were not granted any special protection in terms of apartheid security legislation, and that increasing numbers of children were being detained for 'security reasons', due to 'increasing participation in school boycotts, bus boycotts, political riots and in "anti-apartheid" organisations'.[60]

The response by the Prisons Service to the report was published extensively in the press. The basic thrust of its response was to reiterate that:[61]

> Although it is the ideal to incarcerate young offenders in separate institutions, the prison authorities endeavour at all times to ensure that in those cases

55 *Eastern Province Herald supra* n 53 at 15.
56 *Ibid*.
57 Correctional Services Act 8 of 1959.
58 *The Argus supra* n 48 at 35.
59 *Ibid*.
60 *Eastern Province Herald supra* n 53 at 15.
61 *The Argus* (1984-12-20) 'Reply – "Prison Service maintains professional standards"' 35; see also *Eastern Province Herald supra* n 53 at 15; and *Sunday Tribune* (1984-12-23) 'What the Prisons Service says about this report' 1.

> where it is unavoidable to incarcerate children in prison facilities for adults, they are kept separately from adult prisoners and everything possible is done to prevent contaminating influences by hardened criminals.

It is interesting to note that this type of 'hand-wringing', on the part of the authorities, at the fact that there was no alternative but to detain juveniles in adult prisons, was to continue well into the post-apartheid period.[62] In addition to the 'hand-wringing', the Prisons Service also bemoaned the fact that they had not been consulted about the findings of the research and disputed the unsubstantiated nature of the allegations:[63]

> Unfortunately, the Prisons Service was not approached for months about the findings of research based on interviews with former prisoners whose statements were not verified beforehand. No substantiation was given for the allegations regarding maltreatment by Prisons Service staff.

Predictably, the editorial commentary, in various newspapers, on the issue was scathing. For example, in an editorial with the title 'Shocking Story' *The Natal Mercury* commented, *inter alia*, as follows:[64]

> There have been many disturbing disclosures down the years about conditions in South Africa's overcrowded prisons. But those contained in the University of Cape Town's latest survey, 'Children in Prison in South Africa', are undoubtedly among the most shocking. In parts the report becomes a dossier of horror, with stories of juvenile inmates – 97 percent of whom are black – being raped by adult prisoners and terrorised by gangs. Overall it presents an appalling indictment of a system that would seem to be losing touch with its obligations to children in custody. And if society is not stirred into demanding drastic reforms, it too could have much to answer for. Easily the most devastating finding in the survey is the conclusion that there is 'little real protection for children in the criminal justice system'. For it is a system in which children can be arrested, detained, tried, convicted and sentenced without their parents' knowledge. And in the words of the report 'one can only speculate at the chances of a fair trial', since the State does not provide free legal counsel to indigent accused except for capital offences. The terrible conclusion is that the law does not encourage the police or the courts to find alternatives to detaining children in prison. Even innocent infants find their way behind bars with mothers who have done no more than offend the country's influx laws ... As things stand the Prisons Service itself emerges as an institution seemingly trying to maintain professional standards towards children in its care, but hogtied by inadequate facilities and overwhelmed by the scale of the problem.

A similarly scathing editorial appeared in *The Natal Witness*, which stated, *inter alia*, that:[65]

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62 See, for example, 'Section 9 Juvenile offenders' in Peté (2000) *supra* n 25 at 32-39.
63 *Sunday Tribune supra* n 53 at 1.
64 *The Natal Mercury* (1984-12-21) 'Shocking Story' 10.
65 *The Natal Witness* (1984-12-27) 'Children in prison' 6.

> If the degree of civilisation of any country can be gauged from the treatment meted out to those in its prisons, South Africa does not measure up very well. The findings of the University of Cape Town's survey into Children in Prisons is a shocking indictment, not so much of the Prisons Service, which seems to be doing its professional best under adverse circumstances, but of a system of justice which fails to protect children in custody and sometimes, in the case of infants, puts them behind bars with mothers who have done no more than fall foul of the pass laws. In the opinion of the Director of UCT's Institute of Criminology, there appears to be an exceptionally high number of children in South African prisons and little is being done to prevent them from being victimised and intimidated or to safeguard them from the generally harsh conditions experienced by their adult counterparts. Some of the horrifying case studies outlined in the report could come straight out of the last century.

The Sunday Star published the following two horrifying 'case studies' from the report:

> Peter, a young coloured boy: 'The most difficult thing about that cell for me was just sitting there all day. The cell was dark and there was no fresh air. They wash the floors with Jeyes Fluid which makes the place stink. There were gangsters in the cell and they often fought. Sex is often forced on you and you have to obey, especially if that person is a member of one of the powerful gangs. My food was placed on a piece of paper. There were no plates or cups. Food was watery soup and "katkop", a large, square chunk of bread'.[66]

> Dennis, 17, arrested for alleged car theft and kept in police cells with adults for three weeks awaiting trial, claimed he was regularly assaulted by inmates and the last thing he remembered was being hit over the head with a broom. He was apparently raped and later found himself in hospital. He is now physically and mentally disabled.[67]

4 Conclusion

In Part two of this article, two further 'characters' who formed part of the overall story which emerged in penal discourse during the first half of the 1980s have been examined – the white female prisoner (the 'fallen angel') and the juvenile offender (the 'innocent'). As with the two characters examined in Part one of this article, it has been shown that the characters examined in Part two occupied completely different conceptual spaces within the penal ideology of the time. White female prisoners, segregated in their own cosy prison in Kroonstad, were seen as 'fallen angels' – sadly misguided, but still very much representatives of all that was good, loving, tender and refined in white society. Juvenile offenders were the 'innocents' of the story, trapped in bleak adult prisons filled with depravity and gang violence, but unable to escape despite screeds of outrage in the public media. In the case of each of these two categories of prisoners, there were historical parallels to be drawn with penal debates which had taken place in colonial Natal. As in the case of

66 *The Sunday Star* (1984-12-23) 'Kids say it's hell behind bars' 2.
67 *Ibid*.

the historical parallels discussed in Part one of this article, the 'historical resonances' examined in Part two illustrate the deep roots of the ideological attitudes concerned, as well as their resilience over time. The overall 'lesson' of this article is that prison reform is not simply a matter of bringing about physical changes within the penal system, but also about understanding and transforming these deeply rooted ideological attitudes.

Tracing certain of the themes raised in this article through to the post-apartheid period, it is interesting to note resonances over time. For example, the image of the vicious prison gangster – the 'demon of the penal system – continued to exert considerable influence within the public imagination well into the post-apartheid period.[68] Likewise, the idea of special treatment for a select group of 'penitents – those lucky few within the South African penal system considered to be worthy of rehabilitation - also continued well into the democratic era, although with much less emphasis on race than previously.[69] Furthermore, public discourse surrounding the problem of children detained in adult prisons did not cease with the end of apartheid, but continued to take up a significant number of columns within South African newspapers during the immediate post-apartheid period.[70] Female prisoners were, however, virtually invisible within penal discourse at this time.

68 See, for example, 'Section 5.2 Abuse of human rights by prison gangs' in Peté (1998) *supra* n 25 at 80-81; see also 'Section 2.3 The idea behind a "purgatory" for dangerous prisoners' & 'Section 10 Prison gangs – A continuing reign of terror' in Peté (2000) *supra* n 25 at 4 & 39-41.

69 See, for example, 'Section 3 New "model" prisons – "Five Star Hotels" for the lucky few' in Peté (2000) *supra* n 25 at 8-9. With regard to the reduction in emphasis on race, Van Zyl Smit commented in the late 1990s that: 'Perhaps the most significant change in South African prison regimes in the past decade has been the abolition of official segregation of prisoners according to their officially recognised population groups ... Official figures of the number of prisoners in the different population groups are no longer published. Figures that were made available to the author indicate that these disparities, while large, are gradually diminishing. Thus in 1976 the rate of imprisonment for whites was 79 per 100,000 of population and that for blacks 350 per 100,000. By June 1996 the figure for whites had declined to 57 per 100,000, while that for blacks had declined even further to 198 per 100,000 ... The Coloured (mixed race) group had the highest rates of all, but they too have declined significantly from 776 in 1976 to 714 per 100,000 in 1996'; see Dirk van Zyl Smit 'Chapter 21 – South Africa' pages 589 to 608 at pages 605 to 606, in Dirk van Zyl Smit and Frieder Dünkel (ed) *Imprisonment Today and Tomorrow – International Perspectives on Prisoners' Rights and Prison Conditions* (2001).

70 See, for example, 'Section 9 Juvenile offenders' in Peté (2000) *supra* n 25 at 32-39.

Aantekeninge/Notes

Trade mark law: Can an unregistered mark be protected prior to the acquisition of a reputation?

1 Introduction

It is generally accepted that a 'mere' trade application fixes the date of application, and not much else. Instead, the focus is on the two standard forms of protection which exist in relation to a trade mark. Firstly, a trade mark registration, which is arguably the most effective form of protection. Protection in terms of the Trade Marks Act (194 of 1993) is available immediately, on registration, and is not, in the short term, dependent on the use of the mark. The registration will also automatically extend across the country. Secondly, in the common law, the remedy of passing off exists. This remedy will only be available once a reputation has been established. It was clearly stated in *Caterham Car Sales and Coachworks Ltd v Birkin Cars (Pty) Ltd* (1998 ZASCA 44) that (par 20):

> The correct question can be distilled from the judgments on passing-off of this Court mentioned earlier … In general terms, it appears to me to be whether the plaintiff has, in a practical and business sense, a *sufficient reputation* amongst a substantial number of persons who are either clients or potential clients of his business (own emphasis).

Seemingly, then, where a simple trade mark application is at hand, it might be problematic to obtain protection for such a mark. A scenario that might seemingly fall outside the sphere of the above two standard forms of protection, is where a business has spent millions of rand to prepare to launch a new product, only to find that a competitor has launched a similar product under a confusingly similar name a day before. There is considerable confusion in the market. The business does not have a reputation in the market yet, neither a trade mark registration, and is seemingly without a remedy. Is the money spent wasted? The unfairness of the situation is apparent. That being said, possible situations in which protection might be available are discussed below.

2 The Trade Marks Act

Upon registration, the proprietor of a registered mark is often perceived to have 'per se' rights. The concept 'per se' is used to indicate rights flowing from mere registration, whether there has been use of the mark or not (see Webster & Page *South African Law of Trade Marks* (1997)

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12-79). The authors state this when discussing section 36(1) of the Trade Marks Act, which protects a party that has used its mark prior to the earliest of the proprietor's date of first use or date of filing. In relation to this provision, the following was stated (without crediting said authors) in *Nino's Italian Coffee & Sandwich Bar CC v Nino's Coffee Bar & Restaurant CC* (1998 3 SA 656 (C) 675H):

> The underlying purpose of this section is to prevent a proprietor of a trade mark from exercising his rights merely on the basis of priority of registration and it preserves whatever common-law rights there may be antecedent to the rights of the registered proprietor.

Here the earlier user, A, is accordingly protected because the fact that B was the first to file should not be decisive. B was first to file, but A was first to use. If the mark of B is registered, A could rely on section 10(12) to have B's mark expunged. Section 10(12) protects common law rights but presupposes the existence of a reputation, which does not solve the problem under discussion. Are other perspectives possible?

The current Trade Marks Act seemingly accords a greater measure of deference to applications than the previous Trade Marks Act (62 of 1963; 'previous Act')) did. Under the current Act, there can be grounds of opposition. Under section 17(3) of the previous Act, a determination of rights procedure was created. Turning to substantive law in the latter regard, it was said in *Victoria's Secret Inc v Edgars Stores Ltd* (1994 (3) SA 739 (A) that (parr 752D-E)):

> In determining which of competing claimants should prevail, the guiding principle is encapsulated in the *maxim qui prior est tempore potior est jure*: he has the better title who was first in point of time. In the Moorgate judgment Mr Trollip said:
>
> In a situation in which competing applications for the registration of the same or similar marks are filed in the R.S.A. the general rule is that, all else being equal, the application prior in point of time of filing should prevail and be entitled to proceed to registration. In a 'quarrel' of that kind 'blessed is he who gets his blow in first.

The first statement by Trollip J would seem to be clearly correct if one is dealing with two parties who have simply filed applications, and no use is sought to be proven. However, the statement would of course have to be tempered if one of the parties had use that predated the other's date of application. In line with this proposition, it was considered relevant in the *Victoria's Secret* case whether a reputation existed, with the implication that use can influence the priority of rights (par 48).

The current Act makes reference to applications in an opposition context in two instances. First, section 10(15) determines that, subject to sections 14(1) – honest concurrent use applications – and, second, in terms of section 10(16), one may oppose a later conflicting application on the basis of an earlier application. Section 10(15) seems to deal with conflicting applications' dates only, which would involve a somewhat

mechanical approach. Filing dates are simply compared. This provision typically envisages a situation where a later application, filed by X, is opposed by Y, a person having an earlier application date. However, it might be that X has use predating that of Y, or Y might not have any use. In such an instance, looking solely from the perspective of section 10(15), X should be able to successfully defend the opposition by Y. X may also rely, instead, on section 14(1) which allows for an application to be filed on the basis of honest concurrent use. If X decides to pursue the opposition of Y's application, he would have to qualify in terms of section 10(16). This enactment allows for an opposition of an earlier application by the owner of a later application that has 'existing rights'.

In this situation X, the later applicant, is enabled to oppose the earlier application by Y and would carry the burden of proof (Webster 'The Registration of Trade Marks' in Visser (ed) *The New Law of Trade Marks and Designs* 17). The basis on which the *prima facie* superiority of the earlier application can be overcome is the concept existing rights'. The view of Webster and Page (*supra* 6-38) is that 'existing rights' could include use of a mark to an extent that would not be sufficient for an opposition under section 10(12), protecting common law rights, but which, nevertheless, establishes that registration would be contrary to the rights built up. From this it would follow that the mere filing of an application ensures a lighter burden of proof. 'Existing rights' would seem to be a less involved process than proving the existence of a reputation (s 10(12)). For example, some preliminary marketing activities relating to a product not yet on the market, could be significant.

3 Unregistered Marks in terms of the Trade Marks Act

For the sake of comprehensiveness, it must be pointed out that section 35(3) of the current Act allows for an infringement action against the use of a well-known (often) unregistered mark. Similarly, provision is made for an opposition in similar circumstances (s 10(6)). Section 35(3) could however be problematic as a basis of protection for litigious proceedings instituted by a business that has not yet established a reputation. Regard must, here, be given to the ruling in *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another; McDonald's Corporation v Dax Prop CC and Another; McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another* (1996 ZASCA 82). In this case, it was held that (par 36-37) 'I consider therefore that a mark is well-known in the Republic if it is well-known to persons interested in the goods or services to which the mark relates' (parr 36-37). This 'well-known' requirement could exclude protection in the situation under discussion where there is no reputation.

4 Legislation Acknowledging 'mere' Trade Mark Applications

4 1 Consumer Protection Act

Certain legislative instruments acknowledge mere applications. The Consumer Protection Act (68 of 2008; 'CPA') regulates the operation of businesses by creating a system of compulsory registration (s 79(1) of the CPA). Business names registered in terms of the CPA are open to objection on a number of grounds. It is specifically determined that an objection can be based on a registered trade mark, or a mark in respect of which an *application* has been filed in the Republic for registration as a trade mark. 'Trade mark' means a trade mark as defined in section 2(1) of the Trade Marks Act. Section 2(1) describes a mark in terms of its general distinguishing function and is not limited to registered marks in particular. Also included is a well-known trade mark as contemplated in section 35 of the Trade Marks Act (s 81(2)(a)(ii) of the CPA). Section 35 is of course a provision protecting well-known marks as envisaged in the Paris Convention for the Protection of Industrial Property of March 1883. In this case, there is accordingly protection even though no registration is (necessarily) involved. Lastly, section 81(2)((b)(i) could perhaps be seen as a 'statutory' form of the prohibition of passing off, as it proscribes misleading conduct etcetera.

4 2 Companies Act

A similar approach is followed by the Companies Act (71 of 2008) in section 11(2)(a)(iii). A name to be registered may not resemble a registered trade mark belonging to a person other than the company; or a mark in respect of which an *application* has been filed in the Republic for registration as a trade mark; or a well-known trade mark as contemplated in section 35 of the Trade Marks Act. As highlighted above, section 11(2)(b)(i) might be considered to be a 'statutory' form of the prohibition of passing off, as it proscribes the registration of misleading names.

4 3 Counterfeit Goods Act

The Counterfeit Goods Act (37 of 1997) seems to restrict protection to registered marks. This would follow from the definition of 'intellectual property right' in section 1(1) of the Counterfeit Goods Act which refers to the rights in respect of a trade mark conferred by the Trade Marks Act, and includes rights in relation to a trade mark as mentioned in section 35 of the Trade Marks Act. In contrast with the CPA and the Companies Act, which recognise applications, in the Counterfeit Goods Act the term 'rights' is seemingly restricted to registrations. In *Aruba Construction (Pty) Ltd and Others v Aruba Holdings (Pty) Ltd and Others* (2000 2 SA 155 (C)) it was stated that (par 169):

> There are no – or insufficient – allegations in the papers before me to support a reliance by the applicants on common-law trade mark rights of the kind envisaged in s 33 of the Act, and an order based on statutory trade mark infringement *cannot be obtained in respect of a trade mark which has been applied for but not yet registered* … (own emphasis).

Incidentally, the reference to section 33 of the Trade Marks Act is incorrect in the sense that section 33 does not grant a substantive common law remedy. It merely states that a person can choose between a common law *or* statutory infringement action.

4 4 Is it only Registration that is Affected?

It may be that not only is registration affected, but use as well. One must, here, have regard to the issue of context and indirect consequence. For instance, an objection to a proposed business name can be lodged on the basis of a company name in terms of section 81(2)(a)(i) of the CPA. The outcome of successful objection proceedings would, in the final analysis, be that the proposed business name cannot be *used* (s 79(3) of the CPA).

