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The contributions appearing in the second issue of *De Jure* for 2018 span a wide variety of thematic areas and approaches, reflecting the richness of the South African legal landscape. Some of the contributions focus on procedural aspects of the law; others on more substantive issues.

In the first article of this issue titled 'Opening address: Powerful tool of persuasion or a waste of time?' Willem Gravett alerts our readers to the fact that, despite the best efforts of judges to be impartial they are unable to keep an open mind through the duration of a trial. Gravett uses evidence from research findings in the areas of social cognition and psychology to support his arguments regarding the susceptibility of presiding officers to a well-composed opening address. He argues that, as a powerful first impression of the characters in the case, the opening address is able to influence the presiding officer's view regarding the facts of the case and even the applicable law.

Moving to the field of trust law, Melany Lötter and her co-authors ask whether the beneficiaries of a trust who have unequivocally accepted the benefits stipulated for them are required to consent to an amendment of the trust deed in instances where the trust deed contains a variation clause and, specifically, where the variation clause excludes the need for their participation and/or involvement in the amendment. Their contribution is titled 'The express power to amend a trust deed where the trust beneficiaries have accepted the benefits reserved for them'.

In her timely and topical contribution, 'The future of legislated minimum wages in South Africa: Legal and economic insights', Elsabé Huysamen probes whether a legislated minimum wage in South Africa is a realistic and workable option. She analyses the impact implementing legislated minimum wage levels might have on achieving the International Labour Organisation's Decent Work Agenda and the form that any successful legislated minimum wage level system should take.

In their contribution titled 'The circumstances under which section 85(a) of the National Credit Act 34 of 2005 can be utilised as an avenue to access or re-access the debt relief measures in terms of the Act', Stéfan Renke and Hermie Coetzee discuss the circumstances under which that section may be used by the credit consumer for the purpose of accessing or re-accessing the Act's debt relief measures. They ask this in light of Binns-Ward J's and Van Heerden's restrictive interpretation of section 85 as well as the Supreme Court of Appeal's remarks subsequent to *Kallides* in *Seyffert and Another v Firstrand Bank t/a First National Bank*.

Moving to the field of insolvency law, Roger Evans investigates the dilemma faced by the "poorer" debtor as the requirement of advantage to creditors initially excludes him or her from accessing sequestration procedures that are available to "wealthy" debtors who possess sufficient assets to show advantage to creditors in sequestration applications. He

argues that there appears to be a differentiation between poorer and wealthier debtors when accessing or trying to access sequestration proceedings, and that recent judgments and academic writings indicate a movement towards a more debtor-friendly insolvency regime in South Africa.

A further contribution investigates the origins and application of section 174 of the Criminal Procedure Act in South African law, and is titled 'Section 174 of the Criminal Procedure Act: Is it time for its abolition?'. Managay Reddi and Bhavna Ramji argue that the circumstances which warranted the adoption of the section 174 procedure are no longer present and that, therefore, in light of the absence of the historical factors justifying the procedure, and mindful of the lack of certainty in the judicial application of the test for a discharge, the utility, need and appropriateness of the procedure in current South African law must be analysed fully. They investigate the Canadian and English approaches to the procedure with a view to understanding its application in those jurisdictions, and for guidance on best practices. They conclude that the section 174 procedure, although useful, risks morphing into a process to avoid accountability – so compromising the broader interests of justice – as was seen in the case of *S v Dewani* in the Cape High Court.

This issue of the *De Jure* contains two case discussions. The first relates to the use of the cautionary rule and children's testimony in *S v Haupt* 2018 (1) SACR 12 (GP). Mildred Bekink argues that the abolition of the cautionary rule in children's testimony should receive immediate and serious attention. She calls on NGOs to challenge the constitutionality of the rule, thereby ensuring that child witnesses receive equal protection and benefit of the law.

The second case discussion concerns a much-debated aspect of South African labour law. Bongani Khumalo discusses the rationale for section 23(1)(d) of the Labour Relations Act 66 of 1995 in his contribution titled 'Extension of collective agreements in terms of section 23 (1) (d) of the LRA and the "knock on effect" on the right to strike: *AMCU v Chamber of Mines of South Africa* CCT87/16 [2017]'. He touches on the meaning of a "workplace" as defined in the Act and expounded on by the court, and examines international and foreign law in order to argue that the practice of extending collective agreements to non-parties is not peculiar to South Africa.

From the overview presented above it is clear that the articles in this issue cover a wide range of topics at the cutting edge of our law. The common denominator between these contributions is that they all locate their subject matter firmly in South African soil.

Annelize Nienaber
Guest Editor

Opening address: Powerful tool of persuasion or a waste of time?

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OPSOMMING

Die openingsrede: Kragtige instrument van oortuiging of 'n mors van tyd?

Dit sou ondenkbaar wees vir die meeste Amerikaanse verhoorprokureurs om afstand te doen van die openingsrede. Hulle glo dat die openingsrede 'n onvervangbare eerste geleentheid is om die kliënt se saak te bepleit. In teenstelling hiermee blyk die algemene praktyk in Suid-Afrika – veral in strafsake – te wees om af te sien van die openingsrede. Die persepsie is dat die openingsrede 'n "mors van tyd is" want, anders as Amerikaanse juries bestaande uit leke burgers, het ons ervare voorsittende beamptes wat al "alles gehoor het." Hierdie persepsie blyk gebaseer te wees op die veronderstelling dat die uitsluitlike funksie van die openingsrede is om "kortliks die feite uiteen te sit wat bewys gaan word." Die oogmerk van hierdie artikel is om advokaatskap in die openingsrede en navorsingsbevindinge op die gebiede van sosiale kognisie, boodskapbegrip en oortuiging te sintetiseer. Die doel is om aan te toon dat, buiten die tradisionele funksie daarvan, die openingsrede ook 'n kragtige instrument van oortuiging kan wees. Die tyd het aangebreek om die fiksie te verwerp dat voorsittende beamptes in staat is om geen opinies te vorm oor 'n saak totdat al die getuienis aangehoor is nie. Gegronde sielkundige teorie, gesteun deur algemene ervaring, dui daarop dat die openingsrede kan, tot 'n beduidende mate, die voorsittende beampte se siening kan beïnvloed rakende die feite en die reg, en lei tot die skepping van 'n kragtige eerste indruk van die karakters in die saak. Dit kan blywende indrukke skep wat by die voorsittende beampte sal bly lank nadat die detail van die getuienis vergete is. Suid-Afrikaanse regslgeleerdes moet sosiale sielkundige navorsing aangryp en gebruik om die vaardigheid aan die kern van advokaatskap – hoe om effektief en eties te oorreed – te verfyn.

1 Introduction

There was an awkward moment on the first morning of the Oscar Pistorius trial. All preliminary procedural matters dispensed with the prosecutor declared the state ready to call its first witness. The judge, in a rather incredulous tone, asked: "Before you do that, there's no opening address?" The prosecutor, who clearly had not anticipated giving an opening address, responded: "Uh … I will do so My Lady if the Court require[s] me to do that … I will indeed do so."[1]

1 The prosecutor then proceeded to deliver an opening address of approximately only 80 seconds, in which he emphasised the circumstantial nature of the state's evidence and the fact that there

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Most American trial lawyers, especially prosecutors, would find it unthinkable to waive the opening address. Generally, American trial lawyers believe that the fact-finder's first impressions "harden like cement",[2] thus making the opening address an invaluable tool of persuasion and an irreplaceable first opportunity to advocate the lawyers' case to the fact-finder.[3]

In contrast, in the main the practice in South Africa, especially in criminal trials, is to forego the opening address.[4] The perception is that the opening address is a "waste of time", because, unlike the American system of juries of lay citizens, South Africa has experienced judges who have "heard it all".[5] This perception seems to be based on the understanding that the sole purpose of the opening address is to "briefly outline the facts intended to be proved".[6]

With regard to the South African approach, Marnewick argues that the American (and British) fervour in respect of the persuasive power of the opening address relates to "jury trials", and that the Anglo-American view "should be tempered for the fact that *judges are trained not to make up their minds* before all the evidence has been led and argument has been heard"[7]

This opinion is emblematic of the perilous fiction under which some trial lawyers operate – that judges, as opposed to juries, somehow are

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were no eye witnesses. The exchange between the prosecutor and Masipa J was transcribed *verbatim* from the proceedings on 3 March 2014 as broadcast on public television.

2 Julien *Opening Address* (1996) 2; Lucas "Opening address" 1991 *University of Hawaii Law Review* 351.

3 Perrin "From OJ to McVeigh: The use of argument in opening address" 1999 *Emory Law Journal* 108.

4 As Marnewick points out, in civil cases there is a greater need for an opening address because the issues usually are more complex and the documentary exhibits are plentiful. Marnewick *Litigation Skills for South African Lawyers* (2002) 331.

5 Müller *et al Prosecuting the Child Sex Offender* (2001) 230.

6 Uniform Rule of Court 39(5) as cited in Van Loggerenberg *Erasmus Superior Court Practice Volume 2* (2015) D1-519. See also s 150 of the Criminal Procedure Act 51 of 1977. S 150 enables the prosecutor to address the court for the purpose of explaining the charge and indicating the evidence intended to be adduced, but without commenting thereon. This prohibition against commenting upon the evidence is no more restrictive than the rules regarding the opening address in American trial practice. American trial lawyers similarly are prohibited from arguing or otherwise commenting upon the evidence in opening statement. The thesis of this article is that the power of priming lies in the way the trial lawyer sets forth the facts to be proven in an opening address, and not in the trial lawyer commenting on the evidence.

7 Marnewick (2002) 321. By the same token, however, Marnewick argues that "[t]he opening address is a neglected step in the litigation process. Its tactical value is often underestimated and the opportunity to use an opening address to begin the process of persuasion is often not exploited fully," *Ibid*.

able to suspend judgment until they have heard all the evidence; that judges somehow are capable of storing away evidence for later digestion as squirrels do nuts. In fact, the exact opposite is true.

Marnewick's assertion does not accord with the courtroom vicissitudes of many a trial lawyer who faces anything but open-mindedness from the bench. Rather, their experience is similar to that of John Mortimer's beloved character, Rumpole of the Bailey who, in a case in which the judge took over the questioning of a prosecution witness, whispered to the instructing solicitor: "The judge is suffering from a bad case of premature adjudication."[8] The troubling implication of Marnewick's assertion is that when judges do not keep an open mind it is because they *choose* not to.

However, it is the premise of this contribution that despite the best efforts of judges to be fair and impartial they *cannot* keep an open mind throughout the trial. In fact, a fundamental component of human cognition is the automatic evolutionary impulse to "make sense" of and give meaning to the barrage of stimuli to which it attends, even under circumstances in which the information is insufficient to support a definitive conclusion.[9] A crucial attribute of automatic brain processes is their inescapability; they occur despite a deliberate attempt to bypass or ignore them.[10] Thus, judges, as are all human beings, are not passive information receivers; they are active information processors.[11]

The purpose in this article is to synthesise the process of legal advocacy in the opening address and research findings in the areas of social cognition, message comprehension and persuasiveness. The goal is to show that beyond its traditional function of "briefly outlining the facts intended to be proved" the opening address is a superlative tool of persuasion – it can predispose the judge favourably to the client's case, pre-emptively affect the judge's reception of the evidence and ultimately affect the eventual outcome of the case.

8 "Rumpole of the Bailey: The old, old story" ITV television broadcast 01/19/1987.

9 Grippin & Peters *Learning Theory and Learning Outcomes* (1984) 76; Lucas & McCoy *The Winning Edge: Effective Communication and Persuasion Techniques for Lawyers* (1993) 115.

10 Devine "Stereotypes and prejudice: Their automatic and controlled components" 1989 *Journal of Personality and Social Psychology (J Personality & Soc Psychol)* 6.

11 Linz & Penrod "Increasing attorney persuasiveness in the courtroom" 1984 *Law and Psychology Review (L & Psychol Rev)* 17.

2 Scientific Foundation for the Persuasive Power of the Opening Address

2 1 Priming

Research in social cognition suggests that, to a considerable degree, the trial lawyer is able to determine and shape the judge's first impression of a case to the client's advantage.[12] Primarily, this is done through a process called "priming." Simply put, priming refers to a mental process in which a person's response to later information is influenced by prior information.[13] Priming creates an impression in a person's mind that then is used to interpret new information.[14] Priming is powerful because the prime makes certain words, impressions and feelings more accessible to the brain, and thus more likely that the brain will use the activated knowledge category to process subsequent information.[15]

In the 1980s psychologists discovered that exposure to a word causes instantaneous and measurable changes in relation to the ease with which a person can evoke many related words.[16] For example, if a person recently saw or heard the word EAT, that person would be temporarily more likely to complete the word fragment SO_P as SOUP than as SOAP. Of course SO_P is more likely to become SOAP if that person earlier was exposed to – or *primed* – with the idea of WASH.[17]

Priming not only is powerful but also is far-reaching. The mental process that occurs when a person is primed with the word EAT is called "associative (or spreading) activation." As do ripples on a pond, ideas that have been primed trigger many other ideas in a speeding cascade of activities in the brain. Thus the word EAT not only primes the idea SOUP, but also a multitude of food-related ideas, such as FORK, HUNGRY, FAT, DIET, COOKIE, etcetera.

This complex series of mental events also is exceedingly coherent. All the elements are connected and each supports and strengthens the other. Words evoke memories; memories evoke emotions; and, in turn, emotions evoke facial expressions and other reactions. All these mental activities occur quickly and simultaneously, "yielding a self-reinforcing pattern of cognitive, emotional, and physical responses that are both diverse and integrated … ".[18]

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12 Stanchi "The power of priming in legal advocacy: Using the science of first impressions to persuade the reader" 2010-2011 *Oregon Law Review (Or L Rev)* 306.
13 Higgins "Knowledge activation: Accessibility, applicability, and salience" in Higgins & Kruglanski (eds) *Psychology: Handbook of Basic Principles* (1996) 133, 134.
14 See Stanchi 2010-2011 *Or L Rev* 307.
15 *Idem* 308, 309.
16 Kahneman *Thinking, Fast and Slow* (2011) 52.
17 *Ibid*.
18 *Idem* 51, 53.

Therefore, if a prosecutor in the opening address is successful in painting the defendant as a liar, a disreputable person, or a person possessing some other unfavourable trait, the judge is likely to remember the defendant as having all kinds of unpleasant traits.[19] These kinds of negative impressions are quite strong and will require substantial positive advocacy to overcome.[20]

It is important to note that hardly any of the activated or primed ideas register in consciousness; they arise largely without conscious intention or awareness.[21] As Daniel Kahneman stresses: "[M]ost of the work of associative thinking is silent, hidden from our conscious selves."[22]

Also, research reveals priming to be a strong and consistent reaction.[23] Not only can peoples' emotions and viewpoints be primed by events of which they are not even aware, but priming can also influence what people see and even how they behave. For example, if a person is primed with the idea of BASEBALL, she is more likely to remember seeing a baseball on a table crowded with many different objects of which a baseball is only one.[24] The subject will perceive – and remember seeing – the baseball even if catching only the briefest of glimpses of the table.[25] The baseball will be the most vivid object because, unconsciously, when her mind looked at all the objects on the table it was "searching" for the baseball.

In what has become a classic priming experiment, the psychologist John Bargh and his collaborators at New York University instructed student participants to complete a scrambled-sentence task as part of a language proficiency experiment.[26] The scrambled-sentence task consisted of a list of five-word sets from which the students were to make grammatical four-word sentences (eg, HE WAS WORRIED SHE ALWAYS). For one group of students, half the scrambled sentences contained words associated with the elderly stereotype, such as FLORIDA, LONELY, GREY, FORGETFUL and WRINKLE.[27] After completing the task, one of the experimenters surreptitiously recorded the period of time it took each participant to walk down the corridor after leaving the laboratory room.[28] This measurement was the true purpose of the experiment. As Bargh and his collaborators had hypothesised,

19 Stanchi 2010-2011 *Or L Rev* 342.
20 Lehrer *How We Decide* (2009) 81.
21 See generally Bargh "The four horsemen of automaticity" in Weyer & Skrull (eds) *Handbook of Social Cognition* (1994) 1-40.
22 Kahneman (2011) 52.
23 Stanchi 2010-2011 *Or L Rev* 306.
24 Fazio "On the automatic activation of associated evaluations: An overview" 2001 *Cognition and Emotion* 127-128.
25 *Idem* 128.
26 Bargh *et al* "Automaticity of social behavior: Direct effects of trait construct and stereotype activation in action" 1996 *J Personality & Soc Psychol* 230-244.
27 *Idem* 236-237.
28 *Idem* 236.

those participants who had been primed with the elderly stereotype walked down the hallway significantly more slowly than the ones who had not been primed.[29]

The "Florida effect" involved two stages of priming. First, the words related to the elderly stereotype primed thoughts about the state of being old, although the word OLD is never mentioned. Second, these thoughts of old age primed a behaviour – walking slowly – which is associated with old age. The primed thoughts and behaviour occurred without any conscious awareness.[30] When questioned afterwards none of the students reported noticing that the priming words had a common theme, and they insisted that nothing they did after the experiment could have been influenced by the words they read. Thus, even though the idea of old age never entered their conscious awareness, nevertheless their actions were significantly affected.[31]

In numerous and even more fascinating variations of this priming experiment, researchers in the area of social cognition have established that priming someone with a trait (*eg*, "rudeness"[32] or "intelligence")[33] or a racial stereotype (*eg*, "African American")[34] leads to behaviour which is congruent with the activated constructs.

2 2 Priming and First Impressions

We are conscious of "putting our best foot forward" during a job interview or on a first date because common human experience has taught us that first impressions are powerful and often become lasting impressions. American and English trial lawyers, too, have long been alert to the significance of first impressions. Writing in the *American Bar Association Journal* in 1948, the legendary barrister, Sir Norman Birkett QC, stated that judges are "never, never likely to forget" the opening address.[35] "Shaken they may be by cross-examination, by subsequent

29 *Idem* 237.

30 Kahneman (2011) 53. Gladwell explains the results of the experiment thus: "[T]he scrambled-word test with the "old" primes] was making the big computer in your brain – your adaptive unconscious – think about the state of being old. It didn't inform the rest of your brain with its sudden obsession. But it took all this talk of old age so seriously that by the time you finished and walked down the corridor, you acted old. You walked slowly." Gladwell *Blink: The Power of Thinking Without Thinking* (2005) 53.

31 Bargh *et al* 1996 *J Personality & Soc Psychol* 237.

32 See *Idem* 233-236; Gladwell (2005) 54.

33 Dijksterhuis and van Knippenberg "The relations between perception and behavior, or how to win a game of Trivial Pursuit" 1998 *J Personality & Soc Psychol* 865-877. See also Gladwell (2005) 56.

34 Bargh *et al* 1996 *J Personality & Soc Psychol* 237-240; Teele & Aronson "Stereotype threat and the intellectual test performance of African Americans" 1995 *J Personality & Soc Psychol* 797-811.

35 Birkett as quoted in Boon *Advocacy* (1999) 74. See also Marnewick (2002) 321.

witnesses," he continued, but "that first, clear, incisive impression … is beyond all price."[36]

Our instincts about the salience of first impressions are borne out in a series of studies in cognitive and social psychology that confirm the resilience and tenacity of first impressions.[37] For example, in one study undergraduate students at the start of a semester formed an impression about their lecturer after watching video clips of as little as two seconds[38] of the lecturer's non-verbal behaviour in the classroom.[39] The students' almost instantaneous impressions of a lecturer they had never met based upon the sparsest of information – a two second silent video clip – predicted with striking accuracy their end-of-semester evaluations after they had substantial interaction with the lecturer throughout the semester.[40] Thus, human beings judge swiftly and cling to their snap judgments.[41]

The priming science substantiates the view that the first impression the trial lawyer gives the judge is absolutely critical. Once the judge is primed to form an impression, that impression becomes the lens through which the judge views the events and people involved in the case.[42] The emotion attached to that first impression shapes the judge's interpretation of the evidence that gradually accumulates throughout the rest of the trial.[43] This situation is what Eric Morris SC alluded to when he wrote:[44]

> "To some extent the judge must be affected by the picture presented in the opening address. He … may … have formed a 'view' … The whole of the subsequent proceeding may then, in the judicial mind, be devoted towards ascertaining whether that "view" or the original picture is to be maintained."

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36 *Ibid*.

37 In 2009 neuroscientists mapped those parts of the brain that are activated in the formation of first impressions. fMRI scans of test subjects' brains revealed that primordial neural circuits – the amygdala (regulating emotions) and the posterior cingulate cortex (making financial decisions and assigning values to the outcome of situations) – are activated when people form first impressions of new acquaintances. Although the test subjects were provided with very little information on which to form an opinion, they nevertheless formed first impressions almost instantaneously and automatically, *i.e.* they could not withhold from doing it. Schiller *et al* "A neural mechanism of first impressions" 2009 *Nature Neuroscience* 508 - 514.

38 The experimenters varied the length of the video clip for different groups of students from two seconds up to a maximum of ten seconds.

39 Ambady & Rosenthal "Half a minute: Predicting teacher evaluations from thin slices of nonverbal behaviour and physical attractiveness" 1993 *J Personality & Soc Psychol* 438.

40 *Ibid*. See also Gladwell (2005) 12-13.

41 See Stanchi 2010-2011 *Or L Rev* 305-306.

42 *Idem* 333, 335.

43 Kahneman (2011) 82.

44 Mullins & Da Silva *Morris Technique in Litigation* (2010) 197.

There is a subtle, but substantial, difference, Morris continues, between "a trial in order to establish which view is correct, and a trial in order to establish the correctness of the view".[45] The party "who is fortunate to obtain the advantage of that initial reaction will find his task considerably lighter".[46]

Significantly, the priming studies also show that the judge will view even irrelevant and ambiguous information through the lens of the primed impression. Indeed, the effects of priming are more pronounced when the later information is ambiguous. In a seminal experiment in 1946 the Gestalt psychologist Solomon Asch presented student participants with short lists of adjectives to describe two fictitious people, and then asked them to write a brief characterisation of the person.[47] The two lists of adjectives were:

> "Alan: intelligent – industrious – impulsive – critical – stubborn – envious
>
> Ben: envious – stubborn – critical – impulsive – industrious – intelligent".

Subjects overwhelmingly viewed Alan much more favourably than Ben. In the participants' minds the initial traits in each list changed the very meaning of the traits that appear later. Stubbornness in an intelligent person may very well be justified and actually invoke respect. However, intelligence in an envious and stubborn person makes her more threatening. The word "stubborn" is ambiguous and will be interpreted in a way that makes it coherent with the context.[48]

This process is called the "halo effect". The halo effect is a cognitive bias that causes a person, when initially forming an impression of another person as friendly, competent or outgoing (or unfriendly, incompetent and introverted, for that matter), to not "weigh" any subsequent information as heavily as the first impression.[49] This is the case even if subsequent information contradicts the first impression.[50] The psychologist Abraham Luchins conducted an experiment in which he designed two paragraphs to describe a fictitious character, "Jim", either as outgoing and extroverted, or withdrawn and introverted.[51] He then provided these paragraphs to his student subjects and asked them to characterise Jim either as friendly or unfriendly. The students who read the extroverted material first characterised Jim as friendly, whereas those who read the introverted material first rated Jim as being unfriendly.[52]

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45 *Ibid*.
46 *Ibid*.
47 Asch "Forming impressions of personality" 1946 *The Journal of Abnormal and Social Psychology* 258-290.
48 Kahneman (2011) 82.
49 *Ibid*.
50 Linz & Penrod 1984 *L & Psychol Rev* 10.
51 *Idem* 9.
52 *Ibid*.

In some instances the halo effect increases the weight of first impressions to such an extent that subsequent information is mostly wasted.[53] A person's memory may even distort or falsely recall facts about another person or her behaviour that "must have happened" because they are consistent with the first impression.[54] It should be noted that the listener does not undervalue later information consciously; rather, reliance on first impressions is a mental shortcut (a heuristic)[55] that the listener takes automatically.[56]

2 3 Priming Emotion through Theme and Story

For far too long the law has clung to the Platonian view that the human mind is torn between the rational and the emotional, and that decision-making is best left to the superior rational brain.[57] As recently as 2008 Brian Garner and the late Justice Antonin Scalia (the former a highly-regarded teacher of legal writing and the latter a United States Supreme Court justice), illustrated the prevalence of this perception when they noted: "Appealing to judges' emotions is misguided … [P]ersuasion is possible only because all human beings are born with the capacity for logical thought."[58]

The notion that emotions are, or should be, severed from decision-making conflicts with the results of recent studies in neuroscience. These studies clearly show that emotions intrinsically and intricately are involved in decision-making. Emotion is central to decision-making because in the brain emotional and cognitive-rational pathways are intertwined.[59] Whether their influence is positive or negative, emotions are *always* present in decision-making.[60] Even tangential emotions that are unrelated to the decision at hand can have "a significant impact on judgment and choice".[61]

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53 Kahneman (2011) 83.

54 Higgins *et al* "Category accessibility and impression formation" 1977 *Journal of Experimental and Social Psychology* 141, 142.

55 With regard to cognitive biases and heuristics, see Gravett "The myth of rationality: Cognitive biases and heuristics in judicial decision-making" 2017 *SALJ* (forthcoming).

56 Linz & Penrod "Increasing attorney persuasiveness in the courtroom" 1984 *L & Psychol Rev* 9.

57 See Gravett 2017 *SALJ* (forthcoming) and the sources cited there.

58 Scalia & Garner *Making Your Case: The Art of Persuading Judges* (2008) 32, 41.

59 Damasio *Descartes' Error: Emotion, Reason and the Human Brain* (2005) 34-79; Lowenstein & Lerner "The role of affect in decision making" in Davidson *et al* (eds) *Handbook of Affective Sciences* (2003) 619-620.

60 Lehrer *How We Decide (*2009) 13-27. For a neuroscientific explanation of the predominance of emotion in decision-making, chapter two which summarises how dopamine neurons facilitate knowledge and decision-making is a good source. *Idem* 36-41.

61 See Damasio (2005) 34-79; Lerner & Keltner "Beyond valence: Toward a model of emotion-specific influences on judgment and choice" 2000 *Cognition and Emotion* 473, 477; Lowenstein & Lerner (2003) 619.

2 3 1 Theme

A trial theme is vital to persuasion because of its connection to emotion. A theme aids the trial lawyer to evoke emotions and impressions in the judge that are favourable to the client. Almost every textbook on trial advocacy emphasises the importance of having an overall theme for the case.[62] A theme is a memorable word or phrase that embraces the moral essence of the case. It essentially answers the question: Why do fairness and justice mandate a judgment in the client's favour?[63] Because the objective is to captivate the judge both emotionally and rationally at the outset of the trial, an effective theme compels the judge to embrace the righteousness of the client's cause.[64]

The theme is also critical to memory and retention. It serves as a psychological anchor in memory that assists the judge to integrate and understand the evidence to be lead throughout the remainder of the trial.[65] When the judge searches her memory to answer a question or make a decision, the theme will guide the search.[66] The judge is better able to recall the evidence because the theme is helpful in putting the detail into context.

Moreover, a theme helps the judge to "fill in blanks in a story" in that the judge is able to draw inferences consistent with an overarching theme about what "must" have happened, even though some of the details are missing or some information is ambiguous. Inferences and actual events, then, become practically indistinguishable in the judge's memory.[67]

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62 See, eg, Bergman *Trial Advocacy in a Nutshell* (1997) 65-67; Gravett *The Fundamental Principles of Effective Trial Advocacy* (2009) 9-11; Lubet *Modern Trial Advocacy: Analysis and Practice* (2004) 424-425; Mauet *Trial Techniques* (2000) 62-64; Mauet *Trials: Strategy, Skills, and the New Power of Persuasion* (2005) 85; Tigar *The Litigator's Art* (1999) 80.

63 Bergman (1997) 65; Gravett (2009) 9; Tigar (1999) 80. The most compelling themes state universal truths about life and appeal to the *boni mores*, civic virtues or common motivations. Themes can be simple but powerful evocative words – "love"; "hate"; "revenge"; fear"; "cheating"; "greed"; "power" – or phrases – "taking responsibility"; "playing by the rules"; "loading the dice"; "profit over safety"; "David versus Goliath". Rhetorical questions make effective themes: "Why did he not wait?"; "Why did she take matters into her own hands?"; "Does a handshake still mean anything?" Mauet (2005) 92. For more examples of themes, refer to the trial advocacy texts in n 44.

64 Melili "Succeeding in the opening address" 2005-2006 *Am J Trial Advoc* 538.

65 Linz & Penrod 2008 *L &Psychol Rev* 6.

66 *Idem* 5-6.

67 *Idem* 6.

2 3 2 Story

One of the most effective ways to involve the judge in the dispute is to tell a story in the opening address.[68] Every trial, after all, contains the elements of a story. Because of the trial story's emotional power, the opening address can become powerfully persuasive when the trial lawyer develops the underlying story element of the case. Stories of injustice provoke anger; stories of tragedy provoke sadness.[69]

In emphasising the underlying story-structure of the case, the opening address establishes the core narrative; the perceptual framework that becomes the central interpretive frame into which all subsequent trial persuasion will fit.[70] The story told in opening address previews, outlines and directs the more developed story that will emerge during the remainder of the trial.[71] The judge will pay particular attention to the trial story because she remembers the trial in story terms.[72] Save for a tiny fraction of people, such as those with so-called eidetic and photographic memories, most peoples' brains "are wired to think in story terms".[73] The story form enhances human memory by improving our ability to remember content.[74] Thus, insofar as the trial lawyer provides the judge with a meaningful, comprehensible story constructed around a memorable theme, the trial lawyer contributes to and facilitates the natural way in which judges reconstruct the facts of the case during deliberation.[75]

In research specific to stories in the trial context, these studies show that fact-finders rely extensively on analogy and storytelling to reconstruct the facts of a case in order to arrive at a decision when in deliberation.[76] In fact, after analysing nearly a hundred trial transcripts, the communication scientist Lance Bennett found that the story is such a powerful organising device that even when the evidence is presented out

68 Rideout "Storytelling, narrative rationality, and legal persuasion" 2008 *The Journal of the Legal Writing Institute* 54.
69 Stanchi 2010-2011 *Or L Rev* 313.
70 Snedaker "Storytelling in opening addresss: Framing the argumentation of the trial" 1986-1987 *Am J Trial Advoc* 16, 17, 44.
71 *Idem* 44.
72 Braun-Latour & Zaltman "Memory change: An intimate measure of persuasion" 2006 *Journal of Advertising Research* 57-72; Pinker *How the Mind Works* (1997) 37.
73 Braun-Latour & Zaltman 2006 *Journal of Advertising Research* 57.
74 Haven *Story Proof: The Science Behind the Startling Power of Story* (2007) 68.
75 Linz & Penrod 2008 *L & Psychol Rev* 6.
76 Bennett "Rhetorical transformation of evidence in criminal trials: A model of social judgment" 1978 *Quarterly Journal of Speech* 311. See also Pennington & Hastie "A cognitive theory of juror decision making: the story model" 1991-1992 *Cardozo Law Review* 519-557.

of time sequence or elicited through rather disjointed questions and answers the fact-finder rearranges it into a story during deliberation.[77]

3 Priming Science and the Opening Address

The potential power of priming and first impressions in the opening address is manifest. The opening address can prime the judge to view the case in a particular way. It is more than a figure of speech to say that the judge "gets a feel" for the case from the opening address. It is literally true. However – and here is where the contribution of the trial lawyer becomes crucial – the "feel" that the judge gets from the opening address is not predestined. At the outset of the trial the judge could have any number of impressions about a set of facts.[78] Thus the fundamental question is: What can the trial lawyer do to most effectively and ethically integrate the power of priming into crafting a persuasive opening address?

3 1 Impact Beginnings

Because emotions are so central to decision-making, trial lawyers are well-advised to strive to control the judge's emotions about the case and to do so as early as possible. Of the many structural decisions confronting the trial lawyer one of the most important is how to begin. The first paragraph of the opening address constitutes the "beginning of the beginning" of the trial, thus enhancing the potentially powerful impact of the first impression. The priming studies are crystal-clear in their findings that the behaviour that the trial lawyer singles out for mention in the first paragraph of the opening address and the words used to describe that behaviour, contribute to the formation of a first impression that will become the foundation, as well as the driver, of the judge's memory of the events and people involved in the case.[79]

Trial lawyers too often waste the first paragraph of the opening address by adhering to convention in laying out a dry recitation of the background facts of the case. While indubitably it is important to provide the judge with background and context, the trial lawyer can do so and *simultaneously* prime the judge's first impression of the case. For example, in a case in which a child's mother sued a child protection agency for standing idly by while the child irremediably was injured by his abusive father, the plaintiff can achieve this dual purpose by starting the opening address in the following way:[80]

77 Bennett 1978 *Quarterly Journal of Speech* 311. See also Pennington & Hastie "Juror decision-making models: The generalization gap" 1981 *Psychological Bulletin* 246.
78 See Stanchi 2010-2011 *Or L Rev* 310.
79 *Idem* 335.
80 Facts adapted from *DeShaney v Winnebago Department of Social Services* 489 US 189 (1989) as discussed in Stanchi 2010-2011 *Or L Rev* 335-336.

> "Four-year-old Joshua DeShaney became totally and permanently brain damaged on 8 March 2014, because of the cumulative effects of a continuous process of physical abuse perpetrated by his father and the father's paramour over an extended period. Fourteen months before Joshua's injuries became permanent the local child protection agency began the active phase of its case management of Joshua's physical abuse and neglect. After initially arranging for protective custody to physically protect Joshua from abuse, the agency official returned him to the abusive home of his father. The agency officials did so on their own decision and without court action; and actively followed his case thereafter, dutifully recording in internal documents Joshua's deteriorating situation and their fears for his safety. However, they took no action whatsoever to protect the child."

The opening address quickly and clearly tells the judge who the parties are and why they are before court. Simultaneously, however, it promotes a particular perspective of the facts and sets out to significantly influence the judge's first impression of the case and the parties involved. It depicts Joshua as young and helpless, as well as being permanently injured in a horrific way. It depicts the child-protection agency as being both active in its participation and passively negligent. The opening address paints the caricature of useless bureaucrats who passively observe a terribly dangerous and abusive situation, yet remain mired in inertia except for pointlessly writing reports.[81]

3 2 Which Emotions to Prime

Neuroscientific research suggests that the trial lawyer who ignores the emotional aspects of the case misses an essential opportunity to influence the judge. The trial lawyer should be conscious of how different emotions have different effects on the judge and use this knowledge to the greatest advantage of the client.

On the most basic level positive emotions tend to make people more optimistic, whereas negative emotions tend to make them more pessimistic.[82] These feelings of optimism or pessimism have a direct bearing on cognitive function. Pessimism, for example, results in a narrowed focus of attention on the part of the perceiver, as well as the motivation to process information more deeply and systematically.[83] On the other hand, people in positive moods are quicker to decide and tend to focus their attention more broadly and less on specific details.[84]

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81 See *idem* 336.
82 Lowenstein & Lerner (2003) 627.
83 *Idem* 629. This also makes intuitive sense. Negative emotions usually mean that something is wrong, and this suggests to the brain that more careful and focused attention on the situation is warranted. Stanchi 2010-2011 *Or L Rev* 318. Studies in negative priming have borne out that people in a negative mood take more time to make a decision, focus on specific details of the decision and remember more negative information. Lowenstein & Lerner (2003) 629.
84 *Ibid*.

Plaintiffs and prosecutors of course are the most obvious parties to take advantage of the judge's negative emotions. Usually, these parties want the judge to take action (punish the defendant) or give them something (an award of damages). An opening address that evokes negative feelings through its theme and story can make the judge experience a sense of "wrong" that requires her to take action to remedy it.[85]

However, prosecutors and plaintiffs should be judicious in their decision to attempt to evoke negative feelings in the judge. In addition to invoking a sense of "wrong" to be righted, negative feelings may also cause the judge to scrutinise the facts of the case more closely. Thus, engendering negative feelings in the judge might well be appropriate in a case in which the facts preponderantly favour the plaintiff or prosecutor - "cases that [may] benefit from a close look at the 'trees' as opposed to the 'forest'".[86] A judge in a positive mood likely will be quicker to reach a decision and will tend to focus their attention more broadly and less on specific details.[87] A positive mood therefore is more desirable in cases that have "an impressive big picture aspect to them, such as cases that implicate … policy questions".[88]

Beyond simply attempting to evoke generally positive or negative feelings in the judge, trial lawyers should carefully consider which specific positive or negative emotions their trial theme and story elicit. The research illustrates that different emotions cause people to evaluate similar situations differently. For example, once primed for sadness subjects tend to attribute events to situational causes beyond human control as opposed to holding people responsible for events.[89] In contrast, anger, particularly when connected to feelings that social *mores* have been violated without consequence, reinforces the perception that negative events are predictable and under human control, which results in the tendency to blame.[90] A feeling of anger may increase the judge's

85 In his influential work *The Sense of Injustice* (1949), the philosopher Edmund Cahn points out that the concept of "justice" is vague. It is an abstract ideal not susceptible to precise definition. As a result, an appeal to "justice" is likely to invoke contemplation rather than action. On the other hand, as a concept, "injustice" is immediately recognisable because "feeling wronged" is a common human experience. The concept of "injustice" invokes a sense of unfairness; a wrong to be set right. An appeal to "an injustice suffered" has the power to move a decision-maker to act. Therefore, in constructing trial themes, plaintiffs and prosecutors should avoid abstract concepts – "justice", "freedom", "democracy" – that invite contemplation and philosophical musing. They do not imply a call to action that seeks to remedy a wrong. Gravett (2009) 10.

86 Stanchi 2010-2011 *Or L Rev* 319.

87 Lowenstein & Lerner (2003) 629.

88 Stanchi 2010-2011 *Or L Rev* 319.

89 Keltner *et al* "Beyond simple pessimism: Effects of sadness or anger on social perception" 1993 *Journal of Personality and Social Psychology* 741.

90 *Idem* 742.

desire to blame individuals (as opposed to random fate) for events, and to overlook mitigating details.[91]

In contrast to plaintiffs and prosecutors, for whom anger can be an effective prime (see the sample opening address above)[92], generally defendants should strive to avoid priming for anger, because anger likely leads the judge to blame someone, and the defendant is an easy target. But what can the defendant do to counter a dynamic opening address by the prosecutor or plaintiff that told the story of "an evil villain [who] harmed an undeserving victim and escaped without penalty - that is, until justice was placed in the hand of this court who is empowered to correct that injustice"? The defendant faces a seemingly daunting prospect of convincing the judge not to take any action in the case.

The conventional wisdom has been for the defendant to attempt to tell an emotionally neutral story that glosses over unfavourable facts in dry, neutral language.[93] However, because we know that emotion is an integral and substantial part of decision-making, the choice to tell a "neutral" story essentially cedes emotional power to the other side and forfeits a vital part of the persuasive process.[94]

The scientific research on emotional decision-making, however, does not leave the defendant without recourse. The defendant should attempt to negate a plaintiff's anger prime by telling a positive story that causes the judge to feel more optimistic. If the defendant's story highlights that transgressions have indeed occurred, but that the situation has been quickly and fairly dealt with and/or that the transgressors have been adequately punished, the feelings of anger and injustice that the plaintiff sought to evoke may be neutralised. Such a story with a theme of "all's well that ends well" or "everything's fine now" might be useful to the defendant in a personal injury case (if plaintiff has overcome the injury or the defendant has attempted to remediate the plaintiff's pain and suffering) or a discrimination case (if the employer took prompt remedial action , for example, by promoting the plaintiff or giving her a substantial raise). If the facts do not allow the defendant to tell a story of justice already meted out, the defendant should strive to evoke the emotion of sadness, which can prompt the judge to conclude that there is simply no

91 Goldberg *et al* "Rage and reason: The psychology of the intuitive prosecutor" 1999 *European Journal of Social Psychology* 781-782.

92 Although anger is an obvious emotional prime for plaintiffs, sadness might also be effective in some cases. For example, if the plaintiff does not seek to blame the defendant or there is no discernible culprit to blame but instead argues that she is entitled to welfare or some other governmental benefit or aid, sadness is the emotion most likely to be effective. Small & Lerner "Emotional policy: Personal sadness and anger shape judgments about a welfare case" 2008 *Political Psychology* 152.

93 See, for example, Fontham *et al Persuasive Written and Oral Advocacy in Trial and Appellate Courts* (2007) 193-194.

94 Stanchi 2010-2011 *Or L Rev* 330.

one to blame. The theme of such a story might be that "there are some wrongs that are simply beyond the law's power to redress."

3 3 Memorable and Powerful Stories

As stated above, the story form enhances peoples' memories and improves their ability to remember content.[95] However, not all stories are equally memorable or powerful. It is the trial lawyer's task to tell the most emotionally powerful story that the facts allow. The objective is through words to "paint a picture in the mind's eye"[96] of the events from the client's perspective as if the judge herself witnessed the events.[97] The more detailed and vivid a memory is the greater the emotion attached to it, and the more memorable it is.[98]

A popular misconception among communicators, trial lawyers included, is that adjectives ("large", "minuscule", "gruesome", "heinous", "beautiful") create the best mental pictures.[99] Adjectives, however, tend to convey judgments, which makes them argumentative and therefore less persuasive. Because these words are subjective studies show that a description that contains too many adjectives may be perceived as unreliable by the judge.[100]

Nouns and verbs, on the other hand, have been proven to be the most evocative words.[101] They do not merely suggest a belief in something, but rather the event, action or person itself.[102] Thus, the judge immediately can form a strong visual image of that which the trial lawyer is trying to convey.

