De Jure Law Journal

Volume 53 2020

PULP

Pretoria University Law Press
PULP

ISSN: 1466 3597

VOLUME 53 2020

De Jure Law Journal

DE JURE LAW JOURNAL

FACULTY OF LAW, UNIVERSITY OF PRETORIA

EDITORIAL BOARD
Redakteur/Editor
Dr C Maimela

EDITORIAL COMMITTEE
Prof C Fombad
Dr T Bekker
Dr S Kamga

ADVISORY COMMITTEE
Regter/Judge JY Mokgoro (Former Judge of the Constitutional Court)
Regter/Judge CME O'Regan (Former Judge of the Constitutional Court)
Regter-president/Judge President BM Ngoepe (High Court)
Regter/Judge DH van Zyl (High Court)
Prof G van Beuren (University of London, UK)
Prof JC Sonnekus (University of Johannesburg, SA)
Prof R Zimmermann (Max-Planck-Institut (Privatrecht), Hamburg, Germany)
Prof R Mawdsley (Cleveland Sate University, Ohio, USA)

PRODUCTION
Pretoria University Law Press (PULP), Faculty of Law, University of Pretoria
Lizette Hermann (Manager, PULP)

The Faculty of Law, the Editorial Board, the Editorial Committee and the Advisory Committee do not necessarily agree with views expressed by contributors to this journal.

EDITORIAL POLICY: see back page

2020 *De Jure Law Journal*

De Jure Law Journal appears annually in printed format and continually in electronic format. Financial support from the University of Pretoria and other donors is acknowledged. Correspondence and queries regarding submissions should be addressed to The Editor, *De Jure Law Journal*, Department of Public Law, University of Pretoria, 0002 (email: dejure@up.ac.za). *De Jure Law Journal* is available as an open access journal on the internet at: http://www.dejure.up.ac.za

ISSN: 1466 3597
E-ISSN: 2225 7160

DE JURE LAW JOURNAL

VOLUME 53 2020

CONTENTS

Articles

Editorial

In the second year of adopting continuous publication in 2019 to the future and the year coming to a halt, *De Jure Law Journal* has pleasure in presenting volume 53 of 2020. Achieving this task was not an easy journey bearing in mind the challenges posed by COVID 19 across the globe, but we managed to pull this volume with success. As a *Journal* we are still committed and remain resolute to deliver cutting edge research outputs, despite facing the challenges imposed by the pandemic. The contributors/authors have once again paved the way for interesting discussions on a wide variety of topics based on both domestic and international laws. This includes the following themes: Criminal and Civil Procedure; Banking law; Competition and Intellectual Property law; Property law; Gender based Violence (GBV) which has been described as a second pandemic in South Africa due to its severe impact on society; Human Rights; Food Security; Tax law and regulations; African Customary law and Islamic law; Family law; Access to Justice; and last but not least, the impact of COVID 19 in society.

The editorial committee would like to express gratitude to our editorial assistant Mr Shammah Boterere for his diligent assistance during the production of this volume, and Mrs Amelia Jansen for her commitment and hard work in relation to administration. We would also like to express our gratitude to the team of Pretoria University Law Press (PULP), and especially Mrs Lizette Hermann, for making this volume meaningful and possible.

Prof CA Maimela
Editor

The use of impact statements, minimum sentences and victims' privacy interests: a therapeutic exploration*

Annette van der Merwe
BPROC (UP), LLB (UNISA), LLM (UP), PhD (RHODES))
Professor, School of Law, University of Limpopo

Lize-Mari Mitchell
LLB (NWU), LLM (NWU), HONS (PSYC) (UNISA)
Lecturer, School of Law, University of Limpopo

SUMMARY

By submitting or presenting an impact statement, reflecting on the different kinds of harm caused by the commission of a crime against them, victims are also allowed the opportunity to participate in criminal justice procedures. In South Africa, its use has been endorsed through appellate judgments, legislation, and a Victims' Charter. Though the precise role, value, weight and inconsistent use of victim impact statements have often been debated, no possible human right violation had, until recently, been highlighted. However, in the axe-murder case of *S v van Breda* (SS17/16) [2018] ZAWCHC 87 (7 June 2018)) the prosecution indicated that, in protecting the right to privacy of the surviving victim, no impact statement would be presented during sentencing. This paper explores the argument raised by the state and, in the event of an impact statement infringing on an adult victim's privacy, what the likely psychological consequences are. It is contended that, while it is widely used, and often considered essential, as one factor to determine the absence or existence of substantial and compelling circumstances, it also reveals extremely intimate detail about victims and may be perceived to infringe on their privacy. Victims should at all times be informed of the route this information might take into not only the public domain, but also more pertinently the divulgence to the accused *per se*. They should be empowered to take an informed decision in this regard. Based on an individualistic approach, the particular victim's well-being should be respected and advanced.

* This article is based on a paper presented at the Annual Conference of the European Association of Psychology and Law, Santiago de Compostela, Spain, 17 – 20 July 2019 titled "The use of impact statements and victims' privacy interests".

How to cite: Van der Merwe & Mitchell 'The use of impact statements, minimum sentences and victims' privacy interests: a therapeutic exploration' 2020 *De Jure Law Journal* 1-18
http://dx.doi.org/10.17159/2225-7160/2020/v53a1

1 Introduction

The prosecution has always had the option, as part of relevant information and evidence during sentencing procedures, to submit a victim impact statement (hereafter VIS).[1] This practice has, in particular, become relevant in inter-personal violent crimes, such as in rape, murder and attempted murder. In recent years precedent has encouraged,[2] and indeed often required,[3] the use of victim impact statements during sentencing, and in 2010, it was statutorily introduced in matters involving child offenders.[4] The crime victim's right to provide information to the sentencing court is also highlighted in the Service Charter for Victims of Crime in South Africa 2007.[5]

Though the precise role, value, weight and inconsistent use of victim impact statements have often been debated,[6] no possible human right violation had, until recently, been highlighted. However, in the axe-murder case of *S v van Breda*,[7] the prosecution indicated that, in protecting the right to privacy of the surviving victim, no impact statement would be presented during sentencing. Marli van Breda

1 S 274 of the Criminal Procedure Act 51 of 1977 (hereafter CPA). Terblanche *Guide to Sentencing in South Africa* (2016) 123. Kruger *Hiemstra's Criminal Procedure* (2019) 28-2.

2 *S v Vilakazi* 2009 1 SACR 552 (SCA) par 21; *S v Matyityi* 2011 1 SACR 40 (SCA) par 16; *S v v PB* 2013 (2) SACR 533 (SCA); *S v Ganga* 2016 1 SACR 600 (WCC) para 52.

3 *Rammoko v Director of Public Prosecutions* 2003 1 SACR 200 (SCA) 205e – since the matter involved an appeal against the imposition of life imprisonment, the case was referred back to the trial court to obtain a victim impact statement. The court held that such omission led to a risk for the accused where s 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA) applied in that: "… substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment – which has been prescribed for a very specific reason – simply because such circumstances are, unwarrantedly, held to be present."; *S v Mhlongo* 2016 2 SACR 611 (SCA) par 23 – Mocumie JA held that the absence of a victim impact statement about the harm suffered by a 27-year-old rape victim (after having been abducted and subjected to a night of terror (para 21)), was a cause of concern (para 22).

4 S 70 (2) of Child Justice Act 75 of 2008 (hereafter CJA) provides as follows: "The prosecutor may, when adducing evidence or addressing the court on sentence, consider the interests of a victim of the offence and the impact of the crime on the victim, and, where practicable, furnish the child justice court with a victim impact statement provided for in subsection (1)".

5 Clause 2 (see http://www.justice.gov.za/VC/VCdocs.htm (accessed 2019-10-28).

6 Van der Merwe "A critical evaluation of the use of victim impact statements in child sexual abuse cases" 2006 *De Jure* 422 – 435. Also *S v Ganga supra*.

7 SS17/16 2018 ZAWCHC 87 (7 June 2018)). Van Breda was convicted on three counts of murder and one count of attempted murder. Life imprisonment was imposed for all three murder accounts (his parents and brother) and 15 years for the attempted murder of his sister. She had several wounds directed at the part of the human body with a high mortality rate (para 279) but survived against all expectations (para 298).

(almost 20 years old at the time of sentencing), who survived the excessively violent attack by her brother on the family, was still suffering from amnesia and had not seen the accused since the attack. The decision to withhold an impact statement was probably also influenced by the huge media exposure she had been subjected to since the brutal incident.[8]

This article explores the state's argument concerning victims older than 18 years at the time of making the impact statement. It focusses on the use of impact evidence in considering minimum sentences, the merit of the state's argument in *van Breda*, and if an impact statement indeed infringes on a victim's privacy, what the most likely psychological consequences would be.

2 Impact evidence and minimum sentences

By submitting or presenting an impact statement, victims are allowed the last opportunity to participate in criminal justice procedures.[9] Thereby they are also given a voice to tell their story with reference to the after-effects that the crime had or still has, on their lives.[10] This happens in addition to their testimony regarding the elements needed for a conviction, which is heard during evidence in chief. Normally it does not include any opinion on what the actual sentence should be,[11] since the sentencing discretion belongs to the court.[12] Impact statements may contain a description of the different kinds of harm caused by the commission of the crime against the victim, such as physical or mental injury, emotional suffering, economic loss, or substantial impairment of fundamental rights.[13]

When minimum sentences are prescribed,[14] courts consider evidence about emotional and psychological harm that victims of sexual offences have suffered or still suffer, of particular importance.[15] Though presiding officers generally do not question the existence of emotional harm suffered by the complainants in rape matters, neither that the harm may vary in gravity, or that it "generally deserves more emphasis than

8 See for example https://www.google.com/search?client = firefox-b-d&q = marli + van + breda + now. On 3 November 2019 a google search revealed 33 000 results.
9 *S v Mhlongo supra* para 22.
10 Muller & van der Merwe "Recognising the victim in the sentencing phase: The use of victim impact statements in court" 2006 *SAJHR* 663.
11 Müller & van der Merwe 647-656.
12 *S v Siebert* 1998 1 SACR 554 (SCA) 558*i*–559*a*.
13 According to the definition of harm in the Victims' Charter above.
14 S 51 of the Criminal Law Amendment Act 105 of 1998, read with Schedule 2.
15 *Rammoko v Director of Public Prosecutions supra*; *S v Abrahams* 2002 (1) SACR 116 (SCA) 124C; *S v Matyityi supra*; *S v Ganga supra*.

physical injuries",[16] they do need reliable evidence for the determination of a proportionate or just sentence.[17] For aggravated forms of rape and murder, the sentence of life imprisonment is prescribed as the minimum discretionary sentence.[18] Its imposition is, however, not mandatory and courts may deviate when they find substantial and compelling circumstances to be present in the matter.[19] The after-effects of the crime is one of the factors that are cumulatively taken into account in order to determine whether such a finding would be justified.[20] On the other hand, when rape and murder fall outside the most severe category created by section 51 of the Criminal Law Amendment Act 105 of 1997, aggravating factors, such as the harm caused by the crime, may influence courts to increase the prescribed sentence of 10 and 15 years, respectively.[21] Despite the introduction of the minimum sentencing regime, South African courts still enjoy a fairly wide sentencing discretion,[22] and that, in turn, leads to unpredictable sentencing outcomes.[23] Thus, within the same offence category, imposed sentences will differ to varying degrees. Davis J highlights that not all rapes deserve equal punishment – that is in no way to diminish the horror of rape; it is however to say that there is "a difference even in the heart of darkness."[24]

Impact statements may be prepared and submitted in different ways. Firstly, victims (or someone on their behalf) may prepare a statement

16 *S v Ganga supra*, para 51. Cf; *S v Ncheche* 2005 2 SACR 386 (W) para 29 and *S v Snoti* 2007 1 SACR 660 (E) 663c where the court held that, despite the absence of psychological impact evidence, the brutality and severe injuries caused by crime of rape may totally justify the sentence of life imprisonment.

17 In *S v Ganga supra* par 52 the court held that, despite the submission of an impact report by a forensic social worker, expert evidence about the emotional and psychological harm that the respective victims had suffered, would have been more valuable.

18 S 51(1) read with Schedule 2, Part I, of the Criminal Law Amendment Act 105 of 1997.

19 S 51(3) of the Criminal Law Amendment Act 105 of 1997. The exercise to determine the presence or absence of substantial circumstances is, however, compulsory. In *S v Malgas* 2001 1 SACR 469 (SCA) para 9 it was held that all recognised aggravating and mitigating factors should be considered. It should be noted that victims' interest is a factor separate from the crime, offender and interests of the society to be considered (*S v Matyityi supra*).

20 *S v Matyityi supra*. When a deviation from life imprisonment is permitted, the practical outcome of the sentence will be influenced significantly. For life imprisonment the offender must serve 25 years before consideration of parole (section 73(6)(b)(iv) Correctional Services Act 111 of 1998), while in all other instances of determinate sentences, the offender must only serve 50% of the imposed term (s 73(6)(a) Correctional Services Act 111 of 1998).

21 S 51(2) read with Schedule 2, Parts II and III, of the Criminal Law Amendment Act 105 of 1997. See also *S v Mthembu* 2012 1 SACR 517 (SCA) para 11, where, in a murder matter involving road rage, the prescribed sentence of 15 years was increased to 18 years imprisonment.

22 Terblanche 375-376.

23 *S v Kwanape* 2014 1 SACR 405 (SCA) para 16.

24 *S v Swartz* 1999 2 SACR 380 (C) paras 386b–c.

and simply hand it to the prosecutor or may present it personally in court. For example, the complainants in *S v Hewitt*,[25] presented their impact statements during the sentencing hearing. The court had the opportunity to gain an understanding of the total degree of harm inflicted by the acts of rape perpetrated against them when they were still young girls. It provided a rare window into the true extent of the long-term harm suffered by victims of sexual offences. In this case the offences had been committed decades earlier and the lasting and devastating consequences for the victims, as well as their families, were found to be a serious aggravating factor. The court summarised the life-long impact as follows:

> "The first and second complainants, who are both divorcees, have struggled to maintain intimate relationships with men throughout their adult lives, as a direct result of the rapes. According to the second complainant, her parents and sister never recovered from the incident and it has affected her children too as a result of the manner in which she is raising them. The first complainant has suffered severe depression and anxiety and has led what she termed "a self-destructive" life. All three complainants, who were described as promising tennis players in the trial, abandoned their potential tennis careers, and told how they cannot bring themselves to even watch tennis to this day because of its link to the offences".[26]

In *S v Tuswa*,[27] the elderly rape complainant prepared a written victim impact statement, complemented by the testimony of her niece. According to her statement, she still suffered from a great deal of pain and had become incontinent and soiled herself occasionally. The incident had turned her into "a small child",[28] sharing a bed with her daughter-in-law, and she had constantly to be reminded that she was not alone. The complainant had to abandon her home, the only inheritance from her deceased husband, as she was unable to continue living in the same place where she had been traumatised. She further received regular medical attention for the massive tear inflicted by the accused during the prolonged act of rape,[29] and had to start taking medicine for the first time in her life.[30] The complainant's niece informed the court that before the incident she had been a proud and healthy woman who regularly comforted and pastored members of the community. In contrast, she no longer had any confidence to be of assistance to anyone and had become a liability to her family.[31] The court concluded that the accused's conduct had reduced the complainant from an independent farming woman and a leader in her community to someone, as her niece had described, who is "mentally disturbed, forgetful and frightened with no self-confidence".[32] The court attached substantial weight to this

25 2017 1 SACR 309 (SCA).
26 *S v Hewitt supra*, para 12.
27 2013 2 SACR 269 (KZP).
28 *S v Tuswa supra*, para 59.
29 See *S v Tuswa supra*, paras 12-20 for a description of the injuries inflicted and the force used during the act of rape.
30 *S v Tuswa supra*, para 59.
31 *S v Tuswa supra*, para 59.
32 *S v Tuswa supra*, para 60.

factor, particularly in the light that the complainant was theoretically old enough to be the accused's great-great grandmother. It further took a wide approach to the after-effects of the crime in this matter and included the ripple effect on the complainant's family and on the community where she had lived all her life. These cumulative after-effects, on their own, were found to be compelling reasons to punish the accused severely.[33]

In the case of *Director of Public Prosecutions, North Gauteng, Pretoria v Thusi*,[34] the court accepted that the widow of the deceased suffered enormous trauma caused by finding her husband lying on the ground, tied up with "wires" and with "a stocking" in his mouth, murdered during the course of a robbery:

> "She broke down sobbing in the witness box as she testified that she could never go back to that house again. The incident had effectively ruined her life. Not only did she lose her husband of 39 years and her home, but she also lost her job because she could not concentrate. She was suffering from depression and nightmares and could not sleep. She could not live on her own and had been living in various different houses since the incident."

When the victim does not have the ability or desire to relive the trauma of a personal court appearance, letters or poems written by the victim after the crime can be used. In *S v van Wyk*,[35] the court found the following poem, written by the rape victim, which shows the personal horror experienced by her, to be very enlightening about the effect of the act:

> "Happy Days Today it is exactly a week,
> For seven days long, everything was broken.
> May I ask, why me, Was I in the wrong place?
> Why, wherefore, what now,
> His eyes were not blue but brown, like his skin, his ears hideously small.
> How must I forget, I smell his sweat, Am scared that soon reality will grab me."[36]

Secondly, impact evidence may be prepared and/or presented by a social worker, psychologist, or other behavioural science expert. For example, in *Director of Public Prosecutions, North Gauteng, Pretoria v Thusi*,[37] (already referred to above in context of the 84-year old widow discovering her murdered husband), a social worker compiled a separate

33 *S v Tuswa supra*, paras 61-62. Life imprisonment was imposed (para 72).
34 2012 1 SACR 423 (SCA) para 13.
35 2000 1 SACR 45 (CPD) 51.
36 The text contains a translation by the authors. The following appeared in the judgment: *Happy Days Dis vandag presies 'n week, vir sewe dae alles het gebrek Mag ek vra hoekom ek, Was ek op die verkeerde plek? Hoekom, waarom, wat doen nou, Sy oë was nie eens blou maar bruin, soos sy vel, sy ore aaklig klein. Hoe moet ek vergeet, ek ruik sy sweet, Is bang een of ander tyd, gaan die werklikheid my vang*.
37 *Director of Public Prosecutions, North Gauteng, Pretoria v Thusi supra*, para 13.

victim impact report about the psychological trauma caused by the act of rape following the murder, and described it as being profound and ongoing on the widow:

> "… she was reported to have been experiencing constant headaches which she did not have before the incident. She was terrified and hysterical two years after the rape. She seemed very embarrassed and ashamed of what had happened. When she had to face or recall the events, which led to her trauma, she blocked them out psychologically. She was physically and emotionally traumatised. She was suffering from nightmares and was always scared. She was experiencing panic attacks, nervous tension and lack of emotional control. She still needed counselling two years after the rape."

It was found, on appeal, that the trial court, in imposing sentence on both the murder and the rape charges, over-emphasised the personal interests of the accused over the seriousness and prevalence of the offences, the interests of society and the harm suffered by the rape victim and by the family of the deceased.[38] In contrast to the trial court, no substantial and compelling circumstances were found to be present, and life imprisonment was imposed on both counts.