4 5 Domain Names

The Electronic Communications and Transactions Act (25 of 2000) regulates the registration of domain names. Regulations dealing with objections to domain names were issued on 22 November 2006 under Notice R 1166 in *Government Gazette* 29405 (available at http://www.domaindisputes.co.za). The first ground on which a complaint in terms of the Regulations can be based, is that the registration is *abusive* (reg 3(1)(a) of *GG* 29405 *supra*). This concept means that a domain name was either registered or acquired in a manner which, at the time of registration, took unfair advantage of or was unfairly detrimental to the complainant's rights, or has been used in a manner that takes unfair advantage of, or is unfairly detrimental to the complainant's rights (reg 1 of *GG* 29405 *supra*). The latter term 'include[s] intellectual property rights, commercial, cultural, linguistic, religious and personal rights protected under South African law, but is not limited thereto' (reg 1 of *GG* 29405 *supra*).

A second ground is that a domain name is *offensive*; that is, it advocates hatred that is based on race, ethnicity, gender or religion and/or constitutes incitement to cause harm (reg 4(2) of *GG* 29405 *supra*). The question that arises here is the meaning of the term 'intellectual property right'. Obviously, a trade mark registration would be included, as well as a mark that has been used extensively. However, would a trade mark application suffice? The decision in *mrplastic.co.za* (ZA2007-0001, judgement by OH Dean, dated 7 June 2007 (available at http://www.domaindisputes.co.za/downloads/cases/ZA2007-0001/ZA2007-0001.pdf) might be analogous. It was stated that (par 4):

> The Complainant in 1976 registered a company name 'Mr Plastic (Pty) Limited' and in 1991 it converted that company to a close corporation having

> the name 'Mr Plastic CC'. The registration of a company name or a close corporation name, per se, conferred upon the entity in question no rights in that name enforceable against third parties in the sense that third parties can be restricted from using it…

Similarly, in *mixit.co.za* (ZA 2008-0020, judgment of C Le Roux, dated 30 September 2008 (available at http://www.domaindisputes.co.za/downloads/cases/ZA2008-0020/ZA2008-0020.pdf)) it was held that (par 5.2.1):

> Against this background, since the Complainant's contention that it owns trade mark rights in connection with a trade mark which is the subject of *pending South African trade mark applications is not recognised in law*, the Adjudicator finds that the Complainant has not succeeded in showing trade mark rights on this basis. The Complainant's claims that it owns business name and domain name rights on the basis of the registration of its company name and the domain names are similarly rejected. A company or domain name registration does not in itself give rise to any rights (own emphasis).

Writing on this issue, Hurter (*Aspects of the nature and online resolution of domain-name disputes* (?LLD thesis 2011 UNISA) 228-229), points to a number of instances where recognition was not given, both locally and overseas, to mere trade mark applications. Hurter adopts the view that the owner of an application should either await registration, or rely on common law rights. In conclusion of this section, it would appear that a measure of protection does attach to a trade mark application. A business not having a reputation yet can, therefore, have some form of protection, but not in relation to a domain name or counterfeit scenario.

5 Common Law

The first issue that needs addressing here is whether a product must be on the market before protection for its mark can be obtained? In *Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd* (1972 3 SA 152 (C)) it was argued that the product had, at the relevant time, not yet been marketed and that the label concerned had accordingly acquired no reputation (159H). However, passing off and unlawful competition was held to have taken place.

A reputation in some sectors of the market, but not amongst the general public, was held to suffice in *Pepsico Inc v United Tobacco Co Ltd* (1988 2 SA 334 (WLD)). A introduced its product to the major retailers by way of advertisements and thereafter by advice and information to them in preparation for the marketing of the products. Factory equipment was purchased, which was used to make samples for testing for quality specifications. Thereafter the introduction of suitable packaging took place, as well as the development of an advertising strategy and sales merchandising which related to equipment for the presentation and sale of the product in retail outlets. Passing off was found (346B–D). The court stated (346B–D) the following:

> The question then is: has there been a launch to the trade, and were the applicants trading as such? And consequently, could there have been a passing off? In my view, the applicants have successfully proved the requisites for passing off, in that the trade had been approached, advised, demonstrated to, and arrangements made for the wholesale selling of the product. Samples had been provided; the marketing get-up of the packaging had been prepared and demonstrated. The form of marketing was not only demonstrated to all the major retailers who comprised between 30 and 40 percent of the snack food industry suppliers to the public, but arrangements had been made to take leading marketers from most of the larger retail suppliers overseas to increase their marketing knowledge and know-how for the specific purpose of the launch to the public, of the product concerned.

There was accordingly exposure to some sectors of the market. The court also made (346D-I, own emphasis) the following important statement:

> As was stated in the *Aristoc* decision, trade is a wide word, and a connection with goods in the course of trade means an association with the goods in the course of their production and preparation for the market. Here, in my view, there has been such an association with the goods by the retailers to whom they were presented. The fact that the product had not gone through to the final consumer is, in my view, not a *sine qua non* for the purpose of entering the trade. In the event, the supplier … is the retailer. It is not the man in the street or the little boy who buys the packet of chips at the corner café. That is another section of the market, and no doubt a very substantial, if not the greater part, of the market. However, *the fact that it has not been launched* and provided to the corner café does not derogate from the fact that the Ruffles chip, presented in the form in which it is to be finally launched … has, in my view, entered the market. There had been discussion, arrangement for marketing; it has acquired through demonstration the same reputation which it enjoyed overseas. *That reputation has become associated with the product* in the preparation by all the parties concerned for the market, within the territorial area of the Republic of South Africa. The reference to the *Carling* case, in my view – and after consideration of the facts therein set out – makes it quite clear that that case is on the facts distinguishable from the facts in the present case. There, there had been no such preparation of the market and the retail market to whom the producer was going to sell. Here the position is clearly different.

It would seem that the court regarded preparations for the actual launch of the product as of significance. The end consumer was therefore not the only sector to be taken into consideration. A reputation can accordingly also exist "upstream" in the distribution and marketing structure. With regard to the existence of reputation as a requirement for passing off, the authors Van Heerden and Neethling *Unlawful Competition* (2008) 168 state that it is not necessary to prove that customers are acquainted with the mark, only that the connection between the goods and the mark enables customers to individualise and thus distinguish his goods from other such goods. From this it is said to follow that in the case of "fancy" or invented marks, a reputation is not required. The connection of such a name can only serve to individualise the goods, the name is in itself already distinctive (168). Van Heerden and Neethling 169 (emphasis in

original) is critical of the *Oude Meester* ruling, stating that a finding of passing off was incorrect, as:

> It is, however, doubtful whether this is a case of passing off in its traditional sense. As a matter of fact, the applicant could not acquire a right to the label as distinctive mark before his wine was marketed, since the label did not have any distinguishing value at that stage. The label would only have individuated the wine – in other words, enabled customers to distinguish the wine from other wines – *when* it was placed on the market. Accordingly, the respondent could not have created the misrepresentation that his wine was the wine of the applicant; passing off his wine as that of the applicant was therefore out of the question.

These views, requiring placement on the market, would seem to be in conflict to an extent with those of the authors regarding fancy marks referred to above, namely that for such marks a reputation is not necessary. Another facet is that in their discussion of the right to a distinctive mark, the authors point out that the right to a distinctive mark is an accessory right to the right to goodwill (113). Moreover, there is overwhelming authority for the requirement of a reputation. In practical terms, a mark still existing only within the confines of a company cannot provide rights, if the right to the mark is seen as an accessory right. Here the question of a right to a trade secret, for instance, might feature.

Reference can also be made to the views of Gardiner *The legal nature of the right to a trade mark in South African Law* LLD-thesis Unisa (1995). Gardiner states (556) that for a subjective right of property to vest in a trade mark at common law, three elements are required. The claimant must adopt the mark, it must be distinctive, and, importantly, it must be used. It thus appears that the legal position would be that even if a right to a distinctive mark itself is advanced, the requirement of use is still applicable. It is also, arguably, a blurring of the doctrinal dividing line between common law and statutory protection. The Trade Marks Act specifically allows registration without use, and this approach should be limited to the statutory framework, and those that proceed to file an application. Lastly, the motive for bringing forward a business' launching of a product thereby sabotaging the rival's launch, can also be relevant, and provide "early" protection for the other party's mark (see *Kellogg Company v Bokomo Co-operative Limited* 1997 2 SA 725 (C) 739E). One is then dealing though with the issue of mala fides, a legal principle with a very broad sphere of application.

6 Advertising Standards Authority

If an unregistered trade mark has featured in an advertisement, the rules of the Advertising Standards Authority (ASA) might be relevant (http://www.asasa.org.za/Default.aspx?mnu_id=37). Rule 9.1, dealing with imitation, provides that an advertiser should not copy an "existing advertisement, local or international, or any part thereof in a manner that is recognizable or clearly evokes the existing concept and which may result in the likely loss of potential advertising value." Importantly, this

will apply notwithstanding the fact that there is no likelihood of confusion or deception or that the existing concept has not been generally exposed. Rule 9.2 determines that in considering international campaigns, consideration will be given to, inter alia, the undue imitation thereof by local advertisers. The condition is, however, that the advertiser must be committed to start trading in the local market within a reasonable period of time. This provision could thus provide protection where a trade mark has appeared in an advertisement, also overseas.

7 Conclusion

It appears that although use of a scope not amounting to the existence of a reputation does not provide extensive rights, there are certain contexts in which protection might be possible nevertheless. In statutory law, certain rights are given in terms of the Trade Marks Act. Then, again, the CPA grants protection, also in the form of a statutory type of prohibition of passing off. This might be relevant to the business not yet fully in the market. Similar provisions are found in the Companies Act. Lastly it was noted that the ASA Code might be effective, even if the particular advertisement was shown overseas. In conclusion therefore, there are some rights that attach to a trade mark application, or a trade mark the subject of an application, and the picture is not as bleak as it might seem at first.

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Immigration and the right to respect for family life in the European context: A reflection on the states' positive obligations and possible lessons for South Africa

1 Introduction

The former Aliens Control Act 96 of 1991 has been repealed by the Immigration Act 13 of 2002(s 54), which commenced on 12 March 2003. On 26 May 2014, amendments to the Immigration Act 13 of 2002 effected by the Immigration Amendment Act 3 of 2007 (GN 656 in GG 30095 dated 18 July 2007) and the Immigration Amendment Act 13 of 2011 (GN 690 in GG 34561 dated 26 Aug 2011) as well as the Regulations were implemented (GN R413 in GG 37679 dated 22 May 2014). With regard to the issuing of permanent residence permits to a foreign spouse of a South African citizen or permanent resident under the former and

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now repealed Aliens Control Act, two aspects earlier came under scrutiny in the case of *Dawood, Shalabi and Thomas v Minister of Home Affairs (*2000 1 SA 997 (C), 2000 3 SA 936 (CC)). The first aspect related to a non-refundable fee payable by foreign spouse applicants for immigration permits (now permanent residence permits). The second issue concerned section 25(9)(b) of the Aliens Control Act and, in particular, the question whether it was constitutional to require that an immigration permit could be granted to the spouse of a South African citizen who is *in* South Africa at the time *only* if that spouse is in possession of a valid temporary residence permit. Both aspects were declared to be inconsistent with the Constitution and thus invalid (see the discussion in par 4 3 below). The applicants, whose temporary residence permits had expired, were therefore entitled to remain in South Africa pending the finalisation of their application for an immigration permit. Important to note for purposes of the discussion below, however, is the fact that when they got married, all three applicants were in the Republic *legally*. When initially they applied for permanent residence permits, they were in possession of valid temporary residence permits.

Conversely, a recent judgment by the European Court of Human Rights ('ECtHR') in *Jeunesse v The Netherlands* (appl no 12738/10 of 2014-10-03), involved an application for permanent residence in the Netherlands by an applicant who was *illegally* present in the Netherlands for a number of years, on the basis of her family life in the Netherlands. The existence of 'family life' within the context of article 8 of the European Convention on Human Rights ('ECHR') between the applicant, her husband and three children was not disputed. The pertinent question, however, was whether the Dutch authorities were under a *positive obligation* to allow her to reside permanently and therefore to grant her a permanent residence permit in the Netherlands for the purpose of enabling her to enjoy and exercise family life with her husband and children on their territory (par 85).Article 8 of the ECHR reads as follows:

> (1) Everyone has the right to respect for his … *family life*, …
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in *accordance with the law* and is *necessary in a democratic society* in the interests of *national security, public safety* or the *economic well-being* of the country, for the *prevention of disorder or crime*, for the *protection of health or morals*, or for the *protection of the rights and freedoms of others*. (emphasis added)

This contribution reflects on the valuable *general* guidelines provided by the ECtHR on immigration matters in the European family and humanitarian law context. The application of these guidelines by the ECtHR to the facts at hand in *Jeunesse* is mentioned. Special attention is drawn to the exceptional facts and circumstances of the case that led the ECtHR to deviate from the general guidelines and to find a violation of article 8 of the ECHR by the Dutch authorities. The opportunity is then used to briefly investigate the position in South Africa. The Immigration Act and the question whether and how the judgment by the

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Constitutional Court in *Dawood, Shalabi and Thomas v Minister of Home Affairs* was implemented by the Act is also addressed. The facts of *Jeunesse* are distinguished from those in *Dawood, Shalabi and Thomas*. Views held by commentators (par 4 1) suggest that *Jeunesse* should be seen as a triumph for the right to respect for family life, but only because of the cumulative effect of the special and exceptional circumstances in the case. Should some of these circumstances exist in isolation, and if one looks at several of these circumstances separately, case law by the ECtHR seems to suggest that they are not so 'exceptional', and would not necessarily afford the protection of article 8 of the ECHR. Lastly, some questions relevant to the discussion are posed for consideration in view of the possible future development of this aspect of the law in South Africa.

2 The Facts of *Jeunesse*

The applicant, Mrs Jeunesse, a Surinamese woman, entered the Netherlands in 1997 on a tourist visa, but did not return to Suriname when the visa expired 45 days later. Instead, she stayed in the Netherlands and made numerous attempts to get a permanent residence permit, all of them unsuccessful due to non-compliance with the immigration process (for the different reasons see parr 14-35). In the meantime she had married a Dutch national of Surinamese origin (whom she had met and lived with before in Suriname) and they had three children. Except for her all family members were nationals of the Netherlands. At the date of the judgment, the applicant had been living in the Netherlands for more than sixteen years (parr 8-13). One of the important reasons for the refusal of a permanent residence permit was, in terms of Dutch immigration law and policy at the time, that foreign nationals wishing to reside in the Netherlands for more than three months were required to hold, for admission to the Netherlands, a valid passport containing a valid provisional (temporary) residence visa issued in the country of origin or permanent residence. The purpose of the requirement of this visa, *inter alia*, was to prevent unauthorised entry and residence in the Netherlands (parr 43-61). The applicant alleged that the refusal to exempt her from the obligation to hold a provisional residence visa and the refusal to admit her to the Netherlands violated her rights under article 8 of the ECHR. Therefore, as stated above, the issue was whether or not the Netherlands was under a duty or had a positive obligation to grant her a permanent residence permit which would enable her to enjoy family life in the country (parr 100 & 105).

3 Judgment

3 1 Confirmation of General Principles Developed by ECtHR Case Law

The court, firstly, confirmed the following general principles laid down in its earlier case law (for a summary see in general Harris *et al Law of the European Convention on Human Rights* (2014) 532 & 575-578; Leach

Taking a Case to the European Court of Human Rights (2011) 338; Roagna *Protecting the right to respect for private and family life under the European Convention on Human Rights* (2012) 87). A state is entitled to control the entry of aliens (terminology used by ECtHR; for purposes of the discussion the term 'foreigner' as used in the Immigration Act is preferred) into its territory and their residence there. The ECHR does not guarantee the right of an alien to enter, or to reside, in a particular country (par 100; see *Nunez v Norway* appl no 55597/09 par 66). The corollary of a state's right to control immigration is the duty of aliens, such as the applicant, to submit to immigration procedures and leave the territory of the state when so ordered if they are lawfully denied entry or residence (par 100). States have the right to require aliens seeking residence on their territory to make the appropriate request from abroad (par 101). States are therefore, under no obligation to allow them to await the outcome of immigration proceedings on their territory (see *Djokaba Lambi Longa v The Netherlands* appl no 33917/12 par 81). Where a state tolerates the presence of an alien in its territory, thereby allowing him or her to await a decision on an application for a permanent residence permit, such a state enables the alien to take part in the host country's society, to form relationships and to create a family there (par 103). However, this does not *automatically* entail that the state concerned is, as a result, under an obligation pursuant to article 8 of the ECHR to allow him or her to settle in their country (par 103). Confronting the host country with family life as a *fait accompli* does not entail that the host country is, as a result, under an obligation to allow the applicant to settle in the country (par 103). The court has previously held that, *in general*, persons in that situation have no entitlement to expect that a right of residence will be conferred upon them (par 103; see *Chadra v The Netherlands* appl no 53102/99; *Benamar v The Netherlands* appl no 43786/04; *Priya v Denmark* appl no 13594/03; *Rodrigues da Silva and Hoogkamer v The Netherlands* appl no 50435/99; *Darren Omoregie v Norway* appl no 265/07 and *B.V. v Sweden* appl no 57442/11).

While the essential object of article 8 is to protect the individual against arbitrary action by the state, in addition there may be positive obligations inherent in effective 'respect' for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. In both these contexts, the state enjoys a certain margin of appreciation (par 106). Where immigration is concerned, article 8 cannot be considered to impose on a state a general obligation to respect a married couple's choice of country for their matrimonial residence, or to authorise family reunification on its territory. In a case which concerns family life as well as immigration, the extent of a state's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (par 107). Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the state concerned, whether there are *insurmountable obstacles* in the way of the

family living in the country of origin of the alien concerned, and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (par 107; see *Butt v Norway* appl no 47017/09 par 78).

Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such, that the persistence of the family life within the host state, from the outset, would be *precarious*. It is the court's well-established case law that, where this is the case, it is likely only to be in *exceptional circumstances* that the removal of the non-national family member will constitute a violation of article 8 (par 108; see *Abdulaziz, Cabales and Balkandali v The United Kingdom* 1985 7 EHRR 471 par 68*; Rodrigues da Silva and Hoogkamer v The Netherlands* appl no 50435/99 par 39). Where children are involved, their best interests are of paramount importance (see *Neulinger and Shuruk v Switzerland* appl no 41615/07 par 135, and *X v Latvia*, appl no 27853/09 par 96): Alone they cannot be decisive, yet such interests must be afforded significant weight. The court must assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it (par 109).

3 2 Application of General Principles to the Facts in *Jeunesse*

Having made numerous unsuccessful attempts to secure regular residence in the Netherlands (especially because she did not have a valid temporary residence permit) on each occasion the applicant was aware, well before she commenced her family life in the Netherlands, of the *precariousness* of her residence status. Confronted with family life as a *fait accompli*, the removal of the non-national family member by the authorities would be incompatible with article 8 only in *exceptional circumstances (*parr 113-114). It is important to note that the court considered, 'first and foremost', that all the members of the applicant's family, excluding herself, were Dutch nationals and that her husband and their three children had the right to enjoy family life with each other in the Netherlands. Furthermore, the applicant was a Dutch national at birth and lost such nationality only when Suriname became independent. Therefore, her position could not be regarded as being on par with that of other potential immigrants who had never held Dutch nationality (par 115).

The applicant had been in the Netherlands for more than sixteen years and she had no criminal record. Although she failed to comply with the obligation to leave the Netherlands, her presence was nevertheless tolerated for a considerable period of time by the Dutch authorities, while she repeatedly submitted residence requests and awaited the outcome of appeals. The tolerance of her presence for such a lengthy period of time,

during which for a large part it was open to the authorities to remove her, in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands (par 116). The court accepted, in view of the common background of the applicant and her husband and the young ages of her children, that there would not appear to be 'insurmountable obstacles' for them to settle in Suriname. The court opined, however, that it was likely that they would indeed experience 'a degree of hardship' were they compelled to do so (par 117).

In determining the 'best interests of the children' as a principle of paramount importance, the court paid particular attention to the circumstances of the minor children concerned, especially their age, their situation in the country or countries concerned and the extent to which they were dependent on their parents. Noting that the applicant took care of the children on a daily basis, it was obvious that their interests were best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname, or by a rupturing of their relationship with her as a result of future separation (parr 118-119; see in this regard also the court's reference to relevant provisions of the United Nations Convention on the Rights of the Child (1989), arts 3, 6, 7, 9, 12, 18 & 27). Accordingly, insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit.

The court, confirming the relevant principles set out above, found that on the basis of the above considerations and viewing the relevant factors *cumulatively*, the circumstances of the applicant's case had to be regarded as *exceptional*. The court therefore concluded that a fair balance had *not* been struck between the competing interests involved. Therefore, there had been a failure by the Dutch authorities to secure the applicant's right to respect for her family life as protected by article 8 of the ECHR (parr 120-123).

4 Discussion

4 1 General

Peroni ('*Jeunesse v The Netherlands:* Quiet shifts in migration and Family life jurisprudence?' 2014 *Strasbourg Observers* http://strasbourg observers.com/right-to-respect-for-family-life; accessed on 2015-02-24) points out that readers familiar with the court's case law on family life and immigration will know that the applicant's chances of success are slim if family life was formed at a time when those involved knew that the migration status of one of them was such that their family life would be precarious in the state. Where this is the case, the principle is that the expulsion of the non-national family member will amount to an article 8 violation 'only in exceptional circumstances' (*Jeunesse* par 108, *Rodrigues da Silva and Hoogkamer v The Netherlands* par 39 & *Nunez v Norway* par 70). The court has been reluctant to find a violation where there are no

'insurmountable obstacles' to enjoying family life elsewhere (*Arvelo Aponte v The Netherlands* appl no 28770/05, par 60 & *Useinov v The Netherlands* appl no 61292/00 par 9).

In *Jeunesse,* the court did find a violation of article 8 despite the applicant's awareness of her precarious residence status before starting her family life in the Netherlands and despite the absence of 'insurmountable obstacles' for the family to settle in the applicant's country of origin. Peroni (2014 *Strasbourg Observers supra*) emphasises, however, that much remains the same at the level of principles and that the court re-affirmed its strict basic principles in the area as set out above. According to Peroni, key to understanding *Jeunesse* lies in the court's viewing of the relevant factors *cumulatively*, rather than viewing each of them separately. She concludes by stating that (2014 *Strasbourg Observers supra*):

> It may be too early to tell what exactly to make of the Court's analysis of the *Jeunesse* exceptional circumstances. Yet there is a sense in which *Jeunesse* looks at old issues with 'new eyes'. The analysis of some of the *Jeunesse* exceptional circumstances may contain some shifts in the Court's approach to certain issues in its immigration and family life case law. Though pinpointing what exactly these shifts may be all about is at times elusive, it appears that they concern the assessment of applicant's attitude and ties in the Contracting state and the best interests of their children.

The factors that weighed in Mrs Jeunesse's favour and which *cumulatively* made this an exceptional case, were: The Dutch nationality of the applicant's husband and children; the fact that the applicant herself had been a Dutch national at birth and only lost such nationality by no choice of hers when her country became independent in 1975; residence at an address of which the Dutch authorities were well aware; residence which they tolerated for over sixteen years; there being no criminal offending during that time; that although there were no 'insurmountable obstacles' to the husband and children relocating to Suriname, there would be 'a degree of hardship' in their being forced to do so; and that the situation of all members of the family had to be considered, especially the best interests of the children (see also Harris *et al supra* at 577).

Yeo ('Strasbourgh decides important case on respect for family life' 2014 *Freemovement* https://www.freemovement.org.uk accessed on 2015-05-08) opines, although the outcome was a success for the applicant and her family, that it should not be seen as a super-liberal judgment, but rather a case where the facts were genuinely exceptional. He remarks as follows (2014 *Freemovement supra*):

> As can be seen from a proper reading of the judgment, there were no insurmountable obstacles in this case, only 'a degree of hardship', but the case still succeeded. *Insurmountable obstacles will cause a case to succeed but are not a minimum requirement for success.* Nor does the judgment introduce any requirement that a case meet some sort of exceptionality threshold. As can be seen from the judgment, what is required is a careful assessment of all

> the relevant factors weighing both for and against the migrant before a decision is reached (emphasis added).

Two further points of interest and departure from the so-called 'UK Rules' struck Yeo. The first was the added weight given to family life established while authorities were aware of the person's presence. The second was the fact that the UK Rules make no genuine provision for the impact of refusal of residence on any affected children. Under the UK Rules the effect on children is considered in a completely segregated, compartmentalised way. This provision can be contrasted with the cumulative assessment of article 8 followed by the court in *Jeunesse*.

Van Eijken ('Family life & European citizenship: The Strasbourgh Court Decision in *Jeunesse v The Netherlands*' *Beucitizen* http://beucitizen.eu/family-life-european-citizenship accessed on 2015-03-24) opines that the ECtHR (in *Jeunesse)* therefore, refers to family rights as a collective right – in which the rights of the family as a *whole* have to be taken into account (see in this regard art 20 of the Treaty on the Functioning of the European Union ('TFEU') and the judgment in *Ruiz Zambrano* C-34/09 of 2011-03-08 by the Court of Justice of the European Union ('CJEU')). In *Ruiz Zambrano*, it was decided that *citizens* of the European Union may not be deprived of their 'genuine enjoyment of the substance of their rights' (see *Jeunesse* parr 71-72 & 110-111). The Dutch courts did not accept the possibility of the applicant (a non-European citizen) relying on either the TFEU or *Ruiz Zambrano* with a view to obtaining a derived right to residence in the Netherlands (see par 34 of *Jeunesse*). The ECHR, however, in *Jeunesse* concluded (par 120), under the exceptional circumstances of the case that 'insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit'. Hence, even though the applicant had no right to reside and to family life, on the ground of the status of her children as European citizens, she and her family were protected by the ECHR.

The Immigration Council of Ireland ('Family rights strengthened by European Court of Human Rights' Immigrant Council of Ireland media press release http://www.immigrantcouncil.ie/pages/articles/2014/20 accessed on 2015-05-08) welcomed the judgment. Becker (a senior solicitor with the Immigrant Council) is quoted as saying that:

> The decision of the Court is a reminder to all European Governments of their obligations under the European Convention on Human Rights – which makes clear that an individual's 'right to respect family life' can in exceptional circumstances override a Government's interest in controlling immigration. While the judgment is obviously a personal victory for the family concerned, it is also a further development of the law relating migrants' rights to family life which may prove relevant to many others across Europe.

However, in a minority judgment in *Jeunesse*, three judges held the view (par 10) that the approach adopted by the ECtHR effectively involved giving those prospective immigrants, who enter or remain in

the country illegally and who do not properly and honestly comply with the prescribed conditions for seeking residence, a special premium in terms of Convention protection over those who do respect the applicable immigration law by remaining in their country of origin and who conscientiously comply with the procedures laid down for seeking residence. The result is likely to encourage illegal entry or over-staying and a refusal to comply with the prescribed immigration procedures and judicially sanctioned orders to leave the country. The correct answer in difficult cases is the one that fulfils the obligation of the community to treat its members in a civilised, but also coherent and principled manner. The dissenting judges concluded as follows (par 10):

> In replacing the domestic balancing exercise by a strong reliance on the exceptional character of the particular circumstances, the court drifted away from the subsidiary role assigned to it by the Convention, perhaps being guided more by what is humane, rather than by what is right.

4 2 Dawood, Shalabi and Thomas v Minister of Home Affairs

In *Dawood, Shalabi and Thomas v Minister of Home Affairs* (2000 3 SA 936 (CC)), the relief sought (for, at least, Mr Shalabi and Mr Thomas) was an order declaring them to be entitled to a temporary residence permit pending the final determination of their application for an immigration permit (or permanent residence) and ordering the Department of Home Affairs ('the Department') to issue such a temporary residence permit (for the facts see parr 5, 6 & 7). In the alternative, to have section 25(9)(b) of the repealed Aliens Control Act requiring a temporary residence permit when such spouse applies for permanent residence – declared unconstitutional – to the extent that it authorises the granting of immigration permits to the spouses of South African residents when the applicant spouse is present in South Africa *only* if the applicant is in possession of a valid temporary residence permit (par 6). Section 25(9) provided as follows:

> (a) A regional committee may, on a application mentioned in subsection (1) made by an alien who has been permitted under this Act to temporarily sojourn in the Republic in terms of a permit referred to in section 26(1)(b) [s 26(1)(b) is the provision in terms of which work permits are issued], authorise the issue to him or her of a permit in terms of this section *mutatis mutandis* as if he or she were outside the Republic, and upon the issue of that permit he or she may reside permanently in the Republic.
> (b) Notwithstanding the provisions of paragraph (a) a regional committee may authorise a permit in terms of this section to any person who has been permitted under section 26(1) to temporarily sojourn in the Republic if such person is a person referred to in subsection 4(b) [s 25(4)(b) refers to a person who 'is a destitute, aged or infirm member of the family of a person permanently and lawfully resident in the Republic who is able and undertakes in writing to maintain him or her'] or 5 [persons referred to in s 25(5) are spouses and dependent children of persons lawfully and permanently resident in South Africa].

The grant of temporary residence permits was governed by section 26(3) of the Aliens Control Act, which provided that:

> An immigration officer in the case of an application for a visitor's permit, business permit or a medical permit referred to in subsection (1), or the director-general in the vase of an application for any of the permits referred to in that subsection, may, on the application of an alien who has complied with all the relevant requirements of this Act, issue to him or her the appropriate permit in terms of subsection(1) to enter the Republic or any particular portion of the Republic and to sojourn therein, during such period and on such conditions as may be set forth in the permit.

The extension of a temporary permit was governed by section 26(6) which read:

> The director-general may from time to time extend the period for which, or alter the conditions subject to which, a permit was issued under subsection (3), and a permit so altered shall be deemed to have been issued under the said subsection.

The court immediately noted (par 26) that it was clear from sections 25 and 26 of the Aliens Control Act, that no guidance was provided as to the circumstances in which it would be appropriate for the Department to refuse to issue or extend a temporary residence permit. The following *dictum* by O'Regan J is by now well established (par 37):

> The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. In my view, such legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, *but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right. A central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity.* Like all rights, however, the question of whether such a limitation is unconstitutional or not will depend upon whether it is reasonable and justifiable in an open and democratic society in terms of section 36(1) of the Constitution. I now turn to the question of the effect of section 25(9)(b) (emphasis added).

The court added that (par 38):

> It is implicit in section 25(9), read against the background of section 23, that applicants for immigration permits may not be in South Africa at the time their applications are granted. In the context of this general prohibition, the overall purpose of section 25(9)(b) is to afford to spouses, dependent children and destitute, aged or infirm family members of people lawfully and permanently resident in South Africa a benefit that is not afforded to other applicants for immigration permits. It allows them to remain in South Africa pending the outcome of their application for an immigration permit while other applicants have to leave the country. The effect of section 25(9) read with subsections 26(3) and (6) of the Act is that foreign spouses may continue

> to reside in South Africa while their applications for immigration permits are being considered only if they are in possession of valid temporary residence permits. Given the fact that such applications are not automatically granted but have to be considered on their merits, these provisions necessarily authorise immigration officials and the DG to refuse to issue or extend such *temporary permits* (emphasis added).

As section 26(3) and (6) stood, there was nothing to indicate what factors or circumstances could, or ought to be, taken into consideration by the relevant immigration officials and the Director-General (par 43). Section 25(4)(a) merely stated that a regional committee of the Immigrants Selection Board may have issued an immigration permit if the applicant was of good character; and would have been a desirable inhabitant of the Republic; would not likely harm the welfare of the Republic and did not or was not likely to pursue an occupation in which a sufficient number of persons were available in the Republic to have met the requirements of the inhabitants of the Republic. However, section 25(5) stated that a regional committee, notwithstanding the provisions of section 25(4), might have issued an immigration permit to a spouse of a permanent and lawful resident of South Africa. Furthermore, there was no guidance to be found in either section 25(4)(a) or 25(5) as to the circumstances in which immigration officials may refuse to issue or extend a temporary residence permit. As O'Regan J pointed out (par 49):

> There will be circumstances in which there are constitutionally acceptable reasons for refusing the grant or extension of a temporary residence permit, but those circumstances are not identified at all in the Act. An obvious example one can think of is where the foreign spouse has been convicted of serious criminal offences that suggest that his or her continued presence in South Africa even under a temporary residence permit would place members of the public at risk. Another would be where it is clear to the official that the immigration permit itself will not be granted and that pending that decision it would not be in the public interest to permit the foreign spouse to remain. These are examples only. It is for the Legislature, in the first place, to identify the policy considerations that would render a refusal of a temporary permit justifiable. However, as the legislation is currently drafted, the grant or extension of a temporary residence permit may be refused where no such grounds existed.

The court concluded as follows (par 58):

> In my view, the effect of section 25(9)(b) read with sections 26(3) and (6) results in an unjustifiable infringement of the constitutional right of dignity of applicant spouses who are married to people lawfully and permanently resident in South Africa. There is no government purpose that I can discern that is achieved by the complete absence of guidance as to the countervailing factors relevant to the refusal of a temporary permit. In my view, therefore, section 25(9)(b) as read with sections 26(3) and (6) of the Act is unconstitutional.

The inconsistency with the Constitution therefore lay in a *legislative omission*: The failure to provide guidance to the decision-maker. In view of the cases of *Jeunesse* and *Dawood, Shalabi and Thomas*, it can now be

asked whether, firstly, the abovementioned problems with sections 25 and 26 of the Aliens Control Act have been addressed and rectified in the Immigration Act. Secondly, whether the protection afforded to family life and marriage in *Dawood, Shalabi and Thomas* is also wide enough to cover the factual circumstances in *Jeunesse,* or whether the judgment in *Jeunesse* can serve as a valuable guideline for future development in so far as family law and immigration in South Africa are concerned and one that the South African courts may consider (s 39(1)(c) of the Constitution) in the interpretation of the Bill of Rights. Firstly, then, a brief exposition will be provided of relevant provisions of the Immigration Act (as amended) and accompanying Regulations.

4 3 The Immigration Act 13 of 2002

In terms of section 9(4)(b), a 'foreigner' who is not the holder of a permanent residence permit may only enter the Republic if issued with a valid 'visa' as set out in the Immigration Act ('Immigration Act' or 'the Act'). Section 10(1) reiterates that upon admission, a 'foreigner' who is not the holder of a permanent residence permit may enter and sojourn in the Republic only if in possession of a 'visa'. Section 10(2) provides that one of the 'visas' set out in sections 10A to 23 may be issued to a 'foreigner'. That includes, *inter alia*, a 'visitor's visa', 'study visa', 'treaty visa', 'business visa', 'crew visa', 'medical treatment visa', 'relatives visa', 'work visa' etcetera. Section 11(1) provides that a 'visitor's visa' may be issued by the Director-General in respect of a foreigner who complies with section 10A (port of entry visa) and provides the financial or other guarantees prescribed in respect of his or her departure. Such a visa may not exceed three months and, upon application, may be renewed by the Director-General for a further period which shall not exceed three months (s 11(1)(a)). Section 11(6) states, notwithstanding the provisions of that section, that a visitor's visa may be issued to a foreigner who is the 'spouse' of a citizen or permanent resident and who does not qualify for any of the visas contemplated in sections 13 to 22 provided that such visa shall only be valid while the good faith spousal relationship exists and the holder of such visa shall apply for permanent residence contemplated in section 26(b) within three months from the date upon which he or she qualifies to be issued with that visa. A 'relatives visa' may be issued to a 'foreigner' who is a member of the 'immediate family' of a citizen or a permanent resident, provided that such permanent resident or 'citizen' provides the prescribed financial assurance (s 18). In terms of section 10(4), a visa is to be issued on terms and conditions that the holder *is not or does not become* a prohibited or undesirable person.