For example, in the opening address the trial lawyer states: "The accident was *terrible*" (or *"gruesome", "horrendous", "deadly", "awful"*). The use of these, although vivid, descriptors is a subjective judgment.[103] A description of the accident as "terrible" could mean different things to

95 Haven (2007) 68.
96 Morrill *Trial Diplomacy* (1972) 22.
97 Melili 2005-2006 *Am J Trial Advoc* 534; Powell "Opening address: The art of storytelling" 2001-2002 *Stestson Law Review* 90-91. Powell comments: "It is essential that that trial lawyer recognize that what is taking place is only slightly different from that which occurs around the campfire, in the movie theater, at a child's bedside … it is a form of communication as old as humankind itself … Yet, its objective is the same: to communicate to an audience the occurrence of some event, and to do so in a way that will affect the audience to the desired result." Powell 2001-2002 *Stestson Law Review* 90.
98 Singer "Memory, emotion and psychotherapy: Maximizing the positive functions of self-defining memories" in Uttl *et al* (eds) *Memory and Emotion: Interdisciplinary Perspectives* (2006) 111, 217.
99 Lubet "Persuasion at trial" 1997 *Am J Trial Advoc* 334.
100 Voss "The science of persuasion: An exploration of advocacy and the science behind the art of persuasion in the courtroom" 2005 *Law and Psychology Review* 307.
101 *Ibid*.
102 Lubet 1997 *Am J Trial Advoc* 335; Voss 2005 *L & Psychol Rev* 308.

different people. It conveys a qualitative judgment, but not the factual basis of the judgment.[104] By contrast, consider the difference in persuasive power when the trial lawyer describes the accident using predominantly nouns and verbs:

> "The roof of the car was smashed in on top of the driver. Blood dripped down the side of the driver's door, splattered on the grass and soaked into the ground. The plunge down the ravine ripped off the wheels and the bonnet of the car."

These noun and verb combinations (roof/smashed; grass/splattered; ground/soaked; wheels and bonnet/ripped) offer a more descriptive and reliable - and thus more persuasive - description of the accident.[105]

Mark Twain said: "The difference between the *almost right* word and the *right* word is really a large matter – 'tis the difference between the *lightning bug* and the *lightning*".[106] The trial lawyer uses words in the same way that the artist uses paint. In drawing a "virtual picture" of events that is memorable and compelling, the trial lawyer should be mindful of evocation – word choice. Words convey images, so the right word must be chosen for maximum effect. Referring to the client as "the plaintiff" conveys a different image than calling her "Mrs Thomas". To state that the victim "died" conveys a different image than saying the victim was "killed" or "gunned down". Describing the scene of a robbery as the "house" conveys a different image than referring to it as a "home" (the former clinically connotes a structure, whereas the latter invokes images of privacy, warmth and intimacy).[107]

In a series of studies subjects were shown a film of a motor vehicle collision and asked to estimate the speed of the vehicle upon impact. The researchers used different verbs to describe the collision, and found that subjects' estimates of the speed varied depending on the researchers' choice of verb. When the subjects were told that the vehicle "crashed" into the wall, their estimates of the speed upon impact were significantly higher than when they were told the vehicle "made contact" with the wall.[108]

3 4 Is the Defendant at an Insurmountable Disadvantage?

The research on priming and first impressions might create the sense that the plaintiff and prosecutor, who generally have the first opportunity to present an opening address, have an insurmountable advantage over the defendant, who may present an opening address only at the close of the prosecution or plaintiff's case. While the advantage is

103 Underwood "Logic and the common law trial" 1994 *Am J Trial Advoc* 187.
104 See Gravett (2009) 13.
105 Voss 2005 *L & Psychol Rev* 308.
106 As quoted in Bainton *The Art of Authorship* (1890) 87-88.
107 Gravett (2009) 11.
108 Saks & Hastie *Social Psychology in Court* (1978) 115.

indisputable,[109] social psychological research suggests that it is not insurmountable. Indeed, it might be possible for the defendant to counteract the dominant effect of first impressions in a number of ways.

Studies show that people are more persuaded by an argument if they have had the opportunity to hear a few opposing arguments. When people are aware that there are two sides to an issue (precisely the situation in which the judge finds herself), a one-sided presentation is seen as a biased communication, and thus less trustworthy and less persuasive.[110]

Psychological reactance is another reason why people are reluctant completely to accept the conclusions of a one-sided communication. Reactance is aroused when pressure to adopt a certain position in a two-sided issue is perceived by the listener as a threat to her freedom to decide the issue herself.[111] A way for the listener to restore a feeling of freedom is to adopt a position contradictory to the one-sided position advocated.[112]

An experiment, premised upon the prosecution's summation in a bigamy trial illustrates how reactance is formed. The experimenters presented subjects with either one-sided or two-sided arguments for conviction. In one condition the subjects were told that the case was not "open and shut", and that both the prosecution and defense had presented credible witnesses. In the other condition the subjects read only the prosecution's arguments. The results demonstrated that the *least* effective argument was the one-sided argument when the fact-finder knew that there were two sides.[113]

American trial lawyers and advocacy scholars are very aware of the principle of "primacy" when they discuss the importance of the opening address.[114] Simply put, primacy is a psychological principle that holds that what is perceived first is most likely to be remembered, believed and

109 One can argue that the advantage is probably deserved, because it is generally the prosecutor and the plaintiff who bear the burden of proof.

110 Chu "Prior familiarity, perceived bias, and one-sided versus two-sided communications" 1967 *Journal of Experimental and Social Psychology* 243.

111 Jones & Brehm "Persuasiveness of one- and two-sided communications as a function of awareness that there are two sides" 1970 *Journal of Personality and Social Psychology* 47.

112 Sensing & Brehm "Attitude change from an implied threat to attitudinal freedom" 1968 *Journal of Personality and Social Psychology* 324; Worchel & Brehm "Direct and implied social restoration of freedom" 1971 *Journal of Personality and Social Psychology* 294.

113 *Ibid.*

114 See, eg, Riley "The opening address: Winning at the outset" 1979-1980 *Am J Trial Advoc* 225; Smith "The opening address as a tool of persuasion" 1979-1980 *Am J Trial Advoc* 261; Lubet "The opening moment" 1993 *South Texas Law Review* 123.

embraced, and least likely to be discarded.[115] However, the research on primacy and persuasion seems to suggest that while people commonly use the first bits of information they receive to form an impression they are not always *persuaded* by the first statement or argument they hear. In fact, there is evidence to support the principle that what is presented *last*, not first, will be more persuasive. This possibility is referred to as the "recency effect".[116] Therefore, it might behoove the defendant *always* to present an opening address that sets forth her theory of the case.[117]

Moreover, the recency effect becomes more greatly amplified the longer the delay is between the first and second presentation.[118] Thus, the longer the prosecutor or plaintiff takes to conclude her case the more persuasive the defendant's opening address seems to become.

4 The Ethics of Priming

Morris describes the opening address as the trial lawyer's "first opportunity to subtly poison the judge's mind" with the essence of the client's case.[119] Although the sentiment is to be applauded, the use of the word "poison" is unfortunate. It may suggest that there is something inherently nefarious or underhand or even unethical in utilising priming science to enhance the persuasive power of the opening address.

Priming certainly is not innately unethical, but trial lawyers should be cautious in its use. The fact that priming is a largely unconscious reaction is the source of its power.[120] However, this means that trial lawyers should be particularly mindful of ethics. It is possible to prime someone to make a wrong or biased decision.[121] Priming is effective because of the caches of "knowledge categories" in our memories. Thus, to the

115 Baum "The plaintiff's approach in opening address" in Holmes (ed) *Persuasion: The Key to Success in Trial* (1978) 18. Colley explains the principle of primacy thus: "[W]e tend to believe most deeply that which we first heard, and whichever side of an issue is presented first will have a greater influence on opinion than an equally strong but later presentation of the opposite side." Colley "Friendly persuasion: Gaining attention, comprehension, and acceptance in court" 1981 (August) *Trial* 46.

116 Kristi & Klein "Finishing strong: Recency effects in juror judgments" 2005 *Basic and Applied Social Psychology* 56-57.

117 *Contra* Morris who states: "[I]t will only be rarely that the defendant will find it necessary to take advantage of the right conferred by rule 39(7) and 'briefly outline the case'. When there is something in particular to be brought under the attention of the court then the right should be utlised. Otherwise not" Mullins & Da Silva (2010) 204.

118 Miller & Campbell "Recency and primacy in persuasion as a function of the timing of speeches and measurements" 1959 *Abnormal and Social Psychology* 1.

119 Mullins & Da Silva (2010) 199.

120 Devine 1989 *J Personality & Soc Psychol* 6.

121 Higgins *et al* 1977 *Journal of Experimental and Social Psychology* 141, 142.

extent that we carry prejudices, stereotypes or other biases as part of the knowledge categories in our brains – and we all do – it is possible to tap into that information.[122] For example, in one study an "averaged size Black man" sitting on a park bench during his lunch hour was described as "lazy." What test subjects *remembered*, however, was a "big, healthy" Black man "sprawling idly" on a park bench and "doing nothing all day". All of the fabricated "remembered" impressions were primed by the word "lazy".[123] In another study subjects were primed with words suggesting race (eg, black, negro, slavery) and racial stereotypes (eg, lazy, poor, aggressive). Researchers concluded that subjects who had been primed to think of a character described in racially neutral terms as "Black" automatically and unconsciously attributed "hostility" to the character because the latter is a stereotypical characteristic associated with that racial category.[124]

These results counsel trial lawyers to be scrupulous in their use of priming. Because priming can tap into our unconscious stereotypes with particular tenacity and power, trial lawyers should make every effort to use this technique honestly and ethically. A dishonest prime that plays on stereotypes or group-based bias is unethical and immoral.

5 Conclusion

Studies of priming effects have yielded discoveries that are quite disturbing. The results from these experiments threaten our self-image as conscious and autonomous authors of our judgments and our choices.[125] They suggest that what we think of as free will largely is an illusion. However, as the Nobel-laureate Daniel Kahneman remarks with regard to these priming studies:[126]

> "[D]isbelief is not an option. The results are not made up, nor are they statistical flukes. You have no choice but to accept that the major conclusions of these studies are true. More important, you must accept that they are true about *you*."

The idea that a South African judge – or a judge anywhere in the world for that matter – is able to refrain from forming an opinion until all the evidence has been heard is aspirational rather than realistic. The time has come to reject the "open mind" fallacy and accept that the conscious

122 Devine 1989 *J Personality & Soc Psychol* 6. On implicit racial bias specifically in the legal context, see Gravett "The myth of objectivity: Implicit racial bias and the law" (parts 1 and 2) 2017 *PELJ* (forthcoming).

123 Higgins *et al* 1977 *Journal of Experimental and Social Psychology* 141, 142.

124 Devine 1989 *J Personality & Soc Psychol* 11-12. Even subjects who did not exhibit significant amounts of explicit racial prejudice as measured by the Modern Racism Scale could still be primed to elicit prejudicial responses.

125 Kahneman (2011) 55.

126 *Idem* 57.

mind is not the source or origin of human behaviour. Instead, priming unconsciously activates impulses to act, and the role of the consciousness is as gatekeeper and sense-maker after the fact.[127] Conscious processes kick in only *after* a behavioural impulse has occurred in the brain – *ie*, a prime first generates an impulse unconsciously and then consciousness claims and experiences it as its own.[128]

Sound psychological theory, buttressed by common experience, suggests that the opening address potentially is of great significance in affecting the ultimate judgment in a case. Trial lawyers should accept that judges, at the very least, form preliminary judgments or working hypotheses after the opening address, which they use throughout the trial. Priming in the opening address works not only to influence the judge's feel for the "big picture" of the case but also to actuate the construct of a framework in the judge's mind that colours the receipt and processing of the evidence which follows. Judges are more likely to hear details that they expect to hear based upon the opening address, and to fail to notice or actively to disregard inconsistent information.

Priming, it should be said, is not a magic bullet that can turn a bad case into a good one, but, to a significant degree, it can influence the judge's view of the facts or the law, and create an enduring impression of the characters involved in the case. It can create vivid and lasting impressions that stay with the judge long after the informational detail has been forgotten.[129]

Trial lawyers should embrace and use social psychological research to learn and refine the skill at the heart of courtroom lawyering: how to persuade effectively and ethically. Confronted with the robust research on priming, I hope that South African trial lawyers in future at least pause before waiving the opportunity to present an opening address and dismissing it as a "waste of time". Given the potential impact of the opening address on the outcome of the trial, it is a crucial opportunity to persuade.

127 Bargh & Morsella "The unconscious mind" 2008 *Perspectives on Psychological Science* 77; Bargh *et al* 1996 *J Personality & Soc Psychol* 230-231.
128 Bargh & Morsella 2008 *Perspectives on Psychological Science* 77.
129 Stanchi 2010-2011 *Or L Rev* 345.

The express power to amend a trust deed where the trust beneficiaries have accepted the benefits reserved for them

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OPSOMMING

Die wysiging van 'n *inter vivos* trustakte ingevolge die bepalings van 'n uitdruklike wysiginsgklousule en die implikasies indien begunstigdes reeds voordele aanvaar het

Die geldigheid van trust wysigings het die afgelope jare baie aandag getrek. Selfs die mees noukeurig- opgestelde trustakte mag wysigings benodig en sekerheid aangaande die geldigheid van sodanige wysiging is uiters belangrik. Die toestemming van 'n begunstigde wat reeds sy voordele ingevolge die trustakte aanvaar het, is sonder twyfel gesaghebbend vanuit 'n gemeenregtelike pespektief aangesien die aanvaarde regsbeginsel is dat hy of sy na sodanige aanvaarding as kontraksparty gereken word. Hierdie beskouing was weereens bevestig in die *Potgieter* saak wat die beslissings in *Crookes* – en *Hofer* – gevolg het. In al drie sake het die trustakte óf geen wysigingsklousule bevat nie (*Crookes* en *Hofer*), óf wel 'n wysigingsklousule bevat, maar welke klousule oor beperkings beskik het wat dit ontoepaslik in die omstandighede gemaak het (*Potgieter*). Gevolglik was die normale gemeenregtelike beginsels aangaande trustwysigings toepaslik op hierdie drie hofsake. Ongelukkig is die beginsels neergelê in die *Potgieter* saak blindelings gevolg in latere hofsake sonder dat onderskeid getref is tussen die gevalle waar 'n uitdruklike mag om te wysig in die akte voorgekom het en waar dit nie voorgekom het nie. Die doel van hierdie artikel is om te bepaal of 'n begunstigde van 'n trust wat sonder twyfel sy of haar voordele ingevolge die trust aanvaar het, vereis word om toe te stem tot 'n wysiging van die trustakte waar daar wel 'n wysigingsklousule in die akte voorkom. Is sodanige toestemming 'n vereiste waar die wysigingsklousule die vereiste prosedure of metodologie vir die wysiging spesifiseer en stipuleer dat dit gedoen kan word sonder dat die toestemming van die begunstigde vereis word? Ek stel voor dat die aanvaarding van voordele deur 'n begunstigde nie dieselfde relevansie inhou vir beide scenario's nie. By aanvaarding word die begunstigde 'n party tot die trustooreenkoms wat die begunstigde 'n reg tot voordele beloof, maar terselfdertyd behels dit dat die begunstigde ook enige

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gestipuleerde verpligtinge wat verband hou met die beloofde voordeel aanvaar. Gevolglik is dit so dat die begunstigde inderdaad sekere beperkinge uit hoofde van die trustakte kan oploop, wat natuurlik kan insluit dat sy toestemming tot verdere wysigings van die trustakte nie nodig sal wees nie.

1 Introduction

In the South African law of trusts it is generally accepted that an *inter vivos*[1] trust deed may be varied[2] in terms of the common law[3] on the one hand, which rules are derived from the *stipulatio alteri* or the contract in favour of a third party, or on the other hand by virtue of or in accordance with the terms of an express provision in the trust deed, a so called variation clause,[4] and that these amendments may be effected without the interference of the court.[5] The need to amend a trust deed has become pertinent for a number of reasons, including changes in legislation, economic circumstances and/or the personal circumstances of the parties to the trust.[6] Even the most carefully drafted trust deed may require amendments from time to time and certainty about the validity of the trust deed amendment is of the utmost importance and critical to trust and fiduciary practitioners or advisors, as subsequent litigation can prove very costly.[7]

The significance of the beneficiaries' acceptance of benefits and the implications thereof for the validity of the amendments to the trust deed were once again underlined in the *Potgieter* case.[8] The acceptance of benefits by beneficiaries is undoubtedly authoritative when the validity of the amendments to trust deeds is considered from a common law perspective.[9] However, does the acceptance of benefits have the same significance where an express variation clause is contained in the trust

1 The article is limited to a discussion of an *inter vivos* trust. Variations to a *mortis cause* trust falls outside the ambit of this article.

2 The entire trust deed can be amended, with the exception of the identity of the founder and the act to create. Pace and Van der Westhuizen *Wills and Trusts* (2016) B 18.

3 *Crookes v Watson* 1956 1 SA 277 (A); *Hofer v Kevitt* 1998 1 SA 382 (SCA); *Potgieter v Potgieter* 2012 1 SA 637 (SCA); Olivier Strydom Van den Berg *Trust Law and Practice* (2014) 2-30 (1).

4 A trust deed can empower parties to freely amend a trust deed, empower parties to amend within limits or restrict it. De Waal "Die wysiging van 'n *inter vivos* trust" 1998 TSAR 326; Cameron De Waal Wunsh Solomon Kahn *Honore's South African Law of Trusts* (2007) 25; Olivier *et al* 2-26 (14).

5 Variations by the powers of the court in terms of section 13 of the Trust Property Control Act 57 of 1998 falls outside the ambit of this article.

6 Olivier *et al* illustrate the need to vary a trust deed based on the investment restrictions in the original trust deed. Olivier *et al* 2-26 (7).

7 Vorster "When good intentions go bad: Considering the amendment of a trust deed with great care" 2013 1st Annual International Interdisciplinary Conference, AIIC 2013 Azores, Portugal.

8 *Potgieter v Potgieter* supra.

9 Kerr "The juristic nature of trusts inter vivos" 1958 *SALJ* 88; Cameron *et al* 35, 497; *Potgieter v Potgieter* supra; Olivier *et al* 2-29.

deed? The crisp question for consideration in this article is whether the beneficiaries of a trust who have unequivocally accepted the benefits stipulated for them, are required to consent to an amendment of the trust deed where the trust deed contains a variation clause and, specifically, where the variation clause excludes the need for the beneficiaries' participation and or involvement in the amendment.

De Waal correctly cautions against the temptation to generalise and oversimplify in the quest for the validity of a trust amendment[10] and reiterates the necessity to clearly distinguish between the scenario where a variation clause exists and where it is absent or inapplicable. Where an amendment of the trust deed is contemplated, the advisor or trust practitioner must first determine whether the deed should be amended in accordance with the express variation clause in the deed (if there is such an express power reserved in the deed), or whether the common law principles of *stipulation alteri* should be followed. If the latter approach is to be followed, the second question is about the acceptance of the benefits by the beneficiaries. Did they indeed accept the benefits stipulated for them in the trust and how significant is that acceptance of benefits in the context of the amendment of the trust deed?

These two questions will be analysed in this document and the authorities from leading judgments will be considered, as well as the viewpoints from the leading commentators in this field. The nature of the *stipulatio alteri* will be reviewed and the consequences of the acceptance of benefits by trust beneficiaries and its significance on a variation clause in a trust deed will be examined.

2 Commentators: How Should an *Inter Vivos* Trust Deed be Amended?

De Waal clearly indicates that the provisions in the trust deed should be decisive[11] and that those provisions should dictate how the trust deed should be amended or, conversely, to prevent such amendments. De Waal refers to the common law approach, that is where all the parties to the trust agreement must agree to the amendment of the deed, as an alternative option but only applicable where such intended amendment is not expressly authorised in the trust deed.[12]

Olivier *et al* summarise the position by proposing that the trust deed should first be examined for a variation clause or any express power afforded to parties to amend the deed (the authority afforded to amend the trust deed need off course not be expressed in a separate loose-

10 De Waal 326.
11 De Waal 326.
12 De Waal 326.

standing clause) and only in the absence of such a clause or provision, to then consider the common law approach to amend the trust deed.[13]

Du Toit equates a trust deed to a 'constitutive charter' and says that the wording of the trust deed should always be the point of departure.[14] Claassen agrees with Du Toit and notes that only in the absence of a variation clause should one consider the common law approach.[15]

In a recent Chief Masters Directive,[16] the Chief Master sets out its viewpoint as follows:

> "The rule regarding the amendment of contracts (including *inter vivos* trust deeds) in common law is as follows (Christie Law of Contract 2006; 447):
>
> a) Parties to a contract are free to vary (or amend) their agreement. This means that all the parties to the original contract may amend the original agreement as they please, provided that, if a statute prescribes formalities for the amendment of a contract, those formalities must be complied with.
>
> b) Where the original agreement contains a clause prohibiting the amendment of the contract, the parties may still amend the contract, but it must now take place in two stages, first the prohibition clause needs to be amended, after which the contract may be amended. The two-stage approach can be contained in the same document, but the first stage is a pre-requisite for the second stage.
>
> In terms of our common law principles on trusts as set out in *Crookes v Watson* 1956 (1) SA 277 (A) the trust founder, the trustees and beneficiaries with vested rights in the trust who have accepted benefits under an *inter vivos* trust may vary the provisions of the trust by agreement. If a beneficiary has not yet accepted the benefit, the founder and trustee may vary the trust provisions without the cooperation of the beneficiary. Should the founder and trustees of an *inter vivos* trust purport to vary the provisions of the trust without the consent of the beneficiaries who have accepted a benefit, the variation to the trust deed would be invalid and have no legal force and effect.
>
> The question arises as to whether the provisions of an *inter vivos* trust deed with regard to the amendment of the deed can overrule the above common law rule by expressly permitting amendments of the trust deed by the trustees without the consent of beneficiaries with vested rights in the trust and who have accepted their benefit under the trust deed. This question was answered in the decision of *Potgieter & another v Potgieter NO & others* [2011] JOL 27892 (SCA) the essence of which was succinctly summarized by Thinus Claassen in his article "Die wysiging van *inter vivos*-trustaktes: 'n evaluerende perspektief op die *Potgieter* saak", published in 2014 *Acta Juridica* 243. The current position can be distinguished as follows:
>
> a) If the trust deed expressly permits the amendment of the deed by the trustees without the involvement of the beneficiaries, the consent of the

13 Olivier *et al* 2-30(11).
14 Du Toit "Trust deeds as 'constitutive charters' and the variation of trust provisions: a South African perspective" 2013 *Trusts and Trustees* 40.
15 Claassen "Die wysiging van *inter-vivos* trustaktes: 'n Evaluerende perspektief op die Potgieter-saak" 2014 *Acta Juridica* 243.
16 2 of 2017 Circular 13 of 2017 7 http://www.justice.gov.za/master/m_docs/2017-02_CHM-directive.pdf (accessed 2018-03-01).

beneficiaries who have vested rights will not be required, provided the amendment which is made falls within any condition which is set for amendment by the trustees in the trust deed. This appears to have been one of the issues in the *Potgieter* decision where the amendments made by the trustees did not fall within those permitted in the trust deed.

b) If the trust deed is silent on the involvement of beneficiaries in the amendment of the deed, then the common law rules will apply and the consent of the beneficiaries with vested rights will be required, provided they have already accepted the benefit."[17]

As the Master of the High Court is the so-called "watchdog" which regulates the amendments made to trust deeds, its viewpoint is very important, although not necessarily legally authoritative. The role of the Master is accepted by our Courts to be regarded not only as a mere "rubber stamping".[18] It is clear that the Master has placed emphasis on the provisions of the trust deed and determined that the methodology prescribed to amend the trust deed should "overrule" the common law requirements.

Pace and Van der Westhuizen[19] recommend a checklist to be followed when an amendment is considered and seem to suggest that preference be given to the common law approach before regard be given to the powers afforded in the variation clause.

While there are clearly distinctive views on the matter, it seems that the majority of the commentators agree that the trust deed should first be examined where a trust amendment is contemplated.

The leading Supreme Court of Appeal judgments involving the amendment of *inter vivos* trust deeds must also be considered. In all three cases, *Crookes v Watson*,[20] *Hofer v Kevitt*[21] and *Potgieter v Potgieter*,[22] the authority to amend a trust deed was considered and established. These three cases will be analysed to determine if the amendment was effected in terms of the common law powers of the parties, or in terms of the express provisions of the trust deed.

2 1 *Crookes v Watson*

In *Crookes v Watson* the question was whether the founder (which was also a trustee) was entitled to amend the deed with the concurrence of his co-trustee and of the only beneficiary who had accepted benefits under the deed. The result of such amendment would have been prejudicial to the conditional rights of other beneficiaries who had not accepted the benefits stipulated for them in trust and who had not agreed

17 7.
18 *Hanekom v Voight* 2016 (1) SA 416 (WCC).
19 B18.2.
20 *Crookes v Watson* supra 286.
21 *Hofer v Kevitt* supra 386-387.
22 *Potgieter v Potgieter* supra.

to the envisaged amendment. Centlivres CJ decided that he was compelled to follow the decision in *CIR v Estate Crewe*[23] where it had been decided that a direction by the founder in the trust deed that the trustees had to effect payment to his son from the trust funds indeed constituted a contract between the founder and the trustees, to which the son was not a party.[24] Before acceptance by the son he only had an "inchoate right" and until acceptance by him the direction given by the founder to the trustees to pay the funds could have been revoked by agreement between the founder and the trustees only.[25] Centlivres CJ eventually remarked that nothing prevented the contracting parties (the founder and the trustees) to vary the agreement prior to the acceptance by the third party. However, it is evident from the judgment that there was no express power to amend nor a variation clause in the trust deed, hence the validity of the amendment could only be considered from the perspective of the common law principles. With an envisaged amendment of the deed in mind, the trustees applied to the Natal Provincial Division for an order declaring that the trust deed could be amended by agreement between the founder and the trustees only. The trustees were obviously mindful of the potential prejudice to the interests of trust beneficiaries who had not accepted benefits while the absence of a variation clause in the trust deed further amplified this uncertainty. It is interesting to note that Centlivres CJ commented that before considering the effect of any authorities on the point in issue it would be convenient to consider the terms of the deed itself in so far as those terms may be regarded as being relevant to the enquiry.[26] It is evident that he placed great emphasis on the wording of the trust deed in this regard. Had there been an amendment clause, it would undoubtedly have been discussed and considered, and in my opinion probably be conclusive. The judgment of Steyn JA (part of the majority decision in *Crookes v Watson*) seems indicative of the emphasis placed on the wording of the trust deed and to the mind-set with which the judges considered the variations to this trust deed.[27] After concurring with the finding of Centlivres CJ that the correct general position is that the founder may by agreement with the trustees vary or revoke benefits which have not as yet been accepted by the beneficiaries,[28] Steyn AJ posed the following question:[29]

> "The question then is whether there is anything in the present deed to deprive the settlor of the right to vary it in the manner mentioned."

It is suggested that the judge will not have raised this question unless he accepted or at least suspected that the general common law principles of

23 1943 AD 656.
24 285E-287C.
25 288A.
26 284G.
27 306D.
28 306A-C.
29 306D.

stipulatio alteri should be secondary and subject to what is stipulated in the trust deed.

2 2 *Hofer v Kevitt*

In *Hofer v Kevitt* the trust deed was amended on three occasions by means of notarial deeds.[30] On each occasion the deed was amended on the instructions of the founder with the trustees for the time being consenting thereto. To the second and third amendments some (but not all) of the beneficiaries also provided their consent. These amendments gave rise to an application by the three appellants (grandchildren of the brother of the founder who were also beneficiaries of the trust) to the Court *a quo* for an order declaring the amendments without force and effect as the amendments were undoubtedly prejudicial to the rights of these potential beneficiaries. Importantly, no pertinent provision appeared in the trust deed for the amendment of its terms, nor was there any reservation of a unilateral right of revocation for the founder.[31] It was clearly again a case where the validity of the amendments to the trust deed needed to be decided upon the general common law principles. In this case there was no contention that the amendments were made before the benefits had been accepted by or on behalf of the grandchildren and, consequently, the amendments were found on the authority of *Crookes*' case to be valid.[32] It was argued on behalf of the appellants that an approach which recognises that an *inter vivos* trust in South African law is not purely contractual in nature should be adopted.[33] Van Coller JA, however, regarded this approach as one that would deviate from the authority laid down in *Crookes v Watson* and was not prepared to accept it.[34]

Once again the parties found reprieve in the common law principles to amend the trust deed, and not from any express provisions in the trust deed.

2 3 *Potgieter v Potgieter*

In *Potgieter v Potgieter* the founder of the trust was Mr VPJ Potgieter who passed away on 28 April 2008 at the age of 49. The relevant trust was the Buffelshoek Familie Trust which had been created by means of a trust deed that was notarially executed on 1 June 1999. This was a typical discretionary trust with regards to the income and capital of the trust. On 11 September 2003 the marriage between Mr VPJ Potgieter and his first wife (the two appellants' mother) was dissolved by a decree of divorce. During the divorce proceedings the appellants' mother claimed that the assets of the trust be regarded as part of the deceased's estate for purposes of the divorce proceedings and meetings were held in this

30 384.
31 384.
32 387.
33 385-387.
34 386-387.

regard. After the divorce Mr VPJ Potgieter married the first respondent on 22 November 2003. The fourth and fifth respondents were born of the first respondent's previous marriage. On 25 January 2006 the first respondent became the third trustee of the Trust, together with Mr VPJ Potgieter and Mr Wessels (the attorney).

An agreement to amend the trust deed was then entered into on 21 February 2006 between the founder (Mr VPJ Potgieter) and the trustees (Mr VPJ Potgieter *ex officio*, the first respondent and Mr Wessels). Before the conclusion of this agreement the capital beneficiaries of the trust, were the two appellants (the children of the founder from his first marriage) only, whilst the income beneficiaries could be chosen from the capital beneficiaries and or their family.

The main intention with this amendment was to extend the class of discretionary capital beneficiaries. The two appellants (the two children born from the marriage with the first wife) were no longer the only capital beneficiaries. They were reduced to members of a class of potential capital beneficiaries. Other members of the class subsequently included the founder's new wife and her own two sons (the second and third respondents). In addition, the trustees were afforded an absolute discretion to benefit anyone who falls into that class of capital beneficiaries. Nothing therefore prevented the trustees from excluding the appellants altogether from any discretionary distribution of benefits from the trust. Clause 21 of the deed contained the prescriptions as to how amendments to the deed should take place and made specific mention on how the class of capital beneficiaries could be amended.[35] This right of the trustees to amend the capital beneficiaries meant that the parties which was included as capital beneficiaries could be excluded and other capital beneficiaries could be added to the class, but it had to take place in accordance to the prescripts of the variation clause.[36] This right to amend was limited to the extent that only members of the family or a descendant of the founder could be added to this class.[37] From the prohibitory nature of this clause it is evident that the contracting parties were, in terms of the trust deed, proscribed to effect the envisaged changes to the class of capital beneficiaries because the second and third respondents were not members of the family nor descendants of the founder. Therefore, the variation clause in the trust deed was inapplicable and could not serve as source for the authority to amend the class of beneficiaries. This meant that the amendment had to be adjudicated against the common law principles of *stipulatio alteri*. The question was whether the two appellants could be said to be parties to the contract that would have required their consent to the amendment of the trust deed. The appellants were indeed found to have been parties to the trust agreement because evidence was accepted that they have

35 641.
36 641.
37 641.

previously accepted benefits stipulated for them in trust.[38] As only the trustees and the founder effected and consented to the amendment, the appellants argued that such amendment was invalid and accordingly null and void *ab initio*.[39] The Supreme Court of Appeal and the court *a quo* seemingly accepted that the envisaged amendments did not fall within the ambit of the variation clause.[40] It is critical to note that the appellants did not contest or dispute the notion that an amendment in accordance with the variation clause would have been valid even without their consent. Brand JA ruled in favour of the applicants and referred to the significance of the beneficiaries' acceptance of benefits in terms of the common law as follows:[41]

> "… a trust deed executed by a founder and trustees of a trust for the benefit of others is akin to a contract for the benefit of a third party, also known as a stipulatio alteri. In consequence, the founder and trustee can vary or even cancel the agreement between them before the third party has accepted the benefits conferred on him or her by the trust deed."

2 4 Conclusion

In all three cases referred to above the respective trust deeds which were under scrutiny did either not contain any express power to amend the trust deed (*Crookes* and *Hofer*), or did indeed contain such a power to amend but the envisaged amendment could not be brought within the ambit of such variation clause due to the inherent limitations or restrictions (*Potgieter*). Therefore, the common law principles had to dictate whether the amendment to the trust deed had been validity undertaken or not. The judgments of both Centlivres CJ and Steyn JA in *Crookes v Watson* underline the importance to consider the terms of the trust deed before undertaking its amendment on general common law principles.

After consideration of the facts in the three leading cases discussed above and the views of the different commentators I suggest that the correct approach to the amendment of *inter vivos* trust deeds should be that the express provisions of the trust deed should first be considered to determine how the trust deed could be amended. In most instances this takes the form of a clear variation clause in the trust deed, but it can also be afforded alongside or integrated with the general powers allowed to the trustees of the trust. Only in the absence of any such express directions in the trust deed should the general principles of the common law be considered and then it becomes very important who the parties to the trust agreement are because they need to consent to any amendments to the deed.

38 648.
39 649.
40 643.
41 645.

3 Significance of Acceptance of Benefits by the Beneficiaries

3 1 Court Decisions Which Followed the *Potgieter* Case

If the variation clause prescribes that the deed may be amended without the consent of any beneficiaries, would it make a difference if a beneficiary or beneficiaries have indeed accepted their stipulated benefits in trust? Would they still be required to agree to the envisaged amendment notwithstanding the fact that the terms of the trust deed do not require their consent? It was clear from the discussion above of the three Supreme Court of Appeal judgements that the consent and involvement of the beneficiaries who had accepted their benefits were imperative in order to have rendered the amendment of the trust deed valid. There is a real danger or temptation that the above judgements could be oversimplified and generally applied to amendments of *inter vivos* trust deeds, as was the case in the unreported Western Cape case of *Advocate Leon Luke Zazeraj v JH Jordaan*.[42]

Here the court strictly followed the judgement in *Potgieter* without clearly distinguishing between the two types of scenarios as discussed above. The applicant was appointed as *curator ad litem* to assist the patient, who was blind, handicapped and in need of full-time care, in legal proceedings to protect his interests in the trusts. The patient was the son of the first respondent, Mr Jordaan and Mrs Jordaan. Mrs Jordaan was the deponent to the founding affidavit in this case. Mr and Mrs Jordaan were married in 1976 and divorced in 2000. A number of trusts were created during their marriage for purposes of financial planning. The trusts were intended to be for the benefit of the children, however in February 2010 Mrs Jordaan discovered that:

- Mr Jordaan intended to sell the beach house registered in the Johannes Jordaan Trust ("the JJ Trust"), to increase his cash flow. He envisaged making distributions from the trust to himself;
- The trustees of the JJ Trust had amended the trust deed in 2000 (after the divorce) to include Mr Jordaan as a capital beneficiary. The Master was only notified of the change in October 2008;
- The trustees of the Groothoek Trust ("The GH Trust") arranged to amend the trust deed to include Mr Jordaan as a beneficiary of the trust on 1 June 2001.

The validity of the amendments in 2000 and 2001 was challenged when the fellow-trustee gave notice in October 2011 that Mr Jordaan had applied for the capital in the JJ Trust and the GH Trust to be transferred or lent to him.

The trust deeds of the JJ Trust and the GH Trust were essentially the same. The founder of the trusts was Mr Jordaan and the beneficiaries

42 Case no 22526/11 WCHC.

were described as the children of Mr and Mrs Jordaan, their lawful offspring as well as Mrs Jordaan herself (as income beneficiary only), or any later lawful spouse of Mr Jordaan. It was stipulated in the variation clauses of the original trust deeds that amendments to those deeds could be effected by way of written agreement between the founder and the trustees. All the amendments to the trust deeds took place by written agreement between the founder and the trustees, hence exactly in accordance with the prescripts of the variation clauses. When considering the validity of the amendments, Meer J solely relied on the decision in *Potgieter* as authority for his following contention:[43]

> "With regard to the amendment of trust deeds, it is established law that beneficiaries of discretionary trusts who have received conditional benefits, as have the Patient and his sister, have vested rights and the trust deeds cannot be changed without their assent. See *Potgieter v Potgieter* 2012 (1) SA 637 SCA para 28. Clause 28[44] of the trust deeds of both the JJ and the GH Trusts specifically prevents this. Accordingly, the amendments which occurred without the permission of the beneficiaries stand to be declared invalid."

It seems as if Meer J merely applied the principles enunciated in *Potgieter* without any consideration that the envisaged amendments to the trust deed under scrutiny were effected in terms of the express stipulations of the trust deed[45] and did not need to adhere to the general principles of the common law where all the parties to the trust agreement had to consent to the envisaged amendment. There was in fact no reference to this in the unreported written judgment.

Another unreported case that strictly followed the judgment in *Potgieter* is *Smart v Burne*[46] where the validity of a trust amendment was contested again because of the lack of involvement of the trust beneficiary. Here the trust deed had again been amended by the founder and trustees in terms of the variation clause.[47] The amendment in question concerned a specified foundation, which subsequently was intended to be made the sole beneficiary of the trust, whilst the initial beneficiary, the founder's minor granddaughter, was to be removed as beneficiary in the process. The appellant sought an order to declare the trust amendment in question null and void and to be set aside.[48] Following the judgement in the *Potgieter* case the acceptance of benefits

43 11 par 22.
44 Judge Meer (or the court typist!) erred when he referred to (in the abovementioned passage) "Clause 28 of the trust deeds of both the JJ and the GH Trusts specifically prevents this", as the variation clauses in the deeds were in actual fact clause number 5 and there was nothing preventative in those clauses.
45 As stipulated in clause 5.
46 2013 JDR 2429 (KZD).
47 4 par 7, 12-14.
48 2 par 1.

by the beneficiary was deemed to be of great importance to the outcome of the case.[49] The respondents contested and argued that the beneficiary, upon acceptance of her stipulated benefits in trust, also accepted the terms of the trust deed which included the prescripts of the variation clause in the deed.[50] Therefore it was submitted by the respondents that the founder and trustees were indeed authorised to amend the trust deed without the consent of the beneficiary who was deemed to be bound by the variation clause.[51] The court followed the judgement in *Potgieter* and rejected this argument of the respondents and consequently granted the order as sought.

As was mentioned earlier Pace and Van der Westhuizen[52] adopt the same approach as in the *Jordaan* and *Smart* decisions. However, they also acknowledge that the alternative may be argued, as was contested by the respondents in *Smart*:

> "Such acceptance and the involvement of the beneficiaries to the variation apparently overrule any stipulation in the trust deed (after maintaining this view for many years in previous service issues it is now confirmed in Potgieter v Potgieter 2012 1 SA 637 (SCA)). It is equally possible to argue that once the beneficiaries have accepted the benefit in terms of the stipulatio alteri, they acquire not only the rights *but also the duties in terms of the agreement and therefore have to abide by the exclusion as a party to a variation*. This still remains an uncertain and grey area because, despite very creative arguments, this was not raised in Potgieter v Potgieter 2012 1 SA 637 (SCA) and has not yet elsewhere been authoritatively decided." (my emphasis)

Claassen in his discussion of Pace and Van der Westhuizen's approach, suggests that their argument cannot be supported as correct.[53] He suggests that haphazard application of the finding in the *Potgieter* case in the subsequent judgements disturbed the generally accepted principle that the deed of an *inter vivos* trust should be amended in accordance with what the deed itself prescribes.[54] He further suggests that the *Potgieter* case could not serve as authority for the *Jordaan* case and should actually not even have been considered. Oliver *et al* in their discussion of the *Jordaan* decision suggest that that decision cannot be held to reflect the correct legal position and that an amendment of a trust deed in accordance with the variation clause would be valid notwithstanding the fact that a beneficiary may have accepted benefits under the trust and have not consented to the amendment.[55] Olivier *et al* also express their concern in following the *Jordaan* judgement, that a

49 7 par 11.
50 10 par 15
51 10 par 14.
52 Pace and Van der Westhuizen B18.2.2.
53 Claassen 253.
54 Claassen 252-253. With *McCullogh v Fernwood Estate Ltd* Respondent 1920 AD 204 as authority, Claassen argues that the beneficiary upon acceptance also accepted the terms of the trust deed.
55 Olivier *et al* 2-30(3)-(5).

beneficiary upon acceptance of benefits, will have obtained more rights than what is awarded to him if this decision in *Jordaan* is correct.[56]

In his discussion of the *Smart* case De Waal expresses his doubts whether *Potgieter* went as far as was assumed in the *Smart* case and believes that the respondents' argument necessitated a more in-depth consideration.[57] It seems as if he agrees with the respondents where he states the following:

> "Therefore, the appellants in Potgieter (that is, the beneficiaries on whose behalf trust benefits had been accepted in that case) did not contest that amendments in accordance with the trust deed would have been valid even without their consent."

I agree with the authors that this remains a grey area which compels us to further investigate the parameters of what in fact is accepted when one refers to the acceptance of benefits by a trust beneficiary. This necessitate another careful look at the *stipulatio alteri* which is accepted as the cornerstone of a trust *inter vivos* from a common law perspective.