Irrespective of the way an impact statement is prepared and presented, the defence and accused will be aware of it, since either it is read out in court, presented as evidence or the court refers to it in the sentencing judgment. By being incorporated into the judgment, it becomes part of the public court record. In addition, the media may report about the contents on different platforms, while, in all likelihood, social media comment will continue and is uncontrolled. Though the identity of complainants in sexual offences is statutorily protected,[39] victims differ in terms of resilience, as well as attitudes towards privacy. Nonetheless, as the cases discussed above reveal, intimate and very personal details about victims enter the public domain *via* information provided in impact statements.

3 Right to privacy

The need for privacy is a trait shared and valued by most of humanity.[40] Globally it is protected by most democratic Constitutions and within the transformative constitutional state of South Africa,[41] it is protected by

38 *Director of Public Prosecutions, North Gauteng, Pretoria v Thusi supra*, para 23.

39 S 153(2)(b) and S 154(2) of the Criminal Procedure Act 51 of 1977.

40 Macleod "Privacy: Concept, Value, Right?" in Cudd and Navin *Core Concepts and Contemporary Issues in Privacy* (2018) 32; Cudd and Navin "Conceptualizing Privacy Harms and Values" in Cudd and Navin *Core Concepts and Contemporary Issues in Privacy* (2018) 1; Moore "Privacy: Its Meaning and Value" 2003 *American Philosophical Quarterly* 215.

41 It should be noted that most legislation is centred around data protection and surveillance, with a limited focus on individual privacy. However, the use of the word "includes" in the Constitution is indicative of the wide range that the right to privacy might cover. Despite the numerous

mutually supporting legislation and policies.[42] Despite this, privacy has been notoriously difficult to define,[43] with great discrepancies in the understanding historically, conceptually, and philosophically.[44]

In order to attempt a definition within a legal sense, reference is firstly made to the fundamental 1960 text of William Prosser, "Privacy",[45] which defined and systematized the concept of privacy within the court system. Prosser identified four types of invasions of persons' interests:

a intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
b public disclosure of embarrassing private facts about the plaintiff;
c publicity which places the plaintiff in a false light in the public eye; and
d appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

For purpose of this article, the first two types of invasion are of importance. More specifically, the potential intrusion that the content of a VIS can have on a victim's seclusion/solitude and the disclosures of information that the victim would deem private or embarrassing.

---

legislation and case law surrounding privacy, an exact definition has not been provided by the judiciary. It is also of importance to note that there are debates surrounding the justifiable legal grounds of privacy. Although this paper acknowledges this, it will not elaborate on it. It is a constitutionally recognized right in SA and will be analysed as such.

42 For example, domestically it is enshrined in s 14 of the Constitution which provides for an express, justiciable right to privacy. It states: "Everyone has the right to privacy, which includes the right not to have – (a) their person or home searched; (b) their property searched; (c) their possessions seized; (d) the privacy of their communications infringed." This is supported by the Protection of Personal Information Act 4 of 2013 (hereafter POPI) which is the primary instrument regulating data protection in South Africa. It is also found in regional and international documents, which South Africa is signatory to, for example, the Universal Declaration on Human Rights (article 12); the International Covenant on Civil and Political Rights (article 17); and the African Charter on the Rights and Welfare of the Child (article 10).

43 Macleod 32; Cudd and Navin 3-4; Lee "The Nature and Value of Privacy" in Cudd and Navin *Core Concepts and Contemporary Issues in Privacy* (2018) 47.

44 Allen *Uneasy access: Privacy for women in a free society* (1988) 16; Thomas *The Right to Privacy* (1975) 295–313; DeCew "Privacy" (2015) in Zalta (ed) *The Stanford Encyclopedia of Philosophy* http://plato.stanford.edu/archives/spr2015/entries/privacy/; Lee 47-51. A large body of philosophical debates about privacy has focused on whether privacy is a coherent concept. It has been critised as being overly vague, with no clearly defined parameters. Philosophers, like Judith Jarvis Thomson, famously argued against the coherence of privacy. Others like, De Cew and Lee have defended the coherence of privacy. Addressing this in a definite manner is outside the scope of the article, but the debate surrounding the coherence is acknowledged.

45 Prosser "Privacy" 1960 *California Law Review* 383–423.

Taking Prosser's categories of privacy as a starting point, privacy is further defined with a focus on one specific context, relative to victims of violent crime and the potential content of a VIS.

The definition as provided by Stan Lee,[46] encapsulates this best:

> "Privacy is a condition (and/or the legal and social institutions that support that condition) under which individuals have a protected degree of control over how they are presented publically, in terms of information about themselves available to others."

He elaborated in stating:[47]

> "It is the ability of individuals, founded in protections provided by social and legal institutions, to have some control over how they are presented to the public, whether directly in the observation of their activities or indirectly in terms of what is publically represented about them by others."

Lee's definition clearly addresses both types of privacy as defined by Prosser.[48] With reference to the victims of crime, the emphasis should therefore be on privacy in the context of access, distribution and control over their personal information. More specifically the information held in a VIS. It should be understood as the unitary right of a victim that protects their ability to have control over the dissemination of information about their personal lives. The right to privacy, as referred to in the *Breda* case, should therefore be understood as the right that the victim, Marli van Breda, has to control both information about herself and the impact the heinous crime has had on her life. It refers to the choice she has to limit or simply keep this information from others. Although one can argue that a victim can, to an extent, control the information contained in a VIS, the actual loss of control comes from having it become public record and the fact that the perpetrator and public are privy to these intimate details.

Within this definition, one must also keep in mind the influence of the digital age. The digital age has given rise to renewed concerns about privacy, as new technologies make possible novel kinds and magnitudes of privacy violations.[49] For victims of crime this implies that their VIS is

46 Lee 48.
47 Lee 51.
48 Fried "Privacy" (1984) in Schoeman *Philosophical Dimensions of Privacy: an Anthology* 204-206; De George "Privacy, Public Space and Private Information" in Cudd and Navin Core Concepts and Contemporary Issues in Privacy (2018) 108; Moore 2003 *American Philosophical Quarterly* 222. Similar definitions to that of Lee have been provided by other scholars, for example Fried described privacy as not simply an absence of information about us "in the minds of others: rather it is the control we have over information about ourselves". De George described it as being able to limit the access of unwanted intrusion in areas of our lives. Moore argued that privacy should be seen as the ability to present oneself to public as you wish and to have "control over access to oneself and to information about oneself".
49 Hubbard "The Need for Privacy Torts in an Era of Ubiquitous Disclosure and Surveillance" in Cudd and Navin *Core Concepts and Contemporary Issues in*

part of the public record. For an underage victim, like Marli van Breda, this could potentially have meant that, as soon as the age of majority is reached, her most intimate thoughts, feelings and the impact of crime, will once again be plastered all over the media. A VIS as part of the public domain, and evidently the potential of electronic depositories, will be stored in multiple locations. Therefore, digital technology enables the process in which neither the VIS nor the victim can be forgotten. Cyberspace therefore adds additional complexity to the notion of privacy and makes the control over personal information both more difficult and all that more important.

3 1 The importance of privacy

When discussing privacy in accordance with the given definition, it becomes clear that the emphasis is not on privacy as simply a right, but rather a condition in which access and personal information control exists. It is from this premise that a discussion will now follow of, firstly, the importance of privacy in general and secondly, the importance of privacy within the unique psychology of the victim.

3 1 1 The potential benefits of privacy

> "Therefore, both the threat of an information leak and the threat of decreased control over decision-making can have a chilling effect on my behaviour. If this is correct, then the desire to protect a sanctuary for ourselves, a refuge within which we can shape and carry on our lives and relationships with others – intimacies as well as other activities – without the threat of scrutiny, embarrassment, and the deleterious consequences they might bring, is a major underlying reason for providing information control … and control over decision making."[50]

A fundamental question is whether personal privacy is merely something that we want, or is it something that we need to function within society?

Concerning personal development and our existence within the social sphere, the literature seems to agree on the vital role information privacy plays. Fried describes violations of privacy as having the potential to injure our very humanity.[51] A vast amount of personal development takes place within the realm of private spaces,[52] whether it be physical or within the parameters of one's own private thoughts and convictions.[53] For the development of a unique and self-determined

Privacy (2018) 137-158; Bélanger and Crossler "Privacy in the Digital Age: a Review of Information Privacy Research in Information Systems" 2011 *MIS Quarterly* 1017-1042; DeVries "Protecting Privacy in the Digital Age" 2003 *Berkeley Technology Law Journal* 283.

50 Cudd and Navin 28.

51 Fried "Privacy" 1968 *Yale Law Journal* 475.

52 Margulis "Privacy as a Social Issue and Behavioral Concept" 2003 *Journal of Social Issues* 246; Fried 1968 482; Moore 2003 *American Philosophical Quarterly* 215.

53 Cudd and Navin 27; Lee 50, 58; Hubbard 148.

person,[54] one needs a degree of protection from public scrutiny and potential embarrassment.[55] There needs to exist a barrier in which a person can decide which information about themselves will be known only by those intimate to them and the public.[56] In many instances, the exploration of one's own complex personality will move into areas that do not conform to accepted norms of one's community or inner circle.[57] There needs to be a degree of protection and leeway given to each person for this vital exploration to take place, without this there will exist undue pressure to conform and developmental behaviour can be placed under censure.[58] Although it may seem counter indicative, this development is needed for social cooperation.[59] It seems that there is a degree of a social mask required to ultimately fit into the social sphere. This privacy has also been described as crucial to sustaining intimate personal relationships,[60] the stable development of self-esteem and personal autonomy.[61] The absence of this could have detrimental effects, both individually and communally.[62]

Personal information privacy, therefore, seems to be inherent to the human condition. Humans have a desire to conduct their private affairs free from intrusion. This desire can be fulfilled by giving a person, within the limits of the law, control over their personal information and the ability to deny others access to yourself.

3 1 2 The potential harms of privacy protection

One must however, also acknowledge the harms or potential costs of privacy protection. It holds dangers for public security, private security, and psychological well-being. Privacy concerns do have the potential to interfere with the efforts of the courts to ensure the ends of justice are served. Within the spectrum of VIS, however, we must keep in mind that it is just one of the factors influencing the sentence. It will not have an effect on the guilty plea or investigation. We have two conflicting concerns being uncertain. The court, and lawmakers, as therapeutic agents must acknowledge this. The balance of the two concerning a VIS must be determined taking into account the victims involved.

54 Margulis 2003 *Journal of Social Issues* 244; Fried 1968 *Yale Law Journal* 478; Cudd and Navin 20; Gavison "Privacy and the Limits of Law" in Schoeman *Philosophical Dimensions of Privacy: an Anthology* 359.
55 Cudd and Navin 28; Lee 53; Hubbard 148.
56 Moore 2003 *American Philosophical Quarterly* 217; Cudd and Navin 28; Hubbard 148.
57 Margulis 2003 *Journal of Social Issues* 247; Moore 2003 *American Philosophical Quarterly* 220; Hubbard 148-149.
58 Cudd and Navin 28; Nagel *Concealment and Exposure* (2002) 28.
59 Moore 2003 *American Philosophical Quarterly* 220; Lee 55, 57.
60 Fried 1968 *Yale Law Journal* 477.
61 Margulis 2003 *Journal of Social Issues* 254; Lee 55.
62 Fried 1968 *Yale Law Journal* 477; Margulis 2003 *Journal of Social Issues* 254; Moore 2003 *American Philosophical Quarterly* 215.

A discussion of the importance and potential harms of an overemphasis of personal privacy would be incomplete without acknowledging the feminist argument that privacy has been used to facilitate crime and oppression of the vulnerable.[63] The strongest advocate of the argument is Catharine McKinnon,[64] in Towards a Feminist Theory of the State (1989); she famously argued that privacy claims could enable the oppression of women due to the public/privacy split. Privacy becomes a dangerous ideal when used to cover up the various violent actions against women; privacy has been used as a shield to keep the state from intervening in domestic matters.[65] By choosing to keep some information private, because it is "personal" many women are oppressed within their own homes. Win-chiat Lee,[66] supported this argument by analysing how distinguishing between zones of privacy can, in fact, protect criminal action and instances of abuse. The resolve is that privacy should be considered "only appropriate for practices or conduct that is already deemed morally acceptable".[67]

This argument is especially significant in the protection of victims of domestic violence, sexually motivated crimes and gender-based violence. However, within the parameters of a VIS, the crime has already become known. The private has already been made public. It is therefore important to note that this article in no way supports the notion that some things should be kept private in any attempt to protect the perpetrator or to facilitate the oppression of crime. However, this paper explores the limits of the public/private sphere and the limits to which a victim should be exposed to making the private and horrific public.

3 2 Privacy as an individualised concept

Considering the aforementioned discussion, it is evident that privacy is more than a mere need. In fact, it can be argued that it is vital to our very development as human beings. However, privacy is a deeply personalised concept and, as such, the need for privacy will differ from one person to the next.

63 Cudd and Navin 25; Lever "Feminism, Democracy and the Right to Privacy" 2005 *Minerva: An Online Journal of Philosophy* 1-31.
64 MacKinnon *Towards a Feminist Theory of the State* (1991) 171-183.
65 Macleod 35.
66 Lee "Criminal Acts, Reasonable Expectation of Privacy, and the Private/Public Split" in Cudd and Navin *Core Concepts and Contemporary Issues in Privacy* (2018) 252-255.
67 Cudd and Navin 4.

A person's personality traits, background,[68] culture,[69] and social identity,[70] will determine their vulnerability to and the detrimental effect that privacy protection or violations will have. Accordingly, the value that we, individually and collectively, grant to privacy will be linked to various factors and will be an individualised concept. One must keep in mind that not every penetration of the personal space or information is deemed as harmful by every individual, and what will be experienced as a violation by one person, can be within the comfort zone of another.

Xu oa explains this by means of the Information Boundary Theory (IBT):[71]

> "Depending on the situational and personal conditions, an attempt by an external entity to penetrate these boundaries may be perceived by the individual as intrusion. The motivation to reveal or withhold information is governed by "boundary opening" and "boundary closure" rules. These rules involve dynamic psychological processes that are affected by the nature of the relationship, the expected use of the disclosed information, and the benefits of disclosing the information. Thus, it is important to note that the rules emerge from an individual's articulation of a personal "calculus" of boundary negotiation, which is influenced by the conditions in which disclosure is deemed acceptable or unacceptable. The conditions "depend in part upon the status of the relationship between the sender and the audience (individual or institutional) receiving it"; thus they are context specific."

This is one of the difficulties in trying to develop personal privacy legislation and regulations. It is inevitable that confusion will exist surrounding the parameters of a right that is definition has been as wide as it has been contentious. Privacy is amorphous and ultimately subjective. The privacy regime of a country will therefore be influenced by the value its members place on it. This becomes even more contentious within a culturally diverse country like South Africa.

When relating this to the VIS, it is important to realize that victim reactions to information sharing and a VIS will be highly variable, dependent on their personal boundaries at the time of sentencing. Attempting to make any prediction on how a victim will react to sharing

68 Lee 52; Altman "Privacy Regulation: Culturally Universal or Culturally Specific?" 1977 *Journal of Social Issues* 68; Laufer and Wolfe "Privacy as a Concept and a Social Issue – Multidimensional Developmental Theory" 1977 *Journal of Social Issues* 26; Xu, Dinev, Smith and Hart "Examining the formation of individual's privacy concerns: Toward an integrative view" 2008 *ICIS 2008 Proceedings* 2. Xu et al, described it as "… depending upon context, and dynamic in the sense that it varies with life experience".

69 Moore 2003 *American Philosophical Quarterly* 221; Lee 52; Bellman, Johnson, Kobrin, and Lohse "International Differences in Information Privacy Concerns: A Global Survey of Consumers" 2004 *Information Society* 322; Dinev, Bellotto, Hart, Russo, Serra and Colautti "Internet Users' Privacy Concerns and Beliefs About Government Surveillance: An Exploratory Study of Differences Between Italy and the United States" 2006 *Journal of Global Information Management* (14:4) 62-64.

70 Cudd and Navin 5, Xu et al 2008 *ICIS 2008 Proceedings* 5.

71 Xu et al 5.

such intimate information is problematic, if not impossible. The question should therefore not be, should there be a VIS, but rather how can the court facilitate this, whilst respecting the mental health, personal boundaries and well-being of the individual victim.

3 3 Privacy needs of a victim of crime

Walklate,[72] highlights that victims' needs will vary according to their own personal coping skills and those of people around them. In other words, needs, even in the case of the vulnerable, are not fixed entities.

The discussion thus far has highlighted the importance of privacy for social cohesion, personal autonomy and development, as well as pointing to the subjective nature thereof. Within this frame, a brief analysis will be given of the importance of privacy information control for the victims of crimes.

Control as a psychological concept has been at the centre of numerous fields of psychology, with social psychologists having written a large body of research on the importance of a sense of personal control over one's situation for the psychological wellbeing of a person.[73] Control over information about oneself and one's life is paramount to all people, but the importance of having and regaining control within the psychology of a victim, especially a victim of violent crime cannot be overstated.[74] Providing in depth discussion of the psychological treatment methods and the healing of victims is outside of the scope of this article. However, the research and treatment continuously emphasises the importance of establishing a sense of control for the victim.

Green and Roberts,[75] unfold this by explaining that for a victim of crime, many of the assumptions they have based their lives on, that ground their very beings, are challenged and many times shattered. This causes, amongst others, feelings of disequilibrium and loss of a sense of control. A victim must rebuild not only their lives, but redefine who they

72 Walklate *Imagining the Victim of Crime* (2006) 105.

73 For further reading see Bates and Baltes *The Psychology of Control and Aging (Psychology Revivals* (2014)); Osman *Future-Minded: The Psychology of Agency and Control* (2014); Green and Ventura *The Adaptive Self* (2005) (specifically chapter 5); Thompson, Sobolew-Shubin, Galbraith, Schwankovsky and Cruzen "Maintaining perceptions of control: Finding perceived control in low-control circumstances" (1993) *Journal of Personality and Social Psychology.*

74 See Green and Roberts *Helping Victims of Violent Crime: Assessment, Treatment, And Evidence-Based Practice* (2008) where the word "control" is used 76 times, and 71 of these refer to loss or regain of control. This is an elementary illustration of the importance of regaining control to victim healing. The book refers to various diverse psychological theories and treatment approaches to facilitate healing for different victims of crime, however in each theory one finds some reference to loss and gain of control.

75 Green and Roberts, 34-36.

are and what their barriers will be. The level of personal development that must take place is vast and of paramount importance to their healing. As discussed above, this development can only take place when a person has access to private spaces and control over who has access to their private information.[76] Green and Roberts further emphasise that victims should "not be coerced or confronted into action until they have stabilized and dealt with the initial crisis and trauma reactions".[77] McGill,[78] supports this by identifying the regaining of a sense control as one of the fundamental steps to healing and treating a victim of crime.

The right to privacy as defined above is phrased as having control over what information about oneself is made public. So within the criminal justice system, part of the control that is taken from a victim, will be the loss of information control. It is expected of a victim, for whom regaining of control is vital to their healing, to surrender private information, which leaves them vulnerable. The information contained in a VIS becomes co-owned by every other party to the court proceedings. Some victims could experience this as a complete loss of control of privacy. The potential of harm will be personality dependent and situational, but still it can be detrimental to the victim of crime and will in fact, as argued in the *van Breda* case, limit a victim's right to privacy.

Within the spheres of the legal system and the VIS, the courts should, therefore, be aware and sensitive to the psychological needs of the victim and should refrain against causing more harm to an already injured individual.