In terms of section 10(7), the Director-General may, on application in the prescribed manner and on the prescribed form, extend the period for which a visa contemplated in subsection (2) was issued. With regard to an extension, Regulation 9(8) merely requires that an application contemplated in section 10(7) of the Act shall (a) be made on Form 10 illustrated in Annexure A, as the case may be; (b) be accompanied by an

affidavit by the applicant attesting to having complied with his or her existing visa, the terms and conditions attached thereto and the laws of the Republic; and (c) be submitted in person at any office of the Department no less than 60 days *prior to* the expiry date of his or her visa and if the visa was issued for less than 30 days, not later than seven working days before the expiry of the visa. The prescribed application fee requirement has been done away with (Regulations of fees GN R615 in GG27725 dated 27 June 2005; Department of Home Affairs-Permanent Residency available at http://www.home-affairs.gov.za/index.php/permanent-res).

Section 25(2) provides that one of the permanent residence permits set out in sections 26 and 27 may be issued to a 'foreigner'. The Department shall issue a permanent residence permit in terms of section 26 (so-called 'direct residence') to, *inter alia,* a 'foreigner' who has been the spouse of a citizen or permanent resident for five years, provided that a good faith spousal relationship exists. 'Spouse' in terms of section 1 means a person who is party to a 'marriage' or to a permanent homosexual or heterosexual relationship as prescribed. 'Marriage' is defined as (a) a marriage concluded in terms of the Marriage Act 25 of 1961 or the Recognition of Customary Marriages Act 120 of 1998; (b) a civil union concluded in terms of the Civil Union Act 17 of 2006; or (c) a marriage concluded in terms of the laws of a foreign country (s 1).

Important to note are the strict measures contained in the Act pertaining to 'illegal foreigners'. Section 32 states that any illegal foreigner *shall depart*, *unless authorised by the Director-General to remain in the Republic* pending his or her application for a '*status*'; and that any illegal foreigner shall be deported (s 32(1) & (2); see in general *Littlewood v Minister of Home Affairs* case no 160/04 of 2005-03-22). 'Status' means the status of the person as determined by the relevant visa or permanent residence permit granted to a person in terms of the Act (section 1). Sections 32(2) and 34 make provision for the deportation and detention of illegal foreigners (section 32 is an important section for purposes of the discussion below). In terms of section 38, no person shall employ an 'illegal foreigner' and, save for necessary humanitarian assistance, no person shall aid, abet, assist or in any manner help an 'illegal foreigner' (s 42(1)(a) & (b)). Section 43(b) is also of importance for purposes of the discussion below where it states that a foreigner *shall depart* upon expiry of his or her 'status' (see also ss 48 & 49 regarding offences). Lastly, in terms of section 49, being an illegal foreigner is regarded as an offence.

The question to be answered is whether sections 25(2) and 10(7) have now been supplemented by circumstances or grounds, previously omitted in terms of the Aliens Control Act, whereby officials are provided with guidance as to the factors relevant to the refusal of an application for the grant or extension of a visa or permanent residence permit? The Act, unfortunately, does not contain a clear and conclusive provision regarding the question whether a 'spouse' can apply for a permanent residence permit from within the country *after* a visa to temporarily

sojourn has expired. As stated above, section 32 provides that an 'illegal foreigner' shall depart, *unless authorised by the Director-General to remain in the Republic, pending his/her application for a status*. Only a *legal* foreigner can thus (as a general rule) remain *in* the Republic pending his application for a status, especially permanent residence. When will the Director-General, accordingly, not grant or extend an application for a visa or permanent residence permit? Sections 29 and 30, read with the Regulations, seemingly provide guidance in this regard. They read:

29. Prohibited persons

(1) The following foreigners are prohibited persons and do not qualify for a … visa or a permanent residence permit:
(a) Those infected with or carrying infectious, communicable or other diseases or viruses as *prescribed;*
(b) anyone against whom a warrant is outstanding or a conviction has been secured in the Republic or a *foreign country* in respect of genocide, terrorism, human smuggling, trafficking in persons, murder, torture, drug-related charges, money laundering or kidnapping;
[Para (b) substituted by s 19(b) of Act 13 of 2011.]
(c) anyone previously deported and not rehabilitated by the Department in the prescribed manner;
(d) a member of or adherent to an association or organisation advocating the practice of racial hatred or social violence; and
(e) anyone who is or has been a member of or adherent to an organisation or association utilising crime or terrorism to pursue its ends.
(f) anyone found in possession of a fraudulent visa, passport, permanent residence permit or identification document.
[Para (f) substituted by s 19(c) of Act 13 of 2011.]
[Sub-s (1) amended by s 19(a) of Act 13 of 2011.]
(2) The Director-General may, for good cause, declare a person referred to in subsection (1) not to be a prohibited person.
[S. 29 substituted by s 30 of Act 19 of 2004.]

30. Undesirable persons

(1) The following foreigners may be declared undesirable by the Director-General, as prescribed, and after such declaration do not qualify for a port of entry visa, visa, admission into the Republic or a permanent residence permit:
(a) Anyone who is or is likely to become a public charge;
(b) anyone identified as such by the Minister;
(c) anyone who has been judicially declared incompetent;
(d) an unrehabilitated insolvent;
(e) anyone who has been ordered to depart in terms of this Act;
(f) anyone who is a fugitive from justice;
[Para (f) substituted by s 20(b) of Act No 13 of 2011.]
(g) anyone with previous criminal convictions without the option of a fine for conduct which would be an offence in the Republic, with the exclusion of certain prescribed offences; and
[Para (g) substituted by s 20(b) of Act No 13 of 2011.]
(h) any person who has overstayed the prescribed number of times.
[Para (h) added by s 20(c) of Act 13 of 2011.]

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(2) Upon application by the affected person, the Minister may, for good cause, waive any of the grounds of undesirability.
[S. 30 substituted by s 31 of Act 19 of 2004.]

The guidance these sections provide is confirmed by section 25(3) which states: 'A permanent residence permit *shall* be issued on terms and conditions that the holder is not a prohibited or an undesirable person …' (emphasis added) as well as section 10(4) which confirms that a visa is to be issued on condition that the holder is not *or does not become* a prohibited or undesirable person and, arguably, also relates to the extension of a visa. These sections therefore contain grounds or guidelines for the refusal of a visa (including the extension thereof) or permanent residence permit and, arguably, are in line with the possible 'examples' the Constitutional Court provided in *Dawood, Shalabi and Thomas* above (par 49 of judgment), where, especially, public interest demands such an exclusion or refusal. Furthermore, applicants for the grant or extension of a visa (temporary residence) obviously also have to comply with the requirements and conditions set for the respective visas (see s 11(6) regarding a visitor's visa to a spouse of a citizen or permanent resident above, read with Regs 3 & 9-23).

In terms of Regulation 3(1), an applicant for a visa or permanent residence permit who asserts that he or she is a 'spouse', as defined in section 1 of the Act, must prove such fact in a manner set out in sub-regulation (2). Such applicant must submit a notarial agreement signed by both parties attesting, in the event of a permanent homosexual or heterosexual relationship, that such a relationship has existed for at least two years before the date of application and that the relationship still exists to the exclusion of any other person (reg 3(2)(a)(i)). Furthermore, they must attest that neither of the parties is a spouse in an existing marriage or a permanent homosexual or heterosexual relationship (reg 3(2)(a)(ii)). Documentation to prove financial support to each other, and the extent to which the related responsibilities are shared by the applicant and his/her spouse, has to be provided (reg 3(2)(d); for further requirements see reg 3(3)-(7)). The interpretation of this part of the Act does not seem to be entirely clear as it could possibly be read as meaning that a life partner can apply for permanent residence at the same time as applying for temporary residence if they meet the two year criterion. However, referring back to the original Immigration Act of 2002 and the lack of change in the 2011 Amendment Act in this regard, it would seem that permanent residence can be applied for by the spouse of a citizen or permanent resident only after five years (see s 26(b); see also 'South Africa's New Immigration Act Summary – 2014' in *Homecoming Revolution* available at http://homecomingrevolution.com).

Although section 25, read with sections 26 and 27, implies that a permanent residence permit can be issued to a spouse of a citizen or permanent resident only if the spouse/applicant is a *legal* foreigner, the Director-General has the discretion to authorise the illegal spouse/applicant to remain in the Republic pending his/her application for a

status (s 32). If the illegal foreigner/spouse/applicant is not a prohibited or undesirable person in terms of sections 29 and 30, then, certainly, in view of the Constitutional Court judgment in *Dawood, Shalabi and Thomas,* it would appear that the Director-General cannot require the illegal foreigner/spouse/applicant to leave the Republic pending the outcome of his application. The Preamble of the Immigration Act aims at setting in place a new system of immigration control which, *inter alia*, ensures that immigration control is performed within the highest applicable standards of human rights protection (par l) and that a human rights based culture of enforcement is promoted (par n). It can be argued that the Act, however, did not make sufficient use of the opportunity to embrace and promote family life and 'marriage' as one would have expected after *Dawood, Shalabi and Thomas*. The uncertainty with regard to the abovementioned position should have been clarified.

4 4 Questions for consideration

In view of the decision in *Dawood, Shalabi and Thomas* as well as the discussion of the Immigration Act and Regulations above, the following questions arise: (a) Does the protection afforded to marriage and family life (albeit as part of the right to dignity) grant the illegal foreign spouse merely the right to remain in South African while an application is made for the extension of a *visa* (temporary residence), or does it possibly even extend to a right for the illegal foreign spouse to be granted permanent residence? (b) What will the legal position be if a South African court is confronted by facts similar to that of *Jeunesse*? In *Jeunesse*, the applicant foreign spouse's right to family life was extended to a right to reside in the Netherlands for the purpose of enabling her to enjoy family life with her husband and children, based, however, on *exceptional* and *special* circumstances; (c) Would the legal position in South Africa differ if the illegal foreign spouse was 'merely' married to the citizen or permanent resident, or otherwise regarded as a 'spouse' within the definition of the concept in section 1, without there being any additional, exceptional circumstances (as in *Jeunesse*) present to support such a claim to family life?

The relief granted in *Dawood, Shalabi and Thomas* was in the form of a *mandamus* and required immigration officials and the Director-General, when exercising the discretion conferred upon them by sections 26(3) and (6) in relation to applicants who were people referred to in sections 25(4)(b) or (5) of the Aliens Control Act, to take into account the Constitutional rights of such people and not to refuse to issue or extend temporary residence permits for such applicants unless good cause for such refusal was established. Good cause for refusal, for instance, would have been established were it to be shown that the issue or extension of a permit, even for the temporary period until the immigration permit application had been finalised, would constitute a real threat to the public. Good cause to refuse to issue or extend such permits will also exist if the applicants fail to lodge a complete application for an immigration permit within a reasonable time. These recommendations,

arguably, are now encapsulated in sections 10 to 32 of the Immigration Act and Regulations. These provisions, however, do not extend to or include a right for the foreign illegal spouse to be granted permanent residence simply based on marriage, family life and their right to dignity. Even if confronted by marriage and family life as a *fait accompli*, the state is under no positive obligation to allow the applicant permanent residence. If exceptional circumstances exist, however, as for example in *Jeunesse*, including the duty to consider the best interests of children as factor of paramount importance, and by looking at the circumstances *cumulatively*, the court may consider the development in European family and humanitarian law in deciding whether to allow the illegal foreign spouse to reside in the country for purposes of continuing to enjoy such family life (s 39(1)(c) of the Constitution). Whether the five years of marriage requirement in section 26 will stand in the way of a possible positive obligation is uncertain. In *Patel v Minister of Home Affairs* (2000 2 SA 343 (D); although in the context of a deportation order) the court decided that foreigners are entitled to the same protection under the Constitution as citizens. The court stated (350B-E):

> In the result, I take the view that the second applicant is entitled to the rights set out in ss 9, 10, 12, 21 and in particular to the rights set out in s 33 to administrative action which is lawful, reasonable and administratively fair. He is thus entitled to the right to be heard in respect of his application for permanent residence and in respect of the issue of the deportation order. In my view, the applicants have established *prima facie* that they were not given a hearing or, at any rate, an adequate hearing in respect of both the application and the issue of the deportation order. They have also established *prima facie, in my view, that those decisions were not taken after due consideration of the applicants' constitutional rights to live together as spouses in community of life (cf Dawood's* case*) and of freedom of movement placing first applicant 'in the dilemma of having to decide whether to accompany' second applicant to India or to exercise her constitutional right to continue residing here without her husband* (emphasis added*;* see also *Rattigan v Chief Immigration Officer Zimbabwe* 1995 4 SA 182 (2) & *Salem v Chief Immigration Officer, Zimbabwe* 1995 4 SA 280 (2)).

Another important aspect that the court referred to, is the fact that a deportation order will infringe the applicant's children's right to family or parental care in terms of section 28(1)(b) of the Constitution (see also the United Nations Convention on the Rights of the Child (1989) as referred to by the ECtHR in *Jeunesse*). *Jeunesse* provides valuable guidelines for possible future consideration by South African courts. Can it not be argued that mere 'marriage', or for a person otherwise to be regarded as the 'spouse' of a citizen or permanent resident in terms of the definition in section 1, should suffice for purposes of permanent residence? Why is there a 'five year marriage' requirement (see in general *Booysen v Minister of Home Affairs* (CC) case CCT 8/01 of 2001-06-04)? The protection of permanent intimate relationships is after all, in my view, the underlying message in both *Dawood, Shalabi and Thomas* as well as in *Patel*.

5 Conclusion

The purpose of the Immigration Act is to provide for the regulation of admission of persons to, their residence in, and their departure from the Republic. Strict measures pertain to illegal foreigners. The Act does not guarantee the right of a foreigner to enter or to reside in the country. Illegal foreigners are required to leave the Republic, unless authorised by the Director-General to remain in the Republic pending their application for a status. The Act does not contain a clear provision that a spouse whose visa has expired can apply for a renewal or permanent residence permit from within the country. This authorisation, arguably, will be granted in the event of an illegal foreign spouse who is either married upon entry or who got married to a citizen or permanent resident while illegally in the country, provided he/she is not a prohibited or undesirable person. Authorisation can be done in view of the protection afforded to marriage, 'spouses' and family life (albeit as part of the right to dignity). However, it does not automatically entail that the state is under a positive obligation to allow the applicant, because of the marriage, to settle in the country and thus enjoy a right of permanent residence. Section 26 requires that the foreigner must have been the 'spouse' of the citizen or permanent resident for five years and a good faith spousal relationship should have existed. If the state, however, tolerates an illegal foreigner in its territory, not deporting him/her and enabling him/her to form relationships, to get married, to have children, etcetera, the situation becomes more complicated. Should special and exceptional circumstances prevail, as in *Jeunesse*, their cumulative effect, as well as the importance attached and the protection afforded to marriage or other 'spousal relationships' in terms of *Dawood, Shalabi and Thomas*, could lead to such an illegal spouse being afforded a right to permanent residence in view of international trends and developments. In this regard, the best interests of children can be a persuading factor. The protection of family life under such special and exceptional circumstances seems to outweigh the interest of the state in pursuing a restrictive immigration policy and is recommended. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life (ito European case law see, amongst others, *Rieme v Sweden* (1993) 16 EHRR 155 181 par 54-56; *Margaretha and Roger Anderson v Sweden* (1992) 14 EHRR 615). The right of families to be together must be protected and respected. In order to prevent such legal issues arising and the occurrence of similar situations, authorities should discourage illegal entry and/or over-staying in the Republic in line with the aims of the Act, by effectively employing deportation measures as provided for in the Act.

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Onlangse regspraak/Recent case law

Maccsand v City of Cape Town, Minister for Water Affairs and Environment, MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province, Minister for Rural Development and Land Reform, and Minister for Mineral Resources 2012 4 SA 181 (CC)

Making sense of the interwoven legislative interplay of timelines, hierarchical status, geographical space and governmental spheres in South Africa

1 Introduction

Interpretation of statutes (the juridical understanding or construction of legislation) deals with legal rules and principles used to construct the correct meaning of legislative provisions to be applied in practical situations. Du Plessis (*Re-interpretation of Statutes* (2002) 18) explains as follows:

> [S]tatutory (and constitutional) interpretation is about construing enacted law-texts *with reference to and reliance on other law-texts,* concretising the text to be construed so as to cater for the exigencies of an actual or hypothesised concrete situation (emphasis added).

In other words, statutory interpretation is about making sense of the complete relevant legislative scheme that is applicable to a specific situation. The decision of the Constitutional Court in *Maccsand v City of Cape Town, Minister for Water Affairs and Environment, MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province, Minister for Rural Development and Land Reform, and Minister for Mineral Resources* 2012 4 SA 181 (CC) ("*Maccsand* 3"), as well as the two cases leading up to it (*City of Cape Town v Maccsand (Pty) Ltd* 2010 6 SA 63 (WCC) ("*Maccsand* 1") and *Maccsand (Pty) Ltd v City of Cape Town* 2011 6 SA 633 (SCA) ("*Maccsand* 2")), *inter alia*, deal with the well-known principle in South African law that legislation must be read as a whole. In *S v Looij* (1975 4 SA 703 (RA) 705C-D), the court explained the "wholeness" of legislation as an internal aid to interpretation:

> [T]o determine the purpose of the Legislature, it is necessary to have regard to the Act as a whole and not to focus attention on a single provision to the

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> exclusion of all others. To treat a single provision as decisive … might obviously result in a wholly wrong decision.