3 2 Nature of a *Stipulatio Alteri*

It has been authoritatively accepted by the Supreme Court of Appeal that a trust *inter vivos* should be regarded as a contract for the benefit of a third party, the so-called *stipulatio alteri*.[58] There are mixed views on the application of a *stipulatio alteri* to accommodate a trust *inter vivos* and some authorities warn against the reduction or equation of a trust *inter vivos* to a contract.[59] However, there seems to be consensus that the creation, variation and acquisition of rights by beneficiaries are regulated by the law of contract from the principles of *stipulatio alteri*.[60] A *stipulatio alteri* is where the founder of the trust (the *stipulans*) contracts with the trustee of the trust (the *promittens*) to render performance to the beneficiary (the *tertius*).[61]

By allowing the rules applicable to the *stipulation alteri* into the realm of the *inter vivos* trust, it is clear that the terms of the trust deed may be amended between the trustee and the founder, without the consent of the beneficiary prior to the acceptance of the trust benefits by the

56 Olivier *et al* 2-30(4).
57 De Waal 2013 *Annual Survey of South African Law* 1006.
58 *Crookes v Watson* supra followed in *Hofer v Kevitt* supra 386-387; *Potgieter v Potgieter* supra; also see Hahlo "The trust in South African Law" 1961 *SALJ* 203; De Waal 327.
59 Kerr 1958 *SALJ* 92-93; Cameron *et al* 35; Du Toit *South African Trust Law Principles and Practice* (2007) 18 51; See the judgment of Steyn AJ in *Crookes v Watson* supra 304E-G; *Doyle v Board of Executors* 1999 (2) SA 805 (C).
60 De Waal 1998 TSAR 329-330; Cameron *et al* 35; Du Toit 51; also see *Crookes*, *Hofer* and *Potgieter* decisions.
61 Hutchison Pretorius Du Plessis Eiselen Floyd Hawthorne Kuschke Maxwell Naude De Stadler *The Law of Contract in South Africa* (2013) 238.

beneficiary.[62] Although it may be argued that a trustee is not merely a party to a contract, but also the holder of an office with a fiduciary duty towards the beneficiary,[63] it has nevertheless been held that an amendment to a trust deed is indeed a matter to be determined in accordance with the principles of the law of contract.[64] Before acceptance by the beneficiary, there exists no *vinculum juris* between the beneficiary and the trustees and the contract may be varied. However, upon acceptance,[65] such beneficiary acquires an indefeasible right.[66]

Upon acceptance, it is essential to determine whether the beneficiary becomes a party to the trust and secondly whether the beneficiary only acquires benefits under the trust, or if he or she also assumes obligations, which, if that be so, will be binding upon the beneficiary.

3 3 After Accepting Benefits, Does the Beneficiary Become a Party to the Trust Agreement?

With regard to the *stipulatio alteri*-construction, the South African courts and commentators chose to explain its application by reference to a two-contract arrangement.[67] A two-contract arrangement occurs where the original contract is created between the founder and the trustee and a

62 *Crookes v Watson* supra; *Hofer v Kevitt* supra; *Potgieter v Potgieter* supra 645 par 18; Cameron *et al* 35 493; Olivier *et al* 2-27.

63 And not all aspects of an *inter vivos* trust fall within the ambit of law of contract. Also see De Waal 1998 TSAR 330; Cameron *et al* 596; Du Toit 51; *Doyle v Board of Executors* 1999 (2) SA 805 (C).

64 *Crookes v Watson* supra; *Hofer v Kevitt* supra 386-387; De Waal 1998 *TSAR* 330.

65 See Cameron *et al* 498 -501 on what constitutes acacceptance by the beneficiary; see Olivier *et al* 2-27 on the nature of the benefits that a beneficiary may accept; Also see *Ras v Van der Meulen* 2011 4 SA 17 (SCA); *Potgieter v Potgieter* supra; *Adv Leon Luke Zazeraj v JH Jordaan* supra; *Smart v Burne* supra on what constitutes acceptance. Vorster underlines the lack of regulation or record keeping to support or verify if a beneficiary accepted any benefits; Vorster "When good intentions go bad: Considering the amendment of a trust deed with great care" 2013 1st Annual International Interdisciplinary Conference, AIIC 2013 Azores, Portugal.

66 McKerron "The juristic nature of contracts for the benefit of third persons" 1929 *SALJ* 390, 393; *Mutual Life Assurance Co. of New York v Hotz* 1911 AD 556 567; Cameron *et al* 35.

67 *McCullogh v Fernwood Estate Ltd* Respondent 1920 AD 215; *Kynochs Limited v Transvaal Silver and Base Metals, Limited* 1922 WLD 71 77; *Crookes v Watson* supra 278 -288; *Pieterse v Shrosbree; Shrosbree v Love* 2005 (1) SA 309 (SCA) paragraph 9; McKerron 1929 *SALJ* 390, 393; Kerr is in agreement that a two-contract agreement applies to a trust *inter vivos*, however he is of the opinion that the nature and effect of these contracts differ, Kerr 1958 *SALJ* 84 86 92; Sonnekus "Enkele opmerkings om die beding ten behoewe van 'n derde" 1999 *TSAR* 624; Hutchison *et al* 238; Claassen 249; Although Getz do not agree with this approach, he acknowledge that the South African courts follow the two-contract approach, Getz "Contracts for the benefit of third parties" 1962 *Acta Juridica* 44.

second contract is concluded upon acceptance by the beneficiary subsequent to the offer by the trustees.[68]

In the first contract, the founder agrees with the trustees that they will render performance to the beneficiaries and this contract constitutes an offer of donation by the founder to the beneficiary upon acceptance.[69] It is a contract that enables a third party to enter as a party with one of the original two parties (the trustee). The beneficiary has to accept the benefit to become a party to a contract with the trustee.[70]

The two-contract arrangement was also evident in the dissenting, minority judgement of Schreiner JA[71] in *Crookes v Watson*, where Schreiner JA stated that a contract for the benefit of a third party facilitates the third party to become a party to a contract with the trustee.[72] Schreiner JA's statement of the law has been generally accepted as authoritative and was unanimously approved by the Appellate Division in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd.*[73] De Waal stated with reference to the *Joel Melamed* case that the courts support a construction whereby the third party is enabled to become a party to the contract and so acquire rights, rather than a contract that creates such rights.[74]

Considering this two-contact arrangement, it is clear that the beneficiary would become a party to the trust agreement after acceptance of benefits. How this acceptance should be performed is also considered to be a grey area and falls beyond the scope of this article.

3 4 Does Acceptance of Benefits also Encompass Accompanying Obligations?

In terms of the *stipulatio alteri* construction, acceptance by the third party affords the third party a right to promised benefits, but it also

68 McKerron 1929 *SALJ* 387 390; Kerr 1958 *SALJ* 92; Malan "Gedagtes oor die beding ten behoewe van 'n derde" 1976 *De Jure* 86.

69 *Crookes v Watson* supra 286.

70 An *inter vivos* trust involves two legal transactions, one between the founder and the trustee and another as an offer by the trustee to the beneficiaries which the beneficiaries may or may not accept. Kerr 92; Hahlo 203; Sonnekus 595.

71 *Crookes v Watson* supra 291.

72 Schreiner JA conferred to *Jankelow v Binder Gering* 1927 TPD 364 where Greenberg J had accepted the analysis suggested from the Bar by the future judge of appeal: "the test whether the contract is made for the benefit of a third party is whether that third party, by adopting the contract, can become a party to it."
Cloete AJ in *Eldacc (Pty) Ltd v Bidvest Properties (Pty) Ltd* (682/10) 2011 JDR 1178 SCA par 9 accepted the finding of Ponnan AJA in *Pieterse v Shrosbree NO & others; Shrosbree NO v Love & others* 2005 (1) SA 309 (SCA) where he remarked "... on acceptance of the offer by that beneficiary, a contract will be established between the beneficiary and the insurer."

73 1984 3 SA 155 (A) 172A–F.

74 De Waal 326.

entails binding the third party to any obligations associated with the promised benefits. The two-contract arrangement does not serve as an impediment to the notion that obligations can be brought about for the third party.[75] In his discussion of a two-contract arrangement, Gertz specifically refers not only to the rights, but also the duties that the beneficiary may acquire from such contract. [76] Where the benefits carry with them a corresponding obligation or counter-performance, the beneficiary cannot accept the benefit without being bound by the obligation.[77]

Innes CJ in *McCullogh v Fernwood Estate Ltd Respondent*[78] stated that although the objective of a contract in favour of a third party is to secure some benefit, the benefit may include a corresponding obligation.[79] Innes CJ emphasised that the right cannot be separated from the obligation and that the third party cannot decide to accept the benefit and reject the obligation. Upon acceptance, the third party simultaneously undertakes the corresponding obligation. Malan suggests that the concept of a contract in favour of a third party is misleading since the object is not just to gain or benefit.[80] Mostly it is to enable the third party to enter a reciprocal relationship with the trustee where the third party not only acquires personal rights but also obtains accompanying obligations.[81] From these remarks it is clear that a beneficiary who has accepted benefits under a trust agreement can also be liable to comply with a corresponding obligation. These obligations in my opinion include the limitations or restrictions stipulated in the variation clause of the trust deed.

It therefore appears correct to accept that, with reference to the authorities quoted on the *stipulatio alteri*, the beneficiary who has accepted his or her benefits under a trust steps into an agreement with the trustees. In terms of this agreement, the beneficiary acquires rights and accompanying obligations where the underlying terms are the terms of the initial trust agreement. The beneficiary does not merely receive a benefit from the trust agreement but becomes a party on the same terms and with the same advantages and disadvantages that the founder and the trustees agreed to. If the beneficiaries of a trust accept the benefits in terms of the trust, such beneficiaries become parties to the trust agreement, subject to the provisions already negotiated and agreed between the founder and the trustees.[82]

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75 Van der Merwe Van Huyssteen Reinecke Lubbe *Contract: General Principles* (2012) 233; Van Zyl "Die regte van lewensversekeringsbegunstigdes" 2013 *TSAR* 637.
76 Getz 43.
77 McKerron 1929 *SALJ* 394; Hutchison *et al* 239; Joubert *General Principles of the Law of Contract* (1987) 189.
78 1920 AD 204.
79 *Mccullogh v Fernwood Estate Ltd* supra 206.
80 Malan 85.
81 Malan 85-86.
82 Claassen 253; Olivier *et al* 2-30(4).

Consequently, when a trust beneficiary accepts his or her benefits, he or she becomes party to an agreement with the trustees and accepts the terms of the trust deed which may include the directives of a variation clause. Therefore, the beneficiary will be bound by those directives and the beneficiary's consent to future amendments of the deed will not be required if the variation clause stipulates that only the trustees and the founder need to approve of the amendment.

4 *PPS Insurance Company Ltd and Others v Mkhabela*[83]

In my opinion the abovementioned Supreme Court of Appeal case also provides authority for the viewpoint that the acceptance of benefits by a beneficiary must be subject to the express provisions of the agreement. In this case the daughter (Ms Sebata) nominated her mother (Ms Mkhabela) as beneficiary of a life policy of which she, the daughter, was the owner and insured life. Her mother predeceased her and, after the daughter's death (two months after her mother's death), the question arose whether the proceeds should be paid to the estate of the mother or the estate of the daughter. In the provisions of the life policy Ms Sebata reserved the right to change or cancel the beneficiary nomination at any time. The Supreme Court of Appeal accepted that the appointment of a beneficiary under a life policy amounted to a stipulation in favour of the third party (*stipulatio alteri*). This is why we deem the decision in this case also to be of relevance to an *inter vivos* trust, which also has its foundation based on the *stipulatio alteri.* The Supreme Court of Appeal ruled that acceptance of the benefits by the mother prior to the death of the life insured had no legal consequences because of the reserved contractual right to be able to vary or cancel the beneficiary nomination at any time. It was specifically mentioned that because the insured expressly reserved the right to change or cancel the nomination, the nominated beneficiary has no claim to the benefit of the policy until the insured's death and that if the insured subsequently should choose another beneficiary and thereby revoking the first, the nominee's acceptance would become nugatory. It is clear that the court held the opinion that, where the life insured had the right to unilaterally or in conjunction with the insurance company cancel the nomination, the acceptance of the benefits by the beneficiary prior to the death of the life insured could not have any legal significance. This makes perfect sense due to the fact that an opposite view would lead to the absurdity that acceptance of the benefit by the beneficiary would nullify the right of the life insured to change the beneficiary.

In the context of an *inter vivos* trust it also does not make sense that if the trust beneficiary had accepted the benefits stipulated for him in trust,

83 2012 (3) SA 292 ZASCA.

that he could veto a decision by the parties to amend the trust deed, which parties have been afforded the express right to amend the deed.

5 Conclusion

The significance of the acceptance of benefits by the beneficiaries and the involvement of such beneficiaries from the perspective of the amendment of an *inter vivos* trust deed has, from a jurisprudential point of view, been considered and resolved and certainty should now prevail. In various judgments subsequent to the *Potgieter* decision, the same significance was attached to the acceptance of benefits by the beneficiaries where the trust deed was in actual fact purported to be amended in terms of an express provision in the trust deed. I conclude that the courts should have differentiated between the scenarios where the amendment of the trust deed is undertaken by virtue of the provisions of the trust deed, as opposed to the common law principles which is authoritative where a trust deed does not contain a variation clause or, where such a power to amend does exist in the deed but due to the stipulated restrictions is not applicable. I propose that the acceptance of benefits by a beneficiary under trust does not hold the same significance in both scenarios.

To recapitulate: the accepted view is that a trust beneficiary step into an agreement with the trustees upon acceptance of benefits, where the beneficiary not only acquires certain rights, but also the obligations as stipulated in the trust deed. The beneficiary accepts the terms of the trust deed and is therefore bound by the terms of the trust deed. Should the trust deed be prescriptive about the power to amend the trust deed and does not require the beneficiary's consent to it, such beneficiary is deemed to be bound to that provision and his acceptance of the benefits under trust does not change that. Therefore, if the trust deed empowers the trustees to unanimously amend the trust deed, they may legally undertake such amendment notwithstanding the fact that the beneficiaries had accepted the benefits and terms of the trust deed.

The focus of this article was on the consent required by a beneficiary who has previously accepted his/her benefits stipulated for him/her, specifically in a case where a variation clause appears in a trust deed, and such clause does not require the consent of such a beneficiary.

Although it has been authoritatively decided that the validity of the amendment of a trust deed is solely to be considered within the context of the law of contract, the extent of a trustee's fiduciary obligations is still a matter of contention in instances where the amendment was prejudicial to certain beneficiaries' rights. Although the amendment could have been validly undertaken from a contract law point of view, can it also be said that the fiduciary obligations have been adhered to by the trustees who had consented to the amendment of the trust deed, especially if it has prejudiced the rights of beneficiaries? It is accepted in

law that the trustees owe the same fiduciary duties towards discretionary trust beneficiaries. This aspect requires further investigation which falls beyond the scope of this article.

The circumstances under which section 85(a) of the National Credit Act 34 of 2005 can be utilised as an avenue to access or re-access the debt relief measures in terms of the Act

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OPSOMMING

Die omstandighede waaronder artikel 85(a) van die Nasionale Kredietwet 34 van 2005 as roete gebruik kan word om toegang of her-toegang tot die skuldverligtingsmaatreëls ingevolge die Wet te bekom

Hierdie artikel neem artikel 85(a) van die Nasionale Kredietwet 34 van 2005 as 'n toegangsroete tot die skuldverligtingsmaatrels waarvoor in Deel D van Hoofstuk 4 van die Wet voorsiening gemaak word, in oënskou. Dit vind plaas teen die agtergrond van 'n *dictum* deur Binns-Ward R in *Kallides* en die reaksie daarop, onder andere deur die Hoogste Hof van Appèl in *Seyffert*, deur te ondersoek of daar meerdere opsies is (as wat onder andere deur Binns-Ward R aangedui word) waaronder artikel 85(a) toegang tot die genoemde skuldverligtingsmaatrels verleen. Artikel 85(a) en die howe se diskresie ingevolge daarvan word kortliks toegelig, gevolg deur 'n bespreking van die omstandighede waaronder die verbruiker 'n beroep op artikel 85(a) kan doen. Besondere aandag word aan die wisselwerking tussen artikel 85(a) en artikels 86(2), 86(10) (saamgelees met artikel 86(11)), 88(3) en 83 van die Wet geskenk. Die skrywers maak sekere gevolgtrekkings rakende die trefwydte van artikel 85(a) as die kredietverbruiker se "last port of call" ten einde die skuldverligting ingevolge die Wet te bekom.

1 Introduction

Much has been written on the various debt relief measures (and their advantages, disadvantages and effectiveness or lack thereof) available in law to South African debtors.[1] These include the debt relief measures

1 See *inter alia* Boraine and Roestoff "Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent law reform" (part 1) 2014 *THRHR* 351 and (part 2) 2014 *THRHR* 527 and Coetzee "Is the unequal

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introduced by the National Credit Act,[2] the consumer credit legislation currently in force in South Africa. A core aim of the NCA is to protect consumers by providing mechanisms for resolving over-indebtedness[3] and for the first time in the history of South African consumer credit legislation it provides for the debt relief of over-indebted credit consumers.[4] The main debt relief measures in terms of the Act are provided for in sections 83(3) and 86(7)(c)(ii) read with section 87(1)(b)[5] and naturally are applicable only if the particular credit agreement concluded by the consumer falls within the ambit of the Act.[6]

A consumer is afforded various routes to access the NCA's debt relief measures. One route is that a consumer may apply to a debt counsellor to be declared over-indebted and to be placed under debt review.[7] This route is called "voluntary debt review".[8] Also, debt relief may follow in a case where during any court or National Consumer Tribunal[9] proceedings the court or the Tribunal *mero motu* takes cognisance of the fact that a credit agreement is reckless and declares it to be so.[10] If entering into the particular credit agreement caused the consumer's over-indebtedness,[11] the court or the Tribunal will exercise its powers in terms of section 83(3)(b)(i) and (ii) to provide relief to the consumer provided that the consumer is still over-indebted at the time of the court or Tribunal proceedings.[12] Finally, a consumer may avail him- or herself of section 85 to obtain debt relief by alleging in any court proceedings in which a credit agreement is being considered that he or she is over-indebted.

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treatment of debtors in natural person insolvency law justifiable?: A South African exposition" 2016 *Int Insolv Rev* 36.

2 34 of 2005 (hereafter "the NCA" or "the Act").

3 See Roestoff "The objective of providing debt relief to over-indebted consumers and the interpretation of section 85 of the National Credit Act – *Firstrand Bank Ltd v Govender* [2014] JOL 31572 (ECP)" 2015 *THRHR* 694 696, 701-703 and s 3(g) and (i). See s 79 for the definition of "over-indebtedness".

4 In Ch 4 Part D. These measures are not available to so-called "juristic person" consumers – s 78(1). See s 1 for the definition of "juristic person" in terms of the Act.

5 See Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) paras 11.3.3.1, 11.3.3.2 (j)(iii) and (l), 11.5.7 and 11.5.7.2 and Coetzee *A comparative re-appraisal of debt relief measures for natural person debtors in South Africa*, LLD thesis, UP (2015) 189-235 and 258-269 for an exposition of these measures.

6 For a full exposition of the latter, see Kelly-Louw assisted by Stoop *Consumer Credit Regulation in South Africa* (2012) 27–94; Van Zyl and Otto in Scholtz (ed) chs 4 and 8 respectively and Otto and Otto *The National Credit Act Explained* (2016) ch 3.

7 S 86(1).

8 Van Heerden "Section 85 of the National Credit Act 34 of 2005: thoughts on its scope and nature" 2013 *De Jure* 968, *inter alia* 971.

9 Hereafter "the Tribunal", established in terms of s 26 of the NCA.

10 In terms of s 83(1). S 25 of the National Credit Amendment Act 19 of 2014 (hereafter "the Amendment Act") amended s 83 to include the Tribunal.

11 And therefore constitutes reckless lending in terms of s 80(1)(b)(ii).

12 S 83(3)(a) and (b)).

The aim in this article is to discuss the circumstances under which section 85 can be utilised by the credit consumer as an avenue to access or re-access the NCA's debt relief measures. This exercise has been undertaken in light of Binns-Ward J's and Van Heerden's restrictive interpretation of section 85 in the latter respect.[13] As well, it is consequent on the Supreme Court of Appeal's remarks subsequent to *Kallides* in *Seyffert and Another v Firstrand Bank t/a First National Bank*.[14] Our further aim is to indicate that section 85 has a broader application than indicated by Binns-Ward J in *Kallides* and by Van Heerden.

As indicated below[15] section 85 in most instances serves as a final opportunity for a credit consumer subject to the NCA to access or re-access the debt relief measures in terms of the Act. Therefore, from a debt-relief perspective and having regard to the core aim of the NCA referred to earlier the extent of the ambit of the section 85 avenue to debt relief is of cardinal importance.[16]

With the aforementioned aims in mind the provisions of section 85 are discussed briefly[17] followed by a discussion of the circumstances under which the section can be invoked.[18] The note ends with our conclusions and final remarks.[19]

2 Section 85 of the NCA

Section 85 of the NCA, which resorts under Chapter 4 "Consumer Credit Policy" and more in particular Part D "Over-indebtedness and reckless credit", provides as follows:[20]

> "Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may –
>
> (a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7); or

13 In *Standard Bank Ltd v Kallides* (1061/2012) [2012] ZAWCHC 38 (2 May 2012) SAFLII, available at http://www.saflii.org/za/cases/ZAWCHC/2012/38.html (accessed 2018-03-01) and 2013 *De Jure* respectively. See further par 3 below.

14 2012 6 SA 581 (SCA). See further par 3 below.

15 See par 3.

16 See also Kreuser "The Application of section 85 of the National Credit Act in an application for summary judgment" 2012 *De Jure* 1 21 and Roestoff 2015 *THRHR* 694 711.

17 Par 2 below.

18 Par 3 below.

19 Par 4 below.

20 For discussions of s 85 see Kreuser 2012 *De Jure* 1 *et seq*; Van Heerden 2013 *De Jure* 968 *et seq*; and Roestoff 2015 *THRHR* 694 *et seq*. See also Van Heerden in Scholtz (ed) par 11.3.3.5 and Kelly-Louw assisted by Stoop 382-392.

(b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness."

When considering section 85(a) and (b) it is clear, upon an allegation in court proceedings in which a credit agreement is being considered that the consumer is over-indebted, that the court may elect to follow one of two routes. The court may refer the matter directly to a debt counsellor in terms of section 85(a) to evaluate the consumer's circumstances and make one of the recommendations referred to in section 86(7)(a)-(c)[21] or it may in terms of section 85(b) declare that the consumer is over-indebted and make any order contemplated in section 87 to relieve the consumer's over-indebtedness. It is submitted that the use of the word "may" gives the court discretion, upon an allegation that the consumer is over-indebted and subject to what is discussed below, to follow a section 85(a) or (b) route. However, depending on the debt counsellor's recommendation in terms of section 85(a), both routes eventually lead to the debt-relief measures in terms of section 87(1)(b) read with section 86(7)(c)(ii).

Thus far no judgment has been reported of a case where a court has relied on the provisions of section 85(b) directly to declare the consumer over-indebted and to make an order as contemplated in section 87. This lack could be attributed to the fact that most matters involve various credit agreements and that an investigation into a consumer's financial affairs, negotiations with credit providers and the arithmetic involved in such endeavours rather should be left to debt counsellors whose core business involves such functions as opposed to the courts who have a judicial role to fulfil.[22] Our further discussion consequently focuses on the provisions of section 85(a).

The court's discretion in terms of section 85 further entails that it may refrain from applying either section 85(a) or (b).[23] The court could, for instance, decide to grant summary judgment against the consumer. It is evident from the introductory wording to section 85 that two basic prerequisites or "jurisdictional facts"[24] should be met before a court may exercise its discretion in terms of the section. The first is that a credit agreement to which the NCA applies should be under consideration in any court proceedings[25] and the second is that the consumer's over-

21 Respectively that the consumer is not over-indebted, that the consumer is not over-indebted, but nevertheless is experiencing, or is likely to experience, difficulty in satisfying all the consumer's obligations under credit agreements in a timely manner or that the consumer is over-indebted.
22 See below.
23 See below.
24 See Roestoff 2015 *THRHR* 694 698.
25 Action or application proceedings in the High or Magistrate's Court - see *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W) 367 – 368.

indebtedness should be alleged.[26]

Although consumers mostly make use of the section 85 route once enforcement proceedings have been instituted and may do so in a pleading, affidavit or even *viva voce*,[27] there seems to be no objection to the consumer invoking the section by means of a substantive application.[28] However, as the more economical access to debt review in terms of section 86 is still available to a consumer before a credit provider has taken steps to enforce a credit agreement, it is highly unlikely that such a consumer will bring a court application in order to draw his or her situation within the ambit of section 85. A call on the section 85 provisions does not amount to a defence of a claim and usually takes the form of a request to the court to exercise its powers in terms thereof.[29]

As an allegation of over-indebtedness is the second prerequisite, the court in *Firstrand Bank Ltd v Maleke*[30] acknowledged that it cannot *suo motu* exercise its powers if no allegation has been made. However, a court may act *suo motu* if the two statutory prerequisites are present.[31]

As far as the court's discretion in terms of section 85 to refrain from applying section 85(a) is concerned, according to the Supreme Court of Appeal in *Seyffert*[32] the fact that a discretion exists is indicated by the word "may" and by the introductory words of section 85, namely, "Despite any provision of law or agreement to the contrary". However, the court, with reference to the *Hales* judgment,[33] further stated that before a court may exercise its discretion in terms of section 85 the material facts relied upon must be placed before it.[34] It further held that a court should be slow to exercise its discretion where the matter has already been dealt with by a debt counsellor or where a debt review has been duly terminated and where no material change in the debtor's circumstances can be shown.[35]

The courts' section 85 discretion should be exercised judiciously[36] and with due regard to the objectives of the NCA as set out in section 3 and other sections which are intended to provide a backdrop against which

26 *Panayiotts* 367.
27 *Kallides* par 6.
28 Van Heerden 2013 *De Jure* 968 978.
29 *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D) 320; and *Collett v Firstrand Bank Ltd* 2011 4 SA 508 (SCA) 518. For a discussion of *Hales* see Van Heerden and Lötz "Over-indebtedness and discretion of court to refer to debt counsellor: *Standard Bank Ltd v Hales* 2009 3 SA 315 (D)" 2010 *THRHR* 502 *et seq*.
30 2010 1 SA 143 (GSJ). See also *Panayiotts* 368.
31 *Kallides* par 6.
32 Par 15.
33 Paras 12-13.
34 Par 15.
35 Par 15.
36 See *Hales* 321. See also *Panayiotts* 372 and *Andrews v Nedbank Ltd* 2012 3 SA 82 (ECG) 87.

the discretion must be exercised.[37] The fact that a court must exercise its discretion judiciously means that it should be exercised for substantial reasons and on the material before it and not capriciously on the basis of conjecture or speculation or upon wrong principle.[38] Therefore, though section 85(a) does not necessitate proof of over-indebtedness, attention should be paid to *Hales,*[39] where it was held that the fact of over-indebtedness as opposed to an allegation thereof should be taken into account when the court exercises its discretion.

In *Panayiotts*[40] it was held that over-indebtedness should be established on a balance of probabilities. Accordingly, a consumer requesting the court to exercise its discretion in terms of section 85 should place as much as possible relevant material before the court to assist it to exercise its discretion judiciously and to make sure that the consumer is not raising his or her over-indebtedness to institute delay with no real intention or probable prospect of obtaining debt relief and eventually satisfying his or her obligations.[41]

According to Van Heerden[42] in the absence of abuse, the possibility of an economically feasible restructuring is of utmost importance in the court's exercise of its discretion in terms of section 85(a). In conclusion, the courts require a consumer to satisfy the court of a basket full of factors before it will exercise its section 85(a) discretion in favour of the consumer and refer the matter to a debt counsellor.[43]

3 The Circumstances Under Which Section 85 May be Invoked

3 1 Introduction

Although the wording of section 85 is cast in very wide terms, requiring only the jurisdictional facts[44] to be present as condition for its invocation, the question arises whether the section may be invoked under all circumstances in which the jurisdictional facts are present. In this regard the following *dictum* by Binns-Ward J in the *Kallides* judgment[45] is relevant:

37 See *Hales* 321; *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SE) 359; and *Andrews* 87.
38 See *Hales* 321 where the court refers to *Myburgh Transport v Botha* 1991 3 SA 310 (Nms) 314 and *First National Bank of SA Ltd v Myburg* 2002 4 SA 176 (C) 184.
39 322.
40 368 and 373.
41 See *Hales* 321.
42 2013 *De Jure* 968 990.
43 See the discussion of such requirements by Van Heerden 2013 *De Jure* 968 989-990.
44 See par 2 above.
45 Par 8.

> "Notwithstanding the breadth of the opening words to s 85 of the NCA, reference to the broader context of the statute impels the conclusion that the section was not intended to provide a basis for a repetition of the process already provided for in terms of s 86, or to draw back within the ambit of debt review debts already excluded therefrom by the operation of other provisions of the Act, such as s 86(2), s 86(10) or s 88(3). To construe s 85 otherwise would be conducive to the most unwholesome circularity, at odds with basic principle – *interest rei publicae ut sit finis litium*" (loosely translated as "it is in the interest of the state that legislation be finalised" - Hiemstra and Gonin *Drietalige Regswoordeboek* 3rd ed (2005) 211).

Therefore, in considering the circumstances for which section 85 was intended and in light of the above *dictum* of Binns-Ward J, the provisions of sections 86(2), 86(10) (read with s 86(11)) and 88(3) and the interrelation between these sections and section 85 are important. The same holds for the fact that the Supreme Court of Appeal in *Seyffert*[46] referred to the conclusion by Binns-Ward J and made a (qualified) remark that it is too absolute and loses sight of the court's discretion as provided for by the words "may" and "Despite any provision of law or agreement to the contrary" in the introductory words of section 85. The interrelation between section 85 and the aforementioned sections now will be discussed and followed by a brief discussion of the interplay between sections 83 and 85.[47]

3 2 Section 86(2) NCA

Reference has been made to the fact that a consumer can access the NCA's debt relief measures in terms of section 86(1) by applying to a debt counsellor to be declared over-indebted and to be placed under debt review.[48] Section 86(2) embodies the principle that debt review and debt enforcement in court[49] can never take place at the same time. Section 86(2) provides that a particular credit agreement, in terms of which the credit provider "has proceeded to take the steps contemplated in section 130 to enforce that agreement", is excluded from a section 86(1) application for debt review.

Van Heerden[50] refers to the situation in which the consumer did not previously apply for the debt review procedure in terms of section 86(1) as a scenario where a consumer might be interested in invoking section 85 post-enforcement.[51] She is of the opinion that it could not have been

46 587. See Steyn "*Firstrand Bank Ltd t/a First National Bank v Seyffert and three similar cases* 2010 6 SA 429 (GSJ), *Seyffert & Seyffert v Firstrand Bank Ltd* 2012 ZASCA 81: Bringing home the inadequacies of the National Credit Act 34 of 2005" 2012 *De Jure* 639 *et seq* for a discussion of the judgments of both the court *a quo* and the Supreme Court of Appeal in the context of the NCA's inability adequately to address issues pertaining to the execution against debtors' mortgaged homes.

47 Although s 83 is not mentioned by Binns-Ward J in his *dictum*.

48 See par 1 above.

49 In terms of Part C of Ch 6 of the Act.

50 2013 *De Jure* 968 973.

51 The other two scenarios are discussed in par 3 3 below.

the intention of the legislature that section 86(2) bars a consumer from utilising section 85 in an attempt to access the debt-review process for the first time and therefore does not agree with Binns-Ward J that a debtor who was precluded by section 86(2) from applying for the debt review process upon delivery of the section 129(1)(a) NCA notice cannot use section 85 to access debt review for the first time.[52] Van Heerden submits that in considering the legislature's lenient approach to debt review,[53] "it could not have been the legislature's intention to provide such a small window of opportunity [to apply for debt review]", to wit the period before the delivery of the section 129(1)(a) notice, which often is brief.[54]

We submit that Van Heerden is correct in contending that it could not have been the intention of the legislature to exclude, in all instances, credit agreements from a possible debt re-arrangement where debt enforcement has commenced. We further submit that this situation could have been the exact circumstances that the legislature had in mind when drafting section 85. The legislature could have intended that credit agreements where enforcement has commenced should be excluded from debt review as a matter of course,[55] but that such agreements may be subjected to the debt review process at the discretion of a court in terms of section 85 where the circumstances and rationality necessitate such inclusion. Binns-Ward J indeed referred to the fact that the processes in terms of sections 85 and 86, although they are to be contrasted, have similar objectives, namely, to obtain the consideration of the circumstances and recommendation by a debt counsellor and/or the drawing of a debt-relief order.[56]

Further, should one accept that Binns-Ward J was correct in permanently excluding credit agreements where enforcement proceedings have commenced there would be very few situations in which a *bona fide* consumer is able to make use of the section 85 route to access debt relief. Even though section 86(2) has been amended, the time period within which to access debt review in terms of section 86(1)

52 Van Heerden 2013 *De Jure* 968 977. At the stage when Van Heerden's article was published, in terms of s 86(2) the delivery of the pre-enforcement notice in terms of s 129(1)(a) barred an application for debt review. However, s 86(2) subsequently has been amended in terms of s 26(a) of the Amendment Act, resulting in the credit provider under the credit agreement taking the steps contemplated in s 130 to enforce that agreement (issue or service of summons) now barring the consumer from applying for debt review.

53 *Inter alia* evidenced by the s 86(1) and 86(11) provisions, respectively allowing for voluntary debt review applications and the resumption of debt review after its termination in terms of s 86(10).

54 2013 *De Jure* 968 977. Now, after the amendment of s 86(2), it will be the period before the credit provider has proceeded with the s 130 steps to enforce the credit agreement and not the delivery of the s 129(1)(a) notice which is pertinent.

55 Through the s 86(2) provision.

56 Par 8.

still is very short.[57] Where a consumer avails him- or herself of the debt review process for the first time in terms of section 85 there is no circularity present in the sense referred to by Binns-Ward J. We submit that in the instance where a consumer makes use of section 85 to access debt review for the first time the balancing factor is the court's discretion to refrain from applying the provisions of section 85(a).[58]

3 3 Section 86(10) Read With Section 86(11) NCA

It has been mentioned above[59] that debt review and debt enforcement cannot subsist at the same time. Section 86(10) creates an avenue for a credit provider to enforce a credit agreement that is subject to debt review. It provides that if a consumer is in default in terms of a credit agreement that is subject to debt review in terms of section 86 the credit provider may give notice to terminate the debt review in the prescribed manner,[60] provided that at least 60 business days have expired after the date on which the consumer applied for the debt review.[61] The implication is that such a credit provider may then proceed to enforce the credit agreement due to the fact that it is no longer subject to debt review. Section 86(10) must be read in conjunction with section 86(11). In terms of the latter, if the credit provider who has given notice in terms of section 86(10) to terminate the debt review proceeds to enforce the credit agreement, the court hearing the matter may order that the debt review resume.[62]

In *Kallides*, which concerned an application for summary judgment, an application was "purportedly" made by the defendant in terms of section 85.[63] In brief, the debt in respect of which the plaintiff sought to extract payment had been the subject of debt review in terms of section 86. The defendant did not challenge the allegation that the plaintiff terminated the debt review in terms of section 86(10).[64] Binns-Ward J

57 In particular under circumstances where the credit provider or its legal representative has caused the two time periods of 20 and 10 business days (as defined in s 2(5)) provided for in terms of s 130(1)(a) to run concurrently by delivering the s 129(1)(a) notice soon after default by the consumer has occurred. The default by the consumer and the delivery of the s 129(1)(a) notice respectively trigger the 20 and the 10 business days to run. See Van Heerden in Scholtz (ed) par 12.4.3.

58 Or s 85(b). See par 2 above. See also *Kallides* par 7, where it was remarked that the failure by a consumer to avail him- or herself of the provisions of s 86 is one of the factors that a court will take into account when deciding whether or not to act in terms of s 85.

59 Par 3 2.

60 There are no further prescriptions other than those contained in s 86(10).

61 S 86(10)(a). Notice of termination has to be provided to the consumer, the debt counsellor and to the National Credit Regulator. Once the application for debt review has been filed in court (or the Tribunal), the credit provider is barred from terminating the debt review: S 86(10)(b).

62 Subject to the conditions that the court deems just in the circumstances.

63 Par 4.

64 Par 10.

held that the circumstances in *Kallides* were such as to exclude the application of section 85.[65]

However, the defendant was not remediless as section 86(11) provides redress. As regards the latter, Binns-Ward J contended that a consumer has to make an application in terms of section 86(11) in order to invoke its provisions and proceeded to treat the application purportedly made in terms of section 85 as one in substance made in terms of section 86(11).[66] Accordingly, it was ordered in terms of section 86(11) that the defendant's debt review be resumed, subject to the right of any of the defendant's credit providers to terminate the debt review in terms of section 86(10).[67]

Seyffert concerned an appeal against an order of the High Court granting summary judgment against the appellants in a case that involved a credit agreement falling under the NCA.[68] The proceedings in terms of which summary judgment was granted were preceded by an application for debt review by the appellants, which review subsequently was terminated in terms of section 86(10) by the credit provider, the respondent *in casu*.[69]

The appellants argued that the High Court should have exercised its discretion in their favour by acting in terms of either section 85 or section 87 and referring the matter to a debt counsellor or declaring them over-indebted and rearranging their repayments. It was submitted that the respondent had not acted in good faith by terminating the debt review.[70] The Supreme Court of Appeal[71] thereupon referred to paragraphs from *Collett*[72] in which *inter alia* it was stated that (a) court-ordered debt review in terms of section 85 cannot be terminated by the credit provider; (b) a credit provider's right to terminate debt review proceedings in terms of section 86(10) is balanced by section 86(11); and (c) sufficient information on which the request for debt resumption in terms of the latter sub-section is based must be placed before the court. In *Seyffert* the appellants neither applied for the resumption of debt review nor demonstrated any basis upon which the respondent was not entitled to terminate the debt review. The restructuring proposals of the appellants were "devoid of economic reality" and a substantial part of their debt would have been left unpaid.[73]

65 Par 10.
66 Paras 11 and 12.
67 After 60 business days have elapsed from the date of the court's order – par 14.
68 Par 1.
69 Par 2.
70 Par 6.
71 Paras 7, 8 and 15.
72 Paras 11, 15 and 18.
73 Par 13.

Next, as mentioned above[74] reference was made to Binns-Ward's J *dictum* in *Kallides,* where after the Supreme Court of Appeal made its own qualified remarks.[75] The court in *Seyffert* held that the respondent was entitled in law to terminate the debt review and, on the facts, justifiably did so. It also found that this was not a case where debt review could usefully be employed and therefore dismissed the appeal with costs.[76]

The other two scenarios in which according to Van Heerden[77] a consumer might be interested in invoking section 85 post-enforcement[78] relate to section 86(10). One is where the consumer did apply for the debt review procedure but the credit provider proceeded with enforcement without terminating the debt review as provided for in section 86(10).[79] The other is where a debt review procedure has been terminated in accordance with section 86(10) but the credit provider did not act in good faith.[80] Van Heerden[81] submits that in these two scenarios the NCA provides specific procedures other than section 85 that an aggrieved consumer may utilise.

Where the credit provider has failed to terminate a pending debt review prior to enforcement, as is provided for by section 86(10), and then proceeds to enforce the agreement Van Heerden[82] submits that section 130(4)(c) provides the proper remedy and that section 85 is not suited to such instances. Section 130(4)(c) *inter alia* provides that the court may adjourn the matter pending a final determination of the debt review proceedings or that the court may order the debt counsellor to report directly to the court and thereafter make an order contemplated in section 85(b), in other words an order in terms of section 87, to relieve the consumer's over-indebtedness.

In respect of a third scenario where the credit provider makes use of the section 86(10) procedure to terminate the debt review but did not do so in good faith, Van Heerden[83] argues that section 86(11) provides the suitable remedy, that this remedy is distinct from section 85 in its purposes and that section 85 therefore is not applicable.

Finally, Van Heerden[84] submits that the *dictum* by Binns-Ward J is correct

> "insofar as it indicates that the legislature did not intend to provide a repetition of the process already provided for in section 86 or to draw back

74 Par 3 1.
75 Par 15.
76 Paras 16 and 17.
77 2013 *De Jure* 968 973.
78 The first scenario has been discussed in par 3 2 above.
79 Scenario 2.
80 Scenario 3.
81 2013 *De Jure* 968 973-976.
82 2013 *De Jure* 968 974-975.
83 2013 *De Jure* 968 973-974.
84 2013 *De Jure* 968 976-977.

into the ambit of debt review debts already excluded therefrom by section 86(10) (for which section 86(11) is the appropriate remedy) …"

We agree with Van Heerden's interpretation of the Act that the court should employ the provisions of section 130(4)(c) where a consumer has applied for debt review in terms of section 86(1) but where the credit provider did not duly terminate the debt review prior to commencing debt enforcement. However, we disagree with Van Heerden's contention that the *dictum* by Binns-Ward J is correct as far as section 86(10) is concerned and that section 86(11) is the appropriate remedy in the case of a termination of debt review in terms of the former sub-section to the exclusion of section 85. The same objection holds for the interpretation by the courts in *Kallides* and *Seyffert* of section 86(11) as being the only counter-measure for a section 86(10) termination once again to the exclusion of section 85.

It is obvious that section 86(10) is balanced by section 86(11). Section 86(11) empowers the court hearing the matter[85] to order that debt review resume under circumstances where a credit provider who has given notice in terms of section 86(10) to terminate a review proceeds to enforce that particular credit agreement. The use of "may" in the wording of section 86(11) indicates that the enforcing court has discretion whether or not to order the resumption of debt review. However, in considering the wording of section 86(11) no mention is made of the fact that the consumer must apply to the enforcing court that debt review be resumed. Therefore, the implication is that in terms of section 86(11) a court *mero motu* may order the resumption of debt review.[86] However, where that is not done the consumer must be given the opportunity to apply to the enforcing court that his or her debt review be resumed.[87]

We submit that the only machinery in the Act providing for an application by the consumer that debt review be resumed is provided for in section 85. By making use of the latter provision the consumer may allege before the enforcing court in which a credit agreement is being considered that he or she is over-indebted. The consumer thereupon will have to place sufficient information before the court in order to enable it to exercise its discretion in terms of section 85(a) whether or not to refer the matter to a debt counsellor for the latter's recommendation.[88]

85 The "enforcing court" – *Seyffert* par 8.

86 See also Van Heerden in Scholtz (ed) par 11.3.3.4 holding the same opinion because, according to her, s 86(11) does not require the consumer to bring a substantive application.