> "Involvement in legal proceedings constitutes a significant emotional stress for even the most robust citizen. For victims of violent crime, who may suffer from psychological trauma as the result of their victimization, involvement in the justice system may compound the original injury. Many anecdotal accounts describe the experience of the victim in the justice system as a "revictimization". Indeed, if one set out intentionally to design a system for provoking symptoms of post-traumatic stress disorder, it might look very much like a court of law."[79]

The criminal justice system has been notorious for the mental harm it has caused victims. The treatment has even been described as the double

---

76 See 3 1 above.

77 Green and Roberts 153. Similar sentiments can be found widely in victim treatment literature, for further readings see Miller *Counselling Crime Victims: Practical Strategies for Mental Health Professionals* (2008) (specifically chapter 7 and 10); Hall *Victims of Crime: Construction, Governance and Policy* (2018) (specifically chapter 3).

78 She also discusses the healing of talking about the crime and victims' experiences of it, however, she places emphasis that this should always be done in a safe space. Similar sentiments can be found in Roberts "Bridging The Past And Present To The Future Of Crisis Intervention And Crisis Management" in Roberts *Crisis Intervention Handbook: Assessment, Treatment and Research* (2005) 3–35.

79 Herman "The Mental Health of Crime Victims" 1992 *Journal of Traumatic Stress* 159.

victimization of victims, first by the crime and later by the criminal justice system.[80] It is a "lack of control and subsequent trauma,"[81] that victims of crime experience and are exposed to during the criminal justice process.

The justice system can assist in restoring control and facilitate healing, but not if this is done in a manner that does not fit within the specific personology and psychology of that victim. The court must acknowledge the victims need to control information about oneself and access to oneself. The moment VIS has been read in an open court, the victim has, yet again, lost control over the information about himself or herself. The content of a VIS is centred on the aftermath of the crime, the part of their lives that they should have absolute control over. When a crime has been committed, and it has developed to the stage of going to court, the privacy of the victim is no longer protected in the same manner as before. In order for justice to be served and the court procedures to fully take their place, the account of the crime has to be repeated, analysed and pulled apart. This cannot be changed. However, the repercussion of the crime, the extent to which it has left a permanent mark on the victim's life, does not necessarily have to become public record. It is here that the victim should have control over which information about himself\herself and their lives are made public. Victims, especially, should have a reasonable expectation of privacy within the public sphere. The alternative is that the VIS, although public record, should be given privacy protection.

4 Recommendations and further research

The unique pathology and experience of a victim of crime, as opposed to a member of the public, poses a host of interesting challenges to understanding when privacy is valuable and when it can be harmful. Victims of sexual or degrading crimes especially, may stand in an ambivalent relation to privacy. On the one hand, privacy rights seem to protect them from reliving the crime or being exposed to public scrutiny. It also has the potential to allow them to deal with the events in their own

80 McGrath "Psychological Aspects of Victimology" in Turvey *Forensic victimology: Examining Violent Crime Victims in Investigative and Legal Contexts* (2013) 207; Green and Roberts 31: "Thompson, Norris, and Ruback (1996) conducted a study exploring the experiences of homicide survivors (family members of the murdered), including the criminal justice system and activities therein. The authors also found that fragmented services provided by the criminal justice system increased levels of distress, which could in turn lead to long-term emotional difficulties. They found that fragmented services often lead to the victims' loss of control, lack of social support, and fear, resulting in increased levels of low self-esteem, depression, and complicated grief. Therefore, services provided within the criminal justice system can impact the recovery of victims."

81 Turvey "Victimity: Entering the Criminal Justice System" in Turvey *Forensic victimology: Examining Violent Crime Victims in Investigative and Legal Contexts* (2013) 48.

way. A VIS has the potential, due to its public nature of further reinforcing stigma and shame. On the other hand, using the right to privacy to withhold the VIS may frustrate the ends of justice, as a VIS has had tremendous influence on sentencing.

One must keep in mind that, although no member of the public may ever access a victim's VIS, the perpetrator still will be privy to it. The psychological effects for a victim in having the aftermath of the crime being exposed to a court of people, especially the criminal, may be profound. There is an argument for allowing a victim of crime to be able to choose if any further details of their live should be provided to a criminal. Some victims might find release in this, but for some it might be detrimental. It would depend largely on the type of crime and the personality of the victim. Although we cannot expect of the law to cater for each personality, a victim of crime has already been exposed. The choices have already been taken away from them. Should they not be given the choice to determine the access the public and the perpetrator has to their personal information? It is here that the court system should embrace the opportunity to act as a therapeutic agent.

When revisiting the definition of privacy as provided above, one should think of the many layers of control lost by a victim: physical and psychological control during the crime and later loss of control of the process and the information given during a court proceeding. The victim has lost control of access to the self, whilst they can be given control over information of the self. Victims must be given the power to keep details of their lives from others, and more specifically the court and the perpetrator. There is no clear indication that a VIS will assist all victims in the healing process. As explained previously, healing from trauma is as unique as the victims of trauma. The court, as therapeutic agent, should not attempt to follow a one size fits all approach. The decision surrounding a VIS should acknowledge the fact that disclosure has both benefits and risks. It will necessarily involve a complex calculation and informed decision making by all stakeholders. It is in this calculation that further research will have to be done, especially surrounding the aftermath of a VIS experience.

5 Conclusion

This article demonstrated a potential tension between the courts' need for information contained in an impact statement and that victim's privacy interests. It is, on the one hand, an accepted practice, especially in interpersonal violent crimes carrying minimum sentences, for justice to be served and court procedures to fully take place. On the other hand, it requires not only that the after-effects of the crime have to be repeated, analysed and pulled apart in front of the accused, but also that the extent to which it has left a permanent mark on the victim's life, then becomes part of public record.

This article contends that victims should have control of what information about themselves and their lives are made public, and that they should have a reasonable expectation of privacy within the public sphere. It is recommended that an individualised approach should be followed where victims are first properly informed of the consequences of making an impact statement and then allowed to make an informed decision about their own statement or/and an assessment by a professional.

Carpe Pecuniam: Criminal forfeiture of tainted legal fees

Abraham Hamman
BA LLB LLM LLD
Associate Professor, Department of Criminal Justice and Procedure, University of the Western Cape

Raymond Koen
LLM PhD
Associate Professor, Department of Criminal Justice and Procedure, University of the Western Cape

SUMMARY

A person charged with money laundering has a right to legal representation and a lawyer is entitled to defend such person. What if the lawyer is paid with dirty money? This paper explores the legal status of tainted fees, to determine whether such moneys should be forfeitable and, if so, what forfeiture means for the client's right to legal representation and the lawyer's right to practise his\her profession. This is an issue of international import and the paper considers criminal forfeiture of tainted legal fees in South Africa, the USA and Canada. All three jurisdictions provide for the criminalisation of tainted fees. However, South African lawyers are most in peril both of prosecution and conviction for accepting tainted fees and of having such fees confiscated. Whereas the USA and Canada uphold the right of lawyers to practise their profession, South Africa appears to negate it. The South African position requires reform.

1 Introduction

Nowadays, money laundering is a prominent feature of the international criminal justice landscape, including South Africa's, and most states are keen to arrest, prosecute and punish money launderers. Needless to say, those accused of money laundering have as much right to legal representation as do all other accused. Indeed, such accused persons likely can afford to pay for legal representation of their choice – more so than many accused charged with non-economic crimes – because they have access to the proceeds of their crimes.

Of course, lawyers all over the world are entitled to defend persons accused of money laundering and to be paid for the services rendered in the course of such defence. If the legal fees are paid with clean money, untainted by criminality, then there is no cause for apprehension, at least as far as the lawyer is concerned. However, if the fees are settled with money which derives from the criminal conduct of his\her client, then the lawyer may be in an unenviable position. Here a number of questions arise. Is a lawyer entitled to accept dirty money as legal fees? Is the client

How to cite: Hamman & Koen '*Carpe Pecuniam*: Criminal forfeiture of tainted legal fees' 2020 *De Jure Law Journal* 19-35
http://dx.doi.org/10.17159/2225-7160/2020/v53a2

entitled to use part of his\her criminal proceeds to defray his\her legal costs? Is the lawyer who is paid with dirty money vulnerable to criminal prosecution? Can the state seek to confiscate such legal fees because they are proceeds of crime?

This paper focuses on the last question and makes an attempt to unpack its ramifications with a view to understanding the legal status of tainted fees paid to a lawyer by a client accused of money laundering. Should such moneys be forfeitable and, if so, what does forfeiture mean for the client's right to legal representation and the lawyer's right to practise his\her profession? This is an issue of international range, given that money laundering schemes often cross national borders, and much is to be learnt from the experiences of foreign jurisdictions. Against this backdrop, the paper studies the approaches taken by South Africa, the USA and Canada to the forfeiture of tainted legal fees.

2 The South African approach

In South Africa, economic crimes in general and money laundering in particular are regulated primarily by the Prevention of Organised Crimes Act 121 of 1998 (POCA) and by the Financial Intelligence Centre Act 38 of 2001 (FICA). Both these statutes criminalise the acceptance by lawyers of fees with a criminal provenance. The criminalisation provisions of POCA and FICA operate as a primary prohibition against a South African lawyer receiving tainted fees for services rendered.[1] The lawyer who flouts this prohibition risks criminal prosecution and punishment.[2]

In addition to the threat of personal criminal liability for the lawyer who is paid with dirty money, South African law allows for the forfeiture of the dirty money itself. Criminal forfeiture, which is *in personam* and conviction based, is possible in terms of the various sections of Chapter 5 of POCA.[3] It is structured formally in terms of restraint orders and confiscation orders. Restraint orders operate to prohibit temporarily any transactions with the property or asset to which they pertain, in order that said property or asset may be preserved for eventual forfeiture. Confiscation orders concern the permanent appropriation by the state of criminal assets held by their targets. Once confiscated, these are deposited into the Criminal Assets Recovery Account, which is subsumed within South Africa's National Revenue Fund.[4] The disposition of funds

1 See ss 2, 4, 5 and 6 of the Prevention of Organised Crime Act 121 of 1998 and ss 1 and 28 of the Financial Intelligence Centre Act 38 of 2001.

2 For a full discussion of this aspect see Hamman & Koen "*Pecunia non olet*: Dirty money as legal fees" 2017 *JACL* 108-114.

3 Chapter 6 of POCA sets out a correlative civil forfeiture regime, which is *in rem* and non-conviction based, and which reproduces, for the most part, the structure of criminal forfeiture. However, it is accessory to criminal forfeiture which, as in most countries, is the default forfeiture regime in South Africa.

4 See s 64(a) of the Prevention of Organised Crime Act.

in the Criminal Assets Recovery Account is decided by the Cabinet on the recommendation of the Criminal Assets Recovery Committee.[5]

The criminal forfeiture provisions of POCA are of general application and hence could be deployed by the state to confiscate fees paid to a lawyer by a client who has been charged with or convicted of money laundering, provided that the fees have a criminal derivation. This form of forfeiture hinges upon a criminal prosecution and conviction of the lawyer, probably for receipt of criminal proceeds as fees. The forfeiture process normally would commence with a restraint order and conclude with a confiscation order. The former usually is a pre-conviction step, issued with a view to preventing dispersal or concealment of the tainted fees; the latter occurs post-conviction, at the sentencing stage of the criminal trial.

The key provision in respect of the restraint order in conviction based forfeiture proceedings is section 25(1) of POCA, which reads:

> "A High Court may exercise the powers conferred on it by section 26(1)–
>
> (a) when –
> (i) a prosecution for an offence has been instituted against the defendant concerned;
> (ii) either a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant; and
> (iii) the proceedings against that defendant have not been concluded; or
> (b) when –
> (i) that court is satisfied that a person is to be charged with an offence; and
> (ii) it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against such person."

Section 25(1) thus allows a South African High Court,[6] to grant a restraint order against a lawyer in two instances. The first is during an ongoing prosecution, when a confiscation order already has been made against the defendant-lawyer or when there is a reasonable expectation that such an order will be made. The second is prior to the institution a prosecution, when the court is satisfied that prosecution will ensue and that there are reasonable grounds to expect that a confiscation order will be made against the defendant-lawyer.

The restraint takes place in terms of section 26(1) of POCA, which empowers the High Court to issue the restraint order by way of an *ex parte* application by the state. If the restraint order is granted, the defendant-lawyer and any other person are prohibited from "dealing in any manner with any property to which the order relates". The idea is to ensure that the property, in this case the tainted legal fees, is preserved for possible forfeiture under a future confiscation order. Further, section

5 See s 69 of the Prevention of Organised Crime Act.
6 Evidently, lower courts are not empowered to make restraint orders under the POCA forfeiture regime.

26(2) of POCA provides, essentially, that the restraint order applies to all realisable property.[7] The notion of realisable property is capacious, and would encompass not only the actual tainted fees but also any other assets into which part or all of the tainted fees have been converted, whether in the hands of the lawyer-defendant or in those of a third party to which they have been gifted – presumably in an effort to place them beyond the reach of the law.

The restraint order is primarily a mechanism of preservation. Its core purpose is to secure the tainted legal fees or their commuted equivalent. However, it is a temporary measure, designed to prevent dissipation of the restrained property pending the outcome of the criminal proceedings. The actual forfeiture of the tainted fees (or their converted reciprocal) to the state is accomplished by way of a confiscation order. Confiscation in conviction based forfeiture is governed by section 18(1) of POCA, which stipulates that:

> "Whenever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from –
>
> (a) that offence;
> (b) any other offence of which the defendant has been convicted at the same trial; and
> (c) any criminal activity which the court finds to be sufficiently related to those offences,
>
> and, if the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order."

A confiscation order follows conviction of the defendant and upon application by the state to the convicting court. The granting of a confiscation order does not appear to be dependent upon the existence of a restraint order issued prior to conviction. Indeed, it is possible that a restraint order could be applied for after the granting of the confiscation order. Assume, for example, that a court issues a confiscation order against a convicted lawyer in respect of tainted fees and/or the asset(s) into which said fees have been converted, in whole or in part. The aim of the confiscation order is to deprive the lawyer of access to and enjoyment of his\her-debased currency. According to section 18(1), the confiscation order constitutes a judgment which sounds in money,[8] and if the state is concerned that the convicted lawyer's assets have to be

7 S 14(1) of the Prevention of Organised Crime Act identifies realisable property as:
(a) any property held by the defendant concerned; and
(b) any property held by a person to whom that defendant has directly or indirectly made any affected gift.

8 See Basdeo "The law and practice of criminal asset forfeiture in South African criminal procedure: A constitutional dilemma" 2014 *PELJ* 1054.

preserved in order for the confiscation order to be realised, it well may apply for a restraint order after the confiscation order already has been made. This possibility is envisaged, somewhat counter-intuitively, by section 25(1)(a)(ii) of POCA as cited above. As a rule, though, the restraint order would precede the confiscation order.

The crimes for which the court may issue a confiscation order against the convicted lawyer include any and all offences of which the lawyer has been convicted during the same criminal proceedings.[9] In addition, the confiscation order may encompass any other criminal conduct considered by the court to be "sufficiently related" to these offences.[10] As a money judgment, the confiscation order seeks to divest the convicted lawyer of the proceeds of his\her crime(s) and any related criminal behaviour. The quantum of the confiscation order may be any amount which the court considers appropriate, provided it does not exceed the value of the proceeds gained from the criminal conduct in question.[11] For example, the confiscation order could require the lawyer to pay to the state the full amount which he\she has received as fees from his\her client. This is the fee forfeiture. Further, the court may supplement the primary confiscation order with any secondary order which it considers necessary to implement the confiscation order fairly. The confiscation order and any cognate order do not constitute criminal sanctions, and stand separate from any punishment imposed by the court for the offence(s) committed by the lawyer.

Interestingly, whereas a restraint order may be made only by a High Court, a confiscation order may be granted by the court which has tried and convicted the defendant, be it a High Court or a lower court. This jurisdictional difference likely derives from the fact that the restraint order application is *ex parte* and is granted without reference to the defendant, whereas the confiscation order forms part of a trial in which all the conventional notice requirements would have been met. This means that the tainted legal fees or their proprietary counterpart may be restrained by one (high) court while another (lower) court – which has tried and convicted the errant lawyer – may order their forfeiture, as money, to the state.

Hitherto, South African law has seen only one case in which the state sought the criminal forfeiture of dirty money paid as legal fees.[12] It concerns an abalone poaching syndicate and involves some 30 accused and close to 600 charges. The case has been running in the Western Cape High Court for several years already, but information about it is sparse and has had to be gleaned from newspaper reports and online sources. One of the accused was Anthony Broadway, an attorney, who had been

9 S 18(1)(a) and s 18(1)(b) of the Prevention of Organised Crime Act.
10 S 18(1)(c) of the Prevention of Organised Crime Act.
11 S 18(1) and s 18(2)(a) of the Prevention of Organised Crime Act.
12 The case commenced life as *State v Ran Wei & Others* in the Western Cape High Court. It appears to have been re-named since as *State v Frank Barends and Others*, case no SS 47/2012.

defence counsel for a number of his co-accused before he himself was charged under POCA with the receipt of tainted fees and became an object of forfeiture proceedings by the state. As one report had it:

> "Bellville attorney Anthony Broadway … who represented several syndicate members since 2001, was also a defendant in the restraint proceedings. His assets, listed on an annexure to the order, include properties in Kenridge and Bellville, a Mercedes-Benz, a Hyundai i20, a trailer, two motorcycles and the contents of nine bank accounts in his name".[13]

Mr Broadway now has been saddled with the dubious distinction of being the first South African lawyer ever to become embroiled as a target in the forfeiture regime of POCA. Although the case has not been finalised yet,[14] it has been reported in the media that Anthony Broadway himself is no longer an accused and has been cleared of all charges.[15] It would appear, then, that South Africa's first and only attempt to deploy the provisions of POCA against an attorney in criminal proceedings relating to tainted legal fees has come to nought. However, the attempt does confirm that South African lawyers have to appreciate not only that the receipt of tainted legal fees is an offence but also that such fees are forfeitable to the state.

However, there is a silver lining to the POCA cloud engulfing tainted legal fees in that allowance is made for a lawyer's fees to be paid by a client (accused of money laundering) from funds which well may be proceeds of crime. It is a concession which applies to assets which are subject to a restraint order. In such a case, it is possible for a court to order that the reasonable legal expenses of the accused be settled from the frozen assets. This possibility stands as an exception to the rule that lawyers cannot be paid with dirty money and that said money is subject to confiscation.

This is the so-called legal expenses exception. It is governed by section 26(6)(b) of POCA, which specifies that:

> "Without derogating from the generality of the powers conferred by subsection (1), a restraint order may make such provision as the High Court may think fit –

13 Schroeder (2013-11-02) "Abalone syndicate set to lose millions" *IOL* https://www.iol.co.za/news/abalone-syndicate-set-to-lose-millions-1601120 (last accessed 2018-09-09).

14 See *S v Miller and Others* 2018 (2) SACR 75 (WCC) para 87 in which the court noted: "While this matter has been running, another lengthy POCA trial involving the poaching and export of abalone (*The State v Frank Barends and others*, case no SS 47/2012) has been running in this Division before Mr Justice Erasmus. Judgment in that matter has not been delivered yet."

15 See Menges (2017-06-27) "Perlie lawyer vry" *Die Son*,https://www.son.co.za/Nuus/Kaapsenuus/perlie-lawyer-vry-20170626 (last accessed 2018-09-09); Breytenbach (2017-06-27) "Prokureur vry oor twee rekenaars" *Die Burger,* https://www.pressreader.com/south-africa/die-burger/20170627/281694024789041 (last accessed 2018-09-18).