This means that the interpreter of legislation (including the Constitution) must consider legislation as a whole. In *Nasionale Vervoerkommissie van Suid-Afrika v Salz Gossow Transport (Edms) Bpk* (1983 4 SA 344 (A)), the court again stated, when interpreting certain provisions, a statute must be studied in its entirety (see in this regard the order of the court in *Ex Parte Van Straten* (unreported case 22678/14) Western Cape Division of the High Court, February 2015, from which it is clear that the judge did not read the Cross-Border Insolvency Act 42 of 2000 as a whole and, in the process, failing to take s 2(2)(a) of the Act into consideration). Du Plessis (*The Interpretation of Statutes* (1986) 127-128) refers to this principle as the "structural wholeness of the enactment", and Devenish (*Interpretation of Statutes* (1992) 101) describes it as follows: "Interpretation should be *ex visceribus actus,* i.e. from the bowels of the Act or, to paraphrase, 'within the four corners of the Act'".

Prior to 1994 and the advent of the new constitutional dispensation, the South African statute-law framework (legislative scheme) was fairly static and easily-determined. The timeline of legislation consisted of a continuous development of legislation from 1806 onwards (see Du Plessis (2002) *supra* 22-24), underpinned by the common-law rule that legislation cannot be abrogated by disuse (*R v Detody* 1926 AD 198), as well as the principle of the sovereignty of parliament. Furthermore, the hierarchical status of legislation was rigidly divided into original legislation (Acts of Parliament, provincial ordinances, as well as Acts emanating from the legislative assemblies of the self-governing territories and the TBVC states) and subordinate or delegated legislation (regulations, proclamations, municipal by-laws and other instruments of subordinate legislation). The geographical spaces in which this legislation operated were also determined according to legislation and the governmental policies of the day, while the three tiers of government (national, provincial and local) were clearly and hierarchically demarcated. However, since 1994 this landscape has changed dramatically. All forms of legislation in the new South Africa now operate as an interwoven system: The horizontal timeline now consists of old-order legislation (defined in item 1 definitions of Schedule 6 of the Constitution of the Republic of South Africa, 1996 ("Constitution") as any legislation enacted before the interim Constitution took effect), and new legislation enacted after 27 April 1994.

The two vertical axes of hierarchical status and tiers of government also changed: The distinction between original and subordinate legislation remains, but the supreme Constitution now occupies the top position in the hierarchical structure, and the rigid distinction between the three tiers of government has been obfuscated by the new system of three spheres of co-operative government. This means that the

seemingly simple exercise of reading legislation "together" is now a more daunting task than before.

2 The Facts and Issues

In the *Maccsand* trilogy, the central issue was the interplay (and potential conflict) between three different sets of legislation applicable to mining operations: The Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA"), the National Environment Management Act 107 of 1998 ("NEMA"), and the Land Use Planning Ordinance (Cape) 15 of 1985 ("LUPO") (although the provisions of NEMA are of great importance in the new constitutional order of South Africa, the Act is not directly relevant for purposes of this discussion and is therefore, omitted).

In 2007 the Minister of Mineral Resources granted Maccsand (Pty) Limited (a black empowerment mining company), mining rights in terms of section 23 of the MPRDA in respect of two properties in the Mitchell's Plain area, City of Cape Town. Both properties are located in residential areas, close to two schools, private homes and an informal settlement.

The MPRDA, a new order legislative enactment, empowers the Minister for Mineral Resources to grant mineral rights if certain requirements are met. LUPO, on the other hand, is an old order and thus pre-constitutional provincial ordinance which was still in force in the Western Cape. During 1994, the President of the RSA assigned the administration of LUPO to the provincial government of the Western Cape (GN 115 GG 15813, 1994-06-17). LUPO authorises the making of scheme regulations which determine the use of land in accordance with the applicable zoning of the land. Under LUPO, municipalities are authorised to prepare structure plans for their jurisdictions, which must then be submitted to the provincial government for approval (see s 4 of LUPO). The purpose of structure plans is to lay down guidelines for future spatial development and also to authorise the rezoning of land by a municipality (it should be noted that new legislation has recently been enacted to regulate future spatial development and rezoning activities by municipalities throughout South Africa; see the Spatial Planning and Land Use Management Act 16 of 2013 for further details). When LUPO was still in force, it required that if an owner of land wanted to use the land for a purpose not permitted in terms of the applicable zoning scheme or regulations, he/she had to apply to the relevant municipality for rezoning of the land or for permission for a land-use departure. LUPO further obligated municipalities to enforce compliance with its provisions and to prohibit the use of land for purposes other than those permitted by the zoning scheme (see parr B & A at 190-191) Therefore, in terms of LUPO, mining may only be undertaken on land, within a particular municipal jurisdiction, if the zoning scheme permits it. If it does not, rezoning of the land must be conducted before the commencement of mining operations. However, it must be emphasised that zoning authorisation that permits that land to be used for mining does not license mining nor does it determine mining rights. It merely controls and regulates the use

of land: The MPRDA, on the other hand, governs mining, whilst LUPO only regulates the use of land. Against this background Maccsand obtained a mining permit in terms of the MPRDA in October 2007 and started mining sand on the relevant land in 2008.

In 2009, whilst Maccsand continued with its mining operations, the City of Cape Town, being the registered owner of the land in question, sought an interdict to stop Maccsand's mining activities, because it had not obtained the necessary rezoning permission as required by LUPO. In terms of LUPO and the relevant zoning schemes, the sand dunes which Maccsand started to mine were zoned as public open spaces, and had to be rezoned for it to be used for mining. The City of Cape Town argued that two actions were needed before Maccsand could start with lawful mining activities: Either the zoning scheme would have to be amended to authorise mining on the relevant land or a change would have to be granted from the existing zoning scheme to allow mining to take place on the land in question. The central dispute in this application therefore, was whether a mining permit or mining right granted under the MPRDA exempts the holder from having to obtain authorisation for its mining activities in terms of other legislation which regulate the use of that land, in particular, the provisions of LUPO. Therefore, the question is which legislation should prevail – the MPRDA (national legislation) or LUPO (provincial legislation)? LUPO clearly deals with control and regulation of the use of land: Land must be used for the purpose for which it has been zoned (in other words, zoning schemes as part of municipal planning).

Formally LUPO differs from the MPRDA in at least three respects. First, it is old order legislation, continuing in force subject to amendment or repeal, or invalidation. It may not have a wider impact than it had before the 1993 Constitution took effect, and should continue to be administered by the authorities that administered it when the Constitution took effect (see item 2 of schedule 6 of the Constitution). Second, LUPO was promulgated by the Administrator of the Cape of Good Hope for that province prior to April 1994, and the administration thereof was assigned to the province of the Western Cape in June 1994, as well as to other provinces that formed the erstwhile Cape of Good Hope. Third, in terms of the Constitution, LUPO is provincial legislation (see the definition of provincial legislation in s 239 of the Constitution, and the decision in *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 1 SA 521 (CC) par 26, in which the court confirmed, as a matter of general principle, that old order legislation remains in force until the necessary steps are taken to have it set aside).

A further important consideration is whether the holder of a mining permit in terms of the MPRDA has to obtain environmental authorisations in terms of the NEMA before commencing or continuing with its mining operations. Although a great deal of NEMA has been incorporated into the MPRDA, a further question arose as to whether the MDRPA had the effect of ousting the obligation placed on mining

companies to first obtain environmental authorisations if mining activities involved so-called "listed activities" (by s 24 of NEMA).

Ultimately, the issue at hand is the necessity of reading different legislative provisions (applicable to three different legal regimes) together; namely the administration of land under different spheres of government (the MPRDA and NEMA as national legislation and LUPO as provincial legislation, regulating local government planning; including the horizontal timeline (the MPRDA and NEMA being post-1994 legislation, and LUPO being old-order legislation)).

3 The Decision(s)

The court in *Maccsand* 1 granted the interdict. Notwithstanding the fact that both the Minister for Mineral Resources and Maccsand contended that to construe LUPO as applying to land use for mining would be inconsistent with the new constitutional scheme, since the Constitution divides and confers powers on each sphere of government, and mining falls under the exclusive competence of the national government, and that LUPO does not apply to land used for mining. The court rejected the argument and ordered that mining operations must be halted "until and unless" such mining activities were authorised in terms of LUPO, as well as NEMA.

Maccsand and the Minister appealed the interdict to the Supreme Court of Appeal ("SCA"). The appellants argued that land use authority in terms of LUPO is unnecessary where a mining right or permit has been issued in terms of the MPRDA. They also argued, in the event of a conflict between LUPO and the MPRDA, that the latter would prevail as it regulated a functional area that is vested within the national sphere of government. However, the SCA dismissed the appeal against the order which interdicted Maccsand from continuing with its mining operations until the necessary authorisations were obtained under LUPO (*Maccsand* 2). The SCA held that the MPRDA and LUPO direct different areas — mining rights in the case of the MPRDA, and land use in the case of LUPO. There is therefore, no duplication. It further held that the two pieces of legislation operate alongside each other and that a holder of a mining right or permit in terms of the MPRDA cannot proceed to mine unless LUPO permits such mining on the land (see *Maccsand* 3 par B at 194). For as long as the Constitution reserves the functional area of municipal planning as a concurrent national and provincial legislative competence, a holder of a mining permit will also have to comply with LUPO (provincial legislation) in those provinces in which it operates. The SCA also held that it was unnecessary to examine the potential conflict between the MPRDA and NEMA, as Government Notice R386 (promulgated in *Government Gazette* 28753 of 2006-04-21) was repealed in its entirety on 2 August 2010 (by the Environmental Impact Assessment Regulations Listing Notice 1 of 2010, Government Notice R544 promulgated in *Government Gazette* 33306 of 2010-06-18 reg 4).

That meant that items 20 and 12 of the listings were no longer in operation and could not be contravened in future.

Maccsand and the Minister again appealed against this decision to the Constitutional Court. In *Maccsand* 3 the Constitutional Court, as per Jafta J, unanimously dismissed the appeal against the interdict which halted Maccsand's mining operations. The main issue on appeal was again whether a holder of a mining right or permit granted in terms of the MPRDA may exercise those rights only if the zoning scheme in terms of LUPO permits mining on the land. From the outset, the Constitutional Court confirmed that the interface between the MPRDA and LUPO raised issues of great constitutional importance that warranted the appeal to be heard: Mining plays an important role in the national economy of South Africa – and the issue at hand was not confined to the Western Cape province only. As national legislation, the MPRDA applies throughout the country, whereas LUPO applied only in three provinces. Similar provincial laws also applied in other provinces (see the Township Ordinance 9 of 1969 Orange Free State and the Transvaal Planning and Township Ordinance 15 of 1986). The Constitutional Court recognised that there may be tension between the two laws in circumstances where land, on which mining rights were granted under the MPRDA, was not zoned for a particular land use under LUPO. It also recognised that the administration of the two laws fell under different spheres of government, which were under a constitutional obligation to exercise their powers in a manner that does not encroach on the geographical, functional or institutional integrity of each other (see s 41(1)(g) of the Constitution).

On the merits, LUPO existed and was applied long before the MPRDA, and the zoning of the applicable dunes was in place before Maccsand was granted a mining right and permit on such land. The Constitutional Court ruled that the conflict resolution mechanism in sections 146–150 of the Constitution did not apply, as there was no conflict between LUPO and the MPRDA. Each was concerned with a different subject matter – that required the two laws to operate alongside each other and, in this case, mining could not take place until the land in question was appropriately rezoned:

> The fact that in this case mining cannot take place until the land in question is appropriately rezoned is therefore permissible in our constitutional order. It is proper for one sphere of government to take a decision whose implementation may not take place until consent is granted by another sphere, within whose area of jurisdiction the decision is to be executed (par 47).

This decision in *Maccsand* 3 meant, although a mining right must be granted in terms of the MPRDA, that the exercise of such a mining right is subject to the required rezoning of the land in terms of LUPO. Although Maccsand obtained a valid mining licence in terms of the MPRDA, it still had to apply for the rezoning of the land (on which the mining takes place) in terms of LUPO.

4 Comments and Analysis

The decision of the Constitutional Court in *Maccsand* 3 highlights and confirms a number of important constitutional issues. Such issues include: The importance of construing legislation together; confirmation of the composition of the South African government under the Constitution and the enhanced status of local government; the importance of co-operative government; and the allocation of functional areas of concurrent and exclusive legislative competencies between the three spheres of government and the interpretation of the Schedules to the Constitution as part of the overall constitutional context.

With reference to the composition and status of local government, *Maccsand* 3 confirms the position that, in the Republic of South Africa, the government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and inter-related (see s 40(1) of the Constitution). The local sphere of government consists of municipalities which are established for the whole territory of the Republic. All municipalities have the right to govern, on their own initiative, the local government affairs of their communities, subject to national and provincial legislation as provided for in the Constitution (see s 151(1) & (3) of the Constitution). Neither national nor provincial government may compromise or impede a municipality's ability or right to exercise its powers or to perform its functions. The status of municipalities, therefore, is constitutionally entrenched and the powers and functions, including matters such as municipal planning – which includes aspects such as the rezoning and sub-division of land within the municipal jurisdiction – are constitutionally protected.

In *Mazibuko v City of Johannesburg* (2010 4 SA 1 (CC)) it was confirmed that local government is recognised as the third sphere of government and that a municipal council is a deliberative body that exercises both legislative and executive functions. This confirmation follows the decision of *In Re: Certification of the amended text of the Constitution of the RSA, 1996* (1997 2 SA 97 (CC)) where the Constitutional Court confirmed that the Constitution has to provide for a framework for local governments powers, functions and structures while the details of the local government system are a matter for legislation (see parr 80-82 at 129 D-H & 130 C-D). Therefore, municipalities are not merely administrative bodies under the control and direction of the higher tiers of government. This important constitutional development was further confirmed in the case of *Fedsure Life Assurance v Greater Johannesburg TMC* (1999 1 SA 374 (CC)) where the Constitutional Court held, albeit under the interim Constitution of 1993, that the new constitutional scheme recognises and provides for three levels of government and that each level derives its powers and functions from the Constitution.

The constitutional status of local government, therefore, is materially different to what it was when Parliament was supreme and the powers and existence of local government depended entirely on superior

legislatures. Although local government powers and functions have to be determined by laws of a competent authority, it did not mean that such powers are delegated and should be regarded as original. Municipal councils are therefore deliberative legislative bodies, whose members are elected and their legislative decisions are influenced by political considerations for which they are politically accountable to the electorate (see *Fedsure supra* parr 35-42 at 393-395).

It is also interesting to note, that although the *Maccsand* trilogy of cases referred to and confirmed the constitutional provisions and obligations of co-operative government, the dispute between the interpretation of the MPRDA and LUPO (which effectively involves all three spheres of government) has not been identified as an inter-governmental dispute and, seemingly, has not been subjected to the peremptory constitutional requirements of chapter 3 of the Constitution.

According to section 40(2) of the Constitution, all spheres of government must observe and adhere to the principles of co-operative government and intergovernmental relations as provided for in section 41 of the Constitution. All spheres of government, including the national government and local government, must, *inter alia*, not assume any power or function except those conferred on them in terms of the Constitution and may also not exercise their powers and perform their functions in a manner that encroaches on the geographical, functional or institutional integrity of government in another sphere. Therefore, it is strange that the legal dispute between the national state department and the City of Cape Town municipality was not subjected to the constitutional requirements of sections 40 and 41 of the Constitution – before the matter was taken to court (see the requirement of s 41(1)(h)(iv) of the Constitution, and note that this issue was not raised in any of the three *Maccsand* decisions, and, therefore, was not *mero motu* dealt with by the courts). In the case of *Premier, Western Cape v President of the RSA* (1999 3 SA 657 (CC)) it was confirmed that the purpose of section 41 of the Constitution was to prevent one sphere of government from using its powers in ways which would undermine those of other spheres of government. National legislation must ensure that it does not encroach on the ability of the lower spheres to carry out the functions entrusted to them by the Constitution (parr 58 C-D at 679, and see also s 151(4) of the Constitution). In *MEC for Health, Kwazulu-Natal v Premier, Kwazulu-Natal* (2002 5 SA 717 (CC)) the court reiterated that the obligations of spheres of government to co-operate with one another must be complied with before an appropriate court is approached for relief (par 12 at 720 I-H). Further in *Uthukela District Municipality v President of the RSA* (2003 1 SA 678 (CC)), it was again confirmed that organs of state must avoid legal proceedings against one another and that the courts are obligated to ensure that this duty is duly performed.

Organs of state must make every reasonable effort to resolve an intergovernmental dispute at a political level and must exhaust all other remedies before approaching a court to resolve the dispute (parr 14-19

at 684 B-D and 685 B-C). Building on this background the Constitutional Court, in 2010, in the landmark decision of *Johannesburg Municipality v Gauteng Development Tribunal* (2010 6 SA 182 (CC)), held that municipal planning is an original constitutional power conferred on municipalities in terms of section 156(1) of the Constitution read with part B of Schedule 4 thereto. The Constitutional Court further confirmed that "planning" in terms of municipal affairs is a term with well-established meaning which includes the control and the regulation of the use of land, the zoning of land and the establishment of townships. The Constitutional Court further confirmed that section 41 of the Constitution confirms the autonomy of each sphere of government and also confirms that one sphere may not assume any power or function of another sphere, except those powers conferred on them in terms of the Constitution. National and provincial spheres thus enjoy concurrent legislative authority over matters in part B of Schedule 4 of the Constitution, neither can, by legislation, give itself the power to exercise executive municipal powers. The granting of applications for rezoning under the Development Facilitation Act 67 of 1995 (similar to powers granted in terms of LUPO), encroaches on the functional area of municipal planning and, therefore, is inconsistent with section 156 read with part B of Schedule 4 of the Constitution and, thus, is invalid (see parr 43-44 at 199-200 and 69-70 at 207 B-D).

Apart from the important aspects mentioned above, *Maccsand* 3 is also important for purposes of constitutional interpretation and giving meaning and substance to the content of Schedules 4 and 5 of the Constitution. Such interpretation is necessary in order to determine which functions are allocated to which sphere of government, and how such functions should be interpreted in order to prevent one sphere encroaching on the powers or functions of another sphere.