87 See also Van Heerden in Scholtz (ed) par 11.3.3.4, who submits that upon the termination of a debt review in terms of s 86(10), the debt counsellor becomes *functus officio* and that "[w]here a consumer thus requires a resumption of a debt review it appears that it is the consumer who should make the request to the court …".

88 In *Seyffert* (par 8) with reference to *Collett* (par 18) the Supreme Court of Appeal stated that sufficient information on which the request for debt resumption in terms of s 86(11) is based, must be placed before the court.

Accordingly, we submit that where an enforcing court does not *mero motu* order that debt review be resumed section 86(11) must be read with section 85. We further submit that Binns-Ward J in *Kallides* could have achieved the same result by employing section 85 instead of section 86(11). This response would have been "conducive to circularity", but such circularity would have been no less "unwholesome" than the circularity achieved by means of Binns-Ward J's orders.

In addition to the above arguments, if a credit provider terminates debt review in respect of a particular credit agreement in terms of section 86(10) and, therefore, excludes that agreement from the debt review process but thereafter fails to enforce that credit agreement, the resumption of debt review in respect of that agreement in terms of section 86(11) is not an option. We submit that in such an instance the only viable option for the consumer in order to attempt to re-subject the credit agreement to debt review will be to invoke the provisions of section 85 by means of a substantive application.

3 4 Section 88(3)

Section 88(3) is concerned with a credit provider's prohibited conduct once he or she has received notice of court proceedings as contemplated in sections 83[89] or 85[90] or a notice in terms of section 86(4)(b)(i).[91] Section 88(3) is subject to section 86(9)[92] and (10) and provides that such a credit provider may not exercise or enforce by litigation or other judicial process any right or security under such an agreement. The prohibition against debt enforcement remains in force until the consumer is in default under that credit agreement[93] and one of the following has occurred: (a) the debt counsellor has rejected the consumer's application for debt review and the consumer has failed to file directly for debt review to the court in terms of section 86(9) within the prescribed time limit;[94] (b) the court has determined that the consumer is not over-indebted or has rejected either the debt counsellor's proposal that the consumer is over-indebted or the consumer's direct application for debt review in terms of section 86(9);[95]

89 This notice relates to a declaration by the court or the Tribunal that a credit agreement is reckless.
90 In this instance court-ordered debt review is pertinent.
91 The s 86(4)(b)(i) notice is utilised by a debt counsellor to inform the particular consumer's credit providers of the application for debt review in terms of s 86(1).
92 Providing that where the debt counsellor rejects the consumer's application for debt review in terms of s 86(1) due to the reasonable conclusion that the consumer is not over-indebted, the latter, with leave of the Magistrate's Court, may apply directly to that court to obtain the necessary relief.
93 The credit agreement that has been declared reckless or that is subject to debt review - s 88(3)(a).
94 S 88(3)(b)(i) read with s 88(1)(a). See reg 26 of the National Credit Regulations (GN R489 in *GG* 28864 of 31 May 2006) for the prescribed time limit.
95 S 88(3)(b)(i) read with s 88(1)(b).

(c) a court has re-arranged[96] the consumer's obligations[97] and all the consumer's obligations under the credit agreements are fulfilled;[98] or (d) the consumer defaults on any obligation in terms of a re-arrangement as ordered by a court or the Tribunal.[99]

Section 88 promotes the debt relief objectives of section 85 in that it creates a moratorium on debt enforcement to allow time for a possible solution to the consumer's over-indebtedness to be found. Also, section 88 is directed at the prevention of further indebtedness as section 88(1) provides that a consumer who has alleged in court that he or she is over-indebted[100] must not incur any further charges under a credit facility[101] or enter into any further credit agreement, other than a consolidation agreement.

However, with reference to the provisions of section 88(3), the conclusion by Binns-Ward J that section 85 was not intended "to draw back within the ambit of debt review debts already excluded therefrom by the operation of … s 88(3)" and that "[t]o construe s 85 otherwise would be conducive to the most unwholesome circularity" seems to be correct.

Nevertheless, there could be exceptional circumstances in which this is not the case, for instance where the consumer has applied for debt review in terms of section 86 and the debt counsellor has notified the consumer's credit providers of the debt review application in terms of section 86(4)(b)(i). The receipt of the notice bars a credit provider in terms of section 88(3) from enforcing in court a credit agreement which is subject to debt review. The bar against debt enforcement comes to an end, for instance, if the consumer is in default in terms of the credit agreement, the debt counsellor has rejected the consumer's application for debt review and the consumer has failed to file directly for debt

96 In terms of s 86(7)(c)(ii).
97 Or the consumer and his or her credit providers have made an agreement re-arranging the consumer's obligations.
98 S 88(3)(b)(i) read with s 88(1)(c). The exception is where the consumer fulfilled the obligations by means of a consolidation agreement. The concept "consolidation agreement" is not defined in the NCA. However, it is submitted that a consolidation agreement is an agreement in terms of which a consumer's existing debt is consolidated under one agreement. See also reg 23A(14) which refers to "a credit agreement [that] is entered into on a substitutionary basis in order to settle off one or more credit agreement". If the consumer fulfils obligations by means of a consolidation agreement, the bar against debt enforcement should subsist until all the consumer's obligations in terms of the original (or subsequent) consolidation agreement/s have been fulfilled. S 88(2) provides for consecutive consolidation agreements.
99 Or as agreed upon between the consumer and his or her credit providers – s 88(3)(b)(ii).
100 In terms of s 85.
101 As defined in s 8(3) of the Act.

review to the court in terms of section 86(9) within the prescribed time limit.[102] If the credit provider continues to enforce, the consumer should be permitted to avail him- or herself of the provisions of section 85 to allege over-indebtedness and to explain to the court why the section 86(9) application for debt review was not filed in time.

Therefore we submit that Van Heerden's summary of section 88(3), namely, that it "implies that the consumer had already gone through a debt review which resulted in a debt restructuring order but the consumer failed to comply with the terms of such order",[103] does not apply in this instance.

3 5 The Interplay Between Sections 83 and 85

In light of the purpose of this note[104] the interplay between sections 83 and 85 should be considered. A court or the Tribunal in terms of section 83(1) *mero motu* may take cognisance of the fact that reckless lending has occurred. Where the court or the Tribunal finds that the reckless credit agreement has caused the consumer's over-indebtedness and that the consumer is still over-indebted at the time of the proceedings,[105] debt-alleviation orders in terms of section 83(3)(b)(i) and (ii)[106] will follow. The question arises what the situation would be where reckless credit was involved but where the court fails to take notice of that fact *mero motu*. As the credit agreement already is before a court no longer is it possible for the consumer to apply for a declaration of reckless credit by a debt counsellor via section 86.[107]

It is submitted that a consumer may utilise the provisions of section 85 and make an allegation that credit was granted recklessly to him or her, in spite of the fact that section 85 makes no provision for such an allegation. There are a number of arguments to substantiate our point of view. However, suffice it to say that in terms of section 85(a), read with section 86(7), a debt counsellor may make recommendations to the court in connection with reckless credit.[108] Therefore, it may be argued that the legislature intended reckless credit to be included in the context of section 85.

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102 S 88(3)(b)(i) read with s 88(1)(a).
103 2013 *De Jure* 968 at 977.
104 See par 1.
105 S 83(3)(a).
106 See Van Heerden in Scholtz (ed) par 11.5.7.2 for an exposition of these orders.
107 S 86(6)(b) provides that a consumer who has applied for debt review in terms of s 86(1), may also seek a declaration of reckless credit, where any of the consumer's credit agreements appear to be reckless.
108 S 86(7)(c)(i) provides that a debt counsellor may issue a proposal recommending that the Magistrate's Court *inter alia* makes an order that one or more of the consumer's credit agreements be declared to be reckless credit.

4 Conclusions and Final Remarks

Binns-Ward J's *dictum* in *Kallides* seems to contradict a remark he made with reference to section 85 two paragraphs earlier in the judgment,[109] namely that "[t]he wording of the provision … has a wide import". We submit that the judge's latter remark is supported by the fact that the provision in various instances can serve as an access portal to the Chapter 4 Part D NCA debt relief measures.[110] The remark is further substantiated by the observation in *Seyffert* that the *dictum* in *Kallides* is too absolute and loses sight of the courts' discretion in terms of section 85[111] and by the fact that the legislature intends to amend section 85 to empower a court to invoke the section's provisions where "it appears to the court that the consumer … is over-indebted".[112]

Therefore, it is our opinion that Van Heerden's submission,[113] that "the scope for application of section 85 is of necessity confined to those instances where there was no prior debt review application before enforcement of a credit agreement" and that "[i]t is thus [only] a consumer who did not or was unable to access the voluntary debt review process under section 86 before delivery of a section 129(1)(a)-notice who is afforded *locus standi* to invoke the provisions of section 85" is too narrow. We are of the opinion that no debt situation in which the jurisdictional facts as set out in section 85 are met[114] categorically can be excluded from the section's possible application.

Accordingly, we submit that, at a minimum, circumstances resorting under sections 86(2), 86(10) (read with s 86(11)), 88(3) and 83 all qualify as instances where section 85 could be applied. From a debt-relief perspective and having regard to one of the main aims of the NCA, namely, to protect the consumer, which *inter alia* is achieved by "providing mechanisms for resolving of over-indebtedness",[115] the wide ambit of section 85 is to be welcomed. The provision allows a consumer to request the court for the inclusion in debt review of a debt that otherwise could have been excluded from the ambit of the debt-review process and therefore, in most instances, serves as the consumer's last opportunity to access the Chapter 4 Part D debt relief.

We concede that in some instances section 85 will give rise to a measure of circularity, but that it is unavoidable. We also agree with Binns-Ward J[116] that "[i]t was not the intention of the legislature that the machinery of the Act be used to provide a basis for consumers to wilfully

109 Par 6.
110 See paras 3 2-3 5.
111 Par 3 1.
112 See clause 12 of the *Draft National Credit Amendment Bill*, 2018, GN 922 in *GG* 41274 of 24 Nov 2017.
113 2013 *De Jure* 968 975-976.
114 See par 2.
115 Par 1.
116 Par 7.

or negligently delay, or unreasonably thwart the enforcement by credit providers of their contractual rights". Van Heerden[117] submits that the purpose of section 85 is to act as an "abuse-filter"

> "to ensure that a consumer (who may or may not be actually over-indebted and who merely wants to delay enforcement) does not abuse his failure to voluntary apply for debt review to perpetuate and compound delay of enforcement by attempting, at a later stage, to access the debt review process again in circumstances where it is clear that he is not entitled to debt relief - especially if such disentitlement is based on the fact that he is so over-indebted that debt review will not cure his debt problem."

We submit that the court's discretion in terms of section 85[118] acts as the "abuse filter", the safety net to prevent that against which Binns-Ward J cautioned.

117 2013 *De Jure* 968 977.
118 Par 2.

Section 174 of the Criminal Procedure Act: Is it time for its abolition?

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OPSOMMING

Artikel 174 prosedure van die Strafproseswet

Alhoewel nuttig, staan artikel 174 prosedure van die Strafproseswet die gevaar om misbruik te word as 'n aanspreeklikheids-vermydings-meganisme, ten koste van die wyer belang van geregtigheid. Dit kan geargumenteer word dat daar reeds gewysdes is waarin hierdie gevaar verwerklik is: Die hoë-profiel saak *S v Dewani*, waarin die artikel 174 prosedure suksesvol ingespan om die drie beskuldigdes se ontslag te bewerkstellig, kan dien as voorbeeld. Hierdie artikel spoor die oorsprong van artikel 174 van die Strafproseswet in Suid-Afrikaanse reg na, en toon aan dat die omstandighede wat in die verlede aanleiding gegee het tot die skep van artikel 174, nie meer teenwoordig is nie. In die lig van hierdie afwesigheid van geskiedkundige regverdigingsfaktore, en bedag op die gebrek aan sekerheid in die regterlike uitoefening van die ontslag-toets, assesseer hierdie artikel die nut, nodigheid, en gepastheid van die artikel 174 prosedure in huidige Suid-Afrikaanse reg. Ten einde emuleer-waardige beste praktyk te vind, word Kanadese and Engelse benaderings tot die ontslag-prosedure onder die loep geneem.

1 Introduction

Amongst the litany of fair trial rights that exist in South African criminal and procedural law is the presumption of innocence. This right provides that an accused person is presumed to be innocent until proven guilty. The presumption of innocence obliges the state to show guilt beyond a reasonable doubt in order for an accused to be convicted. Therefore, for a conviction to ensue the state is required, at the close of its case, to have rebutted the presumption of innocence by leading sufficient evidence against the accused, upon which a reasonable person could convict.

A failure by the state to mount sufficient evidence for a conviction at the close of its case, gifts the accused the opportunity to escape having to be put on their defence. This gift takes the form of a procedural device in the Criminal Procedure Act,[1] namely section 174, which provides:

1 Act 51 of 1977 (hereafter the CPA).

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> "If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."

If the application of the provisions of section 174 favour the accused they are discharged from prosecution without having to testify – but with the same advantages as would have accrued if the trial had run its course and if they had been acquitted.

The article traces the origin and application of section 174 of the Criminal Procedure Act in South African law and shows that the circumstances which warranted the adoption of the section 174 procedure are no longer present. Therefore, in light of the absence of the historical factors justifying the procedure, and mindful of the lack of certainty in the judicial application of the test for a discharge, an assessment is conducted of the utility, need and appropriateness of the procedure in current South African law. The Canadian and English approaches to the procedure are scrutinised briefly, with a view to understanding its application in these jurisdictions, and for guidance on best practices worthy of emulation.

The section 174 procedure, although useful, risks morphing into a process to avoid accountability – so compromising the broader interests of justice. Arguably, there are cases where this risk has materialised: In *S v Dewani*,[2] it was successfully employed by a high-profile defence team to see the three accused in a murder trial acquitted. The judgment and order of the court drew harsh media and public criticism, which, it is submitted, may not have been wholly unjustified from a legal perspective. The argument may be warranted that the court in *Dewani* deviated so drastically from the parameters of the test for a discharge in terms of section 174 of the CPA, that a miscarriage of justice occurred in that an accused person against whom a *prima facie* case had been made was acquitted without having been put his defence.

The decision in *Dewani* has further lent credence to the perception that justice through the courts exists only for the wealthy. It is commonplace that the public has an interest in the proper trial of accused persons. Acknowledgement of this is evident in South African legislation, jurisprudence and policy which recognise the interests of victims at the trial stage. Legal decision-making and conclusions which compromise these interests pose problems in the context of a system aimed at serving such interests. This is particularly so when these decisions and conclusions are founded on an over-zealous approach to the application of existing principles.

At the very least, therefore, there is a need to clarify the parameters of the test and the judicial inquiry that needs to occur when a section 174 application is made. Furthermore, although section 174 remains a

2 [2014] JOL 32655 (WCC).

valuable tool in the fair trial rights' arsenal, South African courts seem to have misconstrued what is required of the state when it closes its case, and of the judges when they assess whether evidence exists at this stage. Applications of the test inherent in section 174 have been inconsistent and have resulted in the exploitation of legal loopholes which then triumph over the goals of the criminal justice system.

2 Development of the Section 174 Procedure

The discharge procedure was absent in South African criminal law at the turn of the twentieth century, but in 1917 it was imported into South African law from nineteenth century English law.[3] In its original form in civil courts, the plaintiff was required only to show that there was "a scintilla of evidence" against the defendant to avoid his or her claim being dismissed.[4] The standard of proof was subsequently raised to evidence which would be considered sufficient by a reasonable person for a conviction.[5] A failure to meet the standard resulted in the defendant being granted absolution from the instance.

In English criminal law, following a successful submission by the defence that there was "no case to answer", the court would return a verdict of not guilty, without requiring the defence to advance its case.[6] In 1981, the English Criminal Court of Appeal made it clear that the question to be asked by a trial court when faced with a submission of no case to answer, is whether evidence exists on which a jury, directed properly, could properly convict. Naturally, as it is rare for the state to present no evidence at all, such an interpretation might render the procedure empty of usefulness in most cases. The Criminal Court of Appeal, therefore, clarified by stating that: where the judge concludes that the Crown's evidence is such that a jury could not make a conviction based on evidence at its highest, it is the judge's duty on a submission being made to stop the case, but where Crown evidence depends on an assessment of the witness's reliability or on matters within the province of a jury and where one possible view of the facts suggests evidence on which a jury could make a conviction then the judge should allow the matter to go to trial by jury, and with borderline cases left to the discretion of the judge.[7]

The discharge procedure evidently arose out of the need to protect the integrity of the judicial process when it was being administered by

3 *R v Smith* 1912 AD 386; s 221(3) of Act 31 of 1917. When the Criminal Procedure Act 56 of 1955 was enacted, the same procedure was incorporated under s 157(3). It now finds expression in s 174 of the Criminal Procedure Act 51 of 1977.

4 *Ferrand v Bingley Township District Local Board* (8 T.L.R) 71.

5 *Ibid*.

6 *R v Fardully* 1914 AD 186. Even at this stage, the judicial comment as to the standard was that the evidence must be so weak that it would be wholly unreasonable for the jury to convict.

7 *R v Galbraith* [1981] 2 All ER 1060, 1061.

laypersons. As a result, the test for discharge arose out of the need to protect the role of juries as triers of fact. This was set out in a speech from the House of Lords in a civil action:

> "The Judge has a certain duty to discharge and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; those jurors have to say whether from those facts submitted to them, negligence ought to be inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct."[8]

For this reason, at the close of the Crown's case, judges in England were authorised to decide whether evidence existed upon which a conviction could be made, based on a clinical legal inquiry: Was there evidence led which, if accepted, would satisfy the elements for guilt? The inquiry was not, and has never been whether the evidence was cogent, plausible or constituted proof of guilt beyond a reasonable doubt. The role of a judge in an English criminal court (of first instance) and the limitations on their functions were expressed thus: even if the *judge* considered that, because of inconsistencies, the evidence could not support a conviction, he should leave the matter to the jury; and the judge's obligation lies with cases where the necessary minimum evidence to establish the facts of the crime has not been called, and it is not his responsibility to weigh the evidence and stop the case if he thinks the witness is lying – which is the function of the jury.[9]

2.1 Early Stages of Development

In the South African context, the earliest interpretations of the procedure by the Appellate Division left very little space for judicial discretion when faced with an application for discharge at the close of the state's case. The position was that if there was no evidence of the accused's guilt on the charge or a competent charge, then the judge was required to discharge the accused from prosecution – removing his case from further consideration and thus rendering a verdict of not guilty.[10]

The Appellate Division's resolute approach appeared, however, to have waivered in 1919 and thereafter, when it adopted the position that judges had a discretion on whether to grant the application for discharge.[11] The reason for the shift is unclear.[12]

Later, in 1925, the Appellate Division explained that the words "no evidence" do not mean "no evidence at all" – but rather "no evidence on

8 *Metropolitan Railway Co v Jackson* (1877) 3 A.C 193 (HL) 197.
9 *R v Barker* (1977) 65 Cr App R 287, 288. See, also: *R v Galbraith* (above) 1062.
10 *R v Louw* 1918 AD 344; *R v Thielke* 1918 AD 373.
11 *R v Lakatula* 1919 AD 362, 364; *R v Abrahamson* 1920 AS 283, 285.
12 That is, it is not obviously political nor did it coincide with a drastic change to the bench at the time, nor did it follow legislative changes.

which a reasonable court, acting carefully, might convict".[13] This interpretation is perhaps the only aspect of the section 174 procedure that has remained stable and consistent in its application.[14]

2.2 Judicial Discretion to Grant or Refuse an Application for Discharge

Until the decision of the Supreme Court of Appeal (SCA) in *S v Lubaxa,*[15] the judicial approach to the existence of a judicial discretion in deciding applications for discharge was unclear – with each court taking a different approach.

At the conservative end of the spectrum was the view that even where the state had failed to make out a case against a single accused person, a court had a discretion to refuse an application for discharge on the basis that the accused, if he testified, may lead evidence adverse to his cause. This was expressed in *S v Shuping*,[16] in which Hiemstra CJ rendered a judgment intended to provide guidance to the magistrates' courts when faced with section 174 applications. This he did by formulating a two-part test. First, he adopted the test formulated years earlier in *S v Shein*,[17] namely: Is there sufficient evidence upon which a reasonable person might convict? He then added a second leg to the test: Even if not, is there a reasonable possibility that the defence evidence might supplement the state's case? He referred to the second leg of the test as the 'discretionary component'. The court reasoned that this reasonable possibility could be inferred by the nature of cross-examination, a plea explanation, or from the existence of multiple accused persons.[18]

In applying his newly formulated test to the accused in *Shuping*, Hiemstra CJ found that the version of the state's key witness was uncorroborated by physical evidence which ought to have been available, and was further contradicted by other witnesses. He concluded that the evidence was insufficient for a reasonable person to convict all of the accused. Despite this finding, he also made use of part two of his test, and concluded that the application for discharge ought not to have been granted. To support this stance he said that where a case continued against one or more of several accused, it was unwise to discharge the others at that stage as they might be incriminated by those against whom the case continues – and it could appear that the discharge was premature and that there was a miscarriage of justice.[19]

13 *R v Shein* 1925 AD 6 (W).
14 *R v Herholdt* (3) 1956 (2) SA 722 (W); *S v Mpeta* 1983 (4) SA 262; *S v Shuping* 1983 (2) SA 119 (B); *S v Phuravhatha* 1992 (2) SACR 544 (V); *S v Lubaxa* 2001 (2) SACR 703 (SCA).
15 2001 (2) SACR 703 (SCA).
16 1983 (2) SA 119 (B).
17 *Shein supra*.
18 *Shuping* 148.
19 *Shuping* 148.

Clearly, the new constitutional dispensation would affect South African criminal law and procedure, and it did so in respect of section 174 applications. There have been several rights-based critiques of the *Shuping* test – more so in respect of the discretionary component.

At the vanguard was *S v Mathebula*,[20] decided under the interim Constitution, in which the High Court declared it would be grossly unfair after the prosecution had failed to prove any evidence against an accused, for the court not to acquit him on the possibility of future evidence being tendered by him or a co-accused.[21] The case, however, involved the rare instance where there was *no* evidence against the accused, and must therefore be distinguished from cases where there is some evidence, or where the evidence is of a questionable quality. Essentially, *Mathebula* stressed that to afford a judge the discretion (contained in the second leg of the test in *Shuping*) in instances where the state does not adduce sufficient evidence upon which a reasonable person could reasonably convict, would be a violation of the right to be presumed innocent and the right against self-incrimination (including the right not to testify and to remain silent).

In *S v Lubaxa* the SCA jettisoned the second part of the *Shuping* test from South African law. Although the court acknowledged the pre-existing constitutional arguments against the *Shuping* test as set out in *Mathebula* above, it advanced different reasons for its conclusion. It maintained that to force a full trial in the hope that an accused would incriminate themselves where the state's evidence had failed to do so, was a violation of the right to dignity and personal freedom, which, according to the court, were already embodied in common law principles. The main principle in question is that there should be 'reasonable and probable' cause to believe that an accused is guilty of an offence – before initiating a prosecution. The court considered that the constitutional protection accorded to dignity and freedom appeared to underpin this position. Therefore, if a prosecution is not to commence without that minimum of evidence, it should cease when the evidence falls below the threshold.[22]

The rule which emerged from *Lubaxa* was that *a single accused* is entitled to be discharged at the close of the case for the prosecution, if there is no possibility of a conviction other than if he enters the witness box and incriminates himself.[23] It would seem there was no longer a judicial discretion in such cases. The SCA was, however, explicit in stating that the removal of a judicial discretion (i.e. part two of the

20 1997 (1) SACR 10 (W).
21 *Mathebula* 147.
22 *Lubaxa* para 19. In discussing the court's duty to discharge an unrepresented accused *mero motu*, it hinted at its inclination, referring to "the profound sense of injustice that is evoked by the spectacle of an accused bringing about his own conviction solely through his unfamiliarity with legal procedure" (para 17).
23 *Lubaxa* para 18.

Shuping test) did not necessarily apply in cases involving multiple accused persons where an accused could be implicated by his co-accused. The court specifically indicated that it is important to distinguish between the state's case being supplemented by defence evidence in the form of an accused person incriminating himself, and where there are multiple accused and one is incriminated by his co-accused.[24]

The SCA therefore purposely left room for a modicum of judicial discretion in cases involving multiple accused – by stating that the issue of whether and in what circumstances a trial court should discharge an accused who might be incriminated by a co-accused, cannot be answered in the abstract. For a fair trial to ensue and the interests of justice to be served, this question should be determined on a case-by-case basis, with reference to the particular circumstances of each case.[25]

While the SCA was open to the need to assess the appropriate judicial response in each case involving multiple accused persons, it was resolute in laying down a blanket rule in cases relating to a single accused – and removed judicial discretion in every case involving a single accused. However, this may have been somewhat over-enthusiastic, for (to use the court's words) "one can envisage circumstances in which to [discharge an accused] would compromise the proper administration of justice".[26] One such circumstance was demonstrated in *R v Mall*[27] where, although the accused stood trial alone, he was alleged to have acted together with accomplices[28] who did not stand trial with the accused but instead gave evidence against him. Because of the rule which requires corroboration of accomplice testimony by a non-accomplice, the only way the prosecution could elicit such corroboration was through the accused's own testimony. The court adopted the view that in instances where the only way for the state to make its case would be if an accused were to enter the witness stand and risk incriminating himself – then the accused should be discharged. The court therefore discharged the accused as he was the only person, other than the accomplices, who could corroborate their versions.

The *Mall* case – decided decades before *Lubaxa* – adopted an approach similar to that in *Lubaxa*. However, this approach is at odds with the balanced approach required in the pursuit of justice. Moreover, it could lead to the absurd result where each time a court is faced with an individual accused who committed an offence with one or more other people who have turned state witness/es, in instances where nobody else knew of their plan or of the offence that had been committed, then that individual accused can never be convicted unless he is tried with at least one of his accomplices. Based on these reasons, it is unfortunate that the

24 *Lubaxa* para 15.
25 *Lubaxa* paras 20–21.
26 *Ibid*.
27 1960 (2) All SA 403 (N).
28 *Ibid* at 407. See, also, *R v Herholdt* (above) 273.

SCA did not recognise that the need for judicial discretion could also arise in respect of a single accused person.

It is unclear what the SCA would decide now if faced with a challenge to judicial discretion in cases involving multiple accused. The English position is favourable to an accused in this situation. It holds that an accused person is entitled, as of right, to a discharge if there is no evidence against him and, if this is refused him and he is later convicted as a consequence of evidence given by his co-accused, his appeal will succeed.[29] *Mathebula*, discussed above, also supports this position – but only in instances where there is absolutely no evidence against the accused.

Despite the rule which emerged in *Lubaxa* it is often ignored that the SCA ultimately did *not* grant the application for discharge in that case. The court found that evidence of the commission of the crimes (robbery and murder under the doctrine of common purpose), and the arrival of Lubaxa with the other accused and their continued association until after the commission of the crime, constituted sufficient evidence upon which a reasonable court may convict (i.e. sufficient evidence for the state to avoid a discharge). As the court explained, "[I]f anything was lacking in the evidence at that stage it was an innocent explanation".[30]

This statement appears to lie at the heart of the section 174 enquiry. This, together with an appreciation of the appropriate approach to the question of whether there is sufficient evidence upon which a reasonable person would convict, is what South African courts appear to be missing. Courts are failing to distinguish between spurious state cases in which there is actually no case to answer, and cases where the evidence presented proves the elements of the offence sufficiently for a reasonable person to convict on. It is submitted that it was the inability of the court to make this distinction in *S v Dewani*, which led to a miscarriage of justice in that matter.

2.3 The Question of Evidence at the Close of the State's Case

It is trite law that the standard which the state evidence must meet at the close of its case, in order to avoid an accused being discharged, is lower than the standard that it must meet to secure the accused's conviction.[31] For example, in *R v Louw*[32] the Appellate Division rejected an argument by the defence that the accused should have been discharged at the close of the state's case, because "the evidence produced at the trial was so inconsistent with the innocence of the accused".[33] In dismissing this approach, the Court said that it does not follow that because in a certain

29 *R v Abbot* 1955 (2) AER 899 (CCA).
30 *Lubaxa* para 24.
31 *Lubaxa* 2001 (2) SACR 703 (SCA).
32 R v Louw 1918 AD 344.
33 *Louw* 352.

view of the facts the evidence might suggest innocence, the accused must be acquitted, and that the jury may (and did) not take that view.[34]

This was also the case in *R v Shein*,[35] where the court found that existence of the following evidence on a count of arson was sufficient to refuse a discharge at the close of the state's case: (i) clear evidence that the fire was deliberate; and (ii) circumstantial evidence that the accused had committed the crime (including motive and presence at the property around the time the fire would have been set). The accused did present alternative versions, but suggested mistakes or inconsistencies in the eye-witness accounts of his presence, at the key times, on the property. The court was firm, however, and maintained that these were matters of assessment which involved the evaluation and weighing up of evidence. The imperfections in the state's evidence did not necessarily mean that there was no evidence upon which a reasonable person might convict. The court accordingly stated that the test was for an absence of evidence probative of the crime.[36] In other words, the judge had to determine whether the facts necessary to sustain a particular charge or claim have been shown, and the jury was to determine whether those facts having been shown, were sufficient to warrant a conviction.[37]

Acknowledging the standard in theory, the courts however appear to have fallen short in practice. Even the court in *Shuping*[38] would not have needed to devise a second leg to the discharge inquiry if it had taken the correct approach – that is, if it had confined itself to determining the existence of evidence upon which an accused might be convicted. In *Shuping*, there was evidence in the form of an eye-witness account which was not disqualified. That the witness was a single eye-witness, or given that there was no corroborating evidence, or that aspects of her testimony were contradicted by other eye-witnesses (as Hiemstra CJ noted)[39] – did not mean that there did not exist admissible evidence probative of the elements of theft.

The approach to evidence at the stage of an application for discharge was well articulated in *S v Cooper*.[40] The court stated it was the duty of the judge to determine the presence or absence of facts suitable to be considered by the jury, and, if such facts existed, then the jury had to evaluate the evidence in reaching a final decision in the matter. The court was explicit in stating it was neither the task nor the responsibility of the judge to evaluate the evidence. It should be noted that this is also the post-constitutional approach – as was illustrated in *Lubaxa* above.

34 *Louw* (above) 353. See also *Thielke* (above) 375, 379; *Lakatula* 365–366.
35 *Shein* 10-11.
36 *Ibid*.
37 See *Thielke* (above) 375, 379.
38 *Shuping* 121.
39 *Ibid*.
40 [1974] 3 All SA 253 (T) 266.

The only exception to this rule in South African law is that a court may discharge an accused when the state's evidence is of such poor quality that no reasonable man acting carefully could convict thereon.[41] This exception which permits a limited probe into credibility, appears to be a difficult line to tread – as courts have employed the concession to venture into detailed 'weighing up' exercises. It is submitted that this is neither within their remit nor competence at the stage of the close of the state's case.

2.4 Recent Cases Which Confused the Issue

The decision of the court in *S v Agliotti*[42] warrants the conclusion that the court was confused about the limitations of the inquiry into credibility at the stage of the section 174 application – when it concluded that the state's key witness lacked credibility to such an extent that a discharge of the accused was merited. This conclusion and some of the court's other findings reached after it had engaged in a lengthy and inappropriate credibility analysis (and had seemingly capitulated to the defence's conjecture), are matters of concern when due regard is taken of the relatively low standard the state's evidence must meet in order to avoid discharge.[43] In this case, the sole concern of the court in deciding if a discharge was justified, ought to have been whether there was sufficient evidence (the evidence taken at its highest) on which a reasonable court would convict. Had it made this restricted inquiry, it would likely have found that there was evidence, albeit inconsistent, that the accused had been part of a conspiracy to commit murder, and that the only aspect missing was an innocent explanation from him.

In *S v Dewani*, the Cape High Court considered a section 174 application by one of the accused. The accused had been charged with five counts of conspiracy, kidnapping, robbery with aggravating circumstances, murder, and obstructing the administration of justice. His alleged accomplices – far poorer than he and therefore accessing an

41 *Schwartz* 2001 (1) SACR 334 (W).
42 *S v Agliotti* 2012 (1) SACR 559 (GSJ).
43 For instance, the court discussed the credibility of the witnesses in the following manner: "The startling similarities of the statements of Sanders, Nassif and others as well as the attribution of certain phrases to wrong people as well as the utilisation of incorrect dates and times indicates that there could have been collusion between them in the compilation of those statements. This impacts negatively on their credibility as witnesses and on the fairness of this trial. The timing of the supplementary affidavit by Nassif and its content which belatedly tend to implicate the accused herein point to a predetermined or premeditated course of action to implicate this accused in the crimes set out in the indictment. I cannot see any reason why, if the contents of this affidavit were true, they would not have been part of the section 204 statement that Nassif deposed to on 8 November 2006 or the statement he made on 10 November 2005. They sound to me to be recent fabrications and the defence's charge that they were specially invited or put to Nassif by the investigators or the prosecutors at the time for him only to glorify same with his signature may have a ring of truth to it." *Agliotti* paras 285–286.

entirely different level of legal representation – had entered into plea and sentence agreements. In order to sustain the charges against the accused who was alleged to have masterminded the criminal plan, the state had been required to prove that the accused had entered into a conspiracy agreement with one of the alleged accomplices, Tongo.[44] The court duly noted that "[i]t is common cause that the only witness who could implicate the accused was Tongo (who was an accomplice witness)".[45] It consequently approached Tongo's evidence with caution, and required that it be corroborated. Certain CCTV footage existed which the state tendered in corroboration of Tongo's evidence of a meeting with the accused. Quite bizarrely, the court found that the CCTV footage did not meet the required standard for corroboration. This is a clear misdirection on the facts by the court, even on authority cited in the judgment:

> "It must be emphasised immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which render the evidence of the accused less probable, *on the issues in dispute*" (original emphasis).[46]

Tongo had testified that he had met with the accused on specific occasions and that the accused asked him to arrange or commit the murder of his wife in exchange for money. The CCTV footage revealed that meetings took place between the two at the times and in the places alleged by Tongo.[47] The CCTV footage could not of course confirm what was said during those meetings.

It is therefore unclear on what basis the CCTV footage failed to corroborate the accomplice's testimony. In addition, where an accused is known only by one person to have committed a crime, and where there is CCTV footage at least confirming the probability of the witness's version, the Court surely cannot be so circumspect in its approach to allow for the accused to avoid trial – merely because he managed to keep secret and guarded his involvement in a crime. The court was accordingly wrong to find that the CCTV footage did not corroborate Tongo's version, because the tape could not reveal "what was said during those events".[48] It is submitted that that evidence equated to sufficient circumstantial evidence to warrant placing the accused on his defence. If, after his defence, the court was persuaded by the accused's explanation regarding his meeting with Tongo, the payment made to him, and the telephone calls placed by him – then it could discharge the accused. However, the testimony led by the state together with the objective supporting evidence tendered and the series of seemingly strange coincidences – cried out for an "innocent explanation" by the

44 *S v Dewani* [2014] JOL 32655 (WCC) para 5.
45 *Idem* para 16. See, also para 23.1.
46 *S v Gentle* cited in *Dewani* para 19.
47 *Dewani* para 21.
48 The court found the same in respect of a telephone call which was proved to have taken place, though the content could not be revealed – as with the CCTV footage.

accused. To have discharged the accused under these circumstances amounted to a misdirection on the law which hamstrung the state.

The court was equally wrong to dismiss Tongo's evidence because of certain contradictions, mistakes and (in its view) inadequate explanations for the mistakes. In a clear misapplication of the law and a misjudgment of its role at the stage of discharge, the court had found that in Tongo's case, there were manifest material contradictions and inconsistencies in his evidence and several improbabilities, of sufficient degree as to render his evidence suspect.[49] However, this ought not to have formed the basis on which to find that the evidence carried no weight to place the accused on his defence. This is compounded by the court stating at the end that "In making this finding to reject the witness evidence, I take into account that all three witnesses (…) are intelligent people, and therefore more than capable of attempting to twist their version to implicate the accused".[50] To add insult to injury, the court even found that there were aspects of Tongo's evidence which implicate the accused.[51] Surely this finding, followed by corroboration, was where the inquiry should have ended, as the application of the cautionary rule – which is a weighing up mechanism – had no place at this stage of the proceedings.

Although the court acknowledged the rule that evidence adduced by the state should only be ignored if it is of such poor quality that no reasonable person could accept it, it evidently failed to appreciate the nature of this requirement in its analysis at the close of the state's case.[52] Had the court applied the test correctly, it would have found: (i) evidence existed in this case in the form of an accomplice whose evidence, taken at its highest, was not so far-fetched or inadequate that a reasonable person would not believe it; (ii) there was corroboration of this evidence in terms of the legal requirements; and (iii) the evidence tended to show a conspiracy agreement between the accused and Tongo. This is what

49 *S v Dewani* para 23.1.105.
50 *Dewani* para 24.4.
51 *Dewani* para 23.1.107.
52 This is evident in the following statement of the court: "As pointed out above, Mr. Tongo is a single witness who is also an accomplice witness. As I have noted earlier, in these circumstances the court must look for corroboration of his evidence. On the cases referred to above it is clear that such corroboration must be corroboration implicating the accused. Mr. Mopp attempted to persuade me that I could find corroboration in the circumstantial evidence. This evidence, such as it is, he was constrained to concede does not implicate the accused. Regrettably, there are many unanswered questions about what exactly happened on the fateful night. (…) In the light of the analysis of the State case there is no evidence upon which a reasonable court, acting carefully, can convict the accused, and I am obliged to follow the established legal principles regarding a discharge. The law is clear: the evidence of the accused – if he does not incriminate himself can never strengthen the State's case. Even if the accused is therefore a wholly unsatisfactory witness – I will still be left with a weak State case which cannot on any basis pass legal muster." See: *Dewani* para 24.7.

the state needed to show, perhaps not for conviction – but to avoid discharge. Instead, the court tried the facts, and discharged the accused at the close of the state's case after having conducted an evaluation of the evidence. Courts, it is submitted, are not entitled to discharge an accused simply because the state's case is weak.

By contrast, the correct approach was displayed in *Masondo v S*, where Kgomo J decided an application for discharge in accordance with the prevailing international and local standards which the state must meet. In refusing to resort to probabilities, the judge said that:

> "The gist of the matter herein is that as opposed to situations where there is no evidence on record, in this case there is indeed evidence led against him which, if found to be cogent and credible, may amount to a prima facie case against him. I must make it clear that I am not saying the accused's guilt on these two counts have been proved beyond reasonable doubt. I am saying the evidence led, when juxtaposed to the forensic evidence and the evidence of pointing out which has already been accepted against accused 2 is such that it calls for reply."[53]

There are clearly differing views of judicial power at this stage of a trial, or at least the full extent of the credibility inquiry which judges are required to undertake. A similar situation of differing judicial practices occurred in England, and was settled in *R v Galbraith*.[54] In this case the Criminal Court of Appeal (CCA) attempted to settle a dispute about whether the test for discharge was "no evidence" or whether a judge should stop the case if – in their view – it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict. The court wisely noted that there were risks inherent in such wording which could lead to a deviation from the true purpose of the procedure and compromise the integrity of the jury system. It felt that a judge could hardly be blamed for evaluating the prosecution's evidence if he were to be obliged to consider whether a conviction would be 'unsafe' or 'unsatisfactory'.[55] The CCA therefore clarified the approach by refusing to grant a discharge – even where evidence and aspects of the record were favourable to the accused and possibly exculpatory, including internal inconsistencies in witness testimony and the inability of witnesses to identify the accused in identity parades.[56] The court considered that the jury should be left to evaluate the weight on which the Crown had based its case. It found that *Galbraith* was not a case which could justify the judge stating that the Crown's evidence, at its best, was such that the jury, properly directed, could not convict on it.[57]

This attitude of the English criminal courts encompasses the very essence of what is being submitted – that the judge's role in assessing a

53 *Masondo* (above) paras 43–44.
54 *R v Galbraith* [1981] 1 WLR 1039.
55 *Galbraith* (above) 1062.
56 1062–1063.
57 1063.

section 174 application is not to assess credibility. This was most explicitly stated by Lord Devlin when he said:

> "[T]here is in truth a fundamental difference between the question whether there is any evidence and the question whether there is enough evidence. I can best illustrate the difference by an analogy. Whether a rope will bear a certain weight and take a certain strain is a question that practical men often have to determine by using their judgment based on their experience. But they based their judgment on the assumption that the rope is what it seems to the eye to be and that it has no concealed defects. It is the business of the manufacturer of the rope to test it, strand by strand if necessary, before he sends it out to see that it has no flaw; that is a job for an expert. It is the business of the judge as the expert who has a mind trained to make examinations of the sort to test the chain of evidence for the weak links before he sends it out to the jury; in other words, it is for him to ascertain whether it has any reliable strength at all and then for the jury to determine how strong it is …".[58]

The Canadian decision of *Perry v The King*,[59] which still holds sway today, set the same standard. In *Perry* the court stated that the criterion to determine whether an accused should be put on his defence, is whether the evidence is such that, in the "absence of contradiction or explanation", "a jury might reasonably and properly convict upon".[60] The question of credibility is excluded to the extent that an accused may not be discharged if there is admissible evidence which could, if believed, result in a conviction.[61]

Foreign jurisdictions therefore do not consider the credibility of witnesses at such an early stage, and applications for discharge are dealt with on the basis of whether the prosecution's evidence, if believed, would secure a conviction. It is submitted that, given the proven inability of judges to limit their credibility inquiry, this practice should be strictly emulated in South Africa, and the credibility assessment in section 174 applications should be abandoned. Currently, the credibility inquiry appears to be a uniquely South African problem.