> for the reasonable legal expenses of … a person [against whom the restraint order is being made] in connection with any proceedings instituted against him or her in terms of this Chapter or any criminal proceedings to which such proceedings may relate, if the court is satisfied that the person whose expenses must be provided for has disclosed under oath all his or her interests in property subject to a restraint order and that the person cannot meet the expenses concerned out of his or her unrestrained property."

It must be emphasised here that this section constitutes an exemption from the general tenor of South African law that tainted legal fees are forfeitable, first and foremost. Criminal proceeds or otherwise dodgy funds may be used to defray legal expenses only if they are subject to formal restraint and the court authorises that they may be defrayed. The point is that South African law tolerates the payment of legal fees from criminal funds grudgingly, and then only with the imprimatur of the court. The granting of that imprimatur depends upon the court's being convinced that the subject of the restraint order has declared his\her full interest in the restrained property under oath and that he\she does not own sufficient unrestrained property with which to settle his\her lawyer's account. Honesty and impecuniosity on the part of the client, then, are perquisites for persuading the court to authorise payment of his\her lawyer's fees from restrained funds. The lawyer, who accepts tainted fees outside of the statutory legal expenses exception, breaks the law and stands to be prosecuted and to have the fees confiscated by the state.

3 The USA approach

The forfeiture of tainted legal fees long has been allowed in the USA. The main forfeiture statute is to be found in Title 21 of the United States Code, specifically 21 USC §853(a)-(q), known otherwise as the Comprehensive Forfeiture Act (CFA) of 1984. The CFA was preceded by the Racketeer Influenced and Corrupt Organisations Act (RICO),[16] and the Continuing Criminal Enterprise Act (CCE Act),[17] both of 1970. None of these statutes contains any express provisions that exempt attorneys' fees from forfeiture.[18]

Significantly, the US Money Laundering Control Act (MLCA) of 1986,[19] contains a so-called safe harbour provision which effectively decriminalises the receipt by an attorney of tainted fees, provided such fees relate to upholding the Sixth Amendment right of accused persons

16 18 USC §§1961-1968.
17 21 USC §848.
18 See Brickey "Forfeiture of attorneys' fees: The impact of Rico and CCE forfeitures on the right to counsel" 1986 *Virginia Law Review* 495; Winick "Forfeiture of attorneys' fees under RICO and CCE and the right to counsel: The constitutional dilemma and how to avoid it" 1989 *University of Miami Law Review* 770.
19 18 USC §§1956-1957.

to legal representation.[20] However, it appears that this provision does not indemnify tainted legal fees against forfeiture. Whereas the lawyer who is paid with dirty money in terms of the safe harbour clause does not risk criminal prosecution, the dirty money in question remains fair game for court-ordered confiscation. In other words, the safe harbour clause of the MLCA does not operate to protect tainted legal fees against the reach of the CFA, RICO and the CCE Act.[21]

In 1989, the vulnerability of tainted legal fees to criminal forfeiture was considered in two cases, which have become paradigmatic in this area, namely, *United States v Monsanto*,[22] and *Caplin & Drysdale v United States*.[23] They are discussed below.

3 1 *United States v Monsanto*

In this matter, one Peter Monsanto allegedly was involved in a large-scale heroin distribution enterprise,[24] and was indicted for violations of the racketeering laws, the creation of a continuing criminal enterprise, and tax and firearm offences.[25] It was averred further that he had accumulated assets, a home, an apartment and $35 000 in cash, because of his narcotics trafficking. The state argued that these assets were liable to forfeiture under section 853(e)(1)(A) of the CFA, which provides that, when a person is indicted:

> "the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property … for forfeiture."[26]

The District Court granted the *ex parte* motion for an order freezing the designated assets pending trial. Monsanto claimed, *inter alia*, that the order interfered with his Sixth Amendment right to counsel of his choice.[27] He sought a declaratory order to the effect that if the frozen assets were used to pay attorneys' fees, the state would not invoke section 853(c) of the CFA, which could render a transfer from a client to an attorney forfeitable, to confiscate such payments in the event of his

20 18 USC §1957(f)(1). See also Gaetke & Welling "Money laundering and lawyers" 1992 *Syracuse Law Review* 1168; Nelson "Federal forfeiture and money laundering: Undue deference to legal fictions and the Canadian crossroads" 2009 *Miami Inter American Law Review* 51.

21 For the sake of good order, it should be noted here that in the USA tainted legal fees are liable to be confiscated also by way of civil forfeiture, as provided for in 18 USC §981. However, it appears that US jurisprudence has been pre-occupied with the criminal forfeiture of tainted legal fees, suggesting that the state has not opted to rely upon civil forfeiture in any sustained way.

22 *United States v Monsanto* 491 US 600 (1989).

23 *Caplin & Drysdale v United States* 491 US 617 (1989).

24 See Winick 1989 *University of Miami Law Review* 772; and Nelson 2009 *Miami Inter American Law Review* 53.

25 *United States v Monsanto supra* 603. See also Nelson 2009 *Miami Inter American Law Review* 53.

26 See also Nelson 2009 *Miami Inter American Law Review* 53.

27 *United States v Monsanto supra* 604.

being convicted and the assets forfeited.[28] This motion was denied by the District Court, but the Court of Appeals ordered that the restraining order be amended to allow him to pay attorneys' fees.[29] The matter then went to the United States Supreme Court.

The Supreme Court relied upon section 853(a), which is the primary forfeiture provision of the CFA. It provides, *inter alia*, that:

> "Any person convicted of a violation of this subchapter or subchapter II punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law –
>
> any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation."

It then proceeds to specify that:

> "The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II, that the person forfeit to the United States all property described in this subsection."

The Supreme Court found that section 853(a) of the CFA did not exempt from criminal forfeiture those assets, which a defendant wishes to use to retain an attorney. The Court held that the language of section 853(a) was plain and unambiguous,[30] and that Congress had selected strong words to make mandatory the forfeiture of criminal proceeds. Hence section 853(a) provides that an offender "shall forfeit" any property constituting the proceeds of his\her offence and that the sentencing court "shall order" the forfeiture of such property, in addition to any other criminal sanction it may impose upon the offender.[31] What is more, the Supreme Court found that the definition of property in the CFA could not be taken to exclude attorneys' fees.[32] In other words, tainted legal fees were subject to criminal forfeiture under section 853(a) of the CFA.

The Supreme Court decided further that the restraining order against the contested property did not the violate Monsanto's right to counsel of choice as protected by the Sixth Amendment or the due process clause of the Fifth Amendment.[33] It held that it was constitutionally in order for a district court to make a pre-trial freezing order against assets in a defendant's possession, even where those assets are earmarked as legal

28 *United States v Monsanto supra* 604. The relevant portion of section 853(c) provides that: "All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States."
29 *United States v Monsanto supra* 604.
30 *United States v Monsanto supra* 607.
31 *United States v Monsanto supra* 607.
32 *United States v Monsanto supra* 607.
33 *United States v Monsanto supra* 614.

fees.[34] Here the Court relied upon section 853(c) of the CFA, which provides, as intimated above, that criminal property subject to forfeiture vests in the state "upon the commission of the act giving rise to forfeiture", and that any such property transferred to a third party too is forfeitable in the hands of the recipient.[35] The Court went so far as to equate attorneys' fees with stock-brokers' fees, laundry bills and country club memberships, which also were not exempted from forfeiture.[36] In a word, *United States v Monsanto* confirmed that tainted legal fees enjoy no special status in the USA and, like all criminal proceeds, stand to be forfeited to the state.

3 2 *Caplin & Drysdale v United States*

In *Caplin & Drysdale,* a law firm sought payment for representing a client indicted under the CCE Act. Christopher Reckmeyer was charged with running a massive drug importation and distribution scheme alleged to be a continuing criminal enterprise.[37] The state applied for an order to forfeit to it designated property that had been acquired by Reckmeyer via drug law violations. The indictment sought forfeiture, in terms of §853(a) of the CFA, of the designated assets that were in Reckmeyer's possession. A restraint order was granted by the District Court, which prohibited him from transferring any of the potentially forfeitable assets.[38] Despite the court order, Reckmeyer transferred $25 000 to his lawyers, Caplin & Drysdale.[39] He was represented by Caplin & Drysdale until after his indictment. He then applied to the District Court to amend the restraint order to enable him to use some of the restrained assets to pay his lawyers' fees and he requested the Court to exempt such assets from post-conviction forfeiture.[40] However, before the Court could deliver its judgment, Reckmeyer entered into a plea bargain with the state in terms of which he agreed to forfeit all of the designated assets.[41]

As a result of the plea bargain, the Court rejected Reckmeyer's application, and thereafter ordered that virtually all of his assets be forfeited to the state.[42] The law firm of Caplin & Drysdale then argued that assets used to pay an attorney are exempt from forfeiture under section 853 of the CFA and, if they are not, that the statute's failure to provide an exemption renders the section unconstitutional.[43] It applied in terms of section 853(n) of the CFA for an order to declare that it has a valid third-party interest in the forfeited assets. The District Court granted

34 *United States v Monsanto supra* 614.
35 *United States v Monsanto supra* 613.
36 *United States v Monsanto supra* 609. See also Nelson 2009 *Miami Inter American Law Review* 53.
37 *Caplin & Drysdale v United States supra* 619.
38 This was done in terms of §853(e)(1)(A) of the Comprehensive Forfeiture Act.
39 *Caplin & Drysdale v United States supra* 620.
40 *Caplin & Drysdale v United States supra* 621.
41 *Caplin & Drysdale v United States supra* 621.
42 *Caplin & Drysdale v United States supra* 621.
43 *Caplin & Drysdale v United States supra* 621.

the order to Caplin & Drysdale.[44] However, the decision was overturned in the Court of Appeals, on the basis that there was no exception to the forfeiture requirement and that, the statutory scheme was constitutional.[45]

On a further appeal, the US Supreme Court confirmed, with reference to its own earlier decision in *Monsanto,*[46] that whereas section 853(e) of the CFA endows the court with discretion not to authorise pre-trial restraining orders on potentially forfeitable assets, such discretion does not extend to allowing otherwise forfeitable assets to be available to pay *bona fide* attorneys' fees.[47] It also held that the exercise by the court of the discretion contained in section 853(e) does not prevent non-restrained assets used for attorneys' fees being forfeited subsequently under section 853(c) of the CFA, which allows for the confiscation of forfeitable assets transferred to third parties.[48]

The Supreme Court held also that the CFA does not encroach upon the Sixth Amendment right to legal representation.[49] In this regard, it pronounced that:

> "A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that defendant will be able to retain the attorney of his choice. A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the Government does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense."[50]

Hence the claim by Caplin & Drysdale, that it is a Sixth Amendment right of a criminal defendant to pay attorneys' fees with assets which were forfeited to the state, was without merit.[51]

Caplin & Drysdale argued also that the forfeiture provisions disordered the balance of power between the state and the accused and that it did so in a manner that offended against the due process clause of the Fifth Amendment.[52] Here, too, the Court was unconvinced. It responded in the following terms:

---

44 *Caplin & Drysdale v United States supra* 621.
45 *Caplin & Drysdale v United States supra* 622.
46 *United States v Monsanto supra* 611-614.
47 *Caplin & Drysdale v United States supra* 623.
48 *Caplin & Drysdale v United States supra* 623. See also Gaetke & Welling 1992 *Syracuse Law Review* 1177; Nelson 2009 *Miami Inter American Law Review* 54.
49 *Caplin & Drysdale v United States supra* 626.
50 *Caplin & Drysdale v United States supra* 626. See also Nelson 2009 *Miami Inter American Law Review* 55.
51 See Gaetke & Welling 1992 *Syracuse Law Review* 1176.
52 *Caplin & Drysdale v United States supra* 624. See also Nelson 2009 *Miami Inter American Law Review* 54 & 76.

> "Forfeiture provisions are powerful weapons in the war on crime; like any such weapons, their impact can be devastating when used unjustly. But due process claims alleging such abuses are cognizable only in specific cases of prosecutorial misconduct (and petitioner has made no such allegation here) or when directed to a rule that is inherently unconstitutional …. Petitioner's claim – that the power available to prosecutors under the statute *could* be abused – proves too much, for many tools available to prosecutors can be misused in a way that violates the rights of innocent persons … The Constitution does not forbid the imposition of an otherwise permissible criminal sanction, such as forfeiture, merely because in some cases prosecutors may abuse the processes available to them, *e.g.,* by attempting to impose them on persons who should not be subjected to that punishment … Cases involving particular abuses can be dealt with individually by the lower courts, when (and if) any such cases arise."[53]

In rejecting the Fifth Amendment argument, the Court relied essentially on the distinction between the specific and the general. It found that the danger or possibility of abuses of due process rights in specific forfeiture matters could not be used to nullify the idea of forfeiture as a weapon in the anti-crime arsenal of the state. Violation of the Fifth Amendment during forfeiture proceedings was unconstitutional and had to be dealt with as and when they occurred. But forfeiture itself passed constitutional muster. Caplin & Drysdale had challenged the constitutionality of the criminal forfeiture regime in the USA on two counts, and lost on both.

The decisions in *Monsanto* and *Caplin & Drysdale* set the tone for the USA approach to the forfeiture of tainted legal fees. The former dealt with forfeitable assets subject to a pre-trial restraining order, the latter with criminal forfeiture post-conviction. In both cases, the US Supreme Court upheld the forfeiture orders granted by the lower courts as constitutional and not in violation of the Sixth Amendment right to counsel. In the USA, then, dirty money paid to a lawyer as legal fees is susceptible to confiscation by the state, in the same way as are all other assets which constitute criminal proceeds. As regards their fees, US lawyers do not enjoy any special dispensation, in that neither the legislature nor the courts have seen fit to declare them non-forfeitable.

Reference to the United States Attorneys' Manual (USAM) is in order here. USAM 9-120.000 sets out Attorney Fee Forfeiture Guidelines. These confirm that legal fees paid to a lawyer for legitimate representation in both civil matters (USAM 9-120.103) and criminal matters (USAM 9-120.104) may be the target of forfeiture proceedings. It would appear, then, that attorneys' fees indeed are no different from stock-brokers' fees, laundry bills and country club memberships.

53 *Caplin & Drysdale v United States supra* 634-635.

4 The Canadian approach

The position of the Canadian lawyer who acts as defence counsel for a money launderer and who accepts tainted funds as a fee payment is regulated by the definition of money laundering in section 462.31(1) of the Canadian Criminal Code. It reads:

> "Everyone commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of
>
> (a) the commission in Canada of a designated offence; or
> (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence."[54]

According to this section, then, a person commits money laundering if he\she transacts, in any way and by any means, with criminal property or proceeds, and does so with the intention of concealing or converting said property or proceeds, whilst knowing or suspecting its provenance.[55]

Furthermore, the person convicted of money laundering stands to be subjected to the Canadian assets forfeiture regime. In this connection, section 462.37(1) of the Criminal Code provides that if the trial court:

> "is satisfied, on a balance of probabilities, that any property is proceeds of crime obtained through the commission of the designated offence, the court shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law".[56]

The forfeiture order made by the court under section 462.37(1) is a post-conviction order. Prior to conviction, the court may grant, on application

---

54 S 462.3(1) of the Criminal Code defines a designated offence as:
(a) any offence that may be prosecuted as an indictable offence under this or any other Act of Parliament, other than an indictable offence prescribed by regulation, or
(b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a).

55 See McBride 1995 "Proceeds of crime" library.lawsociety.sk.ca/inmagicgenie/documentfolder/AC1182.pdf (last accessed 2018-09-18); Brucker "Money laundering and the client: How can I be retained without becoming a party to an offence?" 1997 *The Advocate* 680; Wilbern *Assessing the opinion of lawyers of Canadian money laundering legislation* (PhD dissertation 2008 North Central University) 18.

56 It is noteworthy here that Canadian law enjoins the court to confiscate proceeds of the designated crime according to the civil standard of proof and not the usual criminal standard of proof beyond a reasonable doubt. However, discussion of the constitutional issues which this matter entails is beyond the scope of this paper.

of the Attorney General, an order or orders aimed at protecting and preserving the criminal proceeds in question. Thus, under section 462.32 the court is empowered, on reasonable grounds, to issue a warrant to a competent person to search for and seize the forfeitable property. And in terms of section 462.33 the court could make a restraint order, *ex parte* and on reasonable grounds, forbidding all and sundry from transacting in any way with the forfeitable property. An application by the Attorney General for a search warrant under section 462.32 usually is accompanied by a request for a restraint order under section 462.33.[57]

Interestingly, the Canadian forfeiture regime reaches beyond the designated crime, to criminal proceeds of any other crime. Thus, section 462.37(2) provides that:

> "If the evidence does not establish to the satisfaction of the court that property in respect of which an order of forfeiture would otherwise be made under subsection (1) was obtained through the commission of the designated offence of which the offender is convicted or discharged, but the court is satisfied, beyond a reasonable doubt, that the property is proceeds of crime, the court may make an order of forfeiture under subsection (1) in relation to that property."[58]

All in all, Canadian law not only criminalises any and all dealings with criminal proceeds, but also requires their forfeiture to the state if they derive from the designated offence and allows their forfeiture if they derive from any other offence.[59]

The discussion thus far suggests that the Canadian lawyer who receives dirty money as legal fees well may see himself condemned as a money launderer and have his\her fees confiscated by the state. This is the worst-case scenario, but it is unlikely to be the norm in cases involving tainted fees. The position of the lawyer in such cases is mitigated significantly by the fact that knowledge and intention are key elements of the definition of money laundering provided in section 462.31(1) of the Criminal Code. In order to fall foul of the relevant criminalisation and forfeiture provisions, the lawyer who accepts tainted funds from a client for professional services rendered must do so, firstly, "knowing or believing" that they are tainted and, secondly, "with intent to conceal or convert" them. In other words, he\she must know or suspect that the funds are criminal proceeds and he\she must accept them with an intention to launder them. The lawyer who accepts the

57 See McBride 1995 "Proceeds of crime" 5.

58 Unlike section 462.37(1), here the forfeiture is not mandatory and the standard of proof is the conventional criminal standard.

59 See McBride 1995 "Proceeds of crime" 3; Rose *Forfeiture of legal fees with proceeds of crime: The ability of accused persons to pay "reasonable legal fees" out of the alleged proceeds of crime* (LLM dissertation 1995 University of British Columbia) 50; Tapley "Canada's law on money laundering and proceeds of crime" 2004 *Asper Review of International Business and Trade Law* 40; Wilbern 2008 *Assessing the opinion of lawyers of Canadian money laundering legislation* 18.

funds "innocently", without the required *mens rea*, will escape the reach of these provisions, even if he\she was aware or surmised that the funds were proceeds of crime. It is only really the lawyer who is conspiring with his\her launderer-client – say, to use the lawyer's trust account as a money laundering conduit – who stands to be convicted and to forfeit his\her fees. The rest, those who are not animated by the money-laundering *zeitgeist*, may accept tainted legal fees; it appears, with impunity and without fear of forfeiture. There currently is no indication that Canada is pursuing or intends to pursue the prosecution of lawyers who are paid with dirty money for *bona fide* professional services. For all intents and practical purposes, then, tainted legal fees have not been criminalised and are not forfeitable from the perspective of the conscientious and scrupulous Canadian lawyer.

What is more, there are times when the court, in effect, may order that a lawyer be paid with dirty money or, at least, with money which is suspected to be dirty. This is possible in terms of section 462.34 of the Canadian Criminal Code.[60] To begin with, section 462(1)(a) entitles:

> "Any person who has an interest in property that was seized under a warrant issued pursuant to section 462.32 or in respect of which a restraint order was made under subsection 462.33(3) may, at any time, apply to a judge for an order under subsection (4)."