In *In Re Certification of the Constitution of the RSA, 1996* (1996 4 SA 744 (CC)) it was held that Constitutional Principle XIX was complied with by the list of exclusive and concurrent powers contained in Schedules 4 and 5 of the Constitution. Consequently, in the matter of *Ex parte President of the RSA: Constitutionality of the Liquor Bill* (2000 1 SA 732 (CC)) it was confirmed that the Constitution determines the relationship between the central and provincial governments. In this regard Schedule 4 functional competencies have to be interpreted as being distinct from the competencies set out in Schedule 5 and must be properly interpreted in order to give them full meaning within their constitutional context. Furthermore, when interpreting the Schedules to the Constitution there was no presumption in favour of either national or provincial legislation. The functional areas had to be purposively interpreted in a manner which would enable national Parliament and provincial legislatures to exercise their respective legislative powers fully and effectively (see *Western Cape Government: In Re DVB Behuising v North West Government* (2001 1 SA 500 (CC) par 17 at 511 E-F)). Further, in the matter of *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council* (2014 4 SA 437 (CC)) it was confirmed that certain

sections of LUPO, which allowed for appeals of municipal land-use decisions to the provincial government, were unconstitutional and invalid. Such provisions were found to be unconstitutional since they took away the authority of municipal planning, including the zoning and subdivision of property, which were powers falling within municipal competence as determined by the Constitution (see parr 13-15 at 445-447).

Finally, the importance of construing legislation "with reference to and reliance on other" legislation has been applied in a number of other cases since 1994. The intra-textual context (wholeness of the same piece of legislation) was illustrated in *Independent Electoral Commission v Langeberg Municipality* (2001 3 SA 925 (CC)) in which the Constitutional Court held that the definition of "organ of state" in section 239 of the Constitution must be read with section 41(3) of the Constitution. Although the Independent Electoral Commission is an organ of state, it is not an organ of state within the national sphere of government for the purposes of the dispute resolution requirements of section 41(3).

In *Mooikloof Estates (Edms) Bpk v Tshwane Metropolitan Municipality* (unreported case no 29998/2013) the court had to apply an extra-textual context (reading different enactments together) and held that section 118 of the Local Government: Municipal Systems Act 32 of 2000 ("Systems Act") had to be read with section 2 of the Local Government: Municipal Property Rates Act 6 of 2004, as well as the Deeds Registries Act 47 of 1937. This meant that the term "property" in section 118 of the Systems Act refers to the individual stand which is to be transported, and not to all the properties that formed part of the original township development.

The formal non-textual amendment (where there are no direct changes to the wording of the principal (initial) legislation, but the "amending" legislation merely describes the extent of the changes in the law with reference to the provisions that will be affected) brought about by the Constitution also forms part of the "reading-legislation-together" enterprise. For example, item 3(2)(b) Schedule 6 of the Constitution provides that a reference in old order legislation to — amongst others — an Administrator must be interpreted as a reference to the Premier of a province, and so on.

The decision in *Maccsand* 3 also means that the occurrence of implied repeal of conflicting legislation (albeit infrequent) might well be relegated to the history books (see in this regard *CDA Boerdery (Edms) Bpk v Nelson Mandela Metropolitan Municipality* (2007 4 SA 276 (SCA)). The conflict-resolution mechanisms created by sections 146-150 of the Constitution and the system of co-operative government between the three spheres of national, provincial and local government heralds a more flexible (but very complicated) system of dealing with conflicting legislation in South Africa. For purposes of this discussion, however, the court in *Maccsand* 3 concluded that no conflict existed in relation to the conflict resolution

mechanisms as set out in sections 146-150 of the Constitution. Accordingly the court concluded (which conclusion is supported by the authors of this case note) that both the MPRDA and LUPO operated alongside each other, and there was no conflict between the two. For purposes of this note, the aforementioned issue merits no further discussion (see *Speaker, National Assembly: In re National Education Policy Bill* (1996 3 SA 289 (CC)) in this regard).

5 Conclusion

A major practical problem of interpretation of statutes, including the interpretation of a supreme constitutional enactment, has always been the failure to read the provision in question with reference to the entire legislative scheme at hand. Since the advent of the "new" South Africa, the very practical interpretational problem of reading legislation as a whole has been exacerbated by the intricate interplay between the historical timeline, new and old geographical spaces, the hierarchical status of legislation and the constitutional spheres of co-operative government. If one adds the peremptory application of constitutional values and fundamental rights (s 39(2) of the Constitution) during the process, interpretation of statutes has become much more than the text-based process of "painting by numbers" of years gone by. This reality is eloquently captured in the words of Mahomed J in *S v Makwanyane* (1995 3 SA 391 (CC) par 266 at 489D-F):

> What the Constitutional Court is required to do in order to resolve an issue is to examine the relevant provisions of the Constitution, their text and their context; *the interplay between the different provisions;* legal precedent relevant to the resolution of the problem both in South Africa and abroad; the domestic common law and public international law impacting on its possible solution; factual and historical considerations bearing on the problem; *the significance and meaning of the language used in the relevant provisions;* the content and the sweep of the ethos expressed in the structure of the Constitution; *the balance to be struck between different and sometimes potentially conflicting considerations reflected in its text;* and by a judicious interpretation and assessment of all these factors to determine what the Constitution permits and what it prohibits (emphasis added).

Suddenly the practical, inclusive method of interpretation suggested by Du Plessis (*supra* (2002) 197-274; see also Botha (2012) *Statutory interpretation: an introduction for students* 111-156), is no longer merely a seemingly theoretical academic exercise. The systematic and contextual dimension of this suggested methodology not only emphasises the structural "wholeness" of the legislative scheme but also takes the entire contextual environment into account. In *Minister v Land Affairs v Slamdien* (1999 4 BCLR 413 (LCC) par 17) the court referred to this aspect as follows:

> [H]ave regard to *its context in the sense of the statute as a whole,* the subject matter and broad objects of the statute and the values which underlie it … have regard to its immediate context in the sense of *the particular part of the*

statute in which the provision appears or those provisions with which it is interrelated … (emphasis added).

The decision in *Maccsand* (3) should be a timely warning to drafters, courts, practitioners (and the public) about the complexities of the current South African legal landscape. Practitioners might even rue the fact that they did not take interpretation of statutes more seriously during their studies, and given more attention to the continuing changes to local government law in South Africa since 1994.

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RH v DE 2014 6 SA 436 (SCA)

A case of anti-constitutional common-law development[1]

1 Introduction

This case tells the story of an egotistical husband and the fading principle of the horizontal application of the Bill of Rights. The husband alleged that his wife had an affair with the managing director ("MD") of her firm (par 3). He claimed damages for both loss of consortium and insult from the MD (par 2). After an eight day trial, luridly exposing the private sex lives of the three people involved, Vorster AJ held that the MD was liable to compensate the husband for both heads of damage (par 2). On appeal, Brand JA overturned that decision. There are two moments in the unanimous Supreme Court of Appeal ("SCA") judgment.

The first moment involves an exposition of the common-law position: The husband did not prove that the MD incited the wife to leave the common household and, therefore, could not succeed with his claim for loss of consortium. The wife left of her own accord before the adulterous relationship occurred (parr 10 & 13). In principle, according to the court, the husband, however, did prove that the adulterous affair took place while they were married, albeit after the wife had moved out and after divorce proceedings had been instituted. At first glance, therefore, it

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appeared that the husband could succeed with his claim based on insult (par 15).

The second moment of the judgment explains that even though it appeared that the husband could succeed in claiming for insult, that the court has to determine the foundational issue of whether the delictual claim for adultery still has a place in our law. In other words, should the common law be developed in such a way that the husband in this case should be left without a legal remedy for his bruised ego? The short answer, given by the SCA, is that the "changing mores of our society" demand that our law no longer recognise claims of this nature (par 40).

This short answer is commendable. However, the problem that I identify with regard to this case is the approach of Brand JA to common-law development – an approach that I describe as conservatively "anti-constitutional", as I explain later in this piece. Consequently, I limit the analytical part of my discussion to this aspect of the judgment, and base my line of reasoning on the transformative method developed by Van der Walt ("Development of the common law of servitude" 2013 *SALJ* 722) in the context of property law.

2 Rising to the Occasion of Common-law Development

After emphasising that courts are under a duty to develop the common law in an incremental way, Brand JA provides two occasions upon which the common law may be developed (par 17). The first occasion is based on the decision in *Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)* (2001 4 SA 938 (CC) par 40) that the common law must be developed if the section 39(2) objectives so require. The second occasion is based on the guidance provided in *Du Plessis v De Klerk* (1996 3 SA 850 (CC) par 61) that the "common law [can and should be adapted] to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared". Two interrelated issues arise from this suggestion. Does *Du Plessis* have binding force in light of the fact that it was decided in terms of the 1993 Constitution and not the 1996 Constitution? Are the two occasions that prompt common-law development listed by the SCA really two very different and unrelated occasions? There is a relatively simple combined answer to these issues.

The above quotation from *Du Plessis* that was transcribed from the Canadian judgment of *R v Salituro* (1992 8 CRR (2d) 173 ([1991] 3 SCR 654)) has value, however it must be read with the following cautionary note. As Ackermann and Goldstone JJ point out in *Carmichele* (par 36):

> Under our Constitution the duty cast upon Judges is different in degree to that which the Canadian Charter of Rights cast upon Canadian Judges. In South Africa, the [1993 Constitution] brought into operation, in one fell swoop, a completely new and different set of legal norms.

This evaluation reminds one of Cornell's ("Bridging the span toward justice: Laurie Ackermann and the ongoing architectonic of dignity jurisprudence" 2008 *Acta Juridica* 19-22) interpretation of Laurie Ackermann's work to the effect that the new constitutional order brought about a substantive revolution: In line with the transformative metaphor of crossing a bridge from a politics of tyranny and violence to an ethical political environment, based on the justified use of power (see, e.g., Mureinik "A bridge to where? Introducing the interim bill of rights" 1994 *SAJHR* 31-32; Klare "Legal culture and transformative constitutionalism" 1998 *SAJHR* 147).

The idea of a substantive revolution is especially important for the purposes of rethinking the role of the common law in a post-apartheid context (see, e.g., Van der Walt "Tradition on trial: A critical analysis of the civil-law tradition in South African property law" 1995 *SAJHR* 169; Van Marle 'Reflections on legacy, complicity and legal education 2014 *Acta Academica* 196). The exercise of any power (including judicial power) should be justified in terms of the Constitution. To ensure that the judiciary complies with its justificatory mandate, Davis and Klare ("Transformative constitutionalism and the common and customary law" 2010 *SAJHR* 412) suggest that all common-law disputes must be constitutionally framed so that a transformative methodology is effectively utilised to bring about the social change that the Constitution requires. Not only is a transformative methodology missing from the SCA judgment, but there is a complete failure to substantively engage with the applicable provisions in the Bill of Rights.

The cautionary note that I have described is further supported by section 39(2) of the Constitution that requires a court to promote the spirit, purport and objects of the Bill of Rights when it develops the common law. The section 39(2) instruction is not qualified to be applied "now and then, if we feel like it": It is a clear and mandatory obligation of our courts to promote the spirit, purport and objects of the Bill of Rights whenever it develops the common law. In *Carmichele* (par 56) the practical effect of the interplay between the cautionary note and section 39(2) is explained as follows:

> Under s 39(2) of the Constitution concepts such as 'policy decisions and value judgments' reflecting 'the wishes ... and the perceptions ... of the people' and 'society's notions of what justice demands' might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.

The deduction to be made is that the position on common-law development in *Du Plessis* cannot be read in a vacuum and that the two cases cannot be regarded as delineating two separate grounds on which the common law can be developed: Because the "changing mores" of a really diverse society can be found in the Constitution and is given effect to by section 39(2). In *Van Eeden v Minister of Safety and Security (Women's Legal Trust, as Amicus Curiae)* (2003 1 SA 389 (SCA) par 12) Vivier ADP explains that the Constitution cannot be regarded as the sole

embodiment of the legal convictions of the community, but accepts that all law, conduct and values must be consistent with the Constitution. In *Minister of Safety and Security v Van Duivenboden* (2002 6 SA 431 (SCA) par 17) Nugent JA also emphasises that even though the legal convictions of the community are not exclusively found in the Constitution, however extra-constitutional, legal convictions need to be consistent with the Constitution. Thus, even if one accepts for a moment that the legal convictions of society can be found in a logic extrinsic to the Constitution, morality must be consistent with the Constitution *and* must be so justified.

This is a crucially important point to make because apart from the statement that section 39(2) exists and, in principle, could affect the wrongfulness enquiry, the Constitution's role in this specific case is substantively ignored. In fact, Brand JA went so far as to say that he regards (par 40):

> It unnecessary to consider the further contention advanced by some of our academic authors ... that the continued existence of the action is in conflict with our constitutional norms. Suffice it to say that there could well be merit in some of these arguments.

To paraphrase: The Constitution could, but does not need to, have a substantive effect on the process of common-law development. This is an approach that is in conflict with an earlier article authored by Brand JA ("Influence of the Constitution on the law of delict" 2014 *Advocate* 42) in which he gives an overview of the impact of the Constitution on the law of delict, which I read to have a laudatory undertone. Giving due regard to the above explanation of the interaction between *Carmichele, Du Plessis, Van Eeden,* and *Van Duivenboden,* the above approach to the development of the common law should not be supported.

Because of an unfortunate oversight of the above interaction of cases, the SCA opted to develop the common law on the second ground, in other words, simply because societal norms have changed. From a holistic reading of the judgment it is clear that it is the view of the SCA that the Constitution has no direct and substantive role to play in determining the legal convictions of the community, despite Brand JA quoting *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae)* (2011 3 SA 274 (CC) par 122): "[T]he judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms". The judgment gives no explanation as to why the development in question is in accordance with constitutional norms or, at least, it is not explicitly given. The recognition of the Constitution as the guideline for determining the legal convictions of the community could keep many conservative and progressive private lawyers satisfied: Conservatives might now regard the open-ended test as being "more certain" because it can be determined from a more reliable source which respects and protects diversity and even minority groups (see, e.g., the pre-constitutional case of *Van Erk v Holmer* (1992 2 SA 636 (W) 649C)

where the morals of society were found, among other things, in the *Fair Lady* magazine and the *Sunday Times* newspaper), whereas progressives will take solace in the potential of the Constitution to direct private law in a more egalitarian direction. It is regrettable that the role meant to be fulfilled by the Constitution was replaced by extra-constitutional legal argumentation largely based on fashionable morals that dominated Europe in the 1970s.

Even though some of the extra-constitutional substantive reasons provided by the court as to why the claim is out of place in modern society are laudable, at the very least Brand JA should have explained why the suggested development fits comfortably in the objective normative framework of the Constitution (*Carmichele* par 54). In this regard one should be mindful of the fact that section 173 of the Constitution entrusts our courts with the *power* to develop the common law having regard to the interests of justice. As explained above, such a use of power must be justified with reference to the Constitution to give effect to the transformative goals of the supreme law. Failure to do so, which I argue is prevalent in the case under discussion, could be indicative of a use of judicial power amounting to anti-constitutionalism.

I borrow the term "anti-constitutionalism" from an earlier observation made by Roux ("Continuity and change in a transforming legal order: The impact of section 26(3) of the Constitution on South African law" 2004 *SALJ* 466). In Roux's discussion of the case of *Brisley v Drotsky* (2002 4 SA 1 (SCA)), he notes that the SCA's approach in that case to the issue of the impact of the Constitution on the common law was not "anti-constitutional" but rather "anti-vagueness", in the sense that the court wished to avoid the situation in which the "Constitution exerts an indeterminate influence on the common law" (Roux *supra* at 492). It is my argument that the same defence cannot be tweaked to be raised in favour of the SCA in the case of *RH v DE*. In this case the goal of the court was not to uphold legal determinacy by sidestepping the Constitution. Here the court radically disrupted the "predictable" common-law scheme of rules pertaining to delictual claims based on adultery and, consequently, the judgment cannot be said to militate against the indeterminacy of law. The judgment, therefore, is not "anti-vagueness" or "anti-uncertainty". Additionally, the court sidestepped the Constitution while creating this "unpredictable" result.

If a court creates uncertainty while avoiding the Constitution, it appears to me to be "anti-constitutional", contrary to what Roux contends the court may have done in *Brisley*. I do not suggest that the court acted with *dolus directus* to betray the supremacy of the Constitution. But, at least, an inference could be drawn from the SCA's failure to engage with the Constitution at a substantive level (despite there being ample authority for the important role that the Constitution must play in the development of the common law) that it had the *dolus eventualis* to act in an anti-constitutional manner. It is accepted by our

courts that *dolus eventualis* is proven by means of inference, as enunciated in *S v Sigwahla* (1967 4 SA 566 (A) 570D-E).

There are further good reasons for the rejection of the approach promoted in this case that become apparent upon a further exploration of the reasons for the decision (provided in the following sections). I reiterate again that it is not the outcome of this case that is problematic. It is the ideology reflected in the SCA's reasoning that is troubling.

3 The Claim for Adultery in Historical Context

The SCA noted that adultery has had a chequered history in South African law (parr 20-21). In 1904 the crime of adultery was abrogated by disuse (*Green v Fitzgerald* 1914 AD 88) and by 1944 the civil claim for adultery was put at the disposal of spouses of both sexes and no longer limited to its use by aggrieved husbands (*Rosenbaum v Margolis* 1944 WLD 147). By the time that the Divorce Act (70 of 1979) was promulgated, adultery was no longer regarded as a specific ground for divorce distinct from the irretrievable breakdown of a marriage. Despite the historical evidence to the effect that individuals, judges and Parliament have systematically regarded adultery as becoming less of a societal evil that deserves legal condemnation, it was held in *Wiese v Moolman* (2009 3 SA 122 (T)) that a civil claim based on adultery should still be recognised. Brand JA seems surprised at the decision in *Wiese* – because of the overwhelming academic support for a contrary conclusion. The dominant view is that such a claim is "outdated and archaic" (see the authority listed at par 21). This is the first extra-constitutional argument as to why the claim should not be recognised today.