3 Current Relevance of Section 174

The historical context for the discharge procedure no longer exists: The discharge procedure emerged at a time and as a result of jury trials, and where there lay no appeal against factual findings.[62] In South Africa, the circumstances have since changed dramatically. Although an appeal on factual findings by the state is not permitted, a trial court's misdirection on facts is appealable. More significantly, the jury system was abolished

58 Lord Devlin, 8th Hamlyn Lecture "Trial by Jury" 1956.
59 82 Can C.C. 240.
60 *Ibid* at 242.
61 *United States of America v Shepard* [1977] 2 S.C.R 1067, 1080. See, also: *Mezzo v The Queen* [1986] 1 S.C.R 802, 842; *R v Charemski* [1998] 1 S.C.R 679, para 26.
62 *Cooper* 268.

some decades ago.[63] However, this does not necessarily mean that the section 174 application procedure is now superfluous and without value. The question therefore is whether the procedure remains relevant under the current circumstances, and, if so, determining the optimal way in which it should be applied.

There are several aspects which require consideration when deciding if the discharge procedure still serves a purpose – despite the historical problems it sought to address no longer being in existence:

From an efficacy perspective, section 174 has practical usefulness in nipping problematic or frivolous prosecutions in the bud: it "cuts off the tail of a superfluous process".[64] The drawbacks involved in having to resort to an appeal process in every instance of a frivolous prosecution are obvious. Therefore, it is preposterous for a person against whom there is no evidence, to be forced through an appeal process (including the time, expense and burden on the courts) in order to rectify so basic an error. Hence, section 174 provides for an exception to the normal trial procedure – primarily to relieve the trial court of the burden of mechanistically having to continue with a pointless trial when, evidently, a conviction will not be possible. As a result, a core function of section 174 is to "save time and effort, (and) not to complicate the court's task".[65]

From a constitutional outlook, section 174 could be said to protect an accused against the risk of incriminating himself in instances where the state had not met the minimum standard it is required to meet for a *prima facie* case. Whether this right against self-incrimination should be regarded as inviolable is a separate question. Arguably, there are instances which would warrant the exercise of a judge's discretion in favour of the state. For example, where the state has adduced evidence against the accused in the form of satisfactory accomplice testimony, which need only be corroborated by a non-accomplice.

Furthermore, if the reasoning from *Lubaxa* were to be applied, the section 174 procedure is justifiable on the common law principle that there must be reasonable and probable cause to believe an accused is guilty, before initiating a prosecution.[66] It can be argued that in the absence of a discharge procedure, an accused need only stand up and close his or her case without leading evidence. However, in dismissing this proposition as unrealistic, a sympathetic court in *Lubaxa* noted that it is "simplistic" to expect an accused person whose application for discharge was denied, to simply take the liberty gamble of closing his or her case without leading evidence, where he is of the view that the state

63 Abolition of Juries Act 34 of 1969.
64 *Masondo* para 38.
65 Hiemstra's Criminal Procedure, 2008, 22.
66 See, also: *Agliotti* para 269, where the court refers to the purpose of the procedure in promoting orderly and fair criminal justice.

has not met the standard required to show guilt.[67] The court also considered that there are very few accused in this country qualified to make such a decision – especially since most of them are unrepresented at their trials.[68]

The acknowledgement of how difficult it is to take the decision to close one's case without leading evidence, finds credence in the prevailing attitude that an accused's silence (even if as a result of poor judgment or advice) may in certain circumstances, to some extent be used against him when factual findings are being made. This arises from the nature of trial proceedings in an adversarial criminal justice system. Therefore, if the state has produced sufficient evidence to make out a *prima facie* case against an accused – such an accused would be at risk of conviction if they do not produce satisfactory evidence in rebuttal. A likely upshot is that, in the face of such circumstances, the accused may have to give up their right to remain silent. However, the fact that an accused has to make an election is not a breach of the right to silence, since if the right were to be so interpreted, this would sound the death knell of the very nature of an adversarial criminal justice system.[69]

For the above reasons it is submitted that the section 174 process still has value, and has taken on a life of its own. Consequently, there is no basis to believe that the absence of the historical factors which led to the process being created now renders the discharge process obsolete. On the contrary, the 'liberal' argument is more compelling, that, as there is now no distinction between judges and juries (specifically, that judges are now also the triers of fact) – it is appropriate to engage in an exhaustive or at least lengthy credibility analysis at the stage of a section 174 application, and to grant a discharge on the basis of a judge's finding that the state witness or witnesses are not to be believed.

Equally compelling, however, is the argument that the section 174 process has no regard for a victim's rights, and also the interest of the public in a full and fair trial being held.

67 *Lubaxa* (above) para 16.

68 *Ibid*. The last sentence of this paragraph suggests that the court is equally sympathetic to represented and unrepresented accused. It is worth noting how differently represented and unrepresented accused experience the legal system, and the task of a person defending himself or herself is vastly different from a represented accused whose lawyer may well be up to the task. Even in terms of represented accused, there is a vast difference between a wealthy accused and a concomitantly well-resourced legal team, and an accused being represented by over-burdened and under-resourced Legal Aid attorneys. Of course, to resolve this issue requires resolving structural inequality.

69 *Osman v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC) para 22. See, also *Boesak v S* 2001 (1) SA 912 (CC) (para 24).

4 Victims in the Application of Section 174

The court in *Dewani* impliedly came to the questionable (if not wholly unsubstantiated and condescending) conclusion that public and victim opinion was based on an emotionally overcharged hysteria, when it stated the following:

> "I realise that there is a strong public opinion that the accused should be placed on his defence. I have taken note of that. I have also taken note of the plight of the Hindochas. I have however taken an oath of office to uphold the rule of law and to administer justice without fear, favour or prejudice. That I cannot do if I permit public opinion to influence my application of the law. If any court permitted public opinion, which has no legal basis to influence their judgments, it will lead to anarchy. I am obliged to follow the established legal principles regarding a discharge at the close of the State case."[70]

Not every victim is emotional and unreasonable, and the public's interest in criminal trials should not be conflated with public opinion. Furthermore, the (modern) South African system of public prosecutions does not mean that the victim no longer has a role to play, or that the victim's interest should not be a consideration during the trial. The criminal justice process is strongly intertwined with victim and public interest, and is, regardless of preference, infused with social and economic considerations:

For instance, section 342A of the Criminal Procedure Act[71] contains a clear expression of the regard that must be had to the victim, in the court's decision on whether to discontinue a prosecution on the basis of an unreasonable delay in completing proceedings. The court is required to consider "the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued".[72]

There has also been increasing cabinet recognition of the role of victims; the Service Charter for Victims of Crime in South Africa ("Victim's Charter) is a consequence of this recognition. The Victim's Charter is service-orientated, as the name suggests, and therefore does not include in its objectives and promises the sacrosanct area of judicial decision-making. It is not proposed that it do so. However, the Charter's objectives are useful in understanding the recognised interests of victims in the criminal justice process. The objectives are to: eliminate secondary victimisation in the criminal justice process; ensure that victims remain central to the criminal justice process; clarify the service standards that can be expected by and are to be accorded to victims whenever they come into contact with the criminal justice system; and make provision for victim's recourse when these standards are not met.[73]

70 *Dewani* 83.
71 51 of 1977.
72 Section 342A(2)(h) of the CPA.
73 Victim's Charter at 5.

A victim and the public generally have an interest in a conviction where an accused is guilty. They also have an interest in a full trial where the prosecution has presented a case for the accused to answer. Likewise, they also have an interest in the protection of an accused person's rights. However, these interests must be balanced, and not one forsaken for the other. Should that happen, there is a risk of victim/public dissatisfaction with the process.

The public prosecution system on which the victims of crime and the public rely cannot be discussed in the abstract without noting its dire state,[74] and without contrasting it to the legal teams to which wealthy accused persons have access. Victims in cases involving wealthy accused are often faced with the might of well-resourced, round-the-clock legal teams, while they have no option but to rely only on oversubscribed and underfunded public prosecutors.

The suggestion is not that the victim's interests be taken into account for the purposes of assessing guilt or innocence, or even at the stage of an appeal against a conviction.[75] Nor is the suggestion that the victim's rights should trump the entrenched constitutional rights of an accused. However, the disregard of a victim's interest in a full trial and the reduction of public interest to mere opinion, without further substantiation, does not do justice to the full scope of the criminal justice system. Therefore, the proposal is that the victim's interests should be weighed up in the section 174 inquiry.

The complete disregard of the victim in the current judicial approach to the section 174 inquiry does not accord with the general appreciation for the role of victims in the entire criminal justice process. Seemingly, this has happened as a result of the expansion of the credibility inquiry – coupled with the constitutional emphasis on an accused person's rights, and the historically entrenched idea of the state as *dominus litus*. It is submitted that these aspects have subverted the judicial approach in a most inappropriate fashion – one of imbalance between rights with the consequential risk of the public in general and victims specifically feeling that their interests are not protected.

5 Conclusion

The ability of wealthy accused to bankroll criminal litigation over an extended period gives rise to infinite possibilities for exploiting any legal loopholes and procedural mechanisms, and also for employing delaying

74 Mistry, D "Victims and the criminal justice system in South Africa" (1997), Paper presented at Centre for the Study of Violence and Reconciliation, Seminar No. 11, 29 October 1997.

75 See *Morris v Slappy,* 461 U.S. 1 (1983); *United States v Hasting,* 461 U.S. 499 (1983), where the United States Supreme Court refused to uphold appeals against convictions, citing as a relevant factor in the inquiry the interests of the victims who testified at the initial trial.

tactics. As a result, this has become deeply prejudicial to victims and the public interest in the equal administration of justice. A jurisprudence which treats all litigants as equal before the law, ought to be developed to guard against this.

The section 174 process is not harmful in and of itself. However, its implementation presently has been harmful. Therefore, there needs to be an assessment of ways to make section 174 the device that it once was – a sentinel against convictions in the face of spurious state evidence. The harm being experienced by victims of crime, public interest and the integrity of the criminal justice system, is the result of judges acting inappropriately at the stage of the section 174 application for discharge – as triers of fact. It is submitted that this is the source of the harm, and not the section 174 procedure itself.

In South Africa, occasional applications of the test for discharge have seen judges tending towards granting an application for discharge where they think that the witnesses for the prosecution are unreliable or are not telling the truth. This is incorrect and inappropriate. However, on the reasoning in *Galbraith*, a judge can hardly be blamed if he is asked or permitted to rule on credibility, if he were to grant a discharge based on such a finding. The credibility inquiry must therefore be abandoned.

Intensive credibility inquiries are never appropriate at the stage of the discharge application. The *Dewani* outcome clearly demonstrated as much. The reasons for this are twofold: (i) In terms of the section 174 procedure and its limitations as expressed in *Lubaxa*, a judge is simply not entitled to engage in such an inquiry at this stage of the trial; and (ii) this approach, even if the statutory provision were to develop to this extent, fails to adequately balance the interests of the victim in the criminal proceedings and the public interest in a trial.

To obviate this, it is submitted that as is the practice in foreign jurisdictions, when dealing with section 174 applications, judges in South Africa should take the state evidence "at its highest". The requirement that the state evidence be taken at its highest, will provide the necessary limited space for a court to discard completely unbelievable witness testimony. This procedure of abandoning the credibility inquiry can be adapted to non-jury settings. In *The King v Morabito*[76] the Supreme Court of Canada considered an appeal concerning, among other things, an application for discharge in the case of a court sitting without a jury. Although the judge would ultimately be empowered to act as trier of fact, the court held that at the close of the state's case, he did not yet have that power. According to the court, the judge was still empowered only to decide whether there was evidence upon which a jury might convict and that he had no additional power at that stage by virtue of sitting without a jury.[77] The court went on to state:

76 *The King v Morabito* [1949] S.C.R.172.
77 *Morabito* 174.

> "Had a jury been present, the learned trial judge could have done no more, on the application of the defence, than have decided whether or not there was evidence upon which a jury might convict … [The judge] would have had no right, as he in fact did, to proceed to weigh the evidence until all the evidence was in. The decisions are uniform."[78]

What does this mean for the application of the discharge procedure in an era without juries? The answer is simple: The judge must ask himself whether there is any evidence on which to base a charge. He must reserve the weighing up or assessment of that evidence for when the trial has closed. If he does not perform that exercise, and splits his functions at the close of the state's case and at the end of the trial as a whole – then he places the state in a position where it is required to meet an unduly high, if not impossible, burden without the other side testifying.

In other words, the judge needs to delineate and understand his role at the two key stages of the trial: (i) at the close of the state's case he is to draw a legal conclusion on the existence of evidence required for a particular offence; and (ii) at the close of the trial as a whole he is to draw his factual conclusions from the existing evidence.[79]

Based on the existing legal standard, then, a legislative leap is unnecessary. What is necessary, however, is an appreciation by judges of their shifting functions at different stages of a criminal trial.

78 *Morabito* 175.

79 This distinction in the judge's function has been expressed in some way in *S v Cooper* [1974] 3 All SA 253 (T) 266 at 890: "If there is more than one inference possible from the facts assumed to be uncontradicted at the close of the case for the prosecution, then that is just the sort of evidence that should be referred to the triers of fact for decision."

The future of legislated minimum wages in South Africa: Legal and economic insights

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OPSOMMING

Die toekoms van wetlik-gereguleerde minimumlone in Suid-Afrika: Regs- en ekonomiese insigte

Werkloosheid- en gepaardgaande armoedevlakke in Suid-Afrika is uiters hoog. Selfs waar persone permanent werk, is sommige lone so laag dat die individue nie in 'n finansiële posisie is om basiese lewenskostes te finansier nie. Armoede, en gepaardgaande ongelykheid, bly 'n groot probleem in Suid-Afrika, veral gegewe die Grondwet se beskerming van die reg tot menswaardigheid en gelykheid vir almal. Suid-Afrika is egter nie uniek in hierdie opsig nie. Dit is 'n algemene tendens dat middel-inkomste lande dit moeilik vind om te kompeteer met lae-inkomste, lae-lone lande, terwyl hulle terselfdertyd sukkel om te kompeteer met gevorderde en hoë-inkomste lande.

Werkgewers en vakbonde regoor Suid-Afrika ontmoet mekaar jaarliks om die onderhandelingstafel om onder andere basiese diensvoorwaardes, soos basiese lone, te bespreek. Indien die partye nie tot ooreenkoms kan kom in die onderhandelingsproses nie, kan dit lei tot stakings. Daar is egter 'n verskeidenheid opinies vanuit die regs wêreld en die ekonomiese arenas rakende die vlakke wat minimumlone behoort te handhaaf.

Alhoewel geen klinkklaar gevolgtrekking bereik word nie, bespreek die artikel onder andere die volgende kwessies: of dit prakties en realisties is om minimumlone deur middel van wetgewing te reguleer in Suid-Afrika; watter impak wetlik-gereguleerde minimumlone moontlik kan hê op die Internasionale Arbeidsvereniging se Billike Werksagenda; en die moontlike formaat wat 'n suksesvolle wetlik-gereguleerde minimumloon-stelsel moontlik kan aanneem.

1 Introduction

During the mid-1950s Nobel Memorial Prize in Economic Sciences recipient, Sir W A Lewis, proposed a new theoretical model of economic development for developing countries. This model was premised on the assumptions that, first, there was an unlimited supply of labour in most developing countries and, secondly, as the modern industrial sector in such countries developed, these growing economies would be able to

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absorb any labour surplus.[1] Rising high unemployment levels globally, however, would suggest inaccuracies in this model. Paradoxically, with unemployment levels on the rise internationally, statistics indicate that over the last 40 years the average real-unit labour costs in South Africa has increased twice as fast as that of the 30 wealthiest Organisation for Economic Co-operation and Development (OECD)[2] countries. This is worrisome when considering that the youth[3] employment rate revealed a drop from 16.2% in 2000 to 14.6% in 2008.[4] It might perhaps be argued that these and other similar statistics suggest that "[a] policy of good jobs in principle, but no jobs in practice, might assuage our consciences, but it is no favor to its alleged beneficiaries".[5]

Apart from rising unemployment levels, poverty levels of those who do have jobs in South Africa are also alarmingly high. While seemingly at odds, *working poverty* is the situation where working employees continue to earn such low wages that they are unable to meet basic living needs.[6] High poverty levels, and the inherent inequality that comes with it, remain a great cause of concern, whether viewed from economic sustainability, social justice, or basic adherence to Constitutional[7] imperatives such as dignity and equality for all.[8] The situation in South Africa is nevertheless not unique. Many developing countries find themselves in a so-called *middle-income trap*. These countries need to find ways of bridging the gap between, on the one hand, an economic-growth model based on the exploitation of low-cost labour as a means of gaining a competitive advantage, and on the other, an economic-growth model largely dependent on capital investment and high productivity. However, bridging this gap in an increasingly globalised trading environment remains problematic. Middle-income countries find it difficult to compete with low-income, low-wage economies in

1 Lewis *Economic Development with Unlimited Supplies of Labour* as discussed in Chen *et al Supporting Workers in the Informal Economy: A Policy Framework* (Working paper on the informal economy 2002 ILO Employment Sector) 1.

2 THE OECD is an intergovernmental economic organisation founded in 1962, with a member base of 35 countries currently.

3 For purposes of these statistics, youth is regarded as individuals between the ages of 15 and 24.

4 *Trading Economics* 2011 available at www.tradingeconomics.com, as referenced in Cohen & Moodley "Achieving 'Decent Work' in South Africa" 2012 PER 323.

5 Krugman *In Praise of Cheap Labor: Bad jobs at bad wages are better than no jobs at all* available at http://web.mit.edu/krugman/www/smokey.html (accessed 2012-08-09).

6 https://www.dailymaverick.co.za/article/2016-08-11-op-ed-a-national-minimum-wage-for-south-africa-the-path-to-economic-growth/#.WqUKgChuZdh (accessed 9 June 2018).

7 In terms of the Constitution of South Africa, 1996.

8 https://mg.co.za/article/2016-12-12-00-a-national-minimum-wage-is-a-powerful-tool-to-break-the-poverty-cycle (accessed 2018-06-09). Constitution s 1; s 2 of the Constitution further states that the Bill of Rights "… enshrines the rights of all people in our country".

manufactured exports on the one side, and advanced economies in high-skill innovations on the other.[9]

The above does not bode well for employees when it comes to minimum wages. For most employees, demands around increased conditions of employment, particularly increases in wages, are simply born out of their need for financial survival or for increased financial stability. Employers and trade unions across various sectors in South Africa periodically engage in negotiations on issues of terms and conditions of employment, most notably wages. Where the parties are unable to reach agreement the Constitution of South Africa, 1996, assisted by the Labour Relations Act 66 of 1995 (LRA), provide employees with the right to strike and employers with the right to lock-out. Far too often such industrial action unfortunately turns into violent displays of power (or perhaps only perceived power), even at times resulting in loss of life such as was the case in the Marikana incident of 2012 (discussed below). A contentious issue often raised in the South African context is whether, given South Africa's social and economic climate, employee demands for wage increases are reasonable and viable. This question is partly driven by the trend to demand wage increases far in excess of the annual inflation rate.

Although no definite conclusion is likely to be reached, this article will attempt to address the following: whether legislated minimum wage levels in South Africa is a realistic, and in fact workable, option; what impact implementing legislated minimum wage levels might have on achieving the International Labour Organisation's (ILO) decent work agenda,[10] and the form that any successful legislated minimum wage level system should take.

2 Labour Market Regulation

During the mid-19th century economists in the United States of America (USA) sought to justify vast income inequalities between employees by relying on what at the time was referred to as the *marginal-productivity theory*. This theory was predicated on the existence of an identifiable link between higher income and higher productivity. A higher income was directly indicative of an employee's greater contribution to society. Not surprisingly this theory was particularly cherished by the rich.[11] During the latter part of the 19th century, globalisation, as understood in the

9 Deakin "Labour Law, Economic Development, and the Minimum Wage: Comparative Reflections on the South African Debate" 2017 ILJ 10.

10 Refer to the discussion on the ILO's *decent work agenda* in par 4.1 below.

11 Stiglitz *Of the 1%, by the 1%, for the 1%* available at http://www.vanityfair.com/society/features/2011/05/top-one-percent-201105 (accessed 2012-06-05).

modern sense,[12] came to the forefront as a result of strides made in technological innovation which increased the exchange of knowledge, trade and capital on an international level.[13]

Subsequent to the international integration of markets and people brought about by the internationalisation of investment and colonial expansion, and the ultimate onset of the modern understanding of globalisation, businesses were suddenly, and continue to be, exposed to intense competition on national and international levels. Businesses are constantly under pressure to adjust their operations and labour forces to meet fluctuations in demand and progress in productivity.[14] In an attempt to meet these rising demands, businesses often look towards a reduction in worker wages, or lower levels of wage increases, as a means of economic growth and survival. Correlations between the onset of globalisation and rising demands for increased minimum wages were therefore to be expected. This leads one to ask whether increasingly-competitive labour markets should perhaps not be regulated by designated outside forces, such as labour laws.

Labour market policies and regulation remain a highly contested area, with many supporters of both regulation and non-regulation of labour markets respectively. Those in favour of an interventionist approach advocate for regulation, mainly through legislation, aimed towards assisting a poor and vulnerable workforce. Proponents of this approach regard labour laws as any state-recognised labour rights and standards aimed at improving the quality of working lives and bargaining power of workers.[15] Supporters of labour market regulation further argue that labour markets, particularly those of developing countries, are highly imperfect when no dedicated intervention takes place. One example generally used is the frequent power imbalances observed between employers and workers. It is argued that an unregulated market potentially increases the risk of exploitation and unfair treatment of

12 Reference to "… globalisation, as understood in modern times …" should be understood in the context of certain scholars that view globalisation as a concept which originated as far back as 1492 and 1498 already when Christopher Colombus and Vasco da Gama discovered the Americas and sailed around the horn of Africa respectively – as example, see O'Rourke & Williamson *When Did Globalization Begin?* (Working Paper 7632 2000 National Bureau of Economic Research) available at www.nber.org/papers/w7632 (accessed 2018-05-31); also available at O'Rourke & Williamsnon "When Did Globalization Begin?" 2002 *European Review of Economic History* 23-50.

13 The Economist *When did globalisation start?* (2013-09-23) available at https://www.economist.com/free-exchange/2013/09/23/when-did-globalisation-start (accessed 2018-05-30).

14 Auer, Berg & Cazes "Balancing Flexibility and security: The role of labour market policies and institutions" 2007-2008 *Tilburg Law Review* 49.

15 Marshall, Howe & Fenwick *Labour Law and Development: Creating and Enabling Regulatory Environment and Encouraging Formalisation* (Paper 2009 Conference of the Regulating for Decent Work Network ILO) 4 available at http://www.ilo.org/legacy/english/protection/travail/pdf/rdwpaper27a.pdf (accessed 2012-08-27).

workers, which in turn impacts negatively on human development and growth.[16] Regulation through legislative intervention is therefore argued. Otto Kahn-Freund summarised the main rationale for labour law as "… a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship".[17] It is argued that labour market regulation through rules and controls in respect of working conditions could significantly reduce exploitation of workers, which in turn impacts on overall worker productivity.[18] Increased worker productivity it is held contributes towards market competitiveness and growth, which reduces the need for cost-cutting measures, such as wage decreases and poorer working conditions.[19] Protection against exploitation also significantly contributes towards the achievement of the ILO's decent work objective and constitutional imperatives, including the rights to dignity and fair labour practises.[20]

The true effectiveness of legal rules and policies is nevertheless often questioned, despite how effective they might look on paper. The question is largely based on the view that legal rules and policies often are not practically implemented in the informal economy and have little benefit to these workers, largely as a result of non-adherence by employers and a lack of enforcement. Considering the large number of workers employed in the informal economy where work opportunities are more readily available for poor and unskilled workers, particularly in developing countries, questions around effectiveness and practicality are well-founded.[21]

On the other hand, supporters of the neoclassical school of thought advocate the increased deregulation of labour markets with a view to rendering them more efficient.[22] It is argued that reforms of the legislative regime are required in order to enhance workforce flexibility. The argument largely is based on the view that workforce flexibility will contribute to increased market competitiveness, economic growth and ultimately employment opportunities. It is said that a regulatory approach, through protective legislation as example, often results in the

16 Deshingkar *Extending labour inspections to the informal sector and agriculture* (Working paper nr 154 2009 Chronic Poverty Research Centre) 6.

17 Benjamin *Labour Market Regulation: International and South African Perspectives* (Paper 2005 Employment & Economic Policy Research Programme Human Sciences Research Council) 5.

18 Deshingkar 4.

19 Deshingkar 6.

20 Respectively protected within the Bill of Rights in ss 10 and 23 of the Constitution. These rights should be read in conjunction with s 1(a) of the Constitution which provides that "The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms …." As to the ILO's *decent work agenda*, see the discussion in 4.1 below. Also see Deshingkar 6.

21 Deshingkar 4.

22 Deshingkar 4.

misallocation of available resources. Regulation leads to the absence of any real flexibility to adjust wages freely to the marginal productivity of labour; a regulatory approach often prevents labour markets from spontaneously adjusting to acute economic changes and shocks; and regulation has the potential to reduce profits, which in turn could result in the reduction of investments and, ultimately, market growth.[23]

While arguments in favour of regulation and deregulation are interesting, in the South African context the discussion has been rendered mostly academic over recent years. Since the adoption of the Constitution in the 1990s, labour market regulation is rather firmly embedded into South African employment law by virtue of various statutes and related pseudo-legislation such as sectoral determinations. Labour market regulation largely is divided into the following sub-categories: minimum conditions of employment; collective bargaining and worker participation; dispute resolution and adjudication; promoting equality in the workplace; skills development and placement within the labour market; and employment linked social security.[24] Legislated minimum wages are regarded as a form of minimum conditions of employment.

3 Arguments in Favour of and Against Legislated Minimum Wage Levels as a Form of Labour Market Regulation

> "But if a young adult cannot produce enough of value to justify being paid a living wage, nothing we do to the minimum wage will help. He, the institutions which trained him and the society in which he lives, have far bigger problems." (Tim Harford)[25]

Disagreement amongst commentators and stakeholders, from both economic and legal fields, on the feasibility and impact of minimum wages as a form of labour market regulation on employment levels and economic growth is nothing new. In considering labour laws and economic principles in the same context, two inseparable views emerge. The first view holds that employees and employers play a complementary role in production and the running of a successful business. The second view holds that employees and employers,

23 Deshingkar 6.
24 Benjamin 3 - 4.
25 FT Magazine *Can the minimum wage create jobs?* (2012-01-13) available at http://www.ft.com/cms/s/2/6e61f3d6-3c05-11e1-bb39-00144feabdc0.html#axzz2LYq9Uvfl (accessed 2013-02-21).

subsequent to the completion of the production process, compete with one other over the benefits brought about through production.[26] In general there however seems to be agreement that labour laws must be for the good of society at large, and ensuring the availability of sufficient and decent jobs remains a collective responsibility.[27]

It is however often also argued that legislated minimum wage levels do not only regulate employment relationships, but the operation of the labour market in general as well.[28] As example, during the 1980s it was widely accepted that labour laws could be implemented as instruments of economic policy to, for instance, control inflation.[29] Consequently modern labour law has been argued to have four main objectives: the promotion of allocative and productive efficiency and economic growth; macroeconomic management by achieving wage stabilisation, high employment levels and international competitiveness; establishing and protecting fundamental rights; and redistributing wealth and power in the employment context.[30] Labour market regulation can therefore be used to enhance the employment conditions of workers, such as higher minimum wage levels.[31] In turn minimum wage levels potentially impact on three macroeconomic variables: demand for goods and the growth of the economy; employment levels; and inflation.[32]

Arguments against legislated minimum wage levels range from those arguing against implementing any form of legislated minimum wages, to those observing that current minimum wage levels in South Africa are simply too high and therefore unattainable. It is often argued by these critics that the very employees such policies are said to assist may in fact fall prey to growing prejudice and harm as a result of these policies. In turn, proponents of legislated minimum wages remain firm in their view that increased wages play an important role in moving people out of poverty. Arguments by minimum wage supporters have largely been

26 *Economic implications of labour and labour-related laws on MSEs: A quick review of the Latin American experience* (Working Paper No. 31 2009 ILO Employment Sector) 3 available at http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/documents/publication/wcms_115966.pdf (accessed 2012-08-27).

27 Antoine "Rethinking Labour Law in the New Commonwealth Caribbean Economy: A Framework for Change" 2011 *Comparative Labor Law & Policy Journal* 354.

28 Benjamin 2.

29 Benjamin 5.

30 Klare K "The Horizons of Transformative Labour and Employment Law" in Conaghan, Fischl & Klare (eds) *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities* (2002) as referenced in Benjamin 5.

31 Benjamin 5.

32 Eyraud & Saget *The Fundamentals of Minimum Wage Fixing* (2005 ILO) 47.

premised on the ideal of improved quality of life for low income and vulnerable workers.[33] Finally, it has also been argued that in light of trade unions' declining bargaining power, especially when faced with high unemployment rates, legislated minimum wage levels play an increasingly important role in the protection of workers.[34]

Speaking at the release of his annual South African Employment Report during May 2012, economist Mike Schussler was of the opinion that "[t]he ugly truth in South Africa is that unskilled and semiskilled workers are being overpaid, which contributes to keeping other people out of the job market".[35] This statement, however, could be criticised for its seemingly flawed premise, that is, that labour should be kept cheap, and that the *job market* referred to seemingly hint towards a market that exists for cheap and unskilled, or at best semi-skilled, labour. Furthermore, a fundamental question the statement fails to address is the reason *why* workers are still in positions of being unskilled or semiskilled. At the time the Congress of South African Trade Unions (Cosatu) also refuted the statement. Cosatu argued that Schussler had abused the statistical data used as basis for his report, the information on which his views were based was incorrect, and that he had misconceived the principle of purchasing power parity in South Africa.[36]

Those opposing legislated minimum wages often argue that unemployment levels potentially stand to rise as a result of significant increases in minimum wage levels.[37] In a country such as South Africa, where unemployment levels are already alarmingly high, a further rise in such levels would in turn deprive individuals of an income, as well as the gaining of work experience which could in the long run affect earning ability.[38] With limited employment opportunities already a reality, it is argued that workers who are regarded as being overpaid (generally low-skilled workers) through, eg, legislated minimum wage levels, prevent individuals who are willing to earn less from entering meaningful employment. As such it is argued that downward wage flexibility is important in achieving sustainable levels of employment and growth.[39]

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33 Thomas *Basic Economics: A Common Sense Guide to the Economy* (2007) as referenced in Hutchison "Waging War on 'Unemployables'? Race, Low-wage work and Minimum Evidence: The New Evidence" 2011 *Hofstra Labor & Employment Law Journal* (*Hofstra Lab. & Emp. L. J.*) 26.

34 *Labour Administrations and National Labour Policies: Current Challenges, Practices and Policies* (2009 ILO Social Dialogue Sector) 11 available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_123787.pdf (accessed 2012-08-27).

35 "Unskilled workers 'paid too much' in SA" *Business Day Live* (2012-05-07) available at http://www.bdlive.co.za/articles/2012/05/07/unskilled-workers-paid-too-much-in-sa;jsessionid=A2A980CCEB576A9EE6720B3BD6701ABA.present2.bdfm (accessed 2013-02-21).

36 Cosatu *A response to Mike Schussler: Busting Schussler`s myths, exposing white excess* available at http://www.cosatu.org.za/show.php?ID=6132 (accessed 2013-02-21).

37 Thomas as referenced in Hutchison 2011 *Hofstra Lab. & Emp. L. J.* 26.

38 Thomas as referenced in Hutchison 2011 *Hofstra Lab. & Emp. L. J.* 26.

39 Deshingkar 6.

It has to be noted however that while the effect of minimum wages on employment levels has been researched in developed countries, very few similar studies have been undertaken in developing economies thus far. Consequently much less is known about the impact of legislated minimum wages on employment levels in emerging economies.[40] And of those studies in respect of developing countries, very few have found sufficient empirical evidence to show that a rise in minimum wages had any significant effects on the employment levels.[41] In the South African context, reports and statistics on employment growth and reduction in sectors covered by sectoral determinations indicate no significant reduction in employment levels subsequent to the implementation of minimum wages in these sectors, with some even indicating a slight increase in employment levels.[42]

It is further argued that strictly-legislated minimum wage levels, especially those on the higher end of the spectrum, increase the financial burden on companies, many of which are already struggling under on-going difficult economic conditions.[43] Part of the increased financial burden experienced by businesses is higher production costs. While of course varying between different sectors, on average labour costs remain a significant component of production costs.[44] Some economists who argue against minimum wages, or wages which are set too high, rely on statistics which indicate that while internationally production costs have decreased on average, these costs in South Africa have consistently been

40 Broecke, Forti, Vandeweyer *The effect of minimum wages on employment in emerging economies: a literature review* 2 available at http://nationalminimumwage.co.za/wp-content/uploads/2015/09/0221-Effect-of-Minimum-Wages-on-Employment-in-Emerging-Economies-A-Literature-Review.pdf (accessed 2018-06-09).

41 As example see Baek & Park "Minimum wage introduction and employment: Evidence from South Korea" 2016 Economics Letters; Addison, Blackburn & Cotti "Do minimum wages raise employment? Evidence from the U.S. retail-trade sector" 2009 Labour Economics; Broecke, Forti & Vandeweyer *The effect of minimum wages on employment in emerging economies: a literature review* available at http://nationalminimumwage.co.za/wp-content/uploads/2015/09/0221-Effect-of-Minimum-Wages-on-Employment-in-Emerging-Economies-A-Literature-Review.pdf (accessed 2018-06-09).

42 Benjamin 29 – 30. See also *Addressing the Plight of Vulnerable Workers: The Role of Sectoral Determinations* (2010 Department of Labour) available at http://www.labour.gov.za/DOL/downloads/documents/useful-documents/basic-conditions-of-employment/The%20role%20of%20Sectoral%20Determinations.pdf (accessed 2018-05-31); *Sectoral Determination 7 of Domestic Workers: A catalyst for change?* available at http://www.polity.org.za/article/sectoral-determination-7-of-domestic-workers-a-catalyst-for-change-2013-11-21 (accessed 2018-05-31); Addison, Blackburn & Cotti "Do minimum wages raise employment? Evidence from the U.S. retail-trade sector" 2009 Labour Economics 407.

43 "Cosatu set to push for minimum wage policy" *Business Day* (2012-06-06) available at http://www.businessday.co.za/articles/Content.aspx?id=173428 (accessed 2012-06-06).

44 "Cosatu like French beet farmers on SA 'low wages'" *Business Day* (2012-05-21) available at http://www.businessday.co.za/articles/Content.aspx?id=172198 (accessed 2012-06-06).

on the rise. This remains of concern in a globalised economy where international competition remains rife and cheaper foreign labour remains freely available. Consequently South Africa is rendered less competitive on an international level.[45] Yet, experiences from across Europe in cutting labour costs to lower production costs seem to suggest a different reality.

In response to increasing economic pressures many European governments implemented overall worker rights reductions as one measure to bring down labour costs. Not surprisingly cutting of wages and decreases in other employment benefits, such as unemployment benefits, were met with much hostility by both workers and trade unions.[46] Such an approach resulted in a noticeable decrease in disposable household income, which led to a decline in consumer spending. This decline in consumer spending in turn negatively impacted on economic growth.[47] The lowering of wage levels also negatively impacted on the living standards of workers and consequently the ILO's decent work agenda.[48]

Turning now to arguments raised by those in support of minimum wage levels, one argument with a lot of support is that, even if it was accepted that legislated minimum wage levels might result in some short-term employment loss following implementation, increased employment levels in the long run were likely to be observed. This might emerge in one of two ways. First, low wage levels might result in a so-called *low-productivity trap* which hinders job growth. A *low-productivity trap* is where employers fail to invest in their workers through, for example, payment of proper wages, training initiatives and other retention efforts, which measures are often associated with an increase in aggregate workplace productivity levels. Where investment in workers are lacking, low productivity levels are likely to be observed, and consequently business profit levels stand to be negatively affected. This in turn limits a business's potential for growth and further employment creation. Second, legislated minimum-wage policies might also be utilised to correct market failures. Such policies could guard against wage deflation and a resultant decline in aggregate consumer spending. It is argued that, in theory at least, higher wages for employees should lead to increased consumer spending which in turn contributes towards

45 "Unskilled workers 'paid too much' in SA" *Business Day* (2012-05-07) available at http://www.businessday.co.za/articles/Content.aspx?id = 171083 (accessed 2012-06-05).

46 Consider for example the situations in Greece and Italy during 2012.

47 "The crisis, golden opportunity for employers" *Frankfurter Rundschau* (2012-03-23) available at http://www.presseurop.eu/en/content/article/1678031-crisis-golden-opportunity-employers (accessed 2012-08-27).

48 *Labour Administrations and National Labour Policies: Current Challenges, Practices and Policies* (2009 ILO Social Dialogue Sector) 10 available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_123787.pdf (accessed 2012-08-27).

economic growth, and as such, job creation.[49] Caution should however be taken in simply linking a raise in minimum wages with a definite rise in labour productivity. A higher wage level is but one factor in a spectrum of factors which has the potential to impact labour productivity. Other contributing factors include the scale and nature of capital investment in a country, the state of a country's training and education systems, and, perhaps less directly so, the effectiveness of a country's legal and governmental institutions.[50] Consequently, and this cannot be over-emphasised, a crucial focus area towards ensuring a country's ability to sustain long term economic growth and prosperity should be steps taken to ensure a rise in the training and skills levels of its workforce.

The absence of reasonable legislated minimum wage levels, particularly at the level of a living wage, is likely to result in cycles of continued poverty and lack of skills. It is argued that in the absence of proper education and training, workers' earning abilities remain limited. Yet, poorly paid workers cannot afford the further training or education necessary to increase their skills and consequently their earning potential. This inevitably raises the question as to who should be responsible for ensuring that necessary education and training take place. This article supports a view that would advocate for a tripartite responsibility, ie, the responsibility should rest on employees, employers and government alike. Employers should have the responsibility to identify skills needs in the business, particularly in light of increased technology. The responsibility of government should be to, more than it does at the moment, facilitate the development of identified skills. And finally, employees should be responsible for ensuring that they subject and commit themselves to undertake further education and training. The reality however remains that poorly-paid workers continue to find themselves in a cycle of poverty and lack of further education which, without some outside intervention (such as bursaries, grants or other third-party funding), has little prospect of ending. The situations these workers find themselves in are worsened by an era of increased technological advances, which either negates the need for manpower, or requires workers to keep abreast with ever-changing technological advancements. Individuals who remain untrained, or insufficiently trained, in technological matters are effectively prevented from working in high productivity and technologically-advanced environments.[51]

Legislated minimum-wage levels are also justified in the context of imperfect labour markets where employees, particularly those engaged in non-unionised informal work, such as domestic workers, remain vulnerable. It is argued that legislated minimum wage levels might

49 *Towards a COSATU Living Wage Conference: A NALEDI Research Report* (Report 2011 COSATU) 11 available at http://www.cosatu.org.za/docs/reports/2011/naledi_research_paper.pdf (accessed 2012-08-27).

50 Deakin 2017 ILJ 8.

51 *Return to Social Movement Unionism partner* (2011 Naledi) available at http://www.naledi.org.za/index.php?option = com_k2&view = item&id = 42:return-to-social-movement-unionism (accessed 2012-05-24).

protect these workers against exploitation. As example, many households which employ domestic workers consider the worth of these workers to far outweigh the wages actually paid to such workers.[52] Studies in fact indicate that majority of households are willing to increase domestic workers' wages rather than running the risk of losing these workers.[53] Yet, domestic worker wage levels do not provide an accurate reflection of the valuable contribution these workers make, not only to the household economy, but the national economy through enabling their employers to work. By having a domestic worker taking over some household chores (most commonly cleaning, cooking, and child rearing), the employer has more free time available which could be used to generate further income. The income generated as such generally exceeds the amount in wages paid to the domestic worker. The financial benefits experienced by the employer, and even more so in the case of multiple income households, are rarely reflected in the wages paid to domestic workers. Data in fact shows that even as far back as the early 1990s, on average wages of domestic workers constituted, at best, a mere 4% of an employer's salary.[54] Where minimum wages are legislatively determined it will be more difficult for employers to engage in unfair low wage competition. This is off course reliant on the premise that as long as unemployment remains rife, competition over available jobs will remain high. And this is where the opportunity is created for unscrupulous employers to lower wages and provide poorer working conditions to those individuals who remain desperate to generate any form of income. Such workers would in general also be hesitant to challenge their employers' conduct out of fear of retaliation and dismissal.[55] This is of concern when considering that job security is regarded as a fundamental component of decent work.[56]

While there will always remain tension between regulation and non-regulation of minimum wages, in the South African context the issue is these days largely academic. Minimum wages are already regulated on a sectoral level through sectoral determinations. Furthermore, the recently-adopted National Minimum Wage Bill[57] is another step towards further embedding the regulation of minimum wages in the South African employment environment. It is arguably therefore no longer a question of *whether to regulate*, but rather one of *how to best regulate*.

52 Cosatu 2011 10 available at http://www.cosatu.org.za/docs/reports/2011/naledi_research_paper.pdf (accessed 2012-08-27).
53 Cosatu 2011 10 available at http://www.cosatu.org.za/docs/reports/2011/naledi_research_paper.pdf (accessed 2012-08-27).
54 Cosatu 2011 10 available at http://www.cosatu.org.za/docs/reports/2011/naledi_research_paper.pdf (accessed 2012-08-27).
55 *Return to Social Movement Unionism partner* (2011 Naledi) available at http://www.naledi.org.za/index.php?option = com_k2&view = item&id = 42:return-to-social-movement-unionism (accessed 2012-05-24).
56 Cohen & Moodley 2012 PER 329.
57 National Minimum Wage Bill B31 of 2017, published in GG 41257 of 17 November 2017.