Section 462.34(4)(c)(ii) then on goes on to stipulate that:

> "On an application made to a judge under paragraph (1)(*a*) in respect of any property and after hearing the applicant and the Attorney General and any other person to whom notice was given … the judge may order that the property or a part thereof be returned to the applicant or, in the case of a restraint order made under subsection 462.33(3), revoke the order, vary the order to exclude the property or any interest in the property or part thereof from the application of the order or make the order subject to such reasonable conditions as the judge thinks fit, for the purpose of meeting the reasonable … legal expenses of a person referred to in subparagraph (i)."[61]

In the context of this paper, section 462.34(4)(c)(ii) constitutes a legal fees exemption from the Canadian forfeiture regime. It allows for the release of seized or restrained money to defray reasonable legal expenses before forfeiture is granted.[62] It appears, then, that Canadian law places more store by having the lawyer who defends an alleged

60 See Beare "Efforts to combat money laundering in Canada" 1992 *Commonwealth Law Bulletin* 1444; Brucker 1997 *The Advocate* 680; Murphy "Canada's anti-money laundering regime" 2000 *Resource Material Series 117th International Seminar Visiting Experts' Papers* 289.

61 Subparagraph (i) of section 462.34(4)(c) applies to "the person who was in possession of the property at the time the warrant was executed or the order was made or any person who, in the opinion of the judge, has a valid interest in the property and of the dependants of that person".

62 The application for the release of the money for legal expenses is regarded as a two-stage process. Firstly, it must be determined whether the accused is entitled to the release of the fees by virtue of impecuniosity. Secondly, it must be established whether the legal expenses are reasonable in the

money launderer paid rather than by prosecuting the lawyer for accepting dirty money in settlement of his\her fees. The accused person's right to legal representation seems to trump the state's interest in confiscating criminal proceeds, which have been transferred to his\her lawyer as legal fees.[63]

In sum, the Canadian definition of money laundering implies that the receipt of dirty money as legal fees by a lawyer is not a crime, except in the rare case when the lawyer himself\herself is a money launderer of sorts. Further, it does not seek to forfeit such fees accepted by a lawyer, except where the lawyer has been convicted as a money launderer. The protection of the lawyer's right gainfully to practise his\her profession and the client's right to engage defence counsel seems to enjoy priority over the state's right to prosecute money launderers and deprive them of the nefarious assets. It is an approach which is expressed, somewhat ironically, in a conspicuous dearth of Canadian case law on lawyers as launderers and on criminal forfeiture of tainted legal fees.

5 Conclusion

In comparing the South African approach to the forfeiture of tainted legal fees with that of the USA and Canada, a number of trends may be observed. The USA, Canada and South Africa all allow for the criminal forfeiture of tainted legal fees. In other words, all three jurisdictions have enacted statutes designed to deprive of his\her criminal profits a lawyer who has been convicted of money laundering. However, this commonality tends to fracture in the face of rather significant differences across the three countries.

South Africa and Canada both criminalise the acceptance of tainted legal fees by lawyers. However, the USA has the safe harbour clause allowing a lawyer to be paid with dirty money in order to uphold the client's Sixth Amendment right to legal representation. Further, Canada has defined money laundering in such a way as to exclude the receipt by a lawyer of dirty money in payment of *bona fide* legal services rendered, even if the lawyer knows or suspects the money to be dirty. It appears,

circumstances of the case. See Beare 1992 *Commonwealth Law Bulletin* 1444; Kroeker "The legal and ethical propriety of allowing accused to use the proceeds of crime to retain counsel" 1995 *The Advocate* 868; Brucker 1997 *The Advocate* 679.

63 Sections 462.37(3) & (4) represent somewhat of a cautionary tale for the accused. The former allows the court impose a fine *in lieu* of forfeiture where the forfeitable assets have been transferred, in whole or in part, by the accused to his lawyer as fees. The latter requires the court to impose a prison term in default of payment of the fine. In other words, the accused who invokes the legal fees exemption in section 462.34(4)(c)(ii) in order to pay his lawyer and who thereby renders himself unable to pay the fine imposed *in lieu* of forfeiture, well might end up in jail. This situation arose in *R v Pawlyk* (1991) 72 Man R (2d) 1. See also Beare 1992 *Commonwealth Law Bulletin* 1442; McBride 1995 "Proceeds of crime" 8; Brucker 1997 *The Advocate* 683.

then, that it is South African lawyers who stand most in hazard of being prosecuted and convicted for accepting tainted legal fees.

All three countries allow for the pre-conviction restraint and post-conviction forfeiture of tainted legal fees. In this regard, it is important to note that the safe harbour clause in the USA does not shield the tainted fees themselves from forfeiture.[64] Unlike the USA, both South Africa and Canada have legal fees exemption clauses, in terms of which a court may order that a lawyer be paid from a client's assets which are under restraint. The Canadian exemption provision tallies with that country's overall hospitable approach to tainted legal fees. A determinate South African policy approach to tainted legal fees is not discernible yet, so the country's exemption clause has to be comprehended in exceptional terms, as a court-sanctioned departure from its generally inhospitable criminal forfeiture regime.

A lawyer's right to practise law gainfully hardly is contentious. What is more, this right entails the freedom to provide legal services to whosoever is in need of them. In other words, the repute (or otherwise) of his\her clientele ought not to count as a prohibitory factor in relation to a lawyer's right to practise his\her profession. The lawyer who is a scoundrel deserves to be at the receiving end of legal constraints and sanctions. The conscionable lawyer who has a scoundrel for a client does not.

It seems that the USA and Canada have factored the lawyer's right to earn a living into their approaches to and interpretation of the law pertaining to tainted legal fees. By contrast, South Africa's anti-money laundering legislation appears to ride roughshod over the right of a lawyer to practise his\her profession (as well as the client's right to counsel) and may not survive constitutional scrutiny.[65] The fact that the South African forfeiture regime includes a legal fees exemption is cold comfort to the criminal defence lawyer who, *per definitionem*, will have many a scoundrel for clients. Such a lawyer has to contend with the proverbial "double whammy", that is, he\she faces not only the prospect of prosecution, conviction and punishment simply for accepting tainted fees, but also the prospect of losing those fees to the coffers of the state. He\she would be protected and his\her fees would be unassailable only under the legal fee exemption. However, the idea of a criminal defence lawyer having to invoke the exemption and all its procedural accoutrements in order to avoid prosecution and secure his\her fees ought to be a cause for serious concern – if not to the South African legislature then, at least, to the organised legal profession, as represented by the South African Legal Practice Council.

64 This could be accomplished, for example, in terms of the civil forfeiture regime in the USA.

65 For an examination of the constitutional questions embedded in South Africa's criminal forfeiture regime, see generally Basdeo 2014 *PELJ*.

The implementation of customary law of succession and common law of succession respectively: With a specific focus on the eradication of the rule of male primogeniture

Kgopotso Maunatlala
BA Law LLB LLM (UP)
Assistant Lecturer, Department of Private law, University of Pretoria

Charles Maimela
LLB LLM LLD (UNISA)
Senior Lecturer, Department of Private law, University of Pretoria

SUMMARY

This article pays close attention to some of the problems and practical challenges presented by the abolition of the rule of male primogeniture and thereafter, the extension of the Intestate Succession Act to customary law of succession. Additionally, it supports the possibility of harmonising common law of succession with customary law of succession without imposing common law mechanisms and ideas on customary law. The purpose of this article is to suggest ways on how best to reconcile customary law with the Constitution without imposing western law on customary law. This will be achieved by showing the reader the viability and possibility of customary law and common law co-existing, independently from one another, subject to the Constitution as the supreme law, without the application of common law standards as a measure for customary law, which was the case in the past.

1 Introduction

Customary law is without doubt the oldest system of law in most African societies.[1] It therefore has a significant role on personal lives of the majority of African people and has over the years, gained a repute of discriminating against women, treating them as second-class citizens.[2] Central to customary law's application was the rule of male primogeniture.[3] A rule that is at the heart of this article and is identified by its tendency to discriminate against women in areas such as guardianship, inheritance, appointment to traditional office, exercise of traditional authority and the age of majority.[4] This article will highlight the discord between formal customary law as inspired by common law

1 Soyapi "Regulating traditional justice in South Africa: A comparative analysis of selected aspects Traditional Courts Bill" 2014 *PER* 1441.
2 Ndulo "African customary law, customs, and women's rights" 2011 *Cornell Law Faculty Publications* 89.

How to cite: Maunatlala & Maimela 'The implementation of customary law of succession and common law of succession respectively: With a specific focus on the eradication of the rule of male primogeniture' 2020 *De Jure Law Journal* 36-53 http://dx.doi.org/10.17159/2225-7160/2020/v53a3

principles and standards, as well as living customary law, which to this day, remains a problem in South Africa.

Living customary law is used to denote the practices and customs of the people in their day-to-day lives and is customary law which emerges from what people do, or more accurately – from what people believe they ought to do, and not from what a class of legal specialists considers they should do.[5] Accordingly, living customary law refers to the original customs and usages of African indigenous people.[6] The unique character of living customary law is that it is a system that is consensus-seeking and is accountable to the people to whom it applies.[7] Therefore, given its flexible character, customary law requires perpetual consent and acceptance of the people to whom it applies.[8]

Official customary law, contrary to living customary law, is described as the formalised version of customary law that is recorded in the law reports, built upon and interpreted through an Anglo-Saxon or Roman-Dutch law procedural and substantive law filter.[9] This refers to customary law as codified in statutes such as the Recognition of Customary Marriages Act,[10] the Reform of Customary law of Succession and Regulation of Related Matters Act,[11] Traditional Leadership and Governance Framework Act,[12] and decisions of the courts.

The discord between customary law and common law was further steered in *Bhe v Magistrate*, *Khayelitsha* case,[13] by the court requiring that the Intestate Succession Act,[14] apply to customary law of succession whilst the legislature works on enacting appropriate legislation to regulate the rights of women under customary law.[15] The majority *in*

3 This rule orders the eldest surviving male relative of the deceased to succeed to both the status and the role of the deceased. Himonga and Nhlapo describes male primogeniture in the following manner; Where the deceased was in a polygynous marriage, the eldest son of each house succeeds to that specific house. Where the eldest son of a house is absent, his eldest male descendent will therefore succeed. This will continue to happen until all the sons of the deceased and their male descendants have been exhausted. These rules also apply to the succession of a monogamous family head.
4 Ndulo 2011 *Cornell Law Faculty Publications* 89.
5 Himonga & Bosch "The Application of African Customary Law under the Constitution of South Africa: Problems solved or just beginning" 2000 *SALJ* 328.
6 Rautenbach *Introduction to Legal Pluralism* (2018) 23.
7 Ozoemena "Living customary law: A truly transformative tool?" 2013 *Constitutional Court Review* 162.
8 Ozoemena 2013 *Constitutional Court Review* 162.
9 Himonga and Bosch (2000) *SALJ* 328.
10 Recognition of Customary Marriages Act 120 of 1998 (hereinafter RCMA).
11 Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.
12 Traditional Leadership and Governance Framework Act 41 of 2003.
13 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) para 140.
14 Intestate Succession Act 81 of 1987.
15 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) para 140.

casu was convinced that it was only by replacing customary law of male primogeniture with the Intestate Succession Act that the majority of South Africans could find immediate redress.[16] Favourably, women who were subjected to exclusionary customary law rules of intestate succession could now access common law protection under the Intestate Succession Act.

The effect of the above decision is, according to Grant one that suspends the operation of customary law of succession, with no indication as to whether and when it would be operational again.[17] Hence, this article aims to expose the inadequacy of the aforementioned decision and to show that as a result of the above case, it remains unclear, sixteen years post-ruling, whether the legislature will enact appropriate legislation that will apply exclusively to customary law of succession.

Furthermore, the article will probe into the practical problems that exist as a consequence of having more than one system of law applicable to the administration of indigenous people's estates. This includes probing into the confusion that may be created by allowing indigenous people to have a choice between having the Intestate Succession Act and customary rules of succession apply to the administration of their estates, and when it suits them, relying entirely on customary law.

2 Should customary law of succession and common law of succession be harmonised to promote women's rights?

While many Africans would adhere to some aspects of traditional culture, it is no longer the case that their identities are entirely bound up with that culture.[18] This means that it is widely recognised that cultural adherence in modern societies has shifted and more people, specifically women, no longer feel obliged to strictly adhere to traditional customs, especially those that oppressed them.[19] Even though that is the case, this paper highlights and maintains that the development of customary law should be viewed through the lens of customary law itself without the imposition of common law views.

In *Alexkor Ltd v Richtersveld Community*, the following was stated:

> "While in the past customary law was seen through the common law, it must now be seen as an integral part of our law. Like all law, it depends for its

16 Ozoemena 2013 *Constitutional Court Review* 149.
17 Grant "Human rights, cultural diversity, and customary law in South Africa" 2006 *Journal of African Law* 12.
18 Grant 2006 *Journal of African Law* 19.
19 Grant 2006 *Journal of African Law* 19.

> ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but the Constitution".[20]

It is therefore imperative to regard customary law as an integral and independent part of our law, subject to the Constitution. In support of this, the Constitution provides that courts must apply customary law when it is applicable, subject to the Constitution and any legislation that specifically deals with customary law,[21] and thus, promoting the application of customary law as an independent legal system, subject to the Constitution.

The author therefore proposes that traditional courts should become more involved in matters and questions relating to customary law rules and practices such as male primogeniture. This suggestion is made, bearing in mind that traditional courts exist and are used by millions of people to resolve disputes according to customary law in a manner, which should promote justice.[22] They provide communities with dispute resolution mechanisms and focus on the implementation of restorative justice.[23] The Traditional Courts Bill thus provides the following to emphasise the significance of traditional courts:

> "Traditional courts –
>
> […] are intended to promote the equitable and fair resolution of certain disputes, in a manner that is underpinned by the value system applicable in customary law and custom; and
>
> (b) Function in accordance with customary law, subject to the Constitution.
>
> (2) Traditional courts, recognising the consensual nature of customary law, must be constituted and function under customary law and customs […] in a manner that promotes restorative justice, Ubuntu, peaceful co-existence and reconciliation, in accordance with constitutional imperatives and the provisions of this Act".[24]

Therefore it should be noted that indigenous people understand and relate to traditional courts much more than the largely imported common law or the statutory law applied in the state courts.[25] For this reason, the author maintains that solutions coming from the traditional council will be more meaningful and reliable to the indigenous people

---

20 *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) at para 51.
21 Section 211(3) of the Constitution, 1996.
22 Griffin "The traditional courts bill: Are they getting it right?" 2017 *Helen Suzman Foundation* 1.
23 Merten "Can 'everyone live with it'?" 2017 *Daily Maverick* 2. https://www.dailymaverick.co.za/article/2017-01-23-traditional-courts-bill-ver-2017-can-everyone-live-with-it/#.WJrL5Ih97nB; Griffin 2017 Helen Suzman Foundation 1.
24 S 6 of the Traditional Courts Bill of 2017.
25 South African Law Commission "The harmonization of the common law and law: Traditional courts and the judicial function of the traditional leaders" 1999 (Discussion paper 82) 1 http://www.justice.gov.za/salrc/dpapers/dp82_prj90_tradl_1999.pdf (accessed 2019-02-12).

and that their consent will be easily ascertainable when the development of rules such as male primogeniture comes from their local leaders and the community at large. Hence, it is suggested that it will be much easier to implement solutions coming from traditional courts or royal councils than from Western state courts.

Customary law has been distorted in a manner that emphasises its patriarchal features and minimises its communitarian ones,[26] and consequently, leading to customary law being distorted by highlighting the negative application of the rule of male primogeniture. Whilst ignoring the fact that the rule of male primogeniture emerged with the primary purpose of ensuring that the continued existence of family or the group prevails.[27] The author's in support of Langa DCJ's view agrees that most western understanding of customary law is influenced by their negative attitudes towards all things African.[28]

As noted above, customary law is a system that is consensus-seeking and is accountable to the people to whom it applies;[29] it is flexible. Even when living customary law is developed to suit the needs of society, the author's observes that such development is often not reflected in formal customary law. Magistrates courts and other courts responsible for the administration of intestate estates often choose to adhere to the rules of formal customary law, with the consequent anomalies and hardships as a result of changes that have occurred in society.[30] This according to the author's is the reason the contrast between formal and living customary law continues to exist.

Given that the South African legal system is pluralistic in nature, it is often problematic for people, which legal system should be applied in matters regarding customary disputes, such as disputes relating to inheritance and succession. For this reason, authors like Allot suggest the harmonisation of laws in Africa.[31]

Harmonisation refers to the removal of discord, the reconciliation of contradictory elements between the rules and effects of two legal systems, which continue in force as self-sufficient bodies of law.[32] This means that both the existing legal systems, being customary law and common law, remain in force but the incompatible results of applying one or another of the two systems are eliminated and so is the doubt as to which system is to apply in a particular case.[33]

---

26 *Bhe v Magistrate Khayelitsha* (2004) (2) SA 544 (C) para 89.
27 Van Niekerk "Succession, living law and *Ubuntu* in the Constitutional Court" (2005) *Obiter* 479.
28 Ndulo "African customary law, customs, and women's rights" 2011 *Cornell Law Faculty Publications* 91.
29 Ozoemena 2013 *Constitutional Court Review* 162.
30 *Bhe v Magistrate, Khayelitsha* (2004) (2) SA 544 (C) para 89.
31 Allot "Towards the unification of laws in Africa" 1965 *International and Comparative Law Quarterly* 366.
32 Allot 1965 *International and Comparative Law Quarterly* 366.
33 Allot 1965 *International and Comparative Law Quarterly* 377.

The Constitutional Court in *Bhe v Magistrate, Khayelitsha* provided an interim solution for women by ruling that the Intestate Succession Act should temporarily apply to indigenous women whilst the legislature works on enacting appropriate legislation to regulate the rights of women under customary law.[34] The Reform of Customary law of Succession and Regulation of Related Matters,[35] provided the following:

> "The estate or part of the estate of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of that person's will, must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act, subject to subsection (2)".[36]

Extending the use of the Intestate Succession Act, a statute used to regulate common law of intestate succession, is perceived as a conquest of customary law by common law instead of harmonisation between the common law and customary law.[37] In this case, the author's hold that although the courts have made an effort in bringing customary law of succession in line with the Constitution, such an effort may be construed to be an imposition of common law solutions on customary law problems and thus, treating customary law through the common law lens.

The courts and legislature should be commended for the effort they have made to resolve conflicts between customary law of succession and the Constitution, such as ensuring the practice of culture is upheld, while women are not unjustifiably discriminated against.[38] All this was done in order to protect the rights of vulnerable members of families, especially women and children.[39] However, the effectiveness of the court's and legislature's intervention should be measured by the extent to which the implementation of the new laws benefits women in practice.[40] In other words, to test the relevance and success of the reform, the author's provide that it is important to delve into the extent to which the reformed law is accessible and practiced by those it is designed to benefit.