Left in the air, without proper constitutional justification, on what basis should one determine whether a common-law rule is outdated or archaic? Should it be decided on the historical track record of the legal rule, read with academic criticism? On this whim, one could argue that the institution of marriage should also fall away because it is an archaic and outdated institution with formalities that show similarity to the Roman *mancipatio* and *in iure cessio* methods for the transfer of ownership of a slave to a man. There is academic support for the view that the institution of marriage should be abolished on constitutional grounds due to the inherent incompatibility of marriage and the equality clause (see Meyerson "Rethinking marriage and its privileges" 2013 *Acta Juridica* 385). However, if one is sensitive to the impact of the Constitution on the common law, one realises that the jurisprudence of the constitutional right to dignity actually respects the institution of marriage.

As articulated in *Dawood & Another v Minister of Home Affairs & Others* (2000 3 SA 936 (CC) parr 30 & 36) (a case that is referred to later in the judgment by Brand JA), marriage may provide individuals with a deep feeling of personal fulfilment, in the sense that our humanity is expressed through our relationships with one another. To this view I add that the

potential problems of inequality within the marriage and inequality produced by the nature of marriage can be mitigated by the constitutional right to equality as formulated in section 9 of the Constitution. Since the dawning of the Constitution we, for example, have seen the legal recognition that a husband can rape his own wife (section 56(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007) and the legal recognition of unions beyond the conventional one-man-one-woman marriage (for an overview see Robinson "The evolution of the concept of marriage in South Africa: The influence of the Bill of Rights in 1994" 2005 *Obiter* 488).

The key idea put forward, thus, is that the test to determine whether legal rules are archaic and outdated cannot be based on asking whether the rule has had a problematic history and has been subject to academic criticism, due to the fact, even though a rule or an institution may have a problematic foundation, that rule or institution could be transformed into something with a new, constitutionally justifiable rationale and meaning in the South African context (this insight is derived from Snyman "Interpretation and the politics of memory" 1998 *Acta Juridica* 320).

4 The Colony of South Africa

The next stage of the SCA's approach involved an evaluation of the stance of other jurisdictions on the question of a civil claim for adultery. It was explained by the court why Sonnekus has argued that a civil claim for adultery is based on English law and not on a Roman-Dutch model (par 24). The SCA argued that if one accepts English law as the true foundation of the claim, it is worth noting that an action based on adultery was abolished in England in 1970 by their Law Reform (Miscellaneous Provisions) Act (par 26). I concede that the logical force in this argument is that if the basis for one of our rules falls away, our courts should ensure that our rule follows suit. It reminds one of the Latin maxim, *cessante ratione legis cessat ipsa lex*, that conventionally, at most, lays the foundation for a restrictive interpretation of a statute or the abolition of an old law (*Nourse v Van Heerden NO and Others* 1999 2 SACR 198 (W) 208F-H). There is a snag to this point of logic. Before the English legislature intervened, the Court of Appeal in *Pritchard v Pritchard and Sims* (1966 3 All ER 601 (CA) 606-610) described the action as insensible and anachronistic because it was born in a patriarchal society in which men had a proprietary interest in their wives comparable to that in cattle. Yet, that court deferred the matter to the legislature and opted not to abolish the action (par 26). I will return to the issue of judicial deference below.

Brand JA observes, shortly after the developments in England, that the previous colonies of New Zealand and Australia also abolished the action; Scotland, most of Canada and most of the United States of America were next in line (par 27). However, it is not only the common-law jurisdictions that regard claims of this nature as being out of touch with

reality. The French, Dutch, Austrian and German legal systems also do not recognise civil claims for adultery, even though adultery once constituted criminal offences in those legal systems (par 24). Brand JA relied extensively on the reasoning of the Federal High Court of Germany (JZ 1973, 668) to bolster his arguments. The German reasoning is based on the following aspects: (a) when a spouse voluntarily embarks on an extra-marital affair, it is essentially a matter that must be resolved internally between the spouses and not by the law of torts/delict; (b) it is not acceptable to regard the liability of the unfaithful spouse as being regulated by matrimonial law, and the liability of the third party by delict, as if there are two very distinct acts committed by the two adulterers; (c) it is very tricky to decide which types of interference with the marriage should be punishable: Should one pretend that only penetrative sexual intercourse with a third party would bruise a spouse's pride?; (d) the legislature has prudently refrained from dictating to spouses how they should behave in their marriage and thus it is the view of the German population that family law provides enough protection to spouses and; (e) that the law should not interfere in a highly personal relationship such as marriage – a view that is in line with the German Constitution. Thus, the institution of marriage would not be given true protection by the recognition of a claim for adultery because, ultimately, marriages will fail if the spouses themselves are not committed to maintain it (par 25).

The dominance of foreign perspectives in the judgment deserves closer analysis. From the outset I wish to make it clear that I am not entirely against the use of the comparative method. There is great value in comparative legal study in terms of the sharing of ideas and lessons learnt in jurisdictions with similar normative frameworks to ours (see Ackermann "Constitutional comparativism in South Africa" 2006 *SALJ* 496). However, I caution that the laws of other countries should not dictate South African legal morality (a point also made in *Van Duivenboden supra* par 16). We should be mindful that South Africa has a peculiar history which creates the context for our morality. Even though we may find guidance for our decisions from other jurisdictions, we should contextualise those foreign positions in a South African materiality. It is not wise to follow international legal trends under the guise that our morality must be congruent with "most other jurisdictions". To some extent, Brand JA does realise this. For example, he states, if there is a disparity between our morality and that of ten other non-African states, that we should ask why this is the case (par 28). Yet, this question does not appear to be asked in light of the Constitution, but it is asked against the backdrop of extra-constitutional reasoning.

To be clear, I do not regard the reasoning of the German Federal High Court as being false: I agree that those reasons could usefully be incorporated into South African law. However, if a court wishes to develop the common law (and in the process wishes to adopt the law of another state), I have explained above that section 39(2) requires that court to frame the incorporated principles in light of the South African Constitution; which did not occur here. The adoption of a foreign legal

position, especially in the context of attempts at determining the legal convictions of the community, should be approached cautiously and with due regard for the history of colonialism in South Africa.

South Africa is no longer under colonial rule and our law should not be dictated by the laws of Europe. The South African situation, in part, has been shaped by physical and ideological colonial violence and there may be cases where our Constitution demands a break with Eurocentric views on the law. One thinks of the law of ownership in this regard. The need in South Africa for expropriation has drastically (even though not radically) changed the traditional conception of ownership that South Africa inherited from the Roman law tradition. Even though reference might be made to Western European law of private ownership in a judgment, those perspectives can be incorporated only on condition that they are compatible with our constitutional view on property which aims, partially, to redress the effects of colonialism and, what I call its theoretical progeny, "apartheid". In this specific case our constitutionally-inspired morality might not differ greatly from the European perspectives quoted above, but the generalised implication in the SCA's judgment that we should hesitate to differ from foreign jurisdictions should not be supported, especially if the incorporation of foreign legal principles is not properly justified in terms of our Constitution. A contrary view, prevalent in this case, would mean that foreign courts and foreign legislatures have a greater effect on South African law than to our supreme law. I argue that this position is a perpetuated form of objective (ideological) colonial violence and hegemony that our Constitution does not intend.

Drawing upon the work of Žižek (*Violence: Six sideways reflections* (2009)), I argue that the judgment is objectively violent in the sense that it operates at an invisible ideological level. Žižek identifies capitalism as the source of objective violence: The source here would be a colonially submissive failure to recognise the importance of the Constitution that solidifies our democratic transition. Even though some may hold the opinion that the Constitution is not a complete break from colonialism, I argue that it can be regarded as a sincere attempt to do so. Therefore the invocation of the Constitution in common-law matters shows a willingness to move in the direction of a symbolic rejection of a particular form of colonialism.

A pertinent point of criticism that could be raised against my argument is that the Constitution itself is symptomatic of a colonial hegemony over South Africa and thus its transformative possibility is inherently limited (Van Marle *supra* 198; Delport "An ethical (anti)constitutionalism? Transformation for a transfigured public" 2014 *Acta Acdemica* 104). The concept of fundamental rights is not an African creation. My argument is that it is impossible to totally escape colonialism until the radical paradise comes: For the moment, we need to make the best of what we have (this view resonates with the "double-handed" approach suggested by Botha ("Equality, plurality and structural power" 2009 *SAJHR* 37), because,

despite the wide powers given to them, judges cannot abolish the Constitution.

The foregrounding of human rights has its roots in Europe, but South African courts have made attempts to Africanise them: Specifically, I am speaking here of the permeation of the value of *uBuntu* in our discourse on human rights (for an overview see Himonga, Taylor & Pope "Reflections on judicial views of uBuntu" 2013 *PER/LJ* 369). As Ramose indicates (*An African perspective on justice and race* (2001) 19), our Bill of Rights is far from a perfect reflection of an African jurisprudence, but from my perspective, it is a step closer in comparison with the legislation and court decisions of Europe. Williams (*The alchemy of race and rights* (1991) 154) has argued, even though fundamental rights may be criticised from various points of view, that rights have played a great symbolic role in the emancipation of oppressed groups. Williams specifically argues that before rejecting them we need to be sensitive to the black experience of rights: That rights are tools by means of which to demand the attention and respect of oppressors

A further critique to be raised in this case against the incorporation of foreign law, without constitutional verification of imported principles, is that in England the courts deferred the abolition of the action for adultery to the legislature regardless of how outdated the moral grounds may have been (par 26). In Germany the issue was whether a court should create a remedy based on adultery: The court refused to do so on the rationale that the German Parliament did not intend to create penal consequences for adultery committed by a third party and a court is in no position to interfere with that legislative decision (*RH v DE* par 25). If the SCA was concerned to heed the practices of their colleagues overseas, it is strange that it overlooked the fact that foreign courts have not regarded the abolition and creation of the civil claim for adultery as an "incremental change" that would justify judicial law-making. It seems that the SCA is desirous of the best of both worlds: An acceptance of foreign law without constitutional confirmation of the imported principles, as well as the extensive constitutional power given to South African judges to develop the common law. Through its failure, meaningfully and explicitly, to incorporate the rights and values of the Constitution, the SCA opened itself up to this criticism. In the next section I will explore how the foreign law and the aforementioned extra-constitutional reasoning could have been effectively constitutionally framed.

5 Constitutionally Justified Logic

Even though proponents of the civil claim for adultery stress the importance of protecting marriage as an institution and the personality rights of the aggrieved spouse, the SCA provided a number of extra-constitutional factors that outweigh the arguments of those proponents. These logical factors are closely related to the German arguments detailed above. The SCA explains these factors as follows. It is strange that the betraying spouse is not held delictually liable while that spouse's

conduct is more unacceptable than the behaviour of the third party in that the third party is not breaching a solemn vow (parr 29-30). If the spouses are married in community of property and do not get divorced in spite of the adultery, the misbehaving spouse would benefit from the damages accruing to the aggrieved spouse (par 30). The protection of marriage is of great importance, however, it is doubtful whether the possibility of a delictual claim for adultery will prevent its dissolution the spouses have already given up on the marriage. The view that adultery can only occur through sexual intercourse is flawed because non-sexual extra-marital relationships can be a serious breach of trust as well. Marriages do not break down simply because of adultery: The reality is more complicated than that. Besides, people should have the freedom to do with their bodies as they please. If the purpose of this type of claim is prevention, then it is odd that the crime of adultery has already been abolished (par 34). One cannot say that an objective observer will conclude that the aggrieved spouse has been insulted. In fact, it is the good name of the unfaithful spouse that suffers damage the moment that the adulterous behaviour comes to the fore (par 35). Historically, the claim for adultery has undergone numerous modifications, and it could be abolished now (par 38). Young children have experienced serious trauma from the court cases, which is against their best interests, the cross examination of the spouses delved deep into their most intimate spaces, and this case caused massive costs to be incurred, all for the sake of the husband's desire for revenge (par 39). If a court were to say that the conduct of the adulterers is "not wrongful", that does not mean that their conduct is "right". It simply means that the conduct does not attract delictual liability (par 32).

These arguments are powerful and deserve recognition. However, these arguments were never properly strengthened with reference to our rich constitutional jurisprudence. As the Constitutional Court has explained, the wrongfulness enquiry in delict could involve a proportionality exercise and such a balancing should take place through the prism of the spirit, purport and objects of the Bill of Rights (*Carmichele supra* par 43). The summative points of logic that the SCA relied on involve such a balancing exercise: Weighing up the interests of the aggrieved spouse against those of the community at large. In what follows I aim to illustrate how the Constitution could have been used to bolster Brand JA's balancing exercise.

There are two issues that go to the heart of the equality (s 9 of the Constitution) of joint wrongdoers: The fact that the adulterous spouse is not held liable, as is the third party, and the fact that the adulterous spouse could benefit from the conduct whereas the third party will lose money. Hidden in the text is an argument based on unfair discrimination on the grounds of marital status (see, e.g., s 9(3) of the Constitution and *Da Silva v RAF and Another* 2014 5 SA 573 (CC)). The fact that a person's right to determine the future of their marriage is given greater effect to than the institution of marriage itself, is rooted in the Constitutional Court's understanding of self-autonomy as a fundamental aspect of one's

dignity (see, e.g., s 10 of the Constitution and *Barkhizen v Napier* 2007 5 SA 323 (CC) par 57). This fact is linked to the right to physical integrity (section 12 of the Constitution) that includes the freedom that individuals have to make decisions regarding their own bodies, as opposed to the archaic situation in which women were regarded as slaves of their husbands (section 13 of the Constitution prohibits slavery and human servitude). The best interest of the child standard, as embodied in section 28 of the Constitution, has been interpreted to mean that children must be free from the type of emotional trauma that they were subjected to here (see, e.g., *S v Mokoena* 2008 5 SA 578 (T)). The right to privacy (section 14 of the Constitution) is infringed the moment that the opponents wish to delve into each other's private behaviour in the courtroom: This type of cross examination reminds one of earlier cases against homosexuals, who had committed the crime of sodomy, and who had their sexual histories laid bare (see the observation made in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC) par 28). The vengeful nature of the husband's claim is exactly what Mokgoro J warned against in *Dikoko v Mokhatla* (2006 6 SA 235 (CC) par 68), because revenge is inconsistent with reconciliation and *uBuntu* that informs our constitutional right to dignity.

I am mindful of the fact that all of the extra-constitutional logical reasons provided by the court are in fact consistent with the Constitution. Would it have done any harm for the judge to acknowledge this fact, with appropriate constitutional authority? It would not have cost the SCA a tremendous effort to properly integrate the Constitution in its reasoning, especially when one considers the copious amount of non-constitutional authority referred to in the rest of the judgment. Nor would harm have been done to the integrity of the common law, as Van der Merwe once worried ("Constitutional colonisation of the common law: A problem of institutional integrity" 2000 *TSAR* 12), because, after the case of *Pharmaceutical Manufacturers Association of South Africa and Another: In re ex parte President of the Republic of South Africa and Others* (2000 2 SA 674 (CC) par 44), there can be no doubt that there is one type of South African law and, that is, law under the Constitution. The classic purist debate has come to an end. Our common law has been shaped by a wide variety of sources and intellectual influences: The Constitution, as the supreme law, should be one of these, and that reality should be frankly acknowledged.

Giving tacit support to constitutional principles is good, but explicitly shaping the common law to abide by the normative framework created by the Constitution is better. It is unfortunate that the SCA proclaimed that the Constitution would not play a role in its substantive reasoning but, contradictorily, constitutional themes are hidden in the judgment, as has been illustrated above.

6 Concluding Thoughts

The leading textbook by Neethling and Potgieter on the law of delict (*Neethling-Potgieter-Visser Law of Delict* (2015) 22) explains the "indirect horizontal application of the Constitution" as the radiating effect that the Bill of Rights has on open-ended delictual principles, such as the *boni mores* test. In this case it seems that the SCA understands it to mean that the Constitution must be felt but not heard. It is my view that the failure to refer to the Constitution substantively in a case such as this is a subtle but influential neglect of the justificatory obligation that courts have in light of the wide constitutional power conferred on them to develop the common law. The development of the common law without a serious engagement with the Constitution should not be supported.

A colleague posed the question whether the above arguments can withstand the effect of the principle of subsidiarity. That is, that constitutional issues should be avoided if possible (*S v Mhlungu* 1995 3 SA 867 (CC) par 59). Van der Walt (*Property and Constitution* (2012) 37) has already made the point that subsidiarity should not be regarded as a restriction on the influence of the Constitution on all law. A proper reading of section 8 and section 39(2) of the Constitution provides methodological clarity on which sources to turn to in order to best give effect to constitutional rights. My further response is that subsidiarity was introduced by the Constitutional Court, in part, to limit the amount of cases that came before it because, at the time of the introduction of the principle, the court's jurisdiction was limited to constitutional matters (I read this as the subtext in the authority discussed by Du Plessis "Subsidiarity: What's in the name for constitutional interpretation and adjudication?" 2006 *StellLR* 216). Since then, section 167 of the Constitution has been amended to expand the jurisdiction of the Constitutional Court to all matters of general public importance that present an arguable point in law (Constitution Seventeenth Amendment Act of 2012). This move is indicative of South Africa's increasing awareness of the importance of the Constitution as an all-permeating normative-framework-creating document. Promoting steering away from constitutional issues will not assist the Constitutional Court in reducing its workload anymore: Suggesting that litigants should steer away from raising issues of "public importance" would seem quite ridiculous, because what type of legal issue is not significant to the public in some way or another?