4 Understanding Living- and Minimum Wages in a *Decent Work* Paradigm

4 1 International Labour Organisation's Decent Work Agenda

The ILO's Decent Work Agenda was introduced in the late 1990s by former ILO Director-General, Juan Somavia. The ILO has expressed the Decent Work Agenda as follows:

> "The goal of decent work is best expressed through the eyes of people. It is about your job and future prospects; about your working conditions; about balancing work and family life, putting your kids through school or getting them out of child labour. It is about gender equality, equal recognition, and enabling women to make choices and take control of their lives. It is about your personal abilities to compete in the market place, keep up with new technological skills and remain healthy. It is about developing your entrepreneurial skills, about receiving a fair share of the wealth that you have helped to create and not being discriminated against; it is about having a voice in your workplace and your community. In the most extreme situations it is about moving from subsistence to existence. For many, it is the primary route out of poverty. For many more, it is about realizing personal aspirations in their daily existence and about solidarity with others. And everywhere, and for everybody, decent work is about securing human dignity. But to bridge reality and aspiration, we need to start by confronting the global decent work deficit. It is expressed in the absence of sufficient employment opportunities, inadequate social protection, the denial of rights at work and shortcomings in social dialogue. It is a measure of the gap between the world that we work in and the hopes that people have for a better life."[58]

The decent work agenda acknowledges that all individuals, regardless of background, race, gender, social status, or employment and so on "have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity".[59] Poor wage levels it is argued do not adhere to the ILO's Decent Work Agenda. Decent work should encompass:

> "a strategic goal for development that acknowledges the central role of work in people's lives. This includes work that is productive and delivers a fair income; provides security in the workplace and social protection for families; and offers better prospects for personal development and social integration, freedom to express concerns, opportunities to organize and participate in

58 *Reducing the decent work deficit – a global challenge* (2001 ILO) available at http://www.ilo.org/public/english/standards/relm/ilc/ilc89/rep-i-a.htm (accessed 2018-06-09).

59 Macnaughton & Frey "Decent Work for all: A holistic human rights approach" 2011 *American University International Law Review* 449.

> decision-making, and equal opportunity and treatment for all women and men".[60]

Of some significance is the fact that the ILO opted to use the concept decent *work* as opposed to decent *employment*. It appears as if the reference to *work* was deliberate so as to not only include workers in the formal economy, which is regarded as traditional employment in most countries, but all individuals engaged in some form of work. This approach acknowledges that there are a "variety of ways in which people contribute to the economy and society".[61]

The ILO submits that there are four main factors to consider in advancing decent work principles. Firstly, it is important to highlight the ideal of worker rights at the workplace. The objective is "to ensure that work is associated with dignity, equality, freedom, adequate remuneration, social security and voice, representation and participation for all categories of workers".[62] Secondly, further steps must be taken to close the gap between employment and work. The aim is to produce sufficient work opportunities for the majority of individuals and to ensure that proper and reasonable wages are paid.[63] Thirdly, adequate social protection should be provided to cover a variety of contingencies and vulnerabilities, such as unemployment.[64] Finally, there should be an increased focus on social dialogue. Workers' voices must be strengthened by means of proper representation, and in doing so enable workers to defend their interests, articulate concerns, and engage in negotiations and other discussions around worker rights in general.[65] As a member state of the ILO, the South African government has pledged its commitment towards the achievement of decent work for all workers, and the inclusion of decent work imperatives into national development strategies.[66] Minimum wage considerations arguably fit best under closing the gap between employment and work, which includes the payment of proper and reasonable remuneration.

This adherence to the ILO's decent work agenda provides at least one theory as to why governments choose to intervene in labour markets. The theory is predicated on the assumption that free and unregulated labour markets are imperfect for various reasons. Unregulated labour markets create opportunities for unscrupulous employers to abuse

60 *Tackling the "decent work deficit"* (ILO) available at *http://wcmsq3.ilo.org/global/about-the-ilo/newsroom/features/WCMS_071242/lang--en/index.htm* (accessed 2012-12-11), as quoted in du Toit "Extending the frontiers of employment regulation: The case of domestic employment in South Africa" 2010 LDD 4.

61 Macnaughton & Frey 2011 *American University International Law Review* 449.

62 Ghai D (ed) *Decent Work: Objectives and Strategies* (2006 ILO) 7.

63 Ghai D (ed) 10.

64 Ghai D (ed) 14.

65 Ghai D (ed) 18.

66 Cohen & Moodley "Achieving 'Decent Work' in South Africa" 2012 *PER* 320.

workers' rights, such as the right to decent work, in an effort to limit employment costs.[67] Consequently, in the absence of meaningful and effective labour regulation, the achievement of decent work for all will remain but an ideal. Workers are likely to remain subjected to an employer's sense of fairness, rather than commonly established legal norms within which the societal contributions and inherent human dignity of workers are valued.[68] This is particularly of concern in societies such as South Africa where constitutional values underpin the basic rights all individuals enjoy. It is generally accepted that decent work should be approached from a holistic human rights framework – one within which individuals, families, and decent employment are all addressed.

4 2 Minimum- Versus Living Wages

It has been said that "… nearly all individuals who work or seek work do so in order to earn an income and ensure the economic well-being of themselves and their households".[69] Minimum wage levels should be distinguished from what is commonly referred to as a *living wage*. A living wage, narrowly seen, has been described as a minimum wage of a value that would enable a worker to live a life of determined quality when considering needs such as housing, food, utilities, transport, and health care. From a broader view, a living wage is seen as a tool to move low income and underpaid workers out of a life of poverty. This includes creating a sustainable wage income strategy which not only focuses on meeting basic living needs, but also on improving overall worker skills and employment opportunities, while at the same time reducing income inequality and poverty.[70]

In South Africa, Cosatu has been known for advocating that demands for living wages should form the cornerstone of any trade union's role in the fight against poverty.[71] Cosatu has argued that a contract of employment between a worker and his/her employer cannot be regarded as equal or fair where "such a workman submits to work for a low wage to avoid starvation or pauperism (or something like it) for himself or his family".[72] Cosatu uses the example of millions of South Africans that spend their working lives in the gold mining or commercial

67 Botero *et al* "The Regulation of Labor" 2004 *The Quarterly Journal of Economics* 3. See discussion on the ILO's *decent work agenda* in 3 above.
68 Blackett "Introduction: Regulating Decent Work for Domestic Workers" 2011 *Canadian Journal of Women & the Law* 25.
69 Anker *et al Measuring Decent Work* as referenced in Cohen & Moodley 2012 *PER* 327.
70 Cosatu 2011 13 available at http://www.cosatu.org.za/docs/reports/2011/naledi_research_paper.pdf (accessed 2012-08-27).
71 Cosatu 2011 9 available at http://www.cosatu.org.za/docs/reports/2011/naledi_research_paper.pdf (accessed 2012-08-27).
72 Price & Ho "Implementing a Statutory Minimum Wage in Hong Kong: Appreciating International Experiences but Recognizing Local Conditions" 2011 *Common Law World Review* 105.

agricultural industries, whilst never escaping a life of poverty because of the meagre wages earned.[73] This suggests that South Africa falls short in various respects when it comes to the provision of minimum wages at levels which could be said to cater for a living wage.

The first shortcoming often highlighted is the problematic or unsuccessful structure/form that minimum wage levels take in South Africa. Rather than having one national minimum wage, unions argue that government prefers fragmented minimum wage levels in different industries and sectors. A second shortcoming highlights the appropriate level of minimum wages to be paid. Cosatu argues that minimum wage levels should be based on the ideal of a living wage for all, whereas in South Africa there is no clear relation between existing minimum wage levels and what would be regarded as a minimum living wage. It is argued that most South Africans who work for a minimum wage continue to live in poverty. The third shortcoming can be found in the absence of a so-called *solidaristic approach*. Those who argue for minimum wage levels which are reflective of a living wage advocate that minimum wage levels should be constantly increased, whilst at the same time decreasing gaps in wage levels.[74] Finally, it is argued that the relationship between a national minimum wage and collective bargaining should be regarded as complementary in nature. A national minimum wage level should set the minimum level below which no worker's wage may fall, with collective bargaining used to increase the minimum wage floor in different industries and regions.[75]

5 Minimum Wages in South Africa

Employee rights in South Africa as a topic is nothing new and has been the subject of debate for generations. Over the years many factors have influenced this debate. One such factor is globalisation and the access it provided to cheaper foreign labour with a consequent decrease in local working conditions.[76] Wage demands and wage levels specifically came under the spotlight during the global financial crisis of 2007/2008, which resulted in alarmingly high levels of unemployment. Another topic often encountered in employee rights' debates is the substantial informal

73 Chen 12.

74 The 2014 amendments to the EEA have introduced a provision to address the principle of *equal pay for work of equal value* – s 6(4) now stipulates that "[a] difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination".

75 *Towards New Collective Bargaining, wage and social protection strategies: Learning from the Brazilian Experience* (Concept paper 2012 Cosatu) 39 available at http://www.cosatu.org.za/docs/discussion/2012/cec_concept paper.pdf (accessed 2012-08-27).

76 Antoine 2011 *Comparative Labor Law & Policy Journal* 356.

economy,[77] within which worker exploitation and unsatisfactory employment conditions remain rife.

For South Africa 2012 in particular was a pivotal year as far as disputes over minimum wage levels were concerned. During mid-2012 miners at Lonmin mine in South Africa commenced strike action over demands for better working conditions and increased wages (the strike was also known as the Lonmin miners' strike or Marikana miners' strike).[78] Central to the strike action was the view by workers that "… benefits of mining [we]re not reaching the workers or the surrounding communities. Lack of employment opportunities for local youth, squalid living conditions, unemployment and growing inequalities contribute[d] to this mess".[79] The strike was riddled with violent incidents between members of the South African Police Services (SAPS), security personnel at the Lonmin mine, the leadership corps of the National Union of Mineworkers (NUM) and striking workers themselves. Headlines were made when weeks of unrest culminated in the death of approximately 47 individuals, of whom some 34 were striking mineworkers shot by police officers during a spurge of violence that took place on 16 August 2012.

The latter part of 2012, continuing into early 2013, also saw widespread strike action in the agricultural sector. This industrial action resulted in minimum wage levels for farm workers increasing just over 52% with effect from 1 March 2013.[80] This was achieved through the amendment of Sectoral Determination 13: Farm Worker Sector.[81] In response to the significant increase in minimum wages farmers and farmers' organisations alike criticised government for failing to consider the impact that these substantial increases might practically have on the farming industry, especially in the long run. It was argued that most farmers would not be able to afford the payment of wages at the new minimum wage levels rates, as a result of which many farmers would have to resort to lay-offs of workers in an attempt to remain financially sustainable. Despite the aforesaid fears Cosatu, while welcoming the increase in minimum wage levels in principle, maintained that the

77 Antoine 2011 *Comparative Labor Law & Policy Journal* 352.

78 The Lonmin owned mine where the strike took place is situated in the Marikana area near the town of Rustenburg, North West province, South Africa.

79 "Lonmin an example of exploitation" *Business Report* (2012-08-17) available at http://www.iol.co.za/business/companies/lonmin-an-example-of-exploitation-1.1365221 (accessed 2013-02-21).

80 See discussion under 5.1 below, Sectoral Determination 13: Farm Workers Sector.

81 See the discussion in 5.1 below. The amended Sectoral Determination 13 can be accessed at http://www.labour.gov.za/DOL/legislation/sectoral-determinations/sectoral-determination-13-farm-worker-sector (accessed on 2018-06-09).

increased wage levels still did not constitute a living wage,[82] and further argued that merely contributing a fear of job losses to a particular minimum wage level was too simplistic in its approach.[83] While this happened just over five years ago already, at the time of writing this article there was still no clear statistics which indicated any significant rise in unemployment levels in the agricultural sector since 2013.

5 1 The Present: The Wage Regulation Regime in South Africa

Entering an era of democracy after the first democratic elections of 1994, South Africa adopted the Constitution of 1993 (Interim Constitution), followed by adoption of the Final Constitution of 1996. The Constitution rendered values underlying an open and democratic society, such as, human dignity, equality, and the advancement of human rights and freedoms, applicable to *all* individuals.[84] The Constitution is the supreme law of South Africa against which all government actions and legislation are measured. Any law or conduct inconsistent with the values enshrined in the Constitution is invalid,[85] and may consequently be declared unconstitutional.[86] There is no single area of law in South Africa that remains unaffected by constitutional principles. All labour law and employment-related issues must therefore be considered in light of constitutional principles, specifically the Bill of Rights.

Section 39(1)(b) of the Constitution stipulates that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum … must consider international law …". Similarly, section 233 holds that "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international

82 *COSATU cautiously welcomes increase in farm workers minimum wage* available at http://www.cosatu.org.za/show.php?ID = 6912 (accessed 2013-02-21).

83 *COSATU cautiously welcomes increase in farm workers minimum wage* available at http://www.cosatu.org.za/show.php?ID = 6912 (accessed 2013-02-21). See also "Wage Increase Farm Workers Sector – March 2013" *LabourNet* (2013-02-11) available at http://industrialrelations.labournet.com/article-display/wage-increase-farm-workers-sector-%E2%80%93-march-2013/149 (accessed 2013-02-21); "Farm worker minimum wage increased 52%, layoffs expected" *Farmer's Weekly* (2012-02-05) available at http://www.farmersweekly.co.za/news.aspx?id = 35156&h = Grain-SA-advises-members-to-avoid-retrenchment-of-farm-workers (accessed 2013-02-21).

84 Constitution s 1. S 2 of the Constitution further states that the Bill of Rights "… enshrines the rights of all people in our country …".

85 Constitution s 2.

86 Govindjee & Van der Walt in Van der Walt *et al* (eds) *Labour Law in Context* (2012) 3.

law".[87] Since South Africa is a member state to the ILO, when considering minimum wages in South Africa in light of international law, the ILO's Decent Work Agenda is of great importance. Furthermore, in 2015 South Africa also ratified the United Nations International Covenant on Economic, Social and Cultural Rights.[88] This Covenant includes the right of all individuals to an adequate standard of living.[89]

Section 23 of the Constitution remains the empowering provision as far as labour relations are concerned. Section 23(1) affords *everyone* the right to equality and fair labour practices, regardless of race, gender, employment status, and so on. In summary, all workers are protected under section 23(1) of the Constitution, regardless of whether they find themselves working in the formal or informal economy. To give effect to the rights protected under section 23, the Labour Relations Act 66 of 1995 (LRA), the Basic Conditions of Employment Act 75 of 1997 (BCEA), and the Employment Equity Act 55 of 1998 (EEA), amongst others, were enacted.

The BCEA was promulgated "[t]o give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the Republic as a member state of the International Labour Organisation; and to provide for matters connected therewith".[90] As far as wages as a basic condition of employment are concerned, the BCEA addresses issues such as the calculation and payment of remuneration, availability of remuneration information, permitted deductions from remuneration, and payment of benefit fund contributions.[91] The BCEA in itself does not, however, provide for minimum wage levels and simply stipulates that an employee's wage should be calculated by reference to the number of hours ordinarily worked by the employee.[92] However, in terms of section 51(1) of the BCEA the Minister of Labour was vested with the power to promulgate sectoral determinations aimed at establishing basic conditions of employment for employees in a particular sector and area.

Essentially there are three ways through which minimum wages (as well as other conditions of employment) may be set in South Africa. The first is by way of an agreement concluded in the workplace between the

87 See also *National Union of Metal Workers of South Africa & Others v Bader Bop (Pty) Ltd & Another 2003 2 BCLR 182 (CC)* 37 where the Constitutional Court held that an interpretation that takes into account principles contained in relevant ILO Conventions is to be preferred.

88 Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx (accessed 2018-06-09).

89 "A national minimum wage is a powerful tool to break the poverty cycle" *Mail & Guardian* (2016-12-12) available at https://mg.co.za/article/2016-12-12-00-a-national-minimum-wage-is-a-powerful-tool-to-break-the-poverty-cycle (accessed 2018-06-09).

90 Preamble to the BCEA.

91 Ss 32 to 35 BCEA.

92 S 35(1) BCEA.

employer and its employees, or between the employer and a specific employee (typically through a contract of employment). Secondly, collective agreements in terms of which identified employees, or employees as a group within an identified sector or industry, are provided with agreed working conditions may be concluded in any bargaining council.[93] Thirdly, sectoral determinations in accordance with section 51(1) of the BCEA, or other ministerial determinations in accordance with section 50 of the BCEA and section 44 of the LRA, may be promulgated by the Minister of Labour.[94] To date eleven sectoral determinations have been implemented in South Africa in terms of section 51(1) of the BCEA. The relevant sectors are farm workers, children in the performing arts, civil engineering, contract cleaning, domestic workers, forestry, hospitality workers, learnerships, private security, taxi industry, and wholesale and retail.

Late in 2017 the National Minimum Wage Bill of 2017 was introduced by the Minister of Labour's Office in the National Assembly. The Bill was introduced with a view to provide for an across-the-board national minimum wage, and the establishment of a national Minimum Wage Commission. The initial date for implementation of the Bill by the Precedency was earmarked as 1 May 2018, which did not materialise. The Bill was however passed by Parliament during the last week of May, and it is arguably only a matter of time before the Bill is signed off as legislation by the President. Though there are some exceptions and transitional provisions, in general the Bill sets out to implement a national minimum wage of R20 per hour. Not surprisingly the Bill has met with much resistance – both from employers and trade unions. Unions are rejecting implementing a national minimum wage at levels below minimum wages already set in sectoral determinations. A detailed discussion of the Bill, including arguments supporting and opposing the Bill as it stands, falls beyond the scope of this article. It will however be interesting to keep abreast of developments around the proposed Bill over the months to come.

5 2 The Future: Options For a Legislated Minimum Wage System

The justification for adopting a legislated minimum wage system, as opposed to a system of freely-determined wages, has historically been questioned in countries with an established culture of self-regulation, such as centralised bargaining. Over the past few years many of these countries have however shifted the method of wage-determination towards that of regulation. Such a shift in approach has largely been ascribed to increased undermining of, and loss of faith in, centralised

93 S 49 BCEA.
94 Ss 51 to 58 BCEA.

bargaining, and the growing number of vulnerable workers exploited outside a formal system of employment regulation.[95]

As previously mentioned, any debate in South Africa around self-regulation or regulation through, for instance legislation, has now become mostly academic in nature. Minimum-wage levels have already been legislated for years in different sectors through sectoral determinations. And the recently-adopted National Minimum Wage Bill is a further definite step towards a system of legislated minimum wages. It is therefore no longer a question of *whether* minimum wages should be legislatively regulated, but rather *how* such wages could be best regulated through legislative measures. However, establishing a successful and practical system to legislatively regulate minimum wages, whether at national or sectoral level, is not a simple task. Whilst remaining sensitive to the plight of workers, particularly those earning at the lowest wage levels, there are many variables to consider, both from economic and legal perspectives, all of which might impact on the long-term consequences of minimum wage levels.

It is clear from the discussion earlier that the effect legislated minimum wage levels might have on unemployment rates remains uncertain and a topic for debate. It is argued that there are many reasons to expect minimum wages to have very little impact on employment levels in emerging economies such as South Africa, for various reasons. The first is that, in economies characterised by high levels of inflation, it might be very difficult to increase the real value of any legislated minimum wage.[96] A second, yet more disturbing, reason is that the level of compliance with legislated minimum wages is frequently very low in developing countries.[97] This may be as a result of minimum wages being set too high,[98] the system for regulation being too complex,[99] the absence of enforceable sanctions for non-compliance, or minimum wages levels simply not enforced as a result of factors such as a lack of resources.[100]

95 Cosatu 2012 44 available at http://www.cosatu.org.za/docs/discussion/2012/cec_conceptpaper.pdf (accessed 2012-08-27).

96 Lustig & McLeod *Minimum Wages and Poverty in Developing Countries: Some Empirical Evidence* (Discussion Paper 1997 International Economics).

97 Bhorat, Kanbur & Mayet "Minimum Wage Violation in South Africa" 2012 *International Labour Review* 277.

98 Saget "Fixing minimum wage levels in developing countries: Common failures and remedies" 2008 *International Labour Review*; Lee & Sobeck "Low-Wage Work: A Global Perspective" 2012 *International Labour Review* 141; Rani, Belser, Oelz & Ranjbar "Minimum Wage Coverage and Compliance in Developing Countries" 2013 *International Labour Review* 381.

99 Rani, Belser, Oelz & Ranjbar 2013 *Int'l Lab. Rev.*

100 Broecke, Forti, Vandeweyer *The effect of minimum wages on employment in emerging economies: a literature review* 2 available at http://national minimumwage.co.za/wp-content/uploads/2015/09/0221-Effect-of-Minimum-Wages-on-Employment-in-Emerging-Economies-A-Literature-Review.pdf (accessed 2018-06-09).

Studies on minimum wages internationally suggest that more often than not criteria for determining minimum wages are largely economically driven. The most common economic criteria encountered in such studies, in order of relevance based on their inclusion in studies, include: inflation and the general cost of living; prevailing economic conditions in the country involved; existing wage levels; workers' needs; productivity; employment rate; capacity of businesses to pay minimum wages; and the availability of social security benefits to employees.[101] Some interesting observations may be made from the above. Firstly, it is interesting, albeit alarming, to note that the needs of workers as a factor to determine minimum wage levels only ranks fourth in relevance. Secondly, the ability[102] of businesses to actually afford the payment of minimum wages only ranks second to last. It is consequently of some concern that criteria directly influenced by worker and business considerations and needs are not regarded as top criteria in determining minimum wage levels.

Implementing any legislated minimum wage system notably involves two key issues for consideration: firstly, the approach to be used in implementing a legislated minimum wage and, secondly, the level at which minimum wages should be set. Turning to the first issue, there are several options for implementing legislated minimum wages.[103] The most commonly observed approaches include: an across-the-board single national minimum wage; sector-specific minimum wages, ie, specific minimum wages determined for specific sectors or industries; or a combination of the aforesaid two approaches. Very few countries to date have opted for the implementation of a singular national minimum-wage level.[104] In countries where minimum-wage levels have been implemented on sectoral basis, two principal methods for establishing wage levels have emerged: wage levels as set by government itself, or wage levels concluded through collective bargaining between various stakeholders.

Turning to the second issue for consideration, ie, the level at which minimum wages should be set, it is generally agreed that a balance must

101 Eyraud & Saget *The Fundamentals of Minimum Wage Fixing* (2005 ILO) 29.

102 One must off course remain mindful of how such *ability to afford* is actually measured. Care should be taken in simply accepting arguments of ability or otherwise where the ability is based on any employer's subjective view on affordability. Also, wages only forms but one category in a range of possible expense categories when considering the issue around ability to afford.

103 For detailed discussions on examples of minimum wage systems implemented in various countries, see Broecke, Forti, Vandeweyer *The effect of minimum wages on employment in emerging economies: a literature review* available at http://nationalminimumwage.co.za/wp-content/uploads/2015/09/0221-Effect-of-Minimum-Wages-on-Employment-in-Emerging-Economies-A-Literature-Review.pdf (accessed 2018-06-09) as well as Rani, Belser, Oelz & Ranjbar 2013 *Int'l Lab. Rev.* Deakin 2017 ILJ also discusses the move in the UK from a system of sectoral collective bargaining to a legally binding national minimum wage, which is similar to the position SA currently finds itself in.

104 Eyraud & Saget *The Fundamentals of Minimum Wage Fixing* (2005 ILO) 7.

be reached between, on the one hand, setting minimum wages at levels which have the ability to meaningfully improve the livelihoods of workers, and, on the other hand, guarding against the creation of unsustainable minimum wage systems for a country's economy at large.[105] Of critical importance however in deciding on any minimum wage level is moving towards setting minimum wages at levels which could be regarded as living wages. While some countries utilise a basic system within which a single, across-the board, national minimum wage is set, others have highly complex arrangements where minimum wages vary across regions, sectors, occupations and/or age groups.[106] Up until such time as the National Minimum Wage Bill comes into effect South Africa is a good example of a highly complex system of sectoral determined wage levels. It is common for minimum wages in the affected sectors to vary by occupation, location, and hours of work within. Some commentators in fact view South Africa as being one of the countries with the most complex minimum wage system.[107] This is rather interesting when considering studies which suggest that countries with a general national minimum wage system experience higher compliance rates when compared to countries that have numerous sectoral or occupational minimum wages.[108]

Those in favour of a legislated national minimum wage policy argue that a properly-assessed and implemented national minimum wage system can contribute towards reducing poverty and inequality, while potentially also boosting economic growth. It is consequently argued that a proper national minimum wage policy has an important role to play in building a more equitable and prosperous South Africa. The success of a national minimum wage policy however will be dependent on the implementation of other successful supporting policies.[109]

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105 https://www.dailymaverick.co.za/article/2016-08-11-op-ed-a-national-minimum-wage-for-south-africa-the-path-to-economic-growth/#.WqUKgChuZdh (accessed 2018-06-09).

106 Broecke, Forti, Vandeweyer *The effect of minimum wages on employment in emerging economies: a literature review* 5 available at http://nationalminimumwage.co.za/wp-content/uploads/2015/09/0221-Effect-of-Minimum-Wages-on-Employment-in-Emerging-Economies-A-Literature-Review.pdf (accessed 2018-06-09).

107 "The most complex systems can be found in South Africa and India. In South Africa, minimum wage levels are set by sector, but these sector minimum wages can further differ by occupation, region, level of experience, firm size and hours worked" as held in Broecke, Forti, Vandeweyer *The effect of minimum wages on employment in emerging economies: a literature review* 5 available at http://national minimum wage.co.za/wp-content/uploads/2015/09/0221-Effect-of-Minimum -Wages-on-Employment-in-Emerging-Economies-A-Literature-Review.pdf (accessed 2018-06-09).

108 Rani, Belser, Oelz & Ranjbar 2013 Int'l Lab. Rev 402.

109 https://www.dailymaverick.co.za/article/2016-08-11-op-ed-a-national-minimum-wage-for-south-africa-the-path-to-economic-growth/#.WqUKgChuZdh (accessed 2018-06-09).

A fundamental question South African policy-makers will therefore need to address is the nature of the relationship, if any, between a legislated national minimum-wage system and the existing system of sector-specific minimum wages set through sectoral determinations.[110] International evidence suggests that legislated minimum wages work best when they operate in conjunction with arrangements providing for multi-employer collective bargaining, and should not be seen as a replacement for the latter.[111] Approached from a broader policy perspective, the challenge is to find the best combination of policies and interventions which, together, will result in the creation of effective compliance strategies.[112]

6 Conclusion

Key issues that this article is hoped to have provoked some further thought on are: whether legislated minimum wage levels is a realistic and reasonable option, specifically in the South African context; whether the implementation of legislated minimum-wage levels could have a significant effect towards achieving the ILO's Decent Work Agenda;[113] and the form a legislated minimum wage level system should adopt in order to have any chance at success.

As indicated there remains a clear divide between proponents advocating for minimum regulation and those who advocate for freedom of markets without unnecessary outside interference. Whilst there seems to be equally-valid arguments for both regulation and non-regulation, the general consensus internationally, at least at the time of writing this article, seems to be that the advantages of some form of regulation of minimum wages outweigh the risks or restrictions attached to such regulation.

It seems trite that an economy within which the financial position of the majority of citizens is constantly deteriorating is unlikely to do well in the long run.[114] One cannot therefore ignore the advantages and disadvantages legislated minimum-wage policies could have on economies. Considerations around legislated minimum-wage levels took on a further level of complexity in face of the global financial crisis experienced in 2007/2008. During the early days of the crisis many governments opted for a recovery approach within which purchasing power and aggregate demand were maintained as key elements towards economic recovery. However, as the crisis increased in intensity, wage cuts as a result of both collective bargaining and unilateral cuts by

110 Deakin 2017 ILJ 24.
111 Deakin 2017 ILJ 24.
112 Rani, Belser, Oelz & Ranjbar 2013 *Int'l Lab. Rev* 399.
113 See the discussion of the ILO's *decent work agenda* in 4.1 above.
114 Stiglitz available at http://www.vanityfair.com/society/features/2011/05/top-one-percent-201105 (accessed 2012-06-05).

employers were increasingly observed, which resulted in an overall decline in wage levels and a resultant decline in aggregate demand.[115]

Issues of relevance to the ILO's Decent Work Agenda, such as providing a living wage, therefore continue to be prevalent, yet difficult to address. As a result, whilst basic economic theory predicates that the productivity of an industry should be a final consideration in wage determination,[116] many unions argue for a return to *social movement unionism*.[117] The concept of social movement unionism has been a topic of much research for years, and can generally be described as:

> "a highly mobilized form of unionism which emerges in opposition to authoritarian regimes and repressive workplaces in newly industrializing countries of the developing world, and which is based in a significant expansion of semi-skilled manufacturing work. SMU is embedded in a network of community and political alliances, and demonstrates a commitment both to internal demographic practices as well as to the broader democratic and socialist transformation of authoritarian societies."[118]

It might be argued that social movement unionism is in fact a key concept in the search for forward-thinking solutions as to how policy changes in the area of wage-determination could be set in motion and ultimately become successful. Social movement unionism asks, not only of trade unions as understood in labour law, but of a range of role-players, to address wider community issues such as education, skills-development, and employability. From a South African perspective, an on-going restraint in socio-developmental initiatives is the prevailing shortage of critical skills in many sectors.[119] As example, trade unions, as part of social movement unionism, might therefore want to investigate how labour movements could possibly address these shortcomings. In short, social movement unionism not only concerns itself with employment rights and the organisation of workers, but rather engages in a far wider political struggle for the achievement of human rights, social justice and values that underpin any democratic society in general.

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115 *Labour Administrations and National Labour Policies: Current Challenges, Practices and Policies* (2009 ILO Social Dialogue Sector) 10 available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_123787.pdf (accessed 2012-08-27).

116 Price & Ho 2011 *Comm. L. World Rev* 110.

117 *Return to Social Movement Unionism partner* (2011 NALEDI) available at http://www.naledi.org.za/index.php?option = com_k2&view = item&id = 42:return-to-social-movement-unionism (accessed 2012-05-24).

118 Von Holdt "Social movement unionism: the case of South Africa" 2002 Work, Employment and Society 285.

119 *Return to Social Movement Unionism partner* (2011 NALEDI) available at http://www.naledi.org.za/index.php?option = com_k2&view = item&id = 42:return-to-social-movement-unionism (accessed 2012-05-24). The EEA defines *designated groups* to mean black people, women and people with disabilities, while *black people* is defined as a generic term which means Africans, Coloureds and Indians.

120 Cosatu 2011 41 available at http://www.cosatu.org.za/docs/reports/2011/naledi_research_paper.pdf (accessed 2012-08-27). Also see discussion on

Through issues highlighted in this article, yet without attempting to suggest any concrete recommendations or solutions, it seems as if any attempts to achieve overall living standards in line with a living wage ideal is likely only to be achieved through a combination of legal, economic and social movement interventions. As previously argued by Cosatu, actions to close the gap between minimum wage and living-wage levels should focus on core policy interventions aimed at, amongst others, (i) ensuring access to education, skills and human resource development aimed at redressing existing labour market deficiencies; (ii) access to cheap, reliable and safe public transport system(s); and, finally, (iii) the implementation of a national retirement scheme.[120]

Ultimately it seems to come down to the following question: Is it possible to introduce a system of legislated minimum wage levels which will have the power to provide employees with what could be regarded as, a living wage, without fuelling unemployment levels and impacting negatively on economic growth and job creation?[121] As with many issues pertaining to law and economics, this is clearly not an easy question to answer, and there is definitely no blueprint (yet) for any successful system. In pursuing the ideal of social movement unionism, an economy requires collective action from different stakeholders, most notably governments investing in infrastructure, education and technology.[122] It has therefore been said that regulation could be achieved not only through law in itself, but also through other mechanisms aimed at the achievement of social policy goals. Consequently, regulation should not only focus on specific sets of rules, but also on all state interventions and actions, as well as non-state social controls or influence, such as markets.[123]

Perhaps the answer does not lie in a single, strictly-controlled system, but rather the implementation of an out-of-the-box strategy or strategies. Whilst developing such a clear one-size-fits-all minimum wage system model will undoubtedly be difficult, perhaps even impossible, a first step might be to investigate implementing an easily-adaptable system, and one which is firmly embedded in the below non-negotiable values and principles:

- Any minimum wage should be set at a level which, based on country specifics, would be regarded as a living wage;
- Minimum-wage levels must be set at levels which will not lead to a rise in unemployment levels;
- Economic growth and job creation should not be negatively impacted by the minimum-wage system and decided wage levels; and

social protection in Cosatu 2012 51 available at http://www.cosatu.org.za/docs/discussion/2012/cec_conceptpaper.pdf (accessed 2012-08-27).

121 Price & Ho 2011 *Comm. L. World Rev* 96.

122 Stiglitz available at http://www.vanityfair.com/society/features/2011/05/top-one-percent-201105 (accessed 2012-06-05).

123 Baldwin & Cave *Understanding Regulation: Theory, Strategy and Practice* 1999 as referenced in Benjamin 2.

- Training and skills development of individuals should be a focal point in any minimum-wage system, which obligation should not be placed on the shoulders of individuals alone, but declared a shared obligation between individuals, employers and provincial and national government(s) alike.

It is hoped that this article has provided some valuable and clear insights into the multi-dimensional sphere and complexity of minimum wages and issues related thereto, and as such laid a basis from which more studies which could provide further insight into the topic might be undertaken.

Waiving of rights to property in insolvent estates and advantage to creditors in sequestration proceedings in South Africa

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OPSOMMING

Voordeel vir skuldeisers by insolvensieaansoeke en die afstanddoening van die regte van skuldenaars in hierdie aansoeke

In vandag se samelewing, en veral in Suid Afrika, wend die meeste mense hulle tot die leen van geld ten einde hul daaglikse bestaan te finansier. Gevolglik was daar nog altyd 'n behoefte aan professionele hulp in gevalle waar die skuldenaar probleme ondervind met die terugbetaling van sy of haar skuld. Sodanige hulp word gewoonlik daargestel deur wetgewing. In Suid Afrika word die Insolvensiewet 24 van 1936 hoofsaaklik gebruik om hulp te verleen aan partye by die kollektiewe skuldinsamelingsprosedure wat die sekwestrasie van die skuldenaar se boedel beoog. Sekwestrasie is onder andere veronderstel om te lei tot die rehabilitasie van die skuldenaar en dus 'n nuwe kans op finansiële herstel. Vir die sekwestrasie van ?n skuldenaar se boedel vereis die Insolvensiewet bewys dat sekwestrasie tot voordeel van skuldeisers sal wees. 'n Probleem wat ontstaan is dat daar in sommige gevalle'n potensiële voordeel vir skuldeisers bewys kan word, maar in ander gevalle nie. Dus word "arm" of minder-bevoorregte individue verhoed daarvan om gebruik te maak van die prosedure en regte wat die Insolvensiewet daarstel, en daarom ook die voordeel van rehabilitasie. Skuldenaars probeer om hierdie probleem van "voordeel vir skuldeisers" te omseil deur afstand te doen van sekere "regte" wat die Insolvensiewet aan hulle toeken. Dit skep die indruk dat hulle boedelwaarde voldoende is om voordeel te bewys. Die Hoë Hof het egter bevind dat sodanige afstanddoening nie moontlik is nie, en gevolglik ontoelaatbaar.

Hierdie probleem lei tot die vraag of minder-bevoorregte skuldenaars in sulke omstandighede ongelyk behandel word, en of sulke behandeling in stryd is met die vereistes van die Suid-Afrikaanse Grondwet, 1996. Die artikel ondersoek dus die kwessie van voordeel vir skuldeisers by insolvensieaansoeke; die afstanddoening van regte van skuldenaars in hierdie aansoeke; en die moontlike ongrondwetlikheid van die beleid van "voordeel aan skuldeisers" in die Suid-Afrikaanse insolvensiewetgewing. Die skrywer kom tot die gevolgtrekking dat die ongelyke behandeling van skuldenaars in die toekoms heel moontlik voor die Grondwetlike Hof kan beland. Maar alvorens dit egter gebeur sal daar streng gehou moet word by die vereiste van voordeel vir skuldeisers soos in die Insolvensiewet uiteengesit.

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1 Introduction

> Bread, cash, dosh, loot, moollah, readies, the wherewithal: call it what you like, money matters.[1]

In today's consumer-oriented society this quotation is more relevant than ever. Without money it is impossible to survive. But what is to be done when an individual, for whatever reason, runs out of money? Particularly in South Africa, the majority of persons rely to some extent on the borrowing of money from creditors for their daily and future survival.[2] But is this a negative trend? Coetzee answers this question in her citation of the *INSOL Consumer Debt Report* as follows:

> "Consumer debts however are no problem per se: they are one of the great dynamic factors in our economies. A high level of domestic consumption is required for both stability and growth. This is why consumers are encouraged by governments to consume. One of the ways to boost this consumption is to facilitate and expand credit facilities for consumers. Consumer debts become a problem when debtors are unable to find solutions for repayment without professional help and that is why society as a whole bears a collective responsibility."[3]

This being so, it is also true that historically there has been a need for debtors and creditors to seek professional help when the money runs out and the repayment of debts becomes impossible.[4] Professional help usually is achieved through legislation, which may vary in form, depending on the type of debtor or the country where the parties are living.[5]

In South Africa the three important legislative methods by which debt collection amongst natural persons may be achieved are administration orders provided for by section 74 of the Magistrates' Courts Act[6]; debt review under section 86 of the National Credit Act;[7] and the sequestration of a debtor's estate under the Insolvency Act.[8] Only the

1 Ferguson (2008) *Ascent of Money* 1.
2 For statistics see the Credit Bureau Monitor and Consumer Credit Market Report at www.ncr.org.za (accessed 2018-12-31).
3 See INSOL *Consumer Debt Report II* 4, quoted by Coetzee 2015 LLD Thesis 1. For this quotation Coetzee cites the following authors and information: Ramsay 2006 *U Ill L Rev* 244–245 (the year 2006 for the latter *University of Illinois Law Review* article should be 2007} and the Cork *Report* par 9.
4 See eg Hunter *Introduction* 122; Wessels *History* 663; Burdick *Principles* 271; and Bertelsmann *et al Mars* 6 for a few sources on the history of insolvency law.
5 See Ferriel and Janger *Understanding Bankruptcy* par 1.02 for modern theories in bankruptcy law.
6 32 of 1944 (individual debt collection procedure).
7 34 of 2005 (hereafter the NCA) (individual debt collection procedure).
8 24 of 1936 (hereafter the Act or the Insolvency Act) (collective debt collection procedure, as opposed to the individual collection procedure). Only High Courts have jurisdiction over sequestration applications since the individual's status is affected – see ss 2 and 149 of the Insolvency Act 24 of 1936.

latter procedure affords the parties a method of liquidation of assets culminating in rehabilitation[9] and a debt discharge or "fresh start" financially. Only this debt collection procedure is considered in this article.

South African insolvency law aims to provide for an equitable distribution of the debtor's property to the advantage of his creditors. It is not expected to benefit the debtor.[10] The South African Insolvency Act provides for both the voluntary surrender of a debtor's estate and the compulsory sequestration of a debtor's estate.[11] However, if it cannot be shown that the sequestration will be to the advantage of creditors, a court is unlikely to grant the sequestration order.[12] But this leads to the possibility that many debtors are excluded from the sequestration route if they do not possess the required assets to show advantage for creditors, thereby also excluding the possibility of a fresh start via rehabilitation.[13] This has also resulted in the so-called "friendly sequestrations" in compulsory applications and the use of the voluntary surrender procedure for dishonest purposes in several different guises.[14] One of the methods by which it is attempted to obviate this problem of proving advantage to creditors is where the debtor agrees to waive certain "rights"[15] that a debtor is granted by the Insolvency Act. The value of such rights is intended to increase the value of the estate so that the application complies with the advantage requirement.[16] In *Ex parte Anthony*[17] a court ruled that such waiving of rights was acceptable.

9 See s 129 of the Insolvency Act.

10 Section 3(1) of the *Act* regulates this. See Bertelsmann *et al Mars* 48. See also *Ex parte Pillay* 1955 2 SA 309 (N) 311 where the court ruled that "the procedure of voluntary surrender was primarily designed for the benefit of creditors, not for the relief of harassed debtors" (*per* Holmes J).

11 See ss 6, 10 and 12 of the Act.

12 See Loubser 1997 *SA Merc LJ* 326; Roestoff 2002 LLD Thesis; Evans 2003 *SA Merc LJ* 437; and Mabe and Evans 2014 *SA Merc LJ* 651.

13 By implication, this also may exclude creditors from access to the sequestration procedure, particularly where there are several creditors with claims against a debtor. It may therefore occur that only the most vigilant creditor has his claim satisfied in the *individual* debt collection procedure.

14 See, amongst others, *Ex parte Application: Shmukler-Tshiko* 2012 JDR 1796 (GSJ); *Ex parte Arntzen (Nedbank Ltd as Intervening Creditor)* 2013 1 SA 49 (KZP); *Plumb on Plumbers v Lauderdale* 2013 1 SA 60 (KZD); and *Huntrex 337 (Pty) Ltd t/a Huntrex Debt Collection Services v Vosloo* 2014 1 SA 227 (GNP) (hereafter the *Huntrex* case).

15 Hereafter referred to only as "rights", and more specifically, those envisaged in section 82(6) of the *Act*. Section 82(6) provides:

> From the sale of the movable property shall be excepted the wearing apparel and bedding of the insolvent and the whole or such part of his household furniture, and tools and other essential means of subsistence as the creditors, or if no creditor has proved a claim against the estate, as the Master may determine and the insolvent shall be allowed to retain, for his own use any property so excepted from the sale.

16 See s 6 of the Insolvency Act.

17 2000 4 SA 116 (C) (hereafter *Ex parte Anthony*).