The arguments presented and largely accepted by the court in *Bhe v Magistrate, Khayelitsha*,[41] was that the version of customary law applied

34 *Bhe v Magistrate, Khayelitsha* (2004) (2) SA 544 (C) par 140.
35 The Reform of Customary law of Succession and Regulation of Related Matters Act 11 of 2009.
36 S 2 of the Reform of Customary law of Succession and Regulation of Related Matters Act.
37 Rautenbach "South African common and customary law on Intestate Succession: A question of harmonization, integration or abolition" 2008 *Journal of Comparative Law* 129.
38 Himonga "The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession" 2005 *Acta Juridica* 106.
39 Himonga 2005 *Acta Juridica* 106.
40 Himonga 2005 *Acta Juridica* 106.
41 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C).

in the case was a distortion of the law as practised.[42] Thus, customary law in theory contradicted customary law in practice; hence, people who had previously adhered to customary law remained devoted to it and continued to abide by it.

This paper supports Rautenbach's caution that, the courts should not confirm allegations that common law is being used to undermine the survival of customary law, in spite of constitutional guarantees to its continued existence on *par* with the common law of South Africa.[43] Meaning that courts must be careful in their application of the Intestate Succession Act to customary law not to impose common law solutions on customary law problems, especially in their attempt to address the discriminatory effects of the rule of male primogeniture.

It is thus, ineffective to have the courts and the legislature formulate a solution to resolve the discriminatory nature of the customary law rule of male primogeniture if such a solution will not be implemented by the people whom such a solution is meant to apply to. For this reason, it is argued that even though the rule of male primogeniture has been abolished, it could be applied if the deceased chose to do so through exercising his\ her freedom of testation.[44] Freedom of testation refers to the testator or deceased's wishes in disposing of his\her assets, being carried out except in as far as the law restricts this freedom of the testator or deceased.[45]

It is, and then submitted that it is still too soon to unify customary law and common law.[46] Consequently, the wounds that were inflicted on African culture and customary law by apartheid and colonialism are still raw and for that reason, the author's proposes that maintaining a pluralistic system, developed on a basis of full equality, is the better approach to reconcile the competing demands of culture and equality.[47] Therefore, this paper supports the harmonisation of common law and customary law, as opposed to the unification of the two systems. This is to say that customary law and common law should remain separate systems of law; with customary law being followed by people who choose to submit under it and its laws. Thus, applying customary law without the burden of common law principles and methods of doing things. As mentioned above, the validity of customary law must now be determined by reference to the Constitution and not common law.[48]

There could be various reasons why a person might wish to restore the consequences of the rule of male primogeniture in a given situation; for

42 Grant "Human rights, cultural diversity and customary law in South Africa" 2006 Journal of African Law 16.
43 Rautenbach 2008 *Journal of Comparative Law* 129.
44 Rautenbach 2008 *Journal of Comparative Law* 126.
45 De Waal and Schoeman Malan *Law of Succession* (2015) 3.
46 Grant 2006 *Journal of African Law* 22.
47 Grant 2006 *Journal of African* Law 22.
48 *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) at para 51.

example, to ensure that a close-knit family adhering to family traditions in a rural area continues to be provided for after the death of the family head.[49] Furthermore, a family head may during his lifetime allot property to or make a deathbed wish in favour of his eldest son or the eldest male relative, being influenced by the rule of male primogeniture. These allocations and deathbed wishes are given effect to in the same manner as if they were contained in a will.[50] Therefore, the wishes of the deceased will be given effect to. After all, section 25(1) of the Constitution, which is the property clause, guarantees the institution of succession and the principle of freedom of testation that supports it.[51]

In *Re BOE Trust Ltd*,[52] the court explained that by not giving effect to freedom of testation, the right to dignity would be infringed. This is because the right to dignity allows the living and the dying the peace of mind of knowing that their last wishes could be respected after they have passed away.[53] Therefore, the owner of property may dispose of his\her property as he\she wishes and his\her wishes would have to be given effect to, if such wishes are not contrary to the Constitutional values.

It is thus argued that the approach to solving issues concerning African people through the enactment of legislation must be re-evaluated because it is an approach that has brought destabilisation of practices, values, and norms.[54] This approach is one that intensifies the disparity between how customary law is said to be theoretically as opposed to how it is practiced daily. Although the author's does not entirely disagree with the application of the Intestate Succession Act to cure the discrimination against women, it is submitted that the approach employed by the courts, to solve customary law issues by the application of western legislation must be avoided and discontinued. Such a remedy should have been employed on a temporary basis with a more definite period, as allocated by the court, to afford the legislature time to enact customary law of succession legislation that specifically deals with the estates of indigenous people. The former approach is seen as an imposition of western ideologies and solutions to a problem that requires to be solved by employing solutions by traditional courts or indigenous people, who know and understand customary law best. It is further submitted that although traditional courts or indigenous people may draw some inspiration from western legislation, those inspired solutions may alternatively be incorporated in legislation that solely governs customary law of succession for indigenous people who are governed by it thereof.

49 Rautenbach "A few comments on the possible revival of customary rule of male primogeniture: Can the common law principle of freedom of testation come to its rescue?" 2013 *Acta Juridica* 138.
50 Himonga and Nhlapo *African customary law in South Africa: Post-apartheid and living law perspective* (2015) 160.
51 De Waal and Schoeman-Malan *Law of Succession* 4.
52 *Re BOE Trust Ltd* 2009 (6) SA (WCC).
53 *Re BOE Trust Ltd* 2009 (6) SA (WCC) para 27.
54 Ozoemena 2013 *Constitutional Court Review* 162.

3 Ensuring the right to equality and culture

Culture is like an umbrella under which some people like to hide from the rain and to shade themselves from the sun, but sometimes you need to fold it.[55] This statement was declared by Maluleke to indicate people's tendency to use the right to culture as a scapegoat under which they can discriminate against or ill-treat others without facing legal consequences for such ill-treatment.[56] For this reason, it is often necessary to determine which right should prevail in instances where the right to culture and the right to equality conflict.

Although there is no exact definition of culture provided by the Constitution, culture is described as a way of life that is common to a group of people, a collection of beliefs and attitudes, shared understandings, and patterns of behaviour that allow people to live in peace but set them apart from other people.[57]

Equality includes the full and equal enjoyment of all rights and freedoms.[58] It can be limited provided that the limitation is reasonable and justifiable in terms of the Constitution.[59] The Constitution prohibits unfair discrimination towards anyone and therefore only permits discrimination when it is said to be fair and justifiable.[60]

Section 36 of the Constitution makes it clear that no right is absolute. It provides as follows:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[61]

The Constitution affirms the democratic values of human dignity,[62] equality,[63] and freedom.[64] Therefore, these rights to human dignity, freedom, and equality, are highly regarded as fundamental rights in the Constitution. However, the right to culture is also protected in the Constitution which provides that persons belonging to a cultural community may not be denied the right, with other members of that community, to enjoy their culture.[65] Hence, the norms and lifestyle of one group should not be used as a measuring standard for the other. Common law and customary law should be equally respected and

55 Maluleke "Culture, tradition, custom, law and gender equality" 2012 *PELJ* 1.
56 Maluleke 2012 *PELJ* 1.
57 Rautenbach *Introduction to legal pluralism in South Africa* 21.
58 S 9(2) of the Constitution.
59 S 36 of the Constitution.
60 S 9(5) of the Constitution.
61 S 36(1) of the Constitution.
62 S 10 of the Constitution.
63 S 9 of the Constitution.
64 Ss 7 and 12 of the Constitution.
65 S 31 of the Constitution.

applied respectively, all subject to the Constitution. However, it is often a problem which of the rights between the right to equality and the right to culture should prevail over the other.

There is no clear ranking of rights to provide conclusive answers to all the questions relating to the relationship between the rights to equality and culture.[66] However, it can be derived from the preamble of the Constitution that equality will prevail over the right to culture. This is because the primary aim of the Constitution is to guarantee equal protection and treatment of all people.[67] Therefore, the use of cultural rights and practices as an excuse to treat people unequally will not be sufficient enough to escape constitutional scrutiny.[68] The preamble states that the Constitution aims to lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.[69]

Hence, in the event that a cultural practice is challenged from within the cultural group itself on grounds of its failure to comply with the constitutional guarantee of equality, equality should be the determining value.[70] The evidence of which is envisaged in the *Bhe v Magistrate, Khayelitsha* case,[71] where the Constitutional Court held that the rule of male primogeniture as applied to inheritance in customary law is inconsistent with the constitutional guarantee of equality.[72]

As a consequence of the overriding importance of the right to equality in the Constitution, it is clear that in the inevitable clash between the right to culture and the right to equality, equality must take priority.[73] This is because equality forms a fundamental and core value of the Constitution.[74] Therefore, women, under customary law are now considered equal to men and the right to culture does not take priority over the right to equality.

Moreover, all rights in the Constitution, including the right to equality, are to be exercised subject to the Constitution.[75] However, the fact that the right to equality is not internally limited in the same way as sections 30 and 31 of the Constitution,[76] by the *proviso* that the rights to

66 Kaganas and Murray "The contest between culture and gender equality under South Africa's interim Constitution" 1994 *Journal of Law and Society* 415.
67 S 9(1) of the Constitution.
68 Rautenbach "Is primogeniture extinct like the Dodo or is there any prospect of it rising from the ashes? Comments on the evolution of customary succession laws in South Africa" 2006 *SAJHR* 108.
69 The preamble of the Constitution, 1996.
70 Kaganas and Murray 1994 *Journal of Law and Society* 424.
71 *Bhe v Magistrate, Khayelitsha* (2004) (2) SA 544 (C).
72 *Bhe v Magistrate, Khayelitsha* (2004) (2) SA 544 (C) para 109.
73 Grant Human rights, cultural diversity and customary law in South Africa" 2006 *Journal of African Law* 9.
74 S 1(a) of the Constitution.
75 S 7(3) of the Constitution.
76 Ss 30 and 31 of the Constitution.

language,[77] culture,[78] or religion,[79] are to be exercised subject to the Bill of Rights strengthens the above argument that the right to equality trumps the right to culture.[80] For example, as discussed above, the court in *Shilubana v Nwamitwa* case declared that females might now be recognised as traditional leaders.[81] The court found that the succession to the leadership of the Valoyi had operated in the past according to the principle of male primogeniture.[82] However, the traditional authorities had the authority to develop customary law and they did so in accordance with the constitutional right to equality.[83] The value of recognising the development by a traditional community of its law following the Constitution was not outweighed by the need for legal certainty or the protection of rights.[84] The court thereafter held that the change in customary law did not create legal uncertainty and Mr Nwamitwa did not have a vested right to be *Hosi* (King).[85]

Thus, people need to be cautious against the assumption that, culture and equality cannot be reconciled.[86] For this reason Bronstein argues that it should be recognised that culture is constantly evolving and therefore, urges a case to case investigation of customary practices and principles to determine the extent to which custom and culture in its contemporary manifestation already complies with human rights and constitutional norms and how it can be transformed in order to satisfy the demands of equality.[87] The author's submits that customary law in its application is equitable and even in its contemporary manifestation, already complies with constitutional norms. However, the author's also agrees with Ntulo that due to the negative attitude towards customary law, it can also be misunderstood as being discriminatory in nature.[88]

It is possible to ensure that both the right to equality and the right to culture are promoted and protected. Here are the three ways in which this can be achieved, namely:

- An acknowledgment of the importance of both culture and equality and their interrelationship;
- A need for training and research;

77 S 30 of the Constitution.
78 S 30 of the Constitution.
79 S 31 of the Constitution.
80 Grant 2006 *Journal of Journal of African Law* 9.
81 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) para 87.
82 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) para 87.
83 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) para 87.
84 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) para 87.
85 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) para 56.
86 Bronstein "Confronting custom in the new South African state: an analysis of the recognition of Customary Marriages Act 120 of 1998" 2000 *SJHR* 558.
87 Bronstein 2000 *SJHR* 558.
88 Ndulo 2011 *Cornell Law Faculty Publications* 91.

- A commitment to sensitive and sustained legal development of both customary law and common law to serve the purposes of the Constitution is necessary; and
- In the long term, creative ways of reconciling the practical needs of a modern legal system, the cultural heritage of society it serves and the observance of internationally recognized human rights norms.[89]

Consequently, the author's agrees with Grant, that the right to equality and the right to culture can co-exist. This article reveals that the practice and application of culture can always be brought in conformity with the principle of equality. Equality should be the overarching principle that guides the manner in which culture and all other rights should be enjoyed.

The author's makes the following comments in light of Grant's suggestions above:

a An acknowledgment of the importance of both culture and equality and their interrelationship:

Both culture and equality can co-exist for as long as there is a constant evaluation of cultural norms and practices to ensure that customary law is in tune with the constitutional values, including equality. Therefore, as Ngcobo J has recommended, the rule of male primogeniture could have been developed by removing the discriminatory exclusion of women to succession. Thus, the practice could have been maintained and yet developed to grant women equal treatment to men.

(b) A need for training and research:

The author's recommends that there be training programmes that will educate and inform both local, indigenous and western people of each other's legal system. In this way, it is argued that this will promote mutual respect of each legal system, without the desire to impose one on the other or viewing customary law through common law lens.

It is, therefore, possible to have co-existence of customary law and the right to equality. Only when there is a conflict between the two will equality trump the right to customary law. However, customary law can be developed to ensure it is in line with the spirit, purport, and object of the Constitution.[90]

4 Bringing customary law in line with the Constitution

4 1 Women as family head and traditional leaders

Previously, succession to status was limited to males and it was generally

89 Grant 2006 *Journal of African Law* 22.
90 S 39 (2) of the Constitution.

accepted that a woman could not succeed a man.[91] The institution of traditional leadership among the people of South Africa was embedded in the system of patriarchy, and only male members of the family could be traditional leaders.[92]

Surprisingly, although the above was the case, the ba*Lobedu* tribe was the only tribe that had a woman as a traditional leader whilst males in that community held positions of ward heads.[93] Currently, the Traditional Leadership and Governance Act permit the recognition of females as traditional leaders.[94] This means women can now enjoy an equal opportunity to be designated as traditional leaders of their communities like their male counterparts.[95]

Furthermore, the Traditional Courts Bill provides that members of a traditional court must consist of women and men, pursuant to the goal of promoting the right to equality as contemplated in section 9 of the Constitution and traditional courts must promote and protect the representation and participation of women, as parties and members thereof.[96]

Therefore, in the current legal dispensation it is no longer tenable to confine family headship or traditional leadership to males only and thus women can also be family heads and traditional leaders. This is why the Traditional Leadership and Governance Act even make reference to queens and headwomen.[97] Evidently, as referred to above, the court in *Shilubana v Nwamitwa* case also declared that females may now be recognised as traditional leaders, a decision that was upheld by the overall community.[98]

4 2 Legal status of married women

Section 6 of the Recognition of Customary Marriages Act,[99] provides for the legal capacity of women to be equal to that of their husband. This section provides that:

> "A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property systems governing the marriage, full status and capacity, including the capacity to acquire assets and dispose of them, to enter into contracts and litigate, in addition to any rights and powers that she might have at customary law".[100]

91 Rautenbach *Introduction to Legal Pluralism in South Africa* 180.
92 Rautenbach *Introduction to Legal Pluralism in South Africa* 213.
93 Rautenbach *Introduction to Legal Pluralism in South Africa* 213.
94 Traditional Leadership and Governance Framework Act 41 of 2003.
95 S 3(2)(b) of the Traditional Leadership and Governance Framework Act 41 of 2003.
96 S 5(1) and (2) of the Traditional Courts Bill of 2017.
97 S 8(a) and (c) Traditional Leadership and Governance Framework Act 41 of 2003.
98 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) para 87.
99 Recognition of Customary Marriages Act 120 of 1998.
100 S 6 of the Recognition of Customary Marriages Act.

The legislature has therefore given effect to section 10 of the Constitution,[101] by dignifying women through allowing them to have equal legal status and capacity as their counterparts.[102] In other words, women also have legal capacity to enter into transactions independently and are able to acquire and dispose of assets.[103] Therefore, women are now entitled to inherit property under customary law.[104] The Recognition of Customary Marriages Act,[105] makes all customary marriages automatically in community of property unless the parties state otherwise.[106] This means that the assets and income of both spouses are merged into one estate, and both husband and wife have equal powers to manage the estate.[107] Upon dissolution of the marriage, each spouse has an equal right to the estate. Thus women are guaranteed an equal share in all property held by the couple during the marriage.[108]

Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected.[109] As a result, it is submitted that the perpetual minority and legal incapacity of married women, as well as the subjection of women to the husband's marital power are no longer features of customary law.

According to the long-standing rule of male primogeniture and official customary law, *lobolo* agreements required the consent of the bride and groom's guardians.[110] Currently, it is no longer the case that women are entirely excluded and therefore, subject to their husband's marital power. For example, the court in *Mabena v Letsoalo* case,[111] held that a daughter's mother was legally competent to negotiate *lobolo* and receive it in respect of the daughter and that she is also competent to act as the daughter's guardian in approving her marriage.[112] This shows that the legal position of women has improved under living customary law, with women now being granted equal legal status and capacity as men.

In the case of *Ramuhovhi v President of the Republic of South Africa*,[113] the court ordered that husbands and wives have joint and equal ownership and equal rights of management and control over marital property.[114] This supports the notion that women are now permitted to own and administer property independently, like men.

101 S 10 of the Constitution.
102 S 6 of the Recognition of Customary Marriages Act.
103 S 10 of the Constitution.
104 Beninger "Women's property rights under customary law" 2010 *Women's Legal Centre* 9.
105 Recognition of Customary Marriages Act.
106 S 7(2) of the Recognition of Customary Marriages Act.
107 Beninger 2010 *Women's Legal Centre* 14.
108 Beninger 2010 *Women's Legal Centre* 14.
109 S 10 of the Constitution.
110 Rautenbach *Introduction to legal pluralism in South Africa* 41.
111 *Mabena v Letsoalo* 1998 2 SA 1068.
112 *Mabena v Letsoalo* case 1068.
113 *Ramuhovhi v President of the Republic of South Africa* 2017 ZACC.
114 *Ramuhovhi v President of the Republic of South Africa* 2017 ZACC para 71.

The reformed roles of women as discussed above signify the transformation of formal customary law and it being brought in line with the Constitution. However, it should be remembered that living customary law is not rigid, static, immutable and ossified.[115] It too can be developed to promote the spirit, purport and object of the Bill of Rights.[116] On the contrary, customary law is living law because its practices, customs and usage have evolved over the centuries and are adapted to the changing socio- economic and cultural norms as practised in the modern era.[117]

Therefore, based on the above, the author's submits that customary law continues to evolve and shift to meet the social needs of those it applies to. This change was inspired by taking into account the changed time and roles of women in society, as a result of urbanisation, the increase of female headed families due to the absence of fathers and industrialisation. However, despite the fact that these changes might have taken place to bring the constitutional norms and practices in line with the Constitution, such changes remained unnoticed due to the inconsistency that continues to exist between customary law and common law. Hence, the official rules of customary law sometimes contrast with living customary law, in which the rules were adapted to fit in with changed circumstances.[118]

4 3 Factors affecting the implementation of the reformed customary laws – inaccessibility of the reformed law

Many people in South Africa are subject to customary law, but often people are not aware of or do not understand the laws and their rights as developed by the Constitution.[119] The unavailability of the new legislatively reformed laws threaten to reduce the reformed laws to paper rights that are of little, if any, real benefit to the majority of women.[120] Thus, exacerbating the gap and the discord between customary law as practised on a daily basis and customary law as regulated by statute. The extension of common law to customary law problems introduces complex and foreign legal procedures that are peculiar to customary law dispute resolution mechanisms and most people living under customary law and as a result, render these new laws as explored above, inaccessible to ordinary South Africans.[121]

115 Ndulo "African customary law, customs, and women's rights" 2011 *Cornell Law Faculty Publications* 87.
116 S 39(2) of the Constitution.
117 *Sengadi v Tsambo* (40344/2018) [2018] ZAGPJHC 613 para 20.
118 Beninger 2010 *Women's Legal Centre* 67.
119 Beninger 2010 *Women's Legal Centre* 5.
120 Himonga 2005 *Acta Juridica* 83.
121 Himonga 2005 *Acta Juridica* 83.