Another point of concern from a conservative perspective may be that this issue of common-law development creates too much uncertainty in the law and is disastrous for litigants who are told by their legal advisors that they may have claims that are good in law. A brief response is that the American Legal Realists taught, early in the 20th Century, that laws (and facts established during trials) are indeterminate and it is irresponsible for lawyers to guarantee the success of cases that are decided by judges (see, e.g., Van Blerk *Jurisprudence* (1998) 55-81). With that said, Davis and Klare (*supra* 412) do not suggest that a

transformative methodology is completely against stability and the determinacy of rules. At the same time, a transformative methodology does not relegate transformation in favour of predictability. The importance of appropriate dispute resolution as an alternative to courts, with a sincere acknowledgement of the need for reconciliation with (as opposed to domination over) an opponent should be taken more seriously, bearing in mind the spirit of *uBuntu*.

I argue that it is our conservative legal culture that persists in championing a veneration of the common law that has led to South Africa falling behind the rest of the world with regards to delictual claims based on adultery. South African morality surely did not only change in 2014. In both *Wiese* and the trial court judgment of this case, the courts were preoccupied with staying as closely as possible in line with the common law: The court in *Wiese* used the Constitution as a rubber stamp for the common-law *status quo* (while failing to balance competing interests of various persons), while the SCA in *RH* sidestepped the substantive provisions of the Constitution. If the case under discussion reflected the transformative framing of all common-law disputes in constitutional terms, perhaps the judge would have been more open to the possibility of developing the common law with the proper justification that is required in our constitutional context. I concede that the mere constitutional framing of disputes will not automatically result in progressive outcomes, as we observe in *Wiese*. If the SCA applied a transformative framing coupled with a substantive appreciation of the Constitution and its transformative goals, it could have avoided the pertinent criticism that it has been so nostalgic over 1970s Europe that it has set a blueprint for an anti-constitutional approach to developing the common-law of delict.

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Revisiting some aspects of the decisions in *FMBN V NDIC* (1999) 2 NWLR

1 Introduction

It is common cause that insolvency law consists of laws that regulate debtors who are unable to pay their debts (Duns *Insolvency Law and Policy* (2002) 1). It provides the procedures for distributing the assets or proceeds of the assets of a debtor who is unable to pay his debts in favour of his creditors. Unlike other debt collection laws, insolvency law is

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designed to ensure that the inadequate assets of the debtor are fairly distributed amongst his creditors, hence the saying that insolvency law involves a contest among creditors all of whom are staking claims to an inadequate pie, rather than a contest between debtors and creditors (see Duns *supra* at 1).

A critical aspect of insolvency law is the protection of creditors' interests as a group, thus individual interests cannot override the interest of creditors as a group. One creditor, through the process of execution, cannot receive full payment of his claim at the cost of the claims of other creditors, and as correctly stated in the South African case of *Walker v Syfret* (1911 AD 141 par 166) the sequestration order crystallises the insolvent's position – the hand of the law is laid upon the estate and at once, the rights of the general body of creditors have to be taken into consideration (see generally Bertelsmann *et al The law of insolvency in South Africa* (2008) 2-3). Thereafter, no transaction can be entered into with regard to the estate matters by a single creditor to the prejudice of the general body.

The above background explains the rationale behind certain provisions in modern insolvency laws to ensure that creditors are fairly treated and that all assets of the debtor are brought under the control of the trustee or liquidator, as the case may be, for the benefit of the general creditors. One such provision can be found in section 417 of the Companies and Allied Matters Act (Cap C20 LFN 2004) ("CAMA") which prohibits action or proceedings against a company in liquidator except with the leave of the court.

In *FMBN v NDIC*, the Supreme Court of Nigeria had the opportunity to interpret section 417 of CAMA. This paper seeks to consider the interpretation of section 417 by both the Court of Appeal and the Supreme Court in the context of the above principles of insolvency law.

2 *Federal Mortgage Bank of Nigeria v Nigeria Deposit Insurance Corporation (Liquidator of United Commercial Bank Limited)* in Liquidation

2 1 Overview of Facts

The appellant ("FMBN" or the "Creditor") placed the sum of N5 000 000 (five million Naira) on a short-term deposit with the United Commercial Bank on 8 December 1992 at an interest rate of 40% per annum. There were roll-overs and the deposit eventually matured on 6 March 1994. United Commercial Bank (the "Bank" or "Debtor") defaulted in paying the deposit and the appellant sued the Bank claiming the deposited sum as well as interest rates and got judgment in the sum of N6 252 245.13 (six million, two hundred and fifty-two thousand, two hundred and forty-five Naira, thirteen kobo) on 12 July 1994 upon failure of the Bank to enter appearance or file defence. The Bank did not appeal against the judgment; the appellant then levied execution and attached its movable

assets on 5 September 1994. The assets were attached within the Bank's premises by the deputy sheriff. On 9 September 1994 – that is, four days after execution – the Central Bank of Nigeria ("CBN") revoked the banking licence of the Bank and appointed the Nigeria Deposit Insurance Corporation ("NDIC") as liquidator of the Bank. Upon his appointment, the liquidator (the respondent in this case) removed the attached assets and put them in his control, thus preventing the deputy sheriff from affecting a sale. As a result of this development, the appellant applied, on 15 September 1994, to the High Court seeking an order to compel the liquidator to produce the attached assets of the Bank and to direct the deputy sheriff to sell same. Ruling on the application was reserved until 14 October 1994. Prior to the date for of the ruling, the respondent filed an application to arrest the ruling of 14 October 1994 and to stay proceedings pending an appeal on the ground that the High Court had no jurisdiction to adjudicate on the matter. The application was predicated on an appeal filed by the respondent on 4 October 1994 against the judgment of 12 July 1994 which appeal was not pursued by the respondent. The respondent's application to arrest the ruling and stay proceedings was heard and dismissed and the High Court delivered its ruling on the appellant's application and granted the prayers, thus compelling the liquidator to produce the attached goods. Dissatisfied with the ruling, the respondent/liquidator appealed to the Court of Appeal. The Court of Appeal set aside the judgment of 12 July 1994 and the ruling of 14 October 1994. In summary, the Court of Appeal, *inter alia*, held that by virtue of section 38(3) of the Banks and Other Financial Institutions Decree 1991 ("BOFID"; now Banks and Other Financial Institution Act Cap B3 LFN 2004), the NDIC may be appointed by the Governor of the CBN as the official receiver or as a provisional liquidator of a company. Where so appointed, the NDIC shall have the powers conferred under the CAMA and shall be deemed to have been appointed a provisional liquidator by the Federal High Court for that purpose. The Court held that a provisional liquidator can exercise the power of a liquidator unless limited or restricted by the court. The Court of Appeal was of the view that based on the various provisions of CAMA, the deputy sheriff, who had notice of the appointment of a provisional liquidator, was bound to deliver the goods attached to the liquidator and that the liquidator was entitled to take custody of same.

On the provision of section 417 of CAMA, which is the focus of this paper, the Court of Appeal held that the true position is that once a provisional liquidator is appointed for a company, no action or proceedings shall be proceeded with, or commenced against, the company except with leave of the court – given on such terms as the court may impose. The Court was of the view that the term "court" referred to under section 417 is the Federal High Court of Nigeria ("FHC"). Consequently, where such an action is intended to be proceeded with or commenced against the company in any other court, it cannot be done without obtaining the leave of the FHC.

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The appellant/creditor then appealed to the Supreme Court and the respondent, being dissatisfied with certain parts of the judgment, cross-appealed. The Supreme Court considered, amongst other provisions, sections 500(2) and 501(1) of CAMA and correctly held that the respondent/liquidator was in lawful possession of the goods seized by the deputy sheriff, as the Bank's liquidator, because section 501(1) of CAMA enjoined the deputy sheriff in the circumstances of the case to deliver the seized goods to the respondent/liquidator. Consequently, the Supreme Court dismissed the appeal not withstanding that certain issues were resolved in favour of the appellant.

In considering section 417, the Supreme Court held that what is prohibited by section 417, except with the leave of court, is an action or proceeding pending or instituted in the FHC because that is the meaning of "court" as used in section 650 of CAMA. The Supreme Court was of the view that the appellant's application cannot be described as an action or proceeding proceeded with or commenced, and the Court of Appeal, therefore, was in error when it held that leave was required before the appellant could file its application which sought an order to compel the respondent/liquidator to produce the attached goods and chattels of the Bank in liquidator and to direct the deputy sheriff to sell same.

The Supreme Court, however, affirmed the Court of Appeal's decision in setting aside the High Court ruling of 14 October 1994 but declared the Court of Appeal's order in respect of the judgment of 12 July 1994 a nullity and having been made without jurisdiction. Consequently, both the main appeal and cross-appeal failed.

2 2 Area of Disagreement:

As seen from the above decisions, both the Court of Appeal and the Supreme Court arrived at the conclusion that the respondent (liquidator) was in lawful possession of the goods seized by the deputy sheriff and that the deputy sheriff, in the circumstances of the case, ought to deliver the seized goods to the respondent. One area of disagreement is the interpretation of section 417 of CAMA which provides that:

> If a winding up order is made or a provisional liquidator is appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of court given on such terms as the Court may impose.

Whilst the Court of Appeal held the view that the appellant's application, which sought to compel the liquidator to produce the attached goods, violated the above section for failure to obtain the leave of the FHC and that even where the action is before the High Court, leave of the FHC must be sought. The Supreme Court maintained that what is prohibited by section 417, except with the leave of court, is an action or proceeding pending or instituted in the FHC for that is the meaning of "court" as used in section 650 of CAMA. The implication is that an action before the High Court for instance may not require the leave of the FHC.

If one applies this interpretation, it follows that whilst the liquidation of a company may be on-going in the FHC, a creditor may be at liberty to institute an action against a company in liquidation before the High Court without leave.

2 3 Implications and Analysis

As noted earlier, section 417 of CAMA is one of the provisions that seek to ensure that a liquidator is given full control of the company and that the collective interest of creditors takes precedent over individual interest. It is submitted that if a winding up petition is pending before the FHC and other creditors go to the High Court to seek redress against the same company, the liquidator would have a huge challenge in terms of adequately performing his functions. In addition, the possibility that the High Court, before whom the case is pending, may give a decision that would over reach the general creditors cannot be overruled.

Another point to note is that a creditor before the High Court in such a situation is deliberately seeking to benefit or confer more assets on him or herself as an individual creditor and accordingly distort the principles of equal treatment of creditors who are similarly ranked as applicable in insolvency law. Furthermore, if the liquidator is burdened by having to defend suits in other courts – brought without leave of the bankruptcy court – the estate, as well as the creditors, will likely bear the cost and the consequences of such suits which, in turn, will depreciate the available assets. A judgment against the liquidator, whether ultimately satisfied out of the assets of the estate or out of the liquidators' pockets, may affect the administration of the estate of the company. More worrisome is the fact that bankruptcy losers may be turned into bankruptcy winners by exploring another forum against the liquidator or the company.

It is submitted that the above consequences could not have been the intention of section 417 of CAMA. The term "court", as defined under CAMA and the Bankruptcy Act of 1979 as amended in 1992, is the FHC and, therefore, the FHC can be regarded as the bankruptcy court for all intents and purposes. Indeed, under section 251 of the Constitution of the Federal Republic of Nigeria 1999, bankruptcy and insolvency are within the exclusive jurisdiction of the FHC. Consequently, the FHC is saddled with the responsibility of ensuring that the assets of a company under liquidation are properly administered in a fair and transparent manner and, in so doing, uphold the principles of collective interest of creditors as against individual creditor's interest protection. For the FHC, which is the bankruptcy court, to be able to perform these responsibilities, it must be fully in charge of insolvency or bankruptcy proceedings. Therefore, it is logical that leave from the FHC should be required for any action or proceeding intended in any other court to ensure proper coordination of the insolvency proceedings. The author submits that at the stage of seeking leave of the court, the bankruptcy court should consider all necessary factors including the need to protect the interest of the general creditors, and the impact of the intended suit

on the estate before exercising its discretion on whether or not to grant leave.

By way of comparative analysis, section 417 of CAMA can be equated to section 130(2) of the United Kingdom Insolvency Act of 1986 (the "UK Act") which states that:

> When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of court and subject to such terms as the court may impose.

Section 251 of the UK Act defines "court" in relation to company to mean a court having jurisdiction to wind up the company.

Section 130(2) above, makes a clearer provision on the consequences of winding-up. It reaffirms the position that once a winding up order has been made, no suit or action should be commenced with or continued in any forum against the company or its property without the leave of the bankruptcy or winding up court. It is submitted that this is to ensure proper coordination of the insolvency proceedings and that no creditor obtains an unnecessary advantage to the detriment of others. Consequently, the Court of Appeal took the right approach in its decision in *FMBN V NDIC* above. It could be argued that the application dated 15 September 1994 in *FMBN V NDIC* was not an originating process and was not directed against the company to qualify under section 417 of CAMA. Interestingly, the Supreme Court analysed the said application and held the view that the application was not against the company but the liquidator, and it was brought against the liquidator on his own behalf and not as representing the defendant. Consequently, the Supreme Court held that such an application cannot be described as an action or proceeding proceeded with, or commenced against, the defendant within the contemplation of section 417 of CAMA. In evaluating this part of the decision, the paramount question that comes to mind is what is the nature of the application dated 15 September 1994? As stated earlier, the application was to compel the liquidator to give up assets which he took into his custody in discharging his responsibility as a liquidator. Thus, it was an action brought against the liquidator in his official capacity. As rightly held by the United States Court of Appeals in *Re: Vistacare Group, LLC et al* (No 11-2695 3rd Cir 2012-05-04), a party must first obtain leave of the bankruptcy court before it brings an action in another forum against a bankruptcy trustee for acts done in the trustee's official capacity. The court in that case acknowledged the principle in *Barton v Barbour* (104 US 126 (1881)) that before a suit is brought against a receiver, leave of the court by which he was appointed must be obtained.

In *FMBN V NDIC*, the or application in question sought to compel the liquidator to surrender assets which he had secured for the interest of all creditors in favour of one creditor. It is submitted that a judgment in favour of the applicant/creditor would mean taking the property of the

insolvent company from the hands of the liquidator and applying it first to the payment of the applicant's claim, even at the expense of other creditors who ordinarily would rank ahead of such applicant in terms of insolvency law. To this extent, even though the application was not directed against the company, so long as the order granted would impact significantly on the assets of the company in liquidation, leave of the bankruptcy court must be obtained. This is more so where the application is brought against the liquidator in his or her official capacity; bearing in mind that any judgment obtained against the liquidator in that regard will be satisfied out of the assets of the company in liquidation.

3 Recommendations and Conclusion

The pronouncement of the Supreme Court on section 417 of CAMA has far reaching effects on the Nigerian insolvency system as analysed above. Section 417 is included in the law for a purpose and primarily to ensure equitable and consistent administration of a company's property. Consequently, any interpretation which deviates from the intention of the law would pose a big challenge to the liquidator and general creditors. It is submitted that the Supreme Court's decision has clearly created an avenue for particularly disadvantaged creditors, in terms of winding up rankings, to approach the High Court by craftily couching claims to bring them within the jurisdiction of the High Court.

Being a decision of the apex court, it is binding on all the lower courts in Nigeria based on the doctrine of *stare decisis*. Consequently, it is only the Supreme Court that can salvage the situation. One expects that in the near future the Supreme Court would have another opportunity to further pronounce on section 417 and, in such a case, adopt an interpretation that is consistent with the intention of the law.

Prior to such a time, the way forward remains for an appointed liquidator to continue to defend the assets of the company in the overall interest of the creditors. A liquidator faced with similar situation must put up adequate representation and defence at the applicable court to disarm mischievous creditors who will capitalise on this decision to create havoc. The High Courts have a paramount role to play in this regard by discouraging parties from bringing suits against a company undergoing liquidation without obtaining the required leave from the court that appointed the liquidator. It is further submitted that it is not proper to seek leave before a High Court who is not seized of the insolvency proceedings and has no jurisdiction over bankruptcy or insolvency matters.

Clearly, the Supreme Court's decision in *FMBN V NDIC* points to the need to amend section 417 to clearly stipulate as follows:

> If a winding up order is made or a provisional liquidator is appointed, no action or proceeding shall be proceeded with or commenced *in any court of law or forum* against the company or *its property* except by leave of court *as defined under this Act* given on such terms as the Court may impose (own emphasis).

The above suggested amendment will clear all ambiguities and lay the extent and scope of section 417 of CAMA to rest.

On a positive note, both the Court of Appeal and the Supreme Court arrived at the end result that the liquidator (respondent) was in lawful possession of the defendant's goods which could no longer be sold by the deputy sheriff. This is desirable for Nigerian insolvency law and clearly provides a strong platform for a liquidator to take charge of assets of the debtors whether under execution, attachment with the aid of sections 500 and 501 of CAMA, as well as other relevant provisions in CAMA. Finally, it is submitted that a total overhaul of the insolvency laws and procedures in Nigeria will be required in order to address some of the uncertainties that are prevalent in current Nigerian insolvency laws.

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7. Tensy reelings vooraf met die redakteur getref is, mag 'n artikel (insluitend voetnotas en opsomming) nie 8000 woorde oorskry nie. Ander bydraes mag nie 5500 woorde oorskry nie.

8. Tegniese riglyne vir outeurs is op die webblad van die Fakulteit Regsgeleerdheid van die Universiteit van Pretoria bekikbaar: http://www.dejure.up.ac.za/index.php/submissions.

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1. *De Jure* has the promotion of legal science and a critical and analytical approach to law as its main objectives and, towards this aim, publishes original contributions of a high academic standard.

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4. In order to be considered for publication a contribution must be the result of original research by the author(s), meet with all applicable legal principles in respect of publication (such as copyright, etcetera), contribute something sufficiently new to the existing legal literature and conform to the linguistic, technical and stylistic requirements for publications in *De Jure*. Authors are personally responsible to ensure that their submissions meet all these requirements.

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