However, in 2013 a contrary judgment was handed down in *Ex parte Kroese* and *Ex parte Hattingh*.[18] Here Landman J ruled that the rights embodied in section 82(6) of the Act could not be waived.[19] The court's refusal to allow the waiver in question was based, amongst other aspects, on constitutional imperatives. This resulted in Landman J indirectly focussing on the debtor's dilemma in insolvency proceedings, where the debtor is hampered from receiving any form of discharge from debts by the strict creditor-friendly policy of South African insolvency law. This is particularly evident when confronted by debtors who have no income and no assets (so-called NINA debtors).[20]

In the *Kroese* judgment Landman J concluded as follows:

> "The effect is in my view that the advantage to creditors cannot lawfully be increased by the action contemplated by the applicants. It follows that whatever factors may be raised to show that the applicants, because of external circumstances would not [b]e rendered destitute, are irrelevant because the waiver cannot lawfully be made before the application for surrender of the estate has been accepted."[21]

While I consider the judgment correct, the reasoning behind the judgment is questioned. However, the interesting aspect of the *Kroese* judgment is that various constitutional rights of the debtors *per se* were considered. Nonetheless, the question of the constitutionality of the *general* policy framework of insolvency legislation, particularly the "advantage to creditors" requirement, was not considered. However, there are indications that there is a movement towards a more debtor-friendly insolvency regime in South Africa, usually based on constitutional requirements, thereby making sequestration proceedings more accessible to "poor" debtors. In this article a few of these developments are considered.

2 Requirement of Advantage for Creditors

Sections 6, 10 and 12 of the Insolvency Act require sequestration applications to be to the advantage of creditors. In voluntary surrender applications this requirement is stricter than for compulsory applications as the debtor applying for the surrender of his estate must show that it *will* be to the advantage of creditors.[22] For compulsory sequestration applications it only has to be shown that there is reason to

18 Reported as *Ex parte Kroese* 2015 1 SA 405 (NWM). See Ndou April 2014 *De Rebus* 45.
19 The debtors relied heavily on *Ex parte Anthony*.
20 See generally Coetzee 2015 LLD Thesis.
21 At par 65.
22 S 6(1) of the Act.

believe that it will be to the advantage of creditors.[23] This differentiation in proving advantage to creditors results in "poorer" debtors being locked out of the insolvency proceedings.

Coetzee points out that the only solution for such debtors to escape what to the author of this article looks like debt slavery, is to enter into debt rearrangements through voluntary agreement with creditors. Coetzee, however, correctly points out that these debtors are at a disadvantage in negotiations as they cannot offer any monetary return to creditors.[24]

The advantage of sequestration proceedings, as opposed to other forms of debt relief, is that they eventually provide the insolvent debtor with a fresh start in his financial position after rehabilitation. But as already mentioned, the advantage to creditors-requirement has resulted in an abuse of sequestration proceedings in both voluntary and compulsory sequestration proceedings.[25] The courts have been trying to put an end to this abuse. But in doing so no concern has been given to the position of the debtors, particularly NINA debtors, because the South African insolvency regime is creditor-friendly, and:

> "[u]nless and until the Insolvency Act is amended, the South African insolvency law requires an advantage to creditors before the estate of an individual can be sequestrated. Much as the troubled economic times might engender sympathy for debtors whose financial burden has become too much to bear, the insolvency law seeks to protect the interests of creditors at least to the extent that a minimum advantage must be ensured for the concurrent creditor when the hand of the law is laid on the insolvent estate."[26]

However, this dilemma of certain debtors being denied access to sequestration proceedings has prompted the question whether the foundation of the entire South African insolvency regime, resting on the "advantage" requirement, may be unconstitutional. Concerning this question Coetzee says the following:

> "Evans first raised the issue of the possible unconstitutionality of the demonstrated differentiation that occurs in South African natural person insolvency law in the following terms: 'Although the [Insolvency] Act does not provide for different classes of debtors who are to be treated differently in accordance with differing or changing circumstances, it does in fact differentiate between those 'rich debtors' who are able to prove advantage to

23 Ss 10 and 12 of the Act. See *Meskin & Co v Friedman* 1948 2 SA 555 (W) 559. In relation to a practice rule in the North Gauteng High Court, Pretoria, *Ex parte Ogunlaja* [2011] JOL 27029 (GNP) para 9 (hereafter the *Ogunlaja* case) found that at least 20 cents in the rand was required to show advantage for creditors. See generally Roestoff 2002 LLD Thesis 347 and further, and Swart 1990 LLD Thesis 273 and further for a comprehensive discussion hereof.

24 Coetzee 2015 LLD Thesis. For an extreme example, see the *Huntrex* case.

25 See, eg, Smith 1981 *MB* 59; Smith 1997 *JBL* 50; and Evans 2001 *SA Merc LJ* 490 and further.

26 Per Bertelsmann J in the *Ogunlaja* case par 36.

creditors, and the 'poor debtors' who cannot. This raises the question whether, under present legislation, the door has been opened for these 'poor debtors' to question the constitutionality of their position."[27]

In an informative analysis, Coetzee states that the right to equality, entrenched in both the Constitution[28] and the Promotion of Equality and Prevention of Unfair Discrimination Act,[29] must be considered when questioning the constitutionality of the South African insolvency regime.[30]

She states that the equality concept is a difficult and controversial social ideal. She refers to Currie and De Waal who find the challenge of the idea of equality first in determining the similarities in persons' situations and secondly, determining what constitutes equal treatment of those similarly situated.[31]

She submits that all insolvent natural persons are presented with the same problem, being unable to pay their debts and the socio-economic consequences thereof. But what she finds dissimilar is the ability of these different individuals, in different circumstances, to repay their debts. She consequently questions the concept of equality amongst debtors within the context of insolvency law.[32]

In *Harksen v Lane*,[33] decided under the Interim Constitution,[34] the Constitutional Court followed three steps in scrutinising whether a violation of the right to equality had occurred. When applying these steps to the confined access to South African debt relief measures, Coetzee feels comfortable in submitting that:

"[t]he broader natural person insolvency system at the very least differentiates between categories of people, by amongst others drawing a distinction between those who have something to offer creditors, be it assets or income, and those who do not have something to offer. This is so since the 'haves' are allowed access to the system, through one of the three statutory debt relief measures, but the 'have nots' are excluded from any form of statutory recourse. One could possibly argue that this distinction qualifies as discrimination based on the listed ground of 'social origin' which according to Albertyn *et al* encompasses 'class' and can be used to address unfair discrimination based on socio-economic status. If the exclusion does resort under this ground, discrimination will be

27 Coetzee 2015 LLD Thesis 11-12; Evans 2002 *Int Insolv Rev* 34. Here Coetzee also cites Steyn 2004 *Int Insolv Rev* 11; Boraine and Roestoff 2014 *THRHR* 374; and Boraine and Evans "The Law of Insolvency and the Bill of Rights" par 4A8.
28 S 9.
29 4 of 2000 (hereafter the Promotion of Equality Act).
30 Coetzee 2015 LLD Thesis 12.
31 Coetzee 2015 LLD Thesis 14.
32 Coetzee 2015 LLD Thesis 14.
33 1998 1 SA 300 (CC) (hereafter *Harksen v Lane*).
34 Constitution of the Republic of South Africa 200 of 1993 (hereafter Interim Constitution).

> established and unfairness presumed, which will shift the onus to the respondent."[35]

Coetzee however finds it problematic that the term "social origin" has not yet been judicially defined. She therefore takes a more conservative stance by accepting that socio-economic status in the present context (or at all) may not necessarily resort under "social origin". Coetzee takes the matter of "socio-economic status" further[36] and states that ultimately the constitutional enquiry must ask whether established unfair discrimination can be justified under the limitations clause. For present purposes it is sufficient to agree with Coetzee's conclusion that the initial constitutional enquiry indicates that:

> "[t]he broader insolvency system would fail a constitutional challenge – a serious allegation in need of further analysis."[37]

But the point that must be made is that the policy of advantage to creditors upon which the South African insolvency system is based, certainly is open to constitutional scrutiny and may even be found to infringe certain provisions of the Constitution. As will be seen below, much evidence is documented in judgments and academic writing to show that desperate 'poor' creditors attempt to obviate the advantage policy by abusing the court procedures in both voluntary and compulsory sequestration procedures.

3 Waiving Rights to Property for Advantage to Creditors

It is generally accepted that a solvent debtor is the owner of his property with which he can deal as he wishes.[38] Generally such property enjoys constitutional protection.[39] Upon the sequestration of a debtor's estate, however, the insolvent's property vests in the Master and later in the trustee of the insolvent estate.[40] This property passes to the trustee in

35 Coetzee 2015 LLD Thesis 16. In footnotes 99 and 100 Coetzee LLD Thesis 16 provides the following:

> The term "differentiation" is used when a distinction is made on an unlisted ground. See *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) 380 and *Harksen v Lane* 321. See also Kok 2011 *THRHR* 242–244. [It appears that the latter should refer to pages 340-346]. Albertyn *et al Introduction* 79–80. They argue that the ground refers to one's social group or social status. Class, family and clan membership can all be subsumed under the meaning of social origin. To the extent that social origin can be equated with class, this ground could be used to address unfair discrimination arising from one's low socio-economic status.

See the developments in the judgment of *Sarrahwitz v Maritz* 2015 4 SA 491 (CC), discussed below.

36 See Coetzee 2015 LLD Thesis 17.

37 *Idem*, 19.

38 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* par 1.2.2 on 3 to 4, cited in *Ex parte Kroese* par 61.

39 See generally s 25 of the Constitution.

40 Ss 20(1)(a) and 2(b) of the Insolvency Act.

ownership, vesting the *dominium* thereof in the trustee.[41] But some property may be excluded or exempted from an insolvent estate.[42] The common law, court decisions and legislation provide for certain property to be excluded or exempted from the insolvent estate.[43] Whether assets are excluded or exempted should ultimately determine whether an insolvent debtor may waive his rights to property. It would also determine the value of the estate, and consequently whether there is advantage to creditors. Essentially, the question whether property is exempted from an insolvent estate will arise only after the sequestration order has been granted. This is because in the author's opinion excluded property[44] never forms part of an insolvent estate. Exempted property does form part thereof but, depending on circumstances, may be exempted from the estate. Property of the estate is exempted by the Master or the creditors in accordance with legislative provisions such as section 82(6) of the Act. The insolvent debtor has no rights to the property in question if it has not been exempted. Section 82(6) of the Act is one legislative provision that provides for property that can be exempted from an insolvent estate, but the word "excepted" is used in that provision. But if the property envisaged in that section of the Act is not exempted it will not be property belonging to the insolvent.[45] Here the question has arisen whether a debtor may waive certain rights envisaged in the Insolvency Act in order to inflate his estate so as to comply with the requirement of advantage to creditors. Two fairly prominent judgments considered this issue.

3.1 Court Judgments

3.1.1 Ex parte Anthony[46]

This was a full-bench decision in which the waiver of rights envisaged in section 82(6) was not the main issue before the court. But the court found that an insolvent debtor was entitled to waive the benefits embodied in section 82(6).[47] This judgment was considered correct by Meskin.[48]

41 See *De Villiers v Delta Cables (Pty) Ltd* 1992 1 SA 9 (A) 15 I-J. This ruling was accepted in *Harksen v Lane* par 31.

42 For a comprehensive discussion of excluded or exempted property, see Evans 2008 LLD Thesis Ch 9.

43 Ss 23, 79 and 82(6) of the Insolvency Act regulate excluded and exempted property. Other legislative provisions in this sphere are considered in Evans 2011 *PER* 38. See *Wessels v De Jager* 2000 4 SA 924 (SCA) for an example of court judgments relating to excluded or exempted property.

44 See s 23 of the Insolvency Act for examples of excluded property.

45 Unlike for example the debtor's salary or remuneration, which may be considered "excluded" property, depending of the circumstances; see generally s 23 of the Act.

46 2000 4 SA 116 (C).

47 At paa 20. It cited *SA Eagle Insurance Co Ltd v Bavuma* 1985 3 SA 42 (A) 49G-I as authority.

48 Kunst *et al Meskin* para 3.2.

3.1.2 Ex parte Kroese

This judgment involved two applications for the voluntary surrender of debtors' estates. The applicant debtors attempted to waive the rights referred to in section 82(6) of the Act in order to increase the value of realisable assets in an effort to prove advantage of creditors. In a lengthy judgment Landman J entered into the realms of various constitutional issues relating to the relevant debtors and the property concerned.

The applicants attempted to waive the relevant rights in the following terms:

> "I am aware that some of the items listed in the movable property valuation may be viewed as part of basic household necessities, however in terms of section 82(6) of the Insolvency Act 24 of 1936 ('Insolvency Act') I surrender all assets listed in the hands of the Trustee to be appointed herein, thereby waiving the protection afforded by the Insolvency Act pertaining to these assets."[49]

3.1.2.1 Constitutional issues in *Ex parte Kroese*

The court in *Ex parte Kroese* scrutinised constitutional aspects arising from the waiver of the rights in question. Landman J considered sections 10 and 25 of the Constitution of the Republic of South Africa, 1996[50] dealing with the rights to dignity and property, respectively. He found that one's dignity could be infringed by the renunciation of any benefits found in the Act. Nevertheless, he stated that dignity should not be seen as an absolute right deserving protection under all circumstances.[51]

Landman J questioned whether section 82(6) is constitutionally valid in view of its discretionary nature.[52] Potentially it could leave the insolvent and his family destitute, depriving them of basic necessities. He thought that here section 25(1) of the Constitution may come into play.[53] He stated that the discretion to except property, or the refusal to do so, must be exercised reasonably by the Master or creditors, failing which a High Court may intervene.[54] He found that *Ex parte Anthony*[55] was not concerned with waiver of a right to basic necessities, but in any event a waiver:

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49 Par 9. By attempting to waive the "rights" to the property envisaged in s 82(6) the debtors hoped that the value of the assets concerned would inflate their estates and so show advantage to creditors.
50 Hereafter the Constitution.
51 Par 18.
52 Par 33.
53 It provides: "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."
54 Par 34.
55 See n 47 above.

> "[w]as subject to certain exceptions, namely that no one could renounce a right contrary to law, or a right introduced not only for his own benefit but in the interests of the public as well."[56]

Ex parte Anthony, Landman J ruled, gave inadequate consideration to the restriction on waiver regarding public interest.[57] Landman J said that the Constitution had to be considered in a reading of section 82(6), also concerning the dignity of persons.[58] He held that the law is concerned with the dignity of debtors,[59] referring also to section 67 of the Magistrates' Courts Act[60] and section 39 of the Supreme Court Act[61] which provide for protection similar to that found in section 82(6) of the Insolvency Act, but applied in the pre-sequestration debt collection procedure. Landman J further held that section 82(6) partly intended to maintain the right to life and the dignity of an insolvent and his family so that they could start afresh financially.[62] Landman J also coupled this to section 10 of the Constitution, noting[63] that all the protections discussed so far are intended to respect the right to life and dignity of persons.

The court found that section 22 of the Constitution concerning the right to work is also linked to the issues at hand[64] as work supports the notion of self-esteem or dignity.[65] Landman J found[66] that the right to dignity is an inalienable human right.[67] He found that the applicants failed to recognise the protective nature of the legislation under consideration. Under the Constitution, based on human rights, it protects debtors and society in general. The state's interest would not be served

56 Par 37.
57 Par 38.
58 Par 38. The relevant part of s 1 of the Constitution referred to by Landman J states as follows:
> The Republic of South Africa is one, sovereign, democratic state founded on the following values:
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

59 Par 39. At par 40 Landman J also referred to Mokgoro J in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) where she said at 151, with reference to the Magistrates' Courts Act 32 of 1944, that:
> "Section 67 of the Act serves to limit the range of movables that may be attached. The section lists certain movables that are exempt from execution in all cases. It is clear from the list that the Act seems to insulate from execution, certain items necessary for the debtor to survive."

60 32 of 1944.
61 59 of 1959.
62 Par 41.
63 Par 45. S 10 provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."
64 Par 46.
65 S 22 of the Bill of Rights provides:
> Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

66 Par 49.
67 As authority he quoted Chaskalson P in *S v Makwanyane* 1995 3 SA 391 (CC) par 144.

if citizens renounced their assets (to create an advantage to creditors) just to become a burden on society.[68]

Whether or not the parties would be destitute if they waived their rights, the court ruled, was irrelevant. This was because the relevant rights could not be waived prior to the sequestration application.[69] It is submitted that the ruling is correct. However, it is this author's opinion that the analysis of the constitutional issues in this judgment was probably unnecessary. But be that as it may, the court apparently considered the plight of the "poor" debtor important enough to consider his constitutional rights in the light of the stringent policy of advantage for creditors in South African insolvency law. The concern is that some individuals attempt to waive these rights because of the advantage requirement excluding them from applying insolvency legislation, while others are not excluded.

4 Comment

4.1 Advantage for Creditors – Possible Policy Changes?

Coetzee provides convincing arguments for the point that the advantage for creditors-requirement has the effect of excluding specifically those with no income and no assets from effective debt relief.[70] This requirement effectively excludes these debtors from the eventual advantage of achieving a fresh start after their rehabilitation. Consequently the very same requirement of advantage to creditors also results in an abuse of sequestration proceedings, both by creditors and debtors.[71] But as shown above, there are clear reasons for this consequential abuse, and this in turn leads one to question the constitutionality of the foundations of the insolvency system.

As mentioned, Coetzee has considered this problem within the context of the right to equality, entrenched in both the Constitution and the Promotion of Equality Act. As pointed out above, Coetzee finds it problematic that the term "social origin" has not yet been judicially defined, but she is of the opinion that the South African insolvency system may fail a constitutional challenge.[72] However, the matter of social origin can be taken further by analysing the Constitutional Court ruling in *Sarrahwitz v Maritz*[73] relating to a person's access to housing when insolvency intervenes. Although *Sarrahwitz* is not directly concerned with waiving of rights and advantage to creditors, the

68 Par 56.
69 Par 65.
70 See par 2 above.
71 See for example Smith 1981 *MB* 59; Smith 1997 *JBL* 50; and Evans 2001 *SA Merc LJ* 490.
72 See par 2 above.
73 2015 4 SA 491 (CC) (hereafter *Sarrahwitz*).

arguments there concerning differentiation between persons when insolvency affects a contract, are relevant to this article.

5 Access to Housing, and Homelessness and Vulnerability

To build further on Coetzee's arguments it is appropriate to briefly consider the Constitutional Court's judgment in *Sarrahwitz*. This case concerned the transfer of immovable property to a purchaser thereof after the sequestration of the seller's estate. The approach taken by the Constitutional Court in that judgment related, amongst others, to vulnerable persons and their respective rights. It is discussed here in order to show the similar relationship between a vulnerable purchaser of immovable property (within the sphere of insolvency law), and vulnerable debtors in applications for sequestration of their estates.

Mr Posthumus sold a house to Ms Sarrahwitz in 2002 for R40 000 in a cash sale.[74] She took occupation in October of that year. Mr Posthumus agreed to arrange for the transfer of the house into her name, which he failed to do. Ms Sarrahwitz made great efforts to achieve the transfer of the property into her name, but in April 2006 when Posthumus's estate was sequestrated, the house had not yet been transferred to Ms Sarrahwitz. The trustee of his insolvent estate (first respondent) refused to transfer the house to Ms Sarrahwitz since the common law dictated that the immovable property fell into the insolvent estate.[75]

To understand the common-law position and the intricacies of this judgment, a summary of the legal development is required. Before 1971 the common law of insolvency dictated that purchasers were prohibited from insisting on transfer of immovable property if the seller's estate had been sequestrated. Purchasers who had paid within a year (and not acquired transfer) and those paying the purchase price in instalments over a period of one year or longer were all affected by this common law rule. Consequently vulnerable purchasers of residential property were deprived of home ownership and the finances already paid to acquire that property. The Sale of Land on Instalments Act[76] attempted to remedy this problem by providing for instalment purchasers to have the property transferred to them if the seller became insolvent.

Then the Alienation of Land Act[77] was enacted to further facilitate transfer of residential property from an insolvent seller's estate to a

74 She had borrowed R40 000 from her employer.
75 Ms Sarrahwitz approached the High Court for an order for transfer but her application was refused on the ground that the common law and not the Act regulated the transfer of the house and that the common law supported the trustee's position. Her subsequent approaches to the Full Bench of the High Court and to the Supreme Court of Appeal failed for the same reason.
76 72 of 1971.
77 68 of 1981 (hereafter the *Land Act*).

vulnerable instalment purchaser, the emphasis being on sections 21 and 22 thereof. This statute allows a buyer of residential property, paid for in two or more instalments over a period of one year or longer to obtain transfer if the seller's estate is sequestrated. For the purpose of this article this legislation will not be discussed in further detail.

Ms Sarrahwitz, however, was deprived of the protection of the Land Act because she was a cash buyer.

A majority judgment *per* Mogoeng CJ was delivered in the Constitutional Court, and Cameron J and Froneman J delivered a concurring minority judgment. This case contained no exceptional circumstances required for the development of the common law, so the court followed a path of a proper interpretation of sections 21 and 22 of the Land Act, premised on the constitutional rights to housing, dignity, and equality.

The Constitutional Court pointed out that poor South Africans in particular may not have access to home loans and are therefore often forced to rely on credit.[78] Mogoeng CJ said that vulnerable purchasers were at issue, exposing them to possible loss of their residential properties. So the core of this matter concerned homelessness and vulnerability.[79] Access to adequate housing, the right to dignity, and the right to equality insofar as it relates to the differential treatment of vulnerable purchasers of residential property were relevant in this judgment.[80] Differentiation is apparent because the legislation excludes vulnerable purchasers, like Ms Sarrahwitz, who paid the full purchase price, but protects equally vulnerable purchasers who paid at least two instalments over a period of at least a year, notwithstanding the seller's insolvency.[81]

Ms Sarrahwitz's application for leave to appeal to the Constitutional Court centred on the argument that the common law is constitutionally invalid because it excludes a person like her from the category of vulnerable purchasers of residential property who *are* entitled to transfer, in spite of the seller's intervening insolvency. It was also argued that this differentiation denied her equal protection and benefit of the law and was inconsistent with the right to equality, unjustifiable, and therefore constitutionally invalid.

Mogoeng CJ pointed out that it could never have been the purpose of the Land Act to protect all instalment purchasers, regardless of the means at their command. The purpose could only have been to protect those who need protection, being vulnerable people who would lose their home if the seller's estate was sequestrated.[82]

78 Par 16.
79 Par 16.
80 Par 17.
81 Par 17.
82 Par 35.

Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (in Liquidation)[83] was referred to by the court[84] to explain the reasoning on which the Land Act hinges; and the court considered the judgment[85] in *Merry Hill (Pty) Ltd v Engelbrecht*[86] which made the point that this type of legislation generally protects the vulnerable, uninformed small buyer of residential property who cannot stand up to the large developer in a bargaining situation.[87]

At this point this author submits that the 'poor' debtor in sequestration proceedings may be compared with the various courts' reference to the vulnerable and uninformed. Even worse, it should be noted that in insolvency applications there is *no* protective legislation for the 'poor' debtors who attempt to enter the sequestration procedure for the purpose of gaining a fresh financial start.

In its judgment the court in *Sarrahwitz* also said that section 26 of the Constitution was intended to put a permanent end to indignity of this kind.[88] The court also referred to *Jaftha v Schoeman; Van Rooyen v Stoltz*[89] as both cases concerned the right of access to adequate housing,[90] a socio-economic right, which inevitably implicates the right to dignity.[91] Mogoeng CJ, however, found that the right to equal protection and benefit of the law was also at issue.[92] He held that the right to equality is central to the question whether it is constitutionally permissible for legislation to benefit certain vulnerable instalment purchasers to the exclusion of equally vulnerable purchasers who make a one-off payment or pay within one year.[93]

This author again questions whether the vulnerable purchasers in the above judgment are not very similar to vulnerable debtors[94] in sequestration applications.

The court in *Sarrahwitz* ruled that section 9(1) guarantees everyone the right to equal protection and benefit of the law. It means that purchasers who are equally vulnerable must enjoy the same protection, irrespective of their method of payment. So the protection conferred by the Land Act upon vulnerable home purchasers must be extended to all other vulnerable purchasers unless the differentiation was justifiable.[95]

83 1981 1 SA 171 (A) 182D-H.
84 At par 36.
85 At par 37.
86 2008 2 SA 544 (SCA).
87 Par 39.
88 Par 41.
89 2005 2 SA 140 (CC).
90 Par 42.
91 Par 43.
92 Par 46.
93 Par 47.
94 Strictly speaking also vulnerable creditors in compulsory sequestration applications where advantage to creditors is difficult to prove, or where they attempt to persuade their debtor to waive rights to certain assets.
95 Par 49.

But the Land Act effectively excludes buyers who pay for the property in full at once or within a period less than one year. This results in differentiation. *Harksen v Lane*[96] was referred to in ascertaining whether this differentiation was permissible.

The court consequently had to decide whether that differentiation had a rational connection to a legitimate governmental purpose and whether it was justifiable. The limitation analysis in relation to the impairment of Ms Sarrahwitz's right of access to adequate housing, her right to dignity, and her exclusion from the protection and benefit the Land Act offers to vulnerable instalment purchasers thus had to be considered.[97] After analysing several Constitutional Court judgments,[98] the court concluded that Ms Sarrahwitz's situation in essence was the same as that of a vulnerable instalment purchaser whose interests are already protected by the Land Act. No rational basis was found for the protection of one purchaser but not the other.[99] This legislation was under-inclusive,[100] violating the right of access to adequate housing and limiting purchasers' rights unjustifiably.[101]

The court found, amongst others, that the impugned provisions to be unconstitutional to the extent that (i) the differentiation they bring about is irrational in that it is not supported by a legitimate government purpose.[102] [103] It is submitted that these questions must also be considered when judging the differentiation between various debtors for proving advantage to creditors in sequestration proceedings.

5.1 Constitutional Questions

It must be emphasised here that this article is not a comprehensive analysis of all possible constitutional issues that may relate to the position of different types of debtors (or creditors), advantage for creditors and waiving of rights to property. What is attempted here is an early investigation of these issues, thereby identifying a possible future path that may be trodden. In *Ex parte Anthony* and *Ex parte Kroese* the courts should have commenced by questioning whether the rights in question which were sought to be waived were actually in existence prior to or at the time of the sequestration application. Landman J concluded

96 1998 (1) SA 300 (CC) at par 50 of *Sarrahwitz*.
97 Par 57.
98 See par 58 and further.
99 Par 65.
100 Pars 65–66.
101 Par 66.
102 Par 68.
103 Indirectly, however, after the Sarrahwitz house had been excluded by the court as part of Posthumus's insolvent estate, there would probably no longer be any advantage to creditors of Posthumus. By the time of that judgment, however, that issue had apparently become irrelevant.

that they did not exist in his final judgment. It is submitted that his judgment was correct.[104] However, as previously mentioned, it was probably not necessary to wander into the constitutional implications in the *Kroese* case. But by doing so, the court indirectly touched on the problems resulting from the strict creditor-friendly policy in South African insolvency law which is inextricably linked to the advantage for creditor requirements. Landman J's judgment seems to indicate the need for a relaxation of this policy.

As a consequence of the discussion above, one can only conclude that within the context of the *Kroese* judgment concerning waiving of rights to achieve advantage to creditors, there can be no infringement of rights of a constitutional nature. At the relevant moment, prior to sequestration, there simply are no rights of the debtor to be infringed. Whether or not an infringement of the various rights mentioned by Landman J may occur *after* sequestration if the creditors or the Master refuse to "except" any property in terms of section 82(6), is of course another question.

So, under different circumstances, the constitutional nature of the rights to the property mentioned in section 82(6), and the infringement thereof, could be a consideration. Then, however, one will probably be confronted by facts where the *creditors* or the Master refuse to "except" the property in question.[105] The nature of the rights to the property in that section must then be analysed to ascertain what constitutional rights will be infringed. In this respect some of the constitutional rights debated above by Landman J come to mind. It may be argued, as in the *Kroese* case, that if the insolvent debtor after sequestration is left destitute by the creditors' refusal to "except" certain estate property for his benefit, it may infringe his right to dignity, his right to property, and to practise a trade, occupation or profession freely. However, the dilemma of the "poor" (vulnerable) debtor is that the requirement of advantage to creditors initially excludes him from *accessing* the legislative sequestration procedures that are available to "wealthy" debtors, and consequently also the advantage of attaining a fresh financial start through rehabilitation. So the vulnerable debtor has no access to the law of insolvency in the first place and cannot even test his constitutional rights to property (or any other rights) that he may be entitled to if he achieved sequestration of his estate. This obstruction will not apply to applicants who *can* show advantage to creditors and who then gain access to section 82(6) and other advantages of sequestration (such as rehabilitation and absolution from debts) after a sequestration order has been granted.

104 For a comprehensive discussion of this issue, see Evans and Mathethwa 2014 *SAPL* 548-565.

105 See also ss 23(12) and 79 of the Insolvency Act, which also make provision for a type of subsistence allowance for the insolvent. It is submitted that a refusal by the trustee or Master to allow the insolvent such benefits could also result in an infringement of the constitutional rights under discussion.

But if compared with the *Sarrahwitz* judgment, it is possible that similar findings as in the latter case may result if the requirement of advantage to creditors is put through constitutional scrutiny.

But Mogoeng CJ found that also the right to equal protection and benefit of the law was at issue in the *Sarrahwitz* judgment.[106] The court confirmed that section 9(1) of the Constitution guarantees everyone the right to equal protection and benefit of the law. It means that purchasers who are equally vulnerable must enjoy the same protection, irrespective of their method of payment. As will be shown below, it is perhaps precisely on this basis that the advantage to creditors requirement may be attacked. Under the present insolvency dispensation, the more vulnerable the applicant is, the less likely he is able to access the remedial provisions and protection of insolvency legislation. There is no equal protection and benefit of the law. Differentiation between debtors at the point of application for a sequestration order clearly exists between different debtors. Ironically, there is also then a differentiation between *creditors* who are affected by the inability to share in the proceeds of an insolvent estate when a sequestration order is unobtainable. A *concursus creditorum* cannot be established, so it is possible that only one creditor, amongst many, may have his claim satisfied in an individual method of debt collection.

In *Sarrahwitz* the court consequently had to decide whether the differentiation in that judgment had a rational connection to a legitimate governmental purpose and whether it was justifiable.[107] No rational basis was found for the protection of one purchaser but not the other.[108]

6 Conclusion

It is well documented that the requirement of advantage to creditors has led to the abuse of the sequestration procedure in South African law, both by debtors and creditors. The reason why this occurs usually is because applicants who are anxious to surrender their estates, or have their estates sequestrated by creditors, are unable to show advantage to creditors in normal sequestration procedures. They have no way of escaping their indebtedness through access to insolvency legislation.

It is also a fact that South African insolvency law is geared towards the interests of creditors, providing meagre respite for debtors. The introduction of different forms of consumer legislation to improve the position of South African debtors prior to resorting to sequestration[109]

106 Par 46.
107 Par 57.
108 Par 65.
109 Eg the NCA.

does not appear to have alleviated the practice by anxious debtors to try to have their estates sequestrated, often with impure motives.[110]

By analysing possible constitutional infringements in the *Ex parte Kroese* judgment, Landman J indirectly questioned South African insolvency law policy which pays scant attention to the dilemma of certain classes of debtor. It seems correct to say that the Insolvency Act is a law of general application as envisaged by section 36 of the Constitution. Once a sequestration order has been granted, one may, sometimes misleadingly, argue that the rights of several parties in the process appear to be infringed. But the very nature of the insolvency arena is such that insolvency law limits the rights of most of its participants. Most, however, would agree with Jackson who says that it is generally accepted that in principle collectivised debt collection through a bankruptcy procedure is beneficial.[111] But this is perhaps a valid argument only once the insolvency procedure commences, and the relevant debtors have already passed through the gates of sequestration. If *some* are prohibited from passing through those gates at all, then questions of constitutional infringement of rights may arise. There appears to be differentiation between parties who can access the mechanisms of insolvency legislation.

Law reform in South African insolvency legislation has been pending for many years.[112] Several different versions of the Insolvency Bill have been produced. The Law Reform Commission has consistently opined that the requirement of advantage for creditors must form part of future legislation.[113]

The justification for this is that:

> "[i]t is unacceptable to use the expensive procedure of liquidation by the court in cases where the value of the assets is insufficient to ensure a benefit to creditors."[114]

But if one applies the reasoning of the Constitutional Court in *Sarrahwitz* to the policy of advantage to creditors, the provisions of the Insolvency Act may be found to be unconstitutional based on precisely the same infringements of vulnerable persons as in *Sarrahwitz*.

110 See the *Huntrex* case for a recent example of the extreme abuse of consumer legislation.
111 Jackson (2001) *Logic and Limits* 7.
112 The South African Law Commission published a report entitled the *Report on the Review of the Law of Insolvency* in 2000. It contained a draft bill as well as an explanatory memorandum – hence the "2000 Insolvency Bill" and "2000 Explanatory memorandum" respectively. The latest versions of the documents are unofficial working copies on file with the author (hereafter *Bill* or 2015 Insolvency Bill and 2014 Explanatory Memorandum respectively).
113 See Coetzee fn 35, 36 and 37.
114 2014 Explanatory Memorandum para 3.15.

In this respect Millman comments that if insolvency law is seen as a product that the state offers its citizens, then one must enquire whether:

> "[i]t provides the optimum balance between promoting justice between the various stakeholders and achieving the goal of economic efficiency."[115]

He correctly states that the chosen insolvency system must consider the changing norms and formative perceptions of society.[116] This is of particular importance in South Africa where current legislation was introduced nearly a century prior to the current Constitution which ushered in policies based on democratic values and equality.

It is submitted that much of insolvency legislation has as its consequence the "justifiable limitation" of various rights of various classes of persons. Virtually any insolvency regime, by its very nature, infringes the rights of most of the parties concerned, including creditors, debtors, the state and, arguably, society in general. However, these limitations, it is submitted, are in place generally for the benefit of all parties concerned in an open and democratic society based on human dignity, equality and freedom.[117] It is probably acceptable to note that the Act's provisions are mostly justifiable within the limitation criteria of section 36 of the Constitution, once the insolvency mechanisms have been accessed. But as described above, the exclusion of certain members of society from *accessing* insolvency proceedings and the consequential fresh financial start they can produce, appears to infringe the rights of particularly vulnerable members of society. Here it is worth repeating Coetzee's opinion that the equality concept is a difficult controversial social ideal.[118] But if the *Sarrahwitz* ruling is considered, much of the equality concept, in the context of the present article and advantage to creditors, is dealt with. If the *Sarrahwitz* judgment has been correctly understood, then one further has to agree with Coetzee when she says that all insolvent natural persons face an equal problem, namely, the inability to pay their debts and the socio-economic consequences hereof.[119] What she finds dissimilar is the ability of these different individuals, in different circumstances, to repay their debts.

The *Sarrahwitz* judgment is a complex intellectual cactus, near impossible to grapple with. It affects more than merely the provisions of the Land Act. On the one hand, it looks after the interest of one creditor[120] only, and this interferes with the *concursus creditorum* principle. On the other, it indirectly interferes with the common-law principles regarding the transfer of immovable assets that belong to

115 Millman (2005) *Personal Insolvency Law* 2.
116 *Ibid* 2.
117 See Currie and De Waal (2013) *Bill of Rights Handbook* par 7.1.
118 See par 2 above.
119 *Ibid*.
120 Or party to a contract.

insolvent estates. It also considers the existence of "vulnerable" persons[121] without any indication how such qualities or persons must be identified. This has created an even pricklier problem for sequestration applications, since one is essentially dealing with differentiation between three different classes of *debtors* in the debt collection procedures,[122] and the possible differentiation between creditors. In this author's opinion, *Sarrahwitz* has serious implications for the future development of insolvency law in South Africa, leaving more questions than answers. That is a fertile subject for further research.[123] In the context of the present article, and considering the position of "vulnerable people", it is predicted that the provisions of the Act regarding advantage to creditors that exclude persons from accessing sequestration proceedings may be successfully challenged in the courts, sooner rather than later. But until then:

> "[u]nless and until the Insolvency Act is amended, the South African insolvency law requires an advantage to creditors before the estate of an individual can be sequestrated. Much as the troubled economic times might engender sympathy for debtors whose financial burden has become too much to bear, the insolvency law seeks to protect the interests of creditors at least to the extent that a minimum advantage must be ensured for the concurrent creditor when the hand of the law is laid on the insolvent estate."[124]

121 It is submitted that these could be either debtors *or* creditors in the context of *Sarrahwitz*.

122 Meaning first, debtors in the individual debt collection procedure; secondly, debtors who cannot access the individual procedure or the collective sequestration procedure; and, thirdly, those who can access the insolvency mechanisms in the Insolvency Act.

123 It is the author's opinion that the strict requirement of advantage to creditors is in its very foundation ill conceived. Essentially, it should not have a place in a modern constitutional democracy because it serves merely as a vague measure to give a court the discretion to decide what the future will hold for both debtors and creditors in the debt collection process. It is common knowledge that concurrent creditors rarely receive advantage from the sequestration of individual debtors' estates, and generally prefer not to prove claims for fear of having to make a contribution to the cost of the sequestration of the debtor. The classification and ranking of creditors in itself also qualifies as a form of differentiation (between creditors), but that will be discussed in a future article.

124 *Per* Bertelsmann J in the *Ogunlaja* case par 36.

Onlangse regspraak/Recent case law

S v Haupt 2018 (1) SACR 12 (GP)

Defeating the anomaly of the cautionary rule and children's testimony

1 Introduction

The origins of the cautionary rule lie in the practice of warning the jury against certain kinds of witnesses, notably accomplices, complainants in sexual cases and young children. This comes from the notion that these witnesses could not safely be relied upon without some kind of corroboration or other form of evidence confirming their trustworthiness. The presiding officer was also required to show that he or she had kept the warning given to the jury in mind. In this way the cautionary rule persisted even when the jury system was abolished (Zeffert & Paizes *Essential Evidence* (2010) 308-309).

The starting point in any criminal matter is that the state must prove the guilt of the accused beyond any reasonable doubt. This must never be lost sight of even where a number of cautionary rules apply. The purpose of the cautionary rule is to assist the court in deciding whether or not the onus on the state has been discharged (*S v Hanekom* 2011 (1) SACR 430 (WCC) at par 8). It should accordingly be borne in mind that satisfying the rule does not in itself guarantee a conviction. The rule is merely an aid in establishing the truth. The final analysis is whether the court is satisfied beyond reasonable doubt that all the evidence presented is essentially true (*S v Francis* 1991 (1) SACR 198 (A) at 205f).

The cautionary rule relating to the evidence of children entails that the presiding officer should fully appreciate the dangers of accepting the evidence of children. In this regard children's evidence is considered in the same light as that of accomplices and complainants in sexual cases (Prior to 1998, the law took the view that the cautionary rule as it applies to accomplices had to be applied to the evidence of complainants in sexual cases. This rule was, however, abolished by the Supreme Court of Appeal in *S v Jackson* 1998 (1) SACR 470 (A). It was further held in *S v M* 1999 (2) SACR 548 (SCA) at 554-555 that the approach applied in the former case also applied to all cases in which an act of a sexual nature was an element and thus also to the evidence of children. Section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 now also provides that a court may not treat the evidence of a complainant in a sexual offence with caution on account of the nature of the offence). In terms of the cautionary rule a court should not easily

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convict unless the evidence of the child has been treated with due caution. Where the child is also the sole witness the evidence will be regarded with even more caution (*S v Mokoena* 1932 OPD 79 at 80). As a consequence the court will seek corroboration, even though corroboration of a child's evidence is not required by law or by practice. A child's evidence, if not corroborated, will therefore be scrutinised with great care in terms of this rule and will be accepted with great caution (*R v Manda* 1951 (3) SA 158 (A)).

There is no particular age below which the cautionary rule applies. The degree of corroboration or other factors required to reduce the danger of reliance on the child's evidence will vary with the age of the child and the other circumstances of the case (*R v Manda* 1951 (3) SA 158 (A); *Woij v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A). Note that a child means a person under the age of eighteen years. Refer to s 28(3) of the Constitution of the Republic of South Africa, 1996). The court does not enumerate the factors that could increase or lessen the danger, nor does it define the class of children to whom the danger of reliance on the child's evidence is applicable (Joubert *et al The Law of South Africa Vol 9 Evidence* (2005) par 832). However, the younger the child the greater the likelihood that the court will require substantial confirmation of the evidence (*R v Bell* 1929 CPD 478; *De Beer v R* 1933 NPD 30; *R v W* 1949 (3) SA 772 (A); *R v J* 1958 (3) SA 699 (SR)).

In *R v Manda* (1951 (3) SA 158 (A) at 163) the court emphasised that the dangers inherent in reliance upon the uncorroborated evidence of a young child should not be underrated. The court explained (at 163) that the danger involved in the evidence of children can be attributed (among a number of factors) to their "imaginativeness and suggestibility" … "that require their evidence to be scrutinised with care, amounting perhaps to suspicion" (the court did not elaborate on the other factors). However, in *R v J* (1958 (3) SA 699 (SR)) the court held that although there may be circumstances that necessitate special caution, "the exercise of caution should not be allowed to displace the exercise of common sense" (at 90).

The court's stance in *R v Manda* accords with societal views that were prevalent until the 1960s, namely, that children are inherently more unreliable than adult's as witnesses (Spencer & Flin *The Evidence of Children: The Law and Psychology* (1993) 286-287). Conversely, subsequent research in cognitive psychology and child development have challenged these conventional views and led to a realisation that children's ability to be reliable witnesses has been greatly undervalued. This is coupled with research on the reliability of adults' testimony, which has shown that adults' memories may be just as susceptible to suggestion and misinformation (Spencer & Flin 286-287). This has resulted in an awareness that the gap between the abilities of children and adults as witnesses has been exceedingly exaggerated (Schwikkard "Getting somewhere slowly" in Artz & Smythe (eds) *Should we Consent? Rape Law Reform in South Africa* (2008)79).