Traditional courts form part of the heritage of African people and are easily accessible, inexpensive and have a simple system of justice.[122] For example, traditional courts have simple and flexible procedures that involve parties presenting their cases and have their witnesses give their versions of events and thereafter, have the chief or headman and his\her councillors question them and provide a verdict.[123] This informality of traditional courts makes these courts user-friendly and public participation makes the process popular in the sense of regarding it as their own and not something imposed from above.[124]

Contrary to the procedure followed by traditional courts, the procedure followed by western courts is more technical.[125] In western courts (magistrate courts, high courts and supreme court of appeal etc.), there are pre-trial, trial and sentencing stages whereby strict rules are followed in terms of how evidence can be presented and how examination of evidence takes place.[126]

Furthermore, since traditional courts are accessible within a social distance, it is easier for the local inhabitants to access traditional courts without travelling long distances to access magistrate courts.[127] This makes it cheaper due to the fact that disputants do not have to travel far to access the courts. Hence, costs of traditional litigation are not as expensive as those of civil and criminal western litigation.

The language and legal terms that are used in legal texts and the courts are a barrier that threatens the applicability of the law as introduced by common law. This article submits that the latin terms and bombastic english words that are used in legal texts can be hard to understand, especially, by the average person. Traditional courts make use of local language of the parties to the disputes and thus avoid the risk of distortion through interpreting.[128] Even the language used in legal texts is in a language that is mostly not understood or reliable to the inhabitants of the community. As a result the author's argues that the people are unable to fully apply the law as they may not fully understand its relevance and find it easier to relate to sources they can understand.

It is for this reason that the author's maintains that solutions coming from traditional councils will be more meaningful and relatable to the people and that their consent will be easily ascertainable when the development of rules such as male primogeniture comes from their local

122 The South African Law Commission "Harmonisation of the common law and indigenous law: Traditional courts and the judicial function of traditional leaders" (1999) (Draft Issue Paper on Law of Succession) 1 http://salawreform.justice.gov.za/ipapers/ip12_prj108_1998.pdf (accessed 2019-01-09)
123 The South African law Commission (1999) 2.
124 The South African law Commission (1999) 2.
125 The South African law Commission (1999) 2.
126 The South African law Commission (1999) 2.
127 The South African law Commission (1999) 2.
128 The South African law Commission (1999) 2.

leaders and the community at large. The author's moreover hold that it will be easier to implement solutions that come from traditional courts or royal councils than from western state courts. It is argued for the harmonisation of common law and customary law as opposed to the unifying of the two systems of law, is a solution.

5 Conclusion

In light of the above discussion, it is clear that extending the use of the Intestate Succession Act is often perceived by indigenous people, as a conquest of customary law by common law instead of harmonisation between the common law and customary law.[129] For this reason, the author's holds that, although the courts have made an effort to bring customary law of succession in line with the Constitution, such an effort may be construed to be an imposition of common law solutions on customary law problems. Thus, treating and perceiving customary law through the common law lens. The author's moreover, suggests that customary law should be evaluated and reformed within a customary law lens. By allowing participation of traditional courts and the indigenous people in the transformation of customary law of succession.

Therefore, this paper proposes that maintaining a pluralistic system that is developed based on full equality, is a better approach to reconcile the competing demands of culture and equality. It is additionally submitted that customary law and common law should remain separate systems of law; with customary law being followed by those people who choose to submit under it and its laws. Thus, being applicable without the burden of common law principles. In this way, those who choose to be governed by customary law should do so freely, provided that those rules are developed in line with the Constitution.

This paper further submits that the approach employed by the courts to solve customary law issues by the application of western legislation must be avoided and discontinued. Because this is an imposition of western ideologies and solutions to a problem that requires to be solved by employing solutions by traditional courts or the indigenous people, who know and understand customary law best.

It should be kept in mind that indigenous people are not law unto themselves. This means that, they too, are still subject to the Constitution entirely and that any customary principle and rule that contravenes the Constitution and any legislation that deals with it specifically, will be struck down and abolished. Therefore, even though the author's suggests that court solutions to customary law problems should be solved by employing solutions by the traditional courts or the indigenous people, it is maintained that people should be prohibited from using the right to

129 Rautenbach 2008 *Journal of Comparative Law* 129.

culture as a scapegoat under which they can discriminate against or ill-treat others without facing legal consequences for such ill-treatment.

Furthermore, customary law should be implemented following the constitutional values and principles. It is possible to reconcile customary laws with equality. There needs to be recognition that culture is constantly evolving and therefore requires a case to case investigation of customary practices and principles to determine the extent to which custom and culture in its contemporary manifestation already comply with human rights and constitutional norms and how it can be transformed to satisfy the demands of equality.[130] Therefore, whenever customary laws, such as with male primogeniture, are discriminatory towards a particular group of people, traditional councils and courts bear the burden of developing it in line with constitutional values of freedom, human dignity and equality.

130 Bronstein 2000 *SJHR* 558.

The termination of the bank-client relationship in South African banking law

Mzwandile Ngidi
LLB (UP)
Final Year MPhil candidate: Tax Policy and Tax Administration
African Tax Institute, Department of the Economics University of Pretoria

SUMMARY

In the year 2015/16, some of the major South African banks such as Standard Bank, terminated its bank-client contracts with its customers. The customers argued that Standard bank issued no notice of termination of these bank-client contracts. Alternatively, if the bank issued the notice of termination, the period thereof was insufficient for the client to arrange for an alternative baking option. As a result, the client argued that Standard Bank unlawfully terminated the bank-client relationship. Consequently, this paper examines this termination by considering, i) the nature of their relationship, ii) the duties of both the bank and the client, iii) and iv) the ways and circumstances which the bank-client contract may be terminated in South African banking law.

"*The customer's morality and integrity are accordingly characteristics which impact on the customer/banker relationship*"[1]

1 Introduction

After the Guptas' scandal,[2] in 2015/16 the major South African banks issued notices of termination of their contractual relationship with *inter alia* Oakbay Investment (Pty) Ltd, Siva Uranium (Pty) Ltd, TNA Media (Pty) Ltd. The termination of contract came as a result of these Gupta owned companies being suspected and alleged of its directly or indirectly

1 Lamont J in *Breedenkamp v Standard Bank of South Africa* 2009 (6) SA 277 (GSJ) para 32.

2 On the 21 September 2017, it was reported that South Africa's Gupta-owned Oakbay and other affiliated holdings were faced allegations of using ties with South Africa's present to wield undue influence. These companies were further suspected of being directly or indirectly involved in various illicit activities. Consequently, between December 2015 and April 2016 all four major banks in South Africa, there are Standard Bank, Nedbank, Barclays Africa and FirstRand bank terminated the account of these companies controlled by the Guptas relying on the reputational risk. In passing one should mention that the banks derived its right of termination not only from the contractual relationship with these companies but more particularly from the Financial Intelligence Centre Act 38 of 2001, especially s 21, 21B, 21C, 22, 22A, 26A, 26B & 29.

How to cite: Ngidi 'The termination of the bank-client relationship in South African banking law' 2020 *De Jure Law Journal* 54-69
http://dx.doi.org/10.17159/2225-7160/2020/v53a4

involvement in various illicit activities.[3] This article, therefore, seeks to determine whether a bank can, without the client's consent, close the client's bank account. As such I first evaluate the relationship between the bank and its client. Second, I consider the duties of both the bank and its client in relation to banking contractual relationship. Third, I answer the above vexing question by considering the current case law where the courts were called upon to pronounce on the question, the legislation governing banking practice and journal articles that seek to address it.

Essentially the article focuses on the banker-client relationship after the banking contract has been concluded. For convenience purposes, I shall refer to the banker-client relationship as the ("BC relationship /or BC contract"). Throughout the discussion, a "bank" and the "banker" are used interchangeably to refer to the bank as defined by section 1 of the South African Banks Act 94 of 1990 (the "Banks Act"),[4] and other applicable regulations. It should be noted that banking law is a transnational subject and thus its operation is further subject to international standards.[5] Consequently, reference is also made to foreign and international law to clarify some of the banking law principles that regulate the banking system.

3 Writer "Another Major SA Bank Closes its Doors to Gupta Company" https://businesstech.co.za/news/finance/119245/another-major-sa-bank-closes-its-doors-to-gupta-company/ (assessed 2018-04-06). *Minister of Finance v Oakbay Investments (Pty) Ltd; Oakbay Investments (Pty) Ltd v Director of the Financial Intelligence Centre* (80978/2016)[2017] ZAGPPHC 576; [2017] 4 All SA 150 (GP) (18 August 2017), par 12. *Annex Distribution (Pty) Ltd v Bank of Baroda* (52590/2017) [2017] ZAGPPHC 608; 2018 (1) SA 562 (GP) (21 September 2017).

4 In terms of s 1 of the Banks Act, a bank means a public company registered as a bank in terms of the Act. Moreover, the purpose of this Act is to "provide for the regulation and supervision of the business of public companies taking deposits from the public and to provider for matters connected therewith".

5 Basel Committee on Banking Supervision *Core principles for Effective Banking Supervision* Banking for International Settlements (The Basel Core Principles) (2012) 1-79. This publications accessible at https://www.bis.org (assessed 2018-09-19). (United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1998; United Nations Convention against Transnational Organised Crime, 2000. The primary regulator of the Reserve Bank of India; Financial Action Task Force (FATF) available at https://www.fic.gov.za/DownloadContent/NEWS/PRESSRELEASE/FIC%20Annual%20Report&202012-13.pdf (assessed 2018-09-19); Politically Exposed Person (PEP); Banks Act 94 of 1990; See article 68(1) of the United Nations Convention against Corruption Resolution 58/4 of October 31, 2003 and the Money Laundering and Terrorist Financing Control Regulations.

2 The relationship between the banker and its client

The BC relationship is a multi-faceted relationship that is founded in various contracts.[6] In *Standard Bank of SA Ltd v Absa Bank Ltd,*[7] the court noted that amongst other forms of contracts emerges between these parties, the contract of mandate between the bank and its customer underpinned this relationship. This suggests that the common law contract principles apply in the BC relationship as well as other special contractual rules. In the English classic case of *Foley v Hill,*[8] Lord Brougham pointed out that the BC relationship can be described as a "debtor-creditor relationship".[9] This was because as soon as the client deposits his\her money into the bank account, the bank immediately becomes a debtor to the client. It can be said that upon deposit by the client into his\her bank account, the money ceases to be the client's and becomes the bank's financial asset, which the bank is bound to return to its client upon demand.[10] Accordingly, the bank is a debtor to the client to the extent that the client's bank account shows a positive balance. To put it differently, the bank is only a debtor of the client subject to the condition that the client has funds in his\her bank account. It was further submitted in *Foley* case that the BC relationship should also be seen as a principal-agent relationship.[11] The court rejected this contention and held that the banker, after receiving the deposit, is free to decide on the manner and ways in which the money can be used, thus the banker is not strictly confined to the instructions of its client in this regard.

The court's reasoning to classify the BC relationship as one of debtor-creditor in nature is that the bank, on demand by the client, will be expected to pay back the deposited amount of money.[12] Logically, the bank cannot be a debtor if the client has a negative balance in his\her account. In such an instance, the client becomes a debtor and the bank is the creditor. Therefore, the gist of the *Foley* matter is that the law of contract, which also include some elements of the debtor-creditor relationship, regulates BC relationship. Thus, both parties seem to be treated equally and they have the autonomy to contract on any terms

6 Schulze *"The Sources of South African Banking Law-a Twenty-First-Century Perspective"* (part 1) 2002 14 *South African Mercantile Law Journal* 440. The author indicates that this relationship involves different types of contracts such as "mandate, loan for use, depositum and deposit taking".

7 1995 (1) All SA 535 (T).

8 *Foley v Hill* (1848) 2 HL Cas 28 (HL).

9 *Foley v Hill supra*, 28.

10 *Foley v Hill supra*, 35. Proctor *The Law and Practice of International Banking* 2010 301 para 15.13. See further the discussion of *Joachimson v Swiss Bank Corp*. [1921] 3 KB 110 in Holden *The Law and Practice of Banking Volume 1: Banker and Customer* (1974) 40-41.

11 *Foley v Hill supra*, 28. Smart & Chorley *et al*, *Chorley and Smart Leading Cases in the Law of Banking* (1990) 4. The author indicates that the bank is quite free to use the monies received from its customers.

12 *Foley v Hill supra*, 43.

and conditions subject to the rule of law.[13] It appears the BC contract comes into being after both parties have reached an agreement regarding the terms and conditions thereof.

It is understood that once the BC contract comes into being, the general contract rules apply in the BC relationship, in addition to this, there are other unique contractual terms, which may apply between the parties. Hapgood's contention is that special contractual rules could arise in circumstances where the banking institution exclusively offers the service rendered.[14] These special contractual rules entail all the banking services that cannot be rendered by any other contracting parties under the normal contract but that are conferred entirely on the bank. Therefore, it boils down to the question whether the banking institution has the necessary authorisation to render the bank services in terms of the applicable legislation. Thus, the difference between general and unique contractual rules become significant when illustrating the duties and obligations of the bank and its client. For the purposes of the nature of the BC relationship, it suffices to note the rules that govern contracts apply as well as other special contractual terms parties may agree upon. It seems correctly that the BC relationship depends mainly on express and implied contractual terms.[15] In short, BC relationship may be classified as *sui generis* since the circumstances of each case will dictate the nature of the relationship between the parties. Hence, it is impossible to have one-fix all formula to explain the nature of the BC relationship.

3 Duties of the bank and its client

3 1 Duties of the bank

Initially, the bank concludes an agreement with its client to render banking services, as the parties deem fit and ethical. In terms of the international banking standard and domestic law, banks are ethically and legally bound to prevent financial crimes such as illicit transactions, money laundering, and corruption to name a few.[16] It follows the bank is strictly prohibited to perform illegal duties as provided by the banking laws. Therefore, although the parties may enter into BC contract deem fit however, they may not agree to perform illegal acts.

Once the bank and the client has concluded the contract, the bank owes certain duties to the client. These duties include, but are not limited

13 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 57.
14 Hapgood *Paget's Law of Banking* (2007) 145.
15 Talagala "The law relating to bank-customer relationship: some salient duties of banks" (2010)1 20 3. See also *Joachimson v Swiss Bank Corp supra,* 117.
16 Arts 5, 6 7, & 8 of the United Nations Convention against Transnational Organised Crime; s 20A, 21, 21A-E of the Financial Intelligent Centre Act 38 of 2001; the Prevention of Organised Crime Act 121 of 1998.

to the following, because the extent of such duties depends on the particular agreement between the banker and the client:

(a) To accept funds and to collect cheques for the client.[17]
(b) To make repayment of the deposited amount on demand at the branch in which the bank account is held during banking hours.[18]
(c) To pay the client's orders according to the client's mandate provided there are sufficient funds available in the account.[19]
(d) To act only upon the valid instructions of its client and not upon any fraudulent instructions.[20]
(e) Not to pay countermanded cheques.[21]
(f) To provide the client with bank statements.[22]
(g) To protect the client's confidentiality, subject to certain exceptions.[23]
(h) Fiduciary duty in limited circumstances.[24]
(i) To give a reasonable notice before closing the client's bank account if it has a credit balance.[25]

17 Proctor 301 par 15.20.
18 *Libyan Arab Foreign Bank v Bankers Trust* [1989] AC 80 PC. See also Schoeman *et al*, *An Introduction to South African Banking and Credit Law* (2013) 2 para 1.2.
19 *Well v First National Commercial Bank* [1998] PNLR 552, CA.
20 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank* [1986] AC 80 PC.
21 Olanrewaju "Optimizing banker-customer relationship towards sustainable growth and profitability" accessible at on https://www.academia.edu/15965954/Optimizing_the_banker_customer_relationship_for_grwth_and_profitability (assessed 2018-09-19).
22 Olanrewaju.
23 *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461 772-473. See also Wadsley and Penn *The Law Relating to Domestic Banking* (2000) 167 para 4-064.
24 The fiduciary duty of the bank does not arise under the general contractual relationship with the client, however, in terms of the special contract the fiduciary duty may arise. See *National Westminster Bank plc v Morgan* [1983] 3 All ER 8, where the court held that fiduciary duty only arises under special contract, according to the court it could be where the client solely relies on the bank for its service. Talagala para 15, states that the fiduciary duty may arise firstly, when the bank offers investment or financial advice to the client, secondly, when the bank acts as an agent or a trustee of the client. See further Glover "Banks and Fiduciary Relationships" 1995 7 *Bond Law Review* 3, who also indicates that the fiduciary duty could be created by the fact that the customer is in a vulnerable position or has unequal access to certain information. Accordingly, the author provides that fiduciary duty may take two types. The first one is "one sided" relationship. In this regard, the client solely put reliance on the bank that it will employ its financial expertise in order to protect and benefit its customer. In other words, the client is in a vulnerable position because he lacks necessary skills, or information (e.g lack of access to the market or lack of investment skills). The second one may be "two-sided". In this type of fiduciary duty, the relationship is based on the agreement between the client and its banker. To put it differently, their relationship is based on a mutual agreement. In terms of the customer banker relationship, we concerned with the former. Consequently, the unequal or imbalance position between the client and the banker constitute the one-sided relationship. As such the vulnerable party deserves protection from the possible undue influence from the stronger party. See *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 142.
25 *Joachimson v Swiss Bank Corp supra*, para 18.

3 2 Client's duties

The bank's client also has corresponding duties toward the bank. The client has a duty to:

(a) Exercise care when drawing cheques.[26]
(b) Disclose any forgeries.[27]
(c) Demand for the repayment of deposited money.[28]
(d) Pay bank charges accordingly and "interest on loans or overdrafts".[29]
(e) Inform the bank of any apprehensive dealings or fraudulent attempts on his\her account.[30]

The above-listed obligations of the bank and its client are not exhaustive but vary depending on the contract between the parties.

The above two sections have considered the nature of the BC relationship and the duties of both the bank and its clients. In what follows, a discussion on the termination of the BC relationship is considered and whether the bank can unilaterally cancel banking contracts unilaterally.

4 Termination of BC relationship

The BC relationship may be terminated in many ways. These include but are not limited to notice by the bank, mental disorder of the client, insolvency of the client or by mutual agreement.[31] It is noteworthy that in practice, it is nearly always the one party or the other wishes to end the relationship, as such, the BC relationship is terminated unilaterally as will be discussed below. The question arises is whether the bank is obliged to provide a reasonable notice to its client before it unilaterally closes the client's bank account.

4 1 Case law

4 1 1 Breedenkamp v Standard Bank of South Africa (Breddenkamp I).[32] *The interim interdict application*

In *casu*, the United States government listed the applicant (Breedenkamp), Breco (the company) and other certain entities as

26 Hapgood 149-150.
27 *Joachimson v Swiss Bank Corp supra*, 127.
28 *Joachimson v Swiss Bank Corp supra*, para 17.
29 Olanrewaju.
30 *London Joint Stock Bank v Macmillan and Arthur* [1918] AC 777 HL; *Greenwoods v Martins Bank* [1933] AC 51 HL. Olanrewaju. See also *Brown v National Westminster Bank Ltd* (1964) 2 Lloyd's Rep. 182.
31 Smart & Chorley 362, 364, 366, 377. Hapgood 153 para 7.13. The author indicates that the relationship between the banker and its client may be terminated by an agreement between parties, by unilaterally act by either party or by the death of the client.
32 *Breedenkamp v Standard Bank of South Africa* 2009 5 SA 304 (GSJ).

specially designated nationals ("SDN").[33] This came because of allegations against Breedenkamp that he was involved in various illicit activities such as tobacco trading, arms trafficking, oil distribution, diamond extraction and of being a confidant and financial backer of Zimbabwe's President Robert Mugabe.[34] Subsequent to this SDN listing, the US enforcement authorities imposed sanctions on the applicant, Breco and other entities.[35] In terms of US law, US nationals, including juristic persons, are strictly precluded from dealing with SDNs. The Standard Bank of South Africa ("Standard Bank SA") became aware of these facts and upon issuing thirty (30) days' notice of termination of the banking services with Breedenkamp, decided to cease its contract with Breedenkamp, Breco and other entities. The bank derived its powers to unilaterally terminate the contract from the "general terms and conditions for all accounts",[36] entered by both parties and in terms of the Code of Banking Practice. In terms of these general terms and conditions, the bank could terminate any account, for any reason, by providing a written notice to such effect. In addition, the bank could at any time amend the terms and conditions of the BC contract by giving a written notice to the customer. The code of banking practice also empowered the bank to close its customer's bank account if it had reasons to believe that the account was being used for any illegal purposes.[37] Therefore, Standard Bank SA relied amongst other reasons on these provisions to cancel its BC relationship after it became aware of the applicant being listed as the SDN by the US government.

Three initial reasons were advanced by the bank for the closure of the applicant's accounts. First, that the US government as a specially designated person listed the applicant.[38] Second, that these allegations might impaired Standard Bank SA's reputation.[39] Third, certain business risks could arise should the bank continued offering banking services to Breedenkamp and SDN.[40] In response to the intended closure of the bank accounts, the applicant approached the court for an interim interdict to restrain Standard Bank SA from cancelling the contract between the parties pending the finalisation of the matter.[41] The applicant contended that the closure had drastic effects on his business

33 The Specially Designated National ("SDN") is defined by the Terrorism and Financial Intelligence Office of Foreign Assets Control ("OFAC") in the US as those "engaged in activities related to the proliferation of weapons for mass destruction, and other threats to the national security, foreign policy or economy of the US". In terms of the OFAC Act confers powers to the presidential national and other authorities to impose controls on transactions and freeze assets under the US jurisdiction. Accessible at https://www.treasury.gov/about.organization (assessed 2018-09-19).
34 *Breedenkamp I supra*, para 4.
35 *Breedenkamp I supra*, para 4.
36 *Breedenkamp I supra*, para 21.
37 The Banking Association South Africa *Code of Banking Practice* para 7.3.
38 *Breedenkamp I supra*, para 33.
39 *Breedenkamp I supra*, para 33.
40 *Breedenkamp I supra*, para 33.
41 *Breedenkamp I supra*, para 12.

since it would be difficult, if not impossible, to conduct business without banking facilities.

Jajbhay J granted the relief based on several grounds. One of these grounds was that the bank did not have a unilateral right to cancel the contract as it claimed to have under the general terms and conditions, nor did the Code of Banking Practice confer such right. The court considered the evidence before it and concluded that the general terms and conditions were adopted after the accounts of the applicant were already opened therefore it seemed unreasonable for the bank to apply them to these specific bank accounts.[42] Furthermore, the applicant denied that he had received the terms and conditions.[43] The court was not prepared to entertain this denial by the applicant. The court also referred to these general terms and conditions and concluded that they were not sufficient to entitle the bank the right to cancel the banking service contract.[44]

The court also pointed out that Standard Bank SA only communicated its reasons to terminate the contract after it had already closed the bank accounts of the applicant. As such, the applicant's bank accounts were closed based on mere perceptions and not on the facts.[45] After evaluating clause 4.10 of the Code of Banking Practice the court concluded that, the Code did not expressly or by necessary implication entitle the bank to terminate the contract.[46] Jajbhay J further mentioned that the Code expressly provided that it could not be used in a court of law and it was not legally binding between the bank and its client.[47] Hence, the court concluded that the Code did not entitle Standard Bank to close the account of the applicant.[48] Consequently, the court ruled the applicant was entitled to an interim interdict pending the finalisation of the matter.

4 1 2 Breedenkamp v Standard Bank of South Africa (Breedenkamp II):[49] *The main application*

In the main application, the applicant challenged the manner in which Standard Bank SA had terminated the contract. The constitutional attack was directed at the issue of fairness in that Standard Bank SA termination

42 *Breedenkamp I supra*, para 26.
43 *Breedenkamp I supra*, para 26.
44 *Breedenkamp I supra*, para 28.
45 *Breedenkamp I supra*, para 32.
46 Clause 4.10 of the then Code of Banking Practice provided that the bank will not close the customer's bank account without giving a reasonable prior notice at the last address that the customer provided. The Code further stated that the bank reserve the right to protect its interest in its discretion, which include closing the account if the bank is compelled by law; if the customer has not the account for a significant period and if the bank believe that the account is being used for fraudulent purposes.
47 *Breedenkamp I supra*, para 24.
48 *Breedenkamp I supra*, para 25.
49 *Breedenkamp v Standard Bank of South Africa* 2009 6 SA 277 (GSJ).

violated the standard of fairness as set out in the constitution. Both parties had agreed that should the court find that the termination had offended a constitutional right, Standard Bank SA could not therefore exercise the right to cancellation.[50] As a result, the court had to determine if the cancellation clause in itself offended the constitution and whether the exercise of right to terminate contract was fairly exercised as submitted by the applicant.[51] The court held that to determine fairness the court should consider two considerations. First consideration involves the weighing up the public policy as informed by the constitution that requires freely and voluntarily compliance with contractual obligation – the maxim *pact sunt servanda*. As the court correctly stated that this principle entails parties' self-autonomy that contract entered freely and voluntarily must be honoured even to one's own detriment. It seems that if the contract is *prima facie* contrary to public policy the question of enforceability would not arise. If the court is satisfied that the clause in question is reasonable – in that the clause does not offend one or more of the constitutional rights, then the second consideration entails an enquiry into the surrounding circumstances precluded compliance with the clause – a subjective test.[52] The focus in this subjective approach is on the manner in which either party has exercised his\her right of cancellation, whether it violated the right to freedom of contract or dignity of the claimant.[53] The question in this regard is whether it was factually possible to enforce the contractual clause or to expect the other party to comply with BC contract. Therefore, the applicant is required to show that exceptional circumstances exist to justify his non-compliance.

It should be noted that the applicant had to lead evidence to prove that Standard Bank SA cancellation was unreasonable considering the relevant facts.[54] If the applicant successfully convinced the court that the clause could not reasonably be enforced considering the circumstances, such clause would not be enforceable. However, it should also be noted that courts are reluctant and cautious to interfere with the contractual relationship between individuals,[55] unless the contractual terms and conditions concerned are objectively or subjectively unreasonable. This is because of the parties' right to freely arrange their affairs. Accordingly,

50 *Breedenkamp II supra*, para 13.
51 S 36 of the Constitution of the Republic of South Africa, 1996.
52 *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) para 56.
53 *Breedenkamp II supra*, para 13(2).
54 *Breedenkamp II supra*, para 45. In this matter, the court held that "[t]he onus rests on the applicant to establish the fact that the unilateral cancellation of the contract alone results in the applicant being unable to obtain alternative banking facilities and it has failed to do so".
55 *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 32; *Barkhuizen v Napier supra*, para 35; *Brisley v Drotsky* 2002 4 SA 1 (SCA) par 22, 24, 93; *Breedenkamp v Standard Bank of South Africa* 2010 4 SA 468 (SCA); *South African Forestry Co Ltd v York Timbers* 2005 3 SA 323 (SCA) para 30. *Annex Distribution (Pty) Ltd v Bank of Baroda* (unreported, referred to as case no (52590/2017) [2018] ZAGPPHC 6 (12 March 2018). Available online at http://www.saflii.org/za/cases/ZAGPPHC/2018/6.html para 17.

parties may arrange their affairs and conclude contracts that will be binding between themselves, the *pacta sunt servanda* principle. This entails that unless the contrary is proven, parties are bound by the general terms and conditions of their contract.

It was accepted that Standard Bank SA termination of the contract did not directly violate the applicant's right to freedom of contract, dignity or trade.[56] However, the applicant further submitted that should the court find that the cancellation had not directly infringed his constitutional values; the court ought to consider that the termination violated the fairness principle. In this regard, the applicant relied on the fairness principle in that, Standard Bank SA unfairly exercised its right of termination taking into account that the applicant had no sufficient time to move his business to another bank. Furthermore, other banks were not prepared to accept him and therefore it was fair to sustain his relationship with Standard Bank SA. Subsequently, the applicant sought the following reliefs. One, that the bank is prohibited from cancelling the contract without good cause.[57] Two that the bank is "interdicted and restrained from cancelling the account contract unless and until good cause arises."[58] The applicant's contention was that prior to the conclusion of the contract, Standard Bank SA was in a "privileged position" to impose standard-term clauses in the contract.[59] According to the applicant, this might have constituted an unequal bargaining position between the parties and it probably influenced the voluntariness of the applicant to enter into the contract regarding the bank account. Lamont J held that the unequal bargaining power prior to the conclusion of the BC contract did not on its own render the contract unenforceable. According to the court, this might however have had a bearing on the weight that would be attached to the terms of the contract and the extent to which the parties were able to act with dignity and freedom.[60]

Moreover, the applicant argued that the BC contract contained a variation clause entitled the bank to change the terms and conditions from time to time. Subsequently, this empowered the bank to amend the terms from time to time. It can be argued that this seems to perpetuate the unequal bargaining power in that the client has no choice but to contract with the banker because of the need of the client's vulnerable position for banking facilities. If the applicant was not satisfied with the terms of the BC contract or their amendments, he had two options at his disposal. First, the applicant could have negotiated with the bank on different terms.[61] Second, the applicant would be able to terminate the account contract himself.[62] The applicant further argued that the imbalance was further perpetuated by the strict requirements that the he

56 *Breedenkamp II supra*, para 14.
57 *Breedenkamp II supra*, para 19(1).
58 *Breedenkamp II supra*, para 19(2).
59 *Breedenkamp II supra*, para 22.
60 *Breedenkamp II supra*, para 21.
61 *Breedenkamp II supra*, para 21.
62 *Breedenkamp II supra*, para 21.

had to comply with. Furthermore, the South African banking sector has a limited number of banks.[63] For these reasons, the applicant contended that Standard Bank SA was in indeed in a privileged position. The court accepted that banks do impose standard form contracts, but the evidence before the court did not prove that this constituted an aggravating factor in the present matter.[64] It seems that the court was prepared to accept that the parties were not on equal bargaining position provided evidence could support such conclusion. It is submitted that in the banking sector such as South Africa's one with few major banks, it seems difficult to justify that the parties would be on equal footing. This is because amongst other reasons, BC contracts tend to contain standard clauses that cannot easily be changed unless the banker grants such permission. The court continued to consider the applicant's contention and it held that the applicant was a strong entity that would have influenced Standard bank SA in one way or another. To put it differently, the applicant was "no shrinking lily".[65] Accordingly, the court concluded that the facts did not show that the applicant "was at a bargaining disadvantage or in a position of inequality" vis-à-vis the bank[66] It seems likely that the court would reached a different conclusion had the facts proven that the bank was in a more favourable position. In other words, the court would have granted the interdict stopping the bank from cancelling the BC relationship if the facts proved otherwise.

The applicant also submitted that it was fair for Standard Bank SA to have the applicant as its client because other banks were not willing to do business with him.[67] The court accepted that the unbanked position of the applicant impaired his dignity, integrity and respect to carry on trade as a respectable member of society.[68] However, the court further examined the submission and concluded that the applicant had to prove that the cancellation by Standard Bank SA rendered him unbanked.[69] According to the court, the applicant had failed to discharge such onus. In other words, the applicant had failed to establish that other banks could not take him on as a client because of the unilateral cancellation by Standard Bank SA.

The court further held that fairness principle also entailed the bank's right to choose which person it wanted to contract with.[70] Moreover, the bank had a duty to comply with and uphold banking regulations. As such, the court ruled that the process was procedurally fair. Substantively there was a proper rationale for the decision to terminate.[71]

63 *Breedenkamp II supra*, para 23.
64 *Breedenkamp II supra*, para 24.
65 *Breedenkamp II supra*, para 25.
66 *Breedenkamp II supra*, para 26.
67 *Breedenkamp II supra*, para 33.
68 *Breedenkamp II supra*, para 33.
69 *Breedenkamp II supra*, para 46.
70 *Breedenkamp II supra*, para 48.
71 *Breedenkamp II supra*, para 65.

4 1 3 Breedenkamp v Standard Bank of South Africa:[72] *SCA Judgment*

The appellant appealed against the judgment of the High Court that the termination of banking facilities was fair and lawful. In the appeal case, the appellant based his argument squarely on the fairness principle.[73] The appellant submitted that the *Barkhuizen* principle that *pacta servanda sunt* is not "a sacred cow that should trump all other considerations",[74] was applicable regardless of whether the contract violated public policy or not. According to the appellant, the absence of public policy violation did not mean that the contract was enforceable. As such, the appellant submitted that the enforcement of the contract must also be fair and reasonable. The court rejected this contention as follows:

> "[…] I do not believe that the [*Barkhuizen*] judgment held or purported to hold that the enforcement of a valid contractual term must be fair and reasonable even if no public policy consideration found in the Constitution or elsewhere is implicated […]".[75]

The court further relied on the dictum of Ngcobo J in the *Mohlomi* case that parties in a contract have self-autonomy or the ability to regulate their own affairs.[76] Accordingly, the question of enforceability comes into play only if it can be shown that the terms of the contract are unreasonable. Hence, it meant that it would be objectively or subjectively impossible to enforce them. According to the court, since the contractual terms were valid, it was unnecessary for the cancellation process to be fair and reasonable as perceived by the appellant. Consequently, the appellant could not solely rely on fairness as a freestanding requirement to sustain the bank-client relationship.[77]

The court opined that the issue to be decided was whether Standard Bank SA had complied with the termination requirements as agreed in the BC contract. Harms DP considered that in terms of the general terms and conditions the bank first had to issue a reasonable notice if it sought to terminate the contract. Second, it must have had a good cause for the termination of the contract. On the reasonable notice requirement, it was undisputed that the bank had given the appellant a reasonable notice to cease the bank-customer relationship. Based on the good cause requirement, the court held that the bank had exercised its right of cancellation lawfully as permitted by the BC contract. In other words, the bank was at liberty to terminate its contract emanating from the agreement between the parties. More so, the bank made its decision to cancel the banking contract based on the listing of the appellant and considered the reputational and business risk related thereto. The court

72 *Breedenkamp v Standard Bank of South Africa* 2010 4 SA 468 (SCA).
73 *Breedenkamp SCA supra* para 30.
74 *Breedenkamp SCA supra* para 15.
75 *Breedenkamp SCA supra* para 50.
76 *Mohlomi v Minister of Defence supra*, para 57.
77 *Breedenkamp SCA supra* para 53.

remarked that whether or not these were the right factors to be considered was not for the court to decide. It was held further that Standard Bank SA was right to rely on the reputation of the appellant when closing the bank accounts since this had a bearing on the BC relationship.[78] Hence, the bank had exercised its right of termination in a *bona fide* manner.[79] Accordingly, the appeal was dismissed.

5 Analysis and discussion

What is the relevance of *Breedenkamp* in South African banking law? First, this case confirms the principle that fairness forms part of our law. However, it is not an independent legitimate ground for invalidating a BC contract. Thus, fairness cannot be employed as a free-floating requirement.[80] The dictum in the *Breedenkamp* SCA decision indicates that the client may not squarely rely on fairness principle to sustain BC contract with the banker. The client should be able to identify the specific constitutional values that he\she perceives to be unreasonably infringed. Once the constitutional right has been identified, the claimant can further rely on fairness as a "slippery concept".[81] Although a party cannot solely rely on the fairness principle to terminate a valid contract with the bank, however, the court enunciated an exception to this rule. This exception is that unless a claimant alleges unfairness can show that the terms and conditions of the banker-customer contract were objectively and/or subjectively unreasonable at the time of the conclusion of the contract, then the court will be more inclined to accept the principle of fairness as a ground to invalid the contract in question.

Second, this judgment also illustrates that where the BC contract contains an express cancellation clause, either party may exercise his\her right of termination. However, such right must be exercised in a *bona fide* manner.[82] Third, there must be a good cause that justifies the termination of the BC contract. Fourth, the party that purports to cancel the banking contract must further comply with all contractual termination requirements if there are any, such as the compliance with a reasonable notice. In this regard, it is noted that normally a client does not need to issue a reasonable notice to the banker if he\she wishes to close his\her current bank account.[83] To put it differently, the client may summarily terminate the BC contract subject to paying a debit balance and any bank charges that may ensue.[84] Therefore, if the client has a credit balance in his\her account with the bank, he\she can simply

78 *Breedenkamp II supra* para 24.
79 *Breedenkamp II supra* para 64.
80 Bhana "Contract Law and the Constitution: *Breedenkamp v Standard Bank of South Africa Ltd* (SCA)" 2014 29 *South African Public Law* 509.
81 *Breedenkamp SCA supra* para 54.
82 *Breedenkamp SCA supra*, para 64.
83 Ellinger & Lomnicka *et al*, *Ellinger's Modern Banking Law* (2011) 207 para 6.
84 *Breedenkamp II supra* para 29.

withdraw his\her money and close his\her account at any time.[85] However, the same cannot be said from the banker's perspective. Lord Hoffmann in the *National Commercial Bank of Jamaica Ltd v Olint Corporation Ltd* illustrated the *banker's* position,[86] where he stated that unless the banker and the client have agreed, or the statute provides otherwise, a banker might terminate its banking contract upon issuing of a reasonable notice. The notion of reasonable notice is also provided in the Code of Banking Practice that states that the banker will not close its client account without providing the client with a reasonable notice prior to the closing of his\her account.[87]

Therefore, the circumstances of each case will most probably dictate what constitutes a reasonable notice regarding the relevant facts. In the *Breedenkamp* case, the SCA has found that the thirty (30) days termination notice was sufficient for the appellant to arrange his affairs. It could perhaps be mentioned that factors such as the nature of the account, the business in question, and the operational risk if the account is not closed and the grounds and seriousness of misconduct will play a pivotal role in this regard. As correctly argued by Du Toit, a sophisticated company might probably need more time as a small business or someone with a personal account.[88] The logic behind the reasonable notice from the banker's point of view is that any cheques or other effects payable to the client and/or deposited into his\her account must have a sufficient period to clear before the bank account is closed.[89]

The position regarding inadequate notice may be traced back to the matter of *Prosperity Ltd v Lloyds Bank Ltd,*[90] where the court refused to grant an interdict stopping the bank from closing its client's bank account but allowed the declaration that the banker was not entitled to close the account without reasonable notice. The reason why the court could not order the bank to reopen the account was that such an order would be forcing the bank to perform a specific performance of a personal in nature. McCardie J held that based on a balance of probabilities the client could claim damages for