It is therefore unsurprising that this rule has its critics (see for example Whitear-Nel 2011 "Law of Evidence: Cautionary rule: Single child witness" *SACJ* 382 at 396; Schwikkard in Artz & Smythe (eds) *Should we Consent? Rape Law Reform in South Africa* 79) and that the South African Law Commission in its report in 2002 (SALC *Sexual Offences Report* Project 107 (2002) at 186) recommended that the cautionary rule relating to children should be abolished unequivocally. The abolition of the cautionary rule in respect of the evidence of children is by no means a novel idea. The trend internationally has been to abolish this cautionary rule. England abrogated the cautionary rule applicable to children's evidence through section 34(2) of the Criminal Justice Act 1988. In Canada the Supreme Court of Appeal rejected the cautionary rule more than two decades ago (*R v W (R)* (1992) 74 CCC 3(d) 134; *S v B (G)* (1990) 56 CCC (3d) 200). Regionally, in Namibia the cautionary rule relating to children's evidence has been abolished by the insertion of section 164(4) of the Criminal Procedure Act (51 of 1977; through subsection *2b* of the Criminal Procedure Amendment Act 24 of 2003) stating that the evidence of a child should not be regarded as inherently unreliable nor should such evidence be regarded with special caution because of the fact that the witness is a child. Nonetheless, sixteen years later the rule is still being applied in relation to children's testimony in South Africa. This rule recently formed part of a decision in *S v Haupt* (2018 (1) SACR 12 (GP)) and is the subject of this discussion.

2 Facts

The complainant in the case and also the main witness for the state, was a fifteen year-old girl. At the time of the incident she was almost 12 years old. She testified three years later that the appellant, her mother's boyfriend who resided with them, had on various occasions touched her on her breasts and her vagina. According to her testimony the appellant did so by putting his hand underneath her T-shirt and by placing his hand on her vagina whilst she had a panty on (par 6-9). She also testified that she did not confide in anyone about the incidents at the time, as the appellant was the breadwinner of the family and she was afraid that should he leave they would be left destitute (par 10). The state also led evidence of a Dr Rawat, who testified that the complainant's external genitalia were swollen, tender and red, but the hymen was intact (par 11).

To contextualise the evidence tendered by the state it is necessary to take note of the fact that the appellant was charged with "the crime of rape" by "inserting his finger into her vagina" as well as with "the crime of sexual assault" by "sucking her breasts and private parts" (par 5).

The appellant testified in his defence. He denied the allegations against him and stated that the false charges were laid subsequent to a financial quarrel with the complainant's mother (par 12). The appellant was convicted on two counts of attempted rape and sexual assault and was sentenced to respectively twelve years and six years imprisonment

which sentences were to run concurrently (par 1). The appellant's name was also entered into the register for sex offenders (par 1).

The appellant then applied for leave to appeal against his conviction and sentences which was granted by the High Court (par 2). The appellant submitted that the trial court had erred in returning a guilty verdict in that the state had failed to prove its case beyond a reasonable doubt. His submission was based on the fact that the complainant was not only a single witness but also a minor child whose evidence ought to have been be treated with extra caution. The appellant further submitted that the complainant's evidence was unclear and contradictory and thus unreliable in material respects (par 13).

3 Judgment

In addressing the matter, the High Court commenced by confirming that it is trite that the proper approach to evidence is to look at the evidence holistically in order to determine whether the guilt of the accused has been proven beyond a reasonable doubt (par 16).

In so doing the High Court referred to *S v Hadebe* 1998 (1) SACR 422 (SCA) at 426f-426h where it was stated that:

> "But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubt about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that the broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood from the trees."

In order to conform to this approach the High Court examined a variety of factors, such as the fact that the complainant was a minor child testifying in a case of a sexual nature in which she was a single witness as well as the time between the alleged crime and the testimony and the testimony itself (par 17-20). The High Court highlighted that as the state relied on the complainant's evidence it was imperative for her testimony to be clear and reliable in all material respects (par 18). The court found that in *casu* this was not the case. The court per Bagwa J held that whilst the complainant was quite clearly an intelligent child, her powers of free recollection, narration and capacity to frame and express appropriate answers were found wanting in some instances. This furthermore manifested in periods of silence or sheer inability to respond to some questions. In some instances she even stated that she did not want to answer the question. Given the charges, the relevant testimony was, the court found, inadequate and at variance with the charges in material respects (par 20). Bagwa J, indicated that, for example "putting a hand to a breast" is totally irreconcilable with "sucking breasts and private parts

of the complainant" (par 20). In addition, he stressed the fact that the complainant had not voluntary told anyone about the alleged incidents until being prompted about it by her mother (par 24).

In conclusion, the High Court held that, having weighed the strengths, weaknesses, probabilities and improbabilities, it was not persuaded that the state had proven its case beyond reasonable doubt. The court furthermore stated that the trial court had not applied the cautionary rule adequately in evaluating the complainant's evidence thereby constituting another misdirection. The appeal accordingly succeeded and the conviction and sentence were set aside (par 18, 26-27).

4 Analysis and comments

An assessment of *S v Haupt* reveals that the High Court approached the matter of how to assess the evidence of the child witness (and thus children) from two perspectives. On the one hand it endorsed the cautionary rule referring to the case of *Woij v Santam Insurance Co Ltd* (1981 (1) SA 1020 (A) at 1027H-1028A) where the latter court stated the following:

> "The question which the trial Court must ask itself is whether the young witness's evidence is trustworthy. Trustworthiness … depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears 'intelligent enough to observe'. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion 'to remember what occurs' while the capacity of narration or communication raises the question whether the child has 'the capacity to understand the question put, and to frame and express intelligent answers' …"

It should be noted that although *Woij v Santam Insurance Co Ltd* recognised children's individuality, the court's decision was based on the premise that children are inherently unreliable witnesses (Schwikkard "The abused child: a few rules of evidence considered" 1996 *Acta Juridica*148 at 152).

On the other hand, the High Court followed a more enlightened approach by evaluating the evidence of the child in a fashion similar to that of any other witness in a criminal case. This can be seen from the fact that the court with reference to *S v Hadebe* (supra) and *S v Chabalala* (2003 (1) SACR 134 (SCA) at 139*i*-140*a*) stressed that the correct approach to a criminal trial is (paras 16, 25):

> "[T]o weigh up all the elements which point towards the guilt of the accused against those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities, and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."

In casu there were good reasons for treating the child's evidence with caution, which were so noted by the court. This includes the inability of the complainant to answer certain fundamental questions, inconsistencies and contradictions and the lapse of a significant time between the incident complained of and the trial. There were also questions of suggestibility on the part of the mother (par 20-24). The conclusion of the High Court (par 18) that the trial court did not apply the cautionary rules adequately in evaluating the complainant's evidence is therefore undoubtably correct and is supported by the writer hereof.

However, it is submitted by writer hereof, that the same result would have been achieved by the High court without the application of the cautionary rule. By focusing on the case holistically and weighing up all the elements the High Court would be able to, and in fact was able to, base its decision on the basis of the case before the court and not on a generalised notion that children are unreliable witnesses.

This application of a more holistic or enlightened approach can be compared to that of the court in *Director of Public Prosecutions v S* (2000 (2) SA 711 (T)). In *Director of Public Prosecutions v S* the court followed the approach of *S v Jackson* (1998 (1) SACR 470(A) and, referring to trends in countries such as Canada, Ireland, the United Kingdom, Australia and New Zealand, held that the proper approach was not to insist on the application of the cautionary rule as though it was a matter of rote, but to consider each case on its own merits. Although the evidence in a particular case might call for a cautionary approach, this was not a general rule. The court stressed that it could not be said that the evidence of children, in sexual and other cases, where they were sole witnesses, obliged the court to apply the cautionary rules before a conviction could take place (see *S v Jackson* (1998 (1) SACR 470 (A) at 715G-H. In the case under discussion the court *a quo* applied the cautionary rule in respect of all three aspects, namely, the evidence of children in sexual cases where they are single witnesses). What was required of the state, the court held, was to prove the accused's guilt beyond all reasonable doubt. This might require the court to apply the cautionary rule. In *S v M* (1999 (2) SACR 548 (A) at 501) Shakenovsky AJ also held that the correct approach was not to apply a general cautionary rule, but to look at the evidence as a whole and the reliability of what had been placed before the court.

Despite what appears to be the application of a more enlightened approach by the judiciary, other recent case suggests the contrary. In *S v Hanekom* (2011 (1) SACR 430 (WCC) the magistrate was criticised for not taking sufficient notice of the two cautionary rules applicable to the case (the complainant was both a sole witness and a child) and for failing to apply them with the degree of attention to detail demanded by the particular circumstances of the case. According to Saner AJ the magistrate had merely paid lip service to the rules (at par 7). The court referred to *R v Manda* (1951 (3) SA 158 (A) and *S v Viveiros* ([2000] 2 All SA 86 (SCA), stating that because of the potentially unreliable and

untrustworthy nature of the evidence, it fully intended to follow the warning against accepting the evidence of children (at par 9-10). In *Maema v S* ([2011] ZASCA 175 (unreported case 147/, 2011, 29/09/2011) at par 14) the Supreme Court of Appeal per Shongwe JA, referring also to *R v Manda,* uncritically accepted the application of the cautionary rule to the evidence of children. In *S v Raghubar* (2013 (1) SACR 389 (SCA) as well the trial court was criticised for merely paying lip-service to the cautionary rule in respect of a sole child witness aged fourteen.

As was already alluded to above the rule has its critics. Whitear-Nel ("Law of Evidence: recent cases" 2011 *SACJ* 382 at 396) expresses the concern, and in my view rightly so, over the fact that the court in the *Hanekom* case did not refer to recent research in the arena of child psychology and development, which shows that children's ability to give reliable evidence has been greatly underestimated. Whitear-Nel states (at 398) that in light of the recent acceptance of the cautionary rule in cases such as *Hanekom* and *Maemu v S* it is becoming evident that the cautionary rule is not likely to be abolished without a constitutional challenge. She emphasises that the time is ripe for change and that South Africa's crime rate with high levels of child abuse and low rates of conviction for such crimes demands that the issue be reconsidered. She stresses, and rightly so, that it is inappropriate or even irresponsible to continue to blindly rely on the authority of old cases such as *R v Manda* and *Woij v Santam Insurance Co Ltd* to justify the application of the cautionary rule to children (2011 *SACJ* 382 at 398).

Whilst calling attention to the fact that the trend internationally has been to abolish this cautionary rule (Schwikkard in Artz & Smythe (eds) 79) furthermore, Schwikkard emphasises that as the rule is based on discredited beliefs, its application is more likely to lead to error than to the discovery of truth (Schwikkard 1996 *Acta Juridica* 154). A strong argument was therefore made by Schwikkard, which is supported by me, that just as the cautionary rule applicable to complainants in sexual cases was found to be irrational and based on stereotyped notions and was therefore abolished, so too should the cautionary rule applicable to children be abolished. She submits that the cautionary rules applicable to children are *prima facie* discriminatory in that witnesses are disadvantaged on the basis of age and that this infringement of the equality clause will not pass constitutional scrutiny in terms of the limitation clause (Schwikkard 1996 *Acta Juridica* 154).

It should be noted that advocates for the abolition of the cautionary rule do not suggest that there may not be good reason for treating a child's evidence with caution, but argue that the issue should be decided on the basis of the case before the court and not on a generalised and unsubstantiated perception that children are unreliable witnesses (Schwikkard 2011 *SACJ* 382 at 396. This is in line with the notion held in *S v Jackson* 1998 (1) SACR 470 (A) where the court stated with regard to the former cautionary rule relating to sexual cases (at 476) that,

"evidence in a particular case might call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.").

Section 9 of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution) affords everyone the right to equality, and section 9(1) guarantees the right to equality before the law and equal protection and benefit of the law. Sections 9(3) and 9(4) describes how this equality should be realised, namely by prohibiting unfair discrimination by the state and by private entities on a non-exclusive list of grounds. One of the grounds listed in section 9(3) is "age". The effect of this is that any distinction between children and others based on their age will be scrutinised in terms of the Constitution to determine whether it complies with the prohibition on unfair discrimination (Bekink & Brand in Davel (ed) *Introduction to Child Law in South Africa* (2000) 178; Albertyn & Goldblatt "Equality" in Woolman *et al* (eds) *Constitutional Law of South Africa* 2 ed loose–leaf updates 35-69). In *Christian Lawyers Association v Minister of Health* (2005 (1) SA 509 (T)) the High Court considered age as a ground for discrimination. In the case in question the applicants challenged the validity of the provisions of the Choice on Termination of Pregnancy Act 92 of 1996 on the grounds that girls under the age of 18 years should not be able to choose to terminate their pregnancies without parental consent as they were not capable of making the decision alone. The court rejected this challenge and concluded that the Act made informed consent, and not age, the basis for its regulation of access to termination of pregnancy. Mojapelo J emphasised that everyone is equal before the law and has the right to equal protection and benefit of the law and that any distinction between women on the grounds of age would infringe these rights (*Christian Lawyers Association v Minister of Health* 2005 (1) SA 509 (T) at 528E).

The Constitutional Court has developed a detailed test to be followed when confronted with claims of unfair discrimination. This test assists the court in its decision on whether the state or a private party has unfairly discriminated against any person. The test was first set out in *Harksen v Lane* (1998 (1) SA 300 (CC)) at par 54. It should be noted that although the test was developed under the Interim Constitution it has been followed under the Final Constitution. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at par 15.

The Constitutional Court tabulated the test along the following lines (1998 (1) SA 300 (CC) at par 53):

"(a) Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) Secondly, if the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of sections 9(3) and 9(4).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause."

In essence, the test means that a preliminary enquiry must be conducted to establish whether the provision or conduct differentiates between people or categories of people. This is a threshold test in that if there is no differentiation then there can be no question of a violation of section 9(1). If a provision or conduct does differentiate between people or categories of people, a two-stage analysis must follow. The first stage concerns the question whether the differentiation amounts to discrimination. The test here is whether the law or conduct has a rational basis. This is the case where the differentiation bears a rational relation to a legitimate government purpose. If the answer is no, the law or conduct violates section 9(1) and fails at the first stage. If, however, the differentiation is shown to be rational the second stage of the enquiry is activated, namely whether the differentiation, even if it is rational, nevertheless amounts to unfair discrimination under section 9(3) or 9(4) (Ngcukaitobi "Equality" in Currie & De Waal *The Bill of Rights Handbook* 6 ed (2013) 209 at 216. Note, however, that the Constitutional Court held in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at par 18 that this does not mean that in all cases the rational connection enquiry of the first stage must inevitably precede the second stage. According to the Constitutional Court the rational connection enquiry would clearly be unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable. A court need not perform both stages of the enquiry.If the discrimination is on a specified ground, it would be presumed to be unfair. If the discrimination occurs on an unspecified ground the complainant will have to establish that the discrimination was unfair (Albertyn & Goldblatt 35-75).

If the discrimination is found to be unfair a court will proceed to the final stage of the enquiry as to whether the provision can be justified under section 36 of the Constitution, the limitation clause (Albertyn & Goldblatt 35-80). This final stage, according to the Constitutional Court,

"involve[s] a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality" (*Harksen v Lane* 1998 (1) SA 3009 (CC) at par 52). However, this stage only applies to discrimination in terms of law of general application since it is only such discrimination that can be justified under the limitation clause (Albertyn & Goldblatt 35-81).

As was stated above the cautionary rule originated from the notion that the evidence of these witnesses could not safely be relied upon without some kind of corroboration in the form of other evidence confirming their trustworthiness. This rule differentiates between children and other witnesses on the ground of age. The rule also differentiates between children in sexual cases and children in other criminal cases (see Section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 that provides that a court may not treat the evidence of a complainant in a sexual offence with caution on account of the nature of the offence. See also *S v M* 1999 (2) SACR 548 (SCA) at 554-555 where the court held that the approach applied in *S v Jackson* 1998 (1) SACR 470 (A) also applied to all cases in which an act of a sexual nature was an element and thus also to the evidence of children). It is hence submitted that as the rule is based on outdated and discredited beliefs about the trustworthiness of child witnesses and is void of a clear rationale for its application it will be difficult to pass constitutional muster. It therefore calls for abolition of the cautionary rule as a rule of general application.

Notwithstanding the abovementioned criticism, the legislature has to date not enacted legislation abolishing the cautionary rule, nor has the judiciary done so through the development of the common law. It should be noted that in terms of sections 173 of the Constitution the courts have the inherent power to develop the common law, taking into account the interest of justice. When fulfilling this power courts must do so in a manner that promotes the spirit, purport and objects of the Bill of Rights (see s 39(2) of the Constitution). The duty and power to develop the common law have manifested themselves in a few important constitutional decisions in recent times. See for example *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); *Petersen v Maintenance Officer, Simon's Town Maintenance Court* 2004 (2) SA 56 (C); *S v Thebus* 2003 (6) SA 505 (CC); *Masiya v Director of Public Prosecutions, Pretoria* 2007 (5) SA 30 (CC). It is however not within the scope and extent of this article to analyse the legal position extensively). In lieu of this deferment, it is submitted that the onus to approach the judiciary to develop the common law will have to fall on NGOs, such as the Centre for Child Law.

5 Conclusion

As was alluded to above, the essential question in any criminal matter is whether the state has proven its case beyond a reasonable doubt. The

cautionary rule should not be allowed to be a substitute for the test of proof beyond a reasonable doubt. Judicial officers are expected to evaluate evidence properly and objectively. This should be conducted as a whole and against all probabilities in order to arrive at a just and fair conclusion. Judicial officers are trusted to weigh the evidence correctly in order to distinguish between trustworthy and unreliable evidence (See *S v Haupt* par 16; *S v Hadebe* at 426f-426h; *S v Chabalala* at 139*i*-140*a*). If the witness's evidence is found to be unreliable, the court may reject it. Even though it may be necessary in a *particular* case to approach the evidence of the child with caution it does not mean that a *general* cautionary rule should be applied. *S v Haupt* represents an example of such a case and illustrates that it is possible to reach a fair conclusion without the application of a general cautionary rule.

In conclusion it is submitted by writer hereof that the abolition of the cautionary rule should no longer be postponed but should receive serious attention. A call is accordingly made to NGOs to challenge the constitutionality of the rule, thereby ensuring that child witnesses receive equal protection and benefit of the law similar to that of other witnesses in criminal cases.

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Extension of collective agreements in terms of section 23 (1) (d) of the LRA and the "knock on effect" on the right to strike: *AMCU v Chamber of Mines of South Africa* CCT87/16 [2017]

1 Introduction

The Labour Relations Act (Act 66 of 1995) (LRA) aims *inter alia* to promote orderly collective bargaining, collective bargaining at sectoral level and to advance the democratization of the workplace (section 1 of the LRA). This is in keeping with the right of trade unions, employers and employers' organisations to bargain collectively enshrined in section 23(5) of the Constitution of South Africa, 1996. The end product of collective bargaining is a collective agreement as defined in section 213 of the LRA. Collective agreements are an effective tool to regulate terms and conditions of service and other matters of mutual interest (Du Toit (ed) *et al Labour relations Law* (6th ed) (LexisNexis 2015) 309). These collective agreements are capable of being extended to other parties who

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are not signatories thereto. Two possibilities of extension are envisaged in section 23(1)(d) and section 32 of the LRA. Section 23(1)(d) provides that a collective agreement binds employees who are not members of the trade union or trade unions party to the agreement provided that three conditions are met, *viz* the employees are identified in the agreement; the agreement expressly binds the employees; and the trade union or trade unions concluding the agreement enjoy majority membership of employees employed in that workplace (See *Fakude & others v Kwikot (Pty) Ltd* [2012] ZALCJHB 169 par 34). The extension envisaged in section 32 relates to collective agreements concluded at a bargaining council and which require the endorsement of the Minister for them to be extended to an entire sector. The Constitutional Court in *AMCU v Chamber of Mines of South Africa CCT87/16 [2017]* was faced with a contended section 23(1)(d) extension applicable at workplace level.

A difficulty arises where an extended collective agreement limits certain rights enshrined in the Constitution. In the *AMCU* case, the extended collective agreement limited the non-party trade union and non-party employee's right to strike for matters relating to wages and conditions of employment. The right to strike is a very important bargaining tool for workers and trade unions and is protected by section 23(2)(c) of the Constitution and section 64(1) of the LRA. This limitation is triggered in terms of section 65(1)(b) of the LRA which proscribes any person to partake in a strike if that person is bound by a collective agreement that prohibits a strike in respect of a particular dispute. This difficulty is compounded by situations where the business of the employer operates at different geographical locations (*Chamber of Mines v AMCU & others* (J 99/14) [2014] ZALCJHB 13 par 36). The question that arises is whether the different sites constitute separate workplaces or remain a single workplace. The LRA defines a workplace as the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation (section 213 of the LRA). The Constitutional Court in *AMCU* was faced with this question coupled with a constitutional challenge to the principle of majoritarianism embedded in the scheme of the LRA. This note provides a conspectus of the facts and the decision of the court. Moreover, it discusses the rationale for a provision such as section 23(1)(d), the meaning of a "workplace" as defined in the LRA and explicated by the court. International and foreign law comparators are drawn to make the point that the practice of extending collective agreements to non-parties is not peculiar and lastly some remarks on the limitation of the right to strike are made.

2 Factual matrix of the case

In 2013 the Chamber of Mines of South Africa engaged in negotiations on wages and conditions of service on behalf of its members in the gold

mining sector. The mining companies represented by the Chamber of Mines were Harmony Gold, AngloGold Ashanti and Sibanye Gold. The chamber of mines entered into these negotiations with the National Union of Metalworkers (NUM), Solidarity and the United Association of South Africa (UASA) as they represented the majority of workers in the sector. The applicant, Association of Mineworkers and Construction Union (AMCU), was also invited to these negotiations as it represented a minority of workers sector-wide but had a majority membership in certain individual mines. These negotiations culminated in a collective agreement that was accepted and endorsed by all the parties except AMCU. This agreement dealt with wages and other conditions of employment. Moreover, the agreement explicitly stated that it was an agreement as contemplated in section 23(1)(d) of the LRA. Among other provisions, it stated that no party bound by the agreement could call for a strike or lockout in respect of issues dealt with in the agreement for as long as it subsisted. Although the collective agreement expressly made itself applicable to all employees working for the represented mining companies, AMCU maintained that its members were not bound by the agreement since it was not a party thereto. Perhaps it serves justice to mention that the issues raised by AMCU were legitimate and related to the very dignity and livelihood of mineworkers. The union was demanding a R12 500 basic salary for its members (Mapenzauswa and Shabalala "AMCU accepts Sibanye Gold new wage offer" 10 April 2016 *Moneyweb* accessed at https://www.moneyweb.co.za/news/companies-and-deals/amcu-accepts-sibanye-gold-new-wage-offer/ (accessed on 2018-06-08)).

In 2014 AMCU served the three mining companies with a notice to strike over the same issues dealt with in the agreement. The Chamber of Mines approached the Labour Court for an urgent interdict proscribing the strike. The urgent interdict was granted and on the return day, the Court confirmed the order. AMCU then lodged an appeal against this interdict to the Labour Appeal Court and that appeal was dismissed. The matter was then brought to the Constitutional Court as there was evidently a challenge on the constitutionality of s23(1)(d)(iii) read with s65(3) of the Labour Relations Act. Apart from the issue of jurisdiction, the Constitutional Court had to make a determination on the meaning of a "workplace" for purposes of s23(1)(d). Furthermore, the Court had to decide on the constitutionality of limiting the right to strike, the right to collective bargaining and the right to freedom of association in terms s23(1)(d) read with s65(3) of the LRA.

AMCU argued that each individual mine and operation was a separate "workplace" for purposes of s23(1)(d) and that the collective agreement did not extend to those workplaces where it had a majority and thus it was entitled to strike in those mines or operations. It argued that the forum in which the agreement was concluded operates as a bargaining council although not recognized or registered as such, therefore an extension of the agreement, if any, had to take place in terms of section 32 of the LRA. Section 32 provides that the Minister of Labour may

extend a collective agreement concluded in a bargaining council provided that the majority unions and majority employers involved vote in favour of such an extension. AMCU therefore contends that what the Chamber is doing is in fact sidestepping of the requirements of section 32. In the alternative, AMCU challenges the Constitutionality of section 23(1)(d) in that it unjustifiably limits the right to strike, to bargain collectively and to freedom of association. Lastly, the union argued that the section 23 extension offends the rule of law in that it constitutes exercise of public power with no oversight or remedy in cases of abuse of such power and the private actors who exercise such power are not bound by the duties of public administration and public interest in section 195 of the constitution. This note limits the analysis to the two former issues and does not deal with the rule of law argument, which the court responded to adequately.

3 Decision of the Court

With regards to the meaning of a "workplace", the court considered arguments that discourage any notion that the term as used in section 23(1)(d) may mean a single place where a worker works as the word may be used in common parlance (par 26). It was pointed out that a workplace is not the place where every single employee works, such as that individual employee's desk or office. Rather, it is where employees collectively work. This construction is more line with the promotion of orderly collective bargaining as the object of the Act. Moreover, the court pointed that functional organisation is more important than location. The definition envisages a place or places where employees work denoting the possibility of multiple locations where work is being carried out. An important consideration is whether an operation is independent and not where it is located (par 27). What is more important is whether the operation at separate locations are independent of each other. The term "workplace" therefore does not have its ordinary meaning for purposes of the LRA (par 29). The question whether the different mines at which AMCU enjoyed majority constituted separate workplaces therefore becomes a factual one bearing in mind the statutory definition of a workplace (pars 30-31). Factual evidence relating to organizational methodology, processes and procedures was led in the Labour Court and the Labour Appeal Court and both courts could only conclude that the individual mines did not constitute workplaces or independent operations. Some of the evidence produced by the mining companies showed that the mining licenses were held by the mining companies and not by the individual mines they operated (*Association of Mineworkers & Construction Union v Chamber of mines of SA acting in its own name & obo Harmony Gold Mining Co (Pty) Ltd [2016] ZALAC 11* pars 55-57*)*. All the mines owned by the mining companies are controlled from one central head office where all production and financial planning take place (*ibid)*. Financial management; human resources; IT systems and procurement are all centralised (*id)*. The mining companies were the employers and not each individual mine (*id)*. The court agreed with AMCU that the exercise it had to engage in was both interpretational and factual (pars

34-36). Considering these factors, the court concluded that there is no reason to regard each AMCU-majority mine as a separate workplace and deviate from the statutory definition (pars 38-39). It was held that the extension of the agreement to AMCU members at the AMCU-majority mines was valid (par 40).

The court then turned to deal with the constitutional attack on section 23(1)(d). It extrapolated the gist of AMCU's challenge against the application of the principle of majoritarianism recurrent in the LRA (pars 42-43). AMCU contended that the tenets of section 23(1)(d) infringed upon the right to strike and the right to freedom of association. Using the words of Zondo JP, as he then was, in *Kem-Lin Fashions CC v Brunton [2000] ZALAC 25,* Cameron J made the point that the legislature made a policy choice and that choice was that the will of the majority must prevail and that the LRA had numerous provisions illustrating this policy standpoint (par 43). This was done to promote orderly and productive collective bargaining. Section 23(1)(d) enhances the power of the majority union within the workplace (par 44). Granted, the codification of the principle of majoritarianism in section 23(1)(d) limits the right to strike. However, such a limitation is reasonable and justifiable given the purpose of the limitation; the fact that the limitation only subsists for the duration of the agreement and that it limits the rights for specific issues *viz* wages and conditions of service (pars 50 & 58). The court further pointed out that the principle of majoritarianism has been recognized by the court in *TAWUSA v PUTCO Ltd* [2016] ZACC 7 (CC) where Khampepe J said that majoritarianism in the context of section 32 only finds application after a collective agreement has been concluded and the majority seeks to extend it (par 57). The same applies with regards to a section 23(1)(d) extension. AMCU's contention that the extension offends the rule of law was also rejected by the court (pars 82-87).

4 Discussion

4 1 The rationale for section 23(1)(d)

Section 23(1)(d) is a minuscule provision with serious ramifications. Before the introduction of the LRA, there existed a legal *lacunae* and uncertainty with regards to the binding effect of collective agreement (Du Toit (ed) *et al* 311-312). Only collective agreement concluded at the industrial councils had a binding effect and were in fact regarded as subordinate legislation (Vauthier "Collective agreements: A comparative study between Belgium and South Africa" (1998) Unpublished LLM dissertation (University of South Africa) 82). The labour courts, however, have always expressed that the will of the majority, provided that it is in the interests of both the majority union and majority of the affected workers, should prevail over that of an individual (*Ramolesane & another v Andres Mentis another* (1991) 12 ILJ 329 (LAC) par 335H, See also Du Toit "An ill contractual wind blowing collective good? Collective representation in non-statutory bargaining and the limits of union authority (1994) 15 *ILJ* 39). The courts were therefore supporting the

position that collective agreements negotiated by majority unions and in the interests of the majority workers bound the parties thereto and bound the minority irrespective of the forum they were negotiated (*ibid*).

Section 23 of the LRA removed this uncertainty and gave all collective agreements, as defined in section 213 of the Act, a statutory binding effect (section 23(1)(a) of the LRA). Section 23(1)(d) confirms the legislative policy of governance by majority as it allows the majority to extend a collective agreement and bind minority union members and non-unionised employees. The Labour Appeal Court has stated that a trade union that enjoys majority in a workplace may conclude a collective agreement with an employer and extend that agreement to bind all employees of that employer. This includes those employees who are not members of the union, those who may have been its members and resigned and those that the employer is still to employ in the future (*Mzeku and others v Volkswagen SA (Pty) Ltd and others [2001] 8 BLLR 857 (LAC)* pars 55 and 67).

Section 23(1)(d) is amongst numerous sections in the LRA which encapsulate the legislative policy choice of majoritarianism. That choice is based on the legislature's assumption that it would best serve the primary objects of the LRA of labour peace and orderly collective bargaining (*Aunde South Africa (Pty) Ltd v NUMSA* [2011] 10 BLLR 945 (LAC) par 32; see Cohen "Limiting organisational rights of minority unions: *POPCRU v Ledwaba* 2013 11 BLLR 1137 (LC)" (2014) 17.5 *PER* 2211. See also Du toit (ed) *et al Labour Relations Law* (6th ed) (LexisNexis 2015) 283-284).

The Labour Court remarked that if the minority employees represented at the workplace by AMCU were to succeed and have a new wage agreement to come about and to supplant the existing collective agreement, the minorities would be governing the majority in the workplace and that would be an undesirable outcome (*Chamber of Mines v AMCU & others* (J 99/14) [2014] ZALCJHB 13 par 44). Section 23(1)(d) also serves to discourage the proliferation of minority unions in one workplace which is in keeping with the majoritarian preference in the Act. Although the Act provides for the recognition and endorsement of minority unions, a reading of provisions such as section 21((8)(a) which encourages commissioners faced with a dispute regarding the representativeness of a union to seek a solution that minimizes proliferation of unions in a single workplace. This also helps minimise the financial and administrative burden of having to provide stop-order facilities and office space to many unions in one workplace (*SA Commercial Catering & Allied Workers Union v The Hub* (1999) 20 ILJ 479 (CCMA) 481).

The Labour Appeal Court alluded to the Constitutional importance of section 23(1)(d) (*AMCU v Chamber of Mines acting in its own name & obo Harmony Gold Mining* [2016] ZALAC 11). To really appreciate the importance of this provision, one has compare it with its equivalent in

section 31. Section 31 deals with the binding nature of collective agreements concluded in a bargaining council (*ibid* par 42). The provisions of section 31(a)-(c) are similar to those in section 23(1)(a)-(c) (*ibid)*. Collective agreements concluded in bargaining councils are capable of extension in terms of the mechanism in section 32. Section 23(1)(d) serves to extend agreements concluded outside a bargaining council (*ibid*). This provision therefore ensures that the absence of a bargaining council does not preclude the exercise of the right to collective bargaining enshrined in the Constitution (*ibid* par 47).

What happens in a situation where a minority union has concluded a collective agreement that in conflict with a collective agreement extended in terms section 23(1)(d)? Du Toit opines that the extended collective agreement must prevail as it sanctioned statutorily (Du toit (ed) *et al* 313). It is submitted that even if the trade union had its way and concluded a separate agreement in conflict with the majority, a proper application of the law will see the will of the majority prevail. This is called workplace democracy (Cohen 2210 &2218). This also shows the consistency in the majoritarianism characterizing the whole LRA and the role section 23(1)(d plays towards this (Kruger & Tshoose "The impact of the Labour Relations Act on minority trade unions: A South African perspective" 2013 (16) 4 *PER* 288-289).

4 2 "Workplace" envisaged in section 23(1)(d)

The statutory definition of a "workplace" was supplied in the introductory remarks above. This definition is exclusively applicable to the private sector. Whether a site constitutes a "workplace" is a question of fact. The meaning of the term is incontrovertible in a situation where all employees work in one place. That is their workplace. However, in situations such as the one in this case, where there is locational multiplicity, the separate locations may be separate workplaces but they are also capable of constituting a single workplace (*Chamber of Mines v AMCU & others supra* par 32, Thompson in Cheadle *et al Current Labour Law* 1997 (Juta Cape Town 1994) 3). Deciding whether two or more locations are separate workplaces entails an examination of the extent to which they operate independently of each other, which in turn entails a consideration of the size, function and organisation of each (Brassey *Commentary on the Labour Relations Act* (Revision Service 2) (Juta Cape Town 2006) A9-35–A9-36). The correct procedure to determine if a site constitutes a workplace, requires on to look at the facts of a particular case with the definition in mind (*SA Commercial Catering & Allied Workers Union v The Hub* (*supra*), *AMCU v Chamber of Mines of South Africa supra* par 30-31)

In terms of the definition in section 213, the criterion to determine if two or more places of work owned by the same employer constitute separate workplaces, requires on to consider their size, function or organisation. The meaning given to a word in terms of this section applies throughout the entire Act unless the context in which it is used

indicates otherwise (*AMCU v Chamber of Mines acting in its own name & obo Harmony Gold Mining supra* par 49-51). A determination that the statutory definition is applicable to the term "workplace" means that the extension of collective agreements in terms of section 23(1)(d) encompasses the entire workforce irrespective of the geographic location. As the Constitutional Court held, the "workplace" envisaged in section 23(1)(d) is the same as the one contemplated in section 213.

4 3 Limitation on the right to strike

The Constitutional Court has recognised the historical and contemporary importance of the right to strike in safeguarding the dignity of workers and to enable them to assert their bargaining power in labour relations (*NUMSA & others v Bader Bop & another* [2003] 2 BLLR 103 (CC) par 13). This right is an important component of a successful collective bargaining system (*ibid*). Therefore, this right is not an end to itself but a means to an end. The end product is effective collective bargaining that enables the workers to influence the terms and conditions of employment (*Chamber of Mines v AMCU & others* (J 99/14) [2014] ZALCJHB 13 par 50). Provisions such as section 65(1)(a) imposes a limitation on this right by prohibiting employees bound by a collective agreement that proscribes a strike in respect of the issue in dispute. As noted by the court, the limitation fashioned by the section 23(1)(d) extension on the right to strike is merely a "knock on effect" as the provision is not meant to limit the right but to extend collective agreements (*AMCU v Chamber of Mines of South Africa CC* par 44, See also *Chamber of Mines v AMCU & others* (J 99/14) [2014] ZALCJHB 13 par (54). Section 65(1)(a) of the LRA prohibits employees from embarking on a strike if the issue in dispute is regulated by a collective agreement.

Section 23 of the LRA deliberately limits the right to strike in order to attain orderly collective bargaining and fair and expeditious resolution of disputes. The limitation may be generally unfair, however, depending on the circumstances of a particular case it may be justifiable (*National Union of Metalworkers South Africa obo members' v South African Airways Soc Limited & Another* [2017] ZALAC 32 par 34). To check the justifiability of the limitation, we have to hold it against the section 36 scrutiny. Section 36 of the Constitution provides that the limitation should be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Factors such as (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive alternatives means to limit the right while achieving the same purpose, should be taken into account.

Although the court did not deal with these factors one by one, the judgment shows that they were considered. The limitation imposed by the provision does not abrogate the right categorically and the extension does not preclude the minority from joining or participating in the collective bargaining process (Cheadle "Collective bargaining and the

LRA" 2005 (9) 2 *Law, Democracy & Development* 153). It only means that when there is disagreements about the issues regulated by the collective agreement, there will be no strike. This is referred to as a peace clause inserted in favour of the employer (Rautenbach "The constitutionality of statutory authorization to conclude collective agreements that bind non-parties not to strike" 2017 (4) *TSAR* 863). Pienaar and Badenhorst posit that in this particular case there is no less restrictive means of achieving the purposes of orderly collective bargaining (Pienaar & Badenhorst "Minority trade unions are bound by extended collective agreements" Employment Alert May 2015 available at https://www.cliffedekker hofmeyr.com/export/sites/cdh/en/news/publications/2015/employment/ downloads/Employment-Alert-18-May-2015.pdf (accessed on 2018-06-01). Rautenbach argues that adding a requirement of administrative approval by an executive or administrative organ similar to the section 32 procedure would be a less intrusive way to limit this right (Rautenbach 864-865). This author asserts that administrative control, even if the scope is very limited, serves as a procedural safeguard because the exercise of such discretion must comply with rules of admistrative law and may not violate the right to just administrative action (*ibid*). The court had an opportunity to justify why the legislative policy of majoritarianism could not be subjected to judicial review because it was now part of legislation and was clearly limiting rights. The court should have dealt with this aspect instead of just mentioning that the policy choice justified the limitation of the right to strike.

4 4 Foreign and international comparators

The Constitutional Court agreed with the National Union of Mineworkers' (NUM) submission that majoritarianism is internationally recognised as a tool to enhance collective bargaining (par 56). Among the instruments considered was article 5(1) of ILO Collective Agreements Recommendation, 1951 (No 91) (Collective Agreements Recommendation) which states that measures should be taken, where appropriate, to extend the application of all or certain clauses of a collective agreement to all employers and workers within a certain industrial and territorial scope of the agreement (See ILO policy brief by Visser, Hayter and Gammarano "trends in collective bargaining coverage: stability, erosion or decline?" accessed at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/--- protrav/---travail/documents/publication/wcms_409422.pdf (accessed on 2018-06-08). The report of the ILO Committee of Experts' General Survey on the Fundamental Conventions concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalisation 2008 (Report III (Part 1B) ILO Conference 102st Session 2012) expresses a view that the extension of collective agreements to non-parties is not contrary to the principle of voluntary collective bargaining and does not violate Convention 98 of the ILO. The court noted that, in fact, international instruments require a mere sufficient representation to extend agreement to bind non-parties and not majority. Article 5(2) of the Collective Agreements Recommendation provides that national legislation may make collective agreements extendable to non-parties

subject to *inter alia* the condition that the collective agreement already covers sufficiently representative employers and workers. Lastly, the court considered the Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (5 ed, 2006). This instrument stipulates in pars 356 and 1052 that the extension of a collective agreement to cover non-parties does not in principle contradict the principles of freedom of association since under the law, the most representative organisation negotiates on behalf of all workers (*ibid* fn 55 and 56).

The Organisation for Economic Co-operation and Development (OECD) countries (the OECD is made up of the following member countries: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States) have two legal mechanisms in which they extend collective agreements to non-parties (Traxler "Collective bargaining: levels and coverage" in OECD *Employment Outlook* (1994) 178-179). The first is to extend a collective agreement to bind everyone within a particular sector or region generally (*ibid)*. This extension is usually sanctioned by the Labour Ministry of the country provided that certain preconditions are met. For example, in Germany the bargaining parties concluding the agreement must represent at least 50 per cent of employees within that sector (*ibid)*. The second mechanism is commonly referred to as an enlargement. This type of extension binds employers and employees in a sector or geographical area outside the domain of the collective agreement if they are economically similar to those covered in the agreement (*ibid)*. Member countries such as Austria, Belgium, France and Portugal have a significant number of collective agreements that are regularly extended (*ibid)*. Provisions for extending collective agreements are made in the Japanese labour legislation although these are seldom used. Norway and Sweden have highly centralised bargaining systems but do not have extension mechanisms (*ibid)*. Collective agreements relating to welfare issues such as pension and training are extended by the state based on the principle of *erga omnes* (towards all or towards everyone) in Denmark, France, Germany and the Netherlands (Trampusch "Industrial Relations as a Source of Solidarity in Times of Welfare State Retrenchment" (2007) 36(2) *Journal of Social Policy* 206-210).

Out of the 27 European Union (UE) member states, 21 have legal provisions to extend collective agreements to non-parties (Kerckhofs "Extension of collective bargaining agreements in the EU: Background paper" 2011 *Eurofound* 1 available at http://www.bollettinoadapt.it/old/files/document/15105EF_collectivebar.pdf (accessed on 2018-06-06). Extension of an agreement in the UE is normally done by means of an administrative decision by the labour ministry, a publication in an official journal, or both. Usually, there's a precondition relating to the threshold levels of the bargaining parties.

5 Conclusion

The decision of the court in *AMCU* demonstrated that the impugned section 23(1)(d) of the LRA can withstand constitutional scrutiny, especially when considered in conjunction with the policy of majoritarianism embedded in the LRA. A challenge to the provision is also a challenge to the legislative policy chosen by the legislature and this has a far-reaching effect as it involves the whole scheme of the Act and not just section 23(1)(d). In any case, the union that sought to attack the principle wanted to rely on its majority representation in some mines of the employer. This is therefore a self-defeating exercise. The judgment has also highlighted the constitutional importance of this provision. It has shown that section 23(1)(d) ensures that employees whose trade union operates outside a bargaining council can still exercise their right to collective bargaining effectively. The note has considered the significance of the right to strike but that it is not absolute and the limitation imposed upon it is merely collateral and justifiable in an open and democratic society. Lastly, consideration of international and foreign jurisprudence demonstrates the international recognition and acceptance of the practice. Furthermore, it vindicates the importance of section 23(1)(d) with its specificity because in most EU countries, agreements are extendable to entire sectors through some administrative action. Section 23(1)(d) creates the possibility to extend within one employer but encompasses all the workers.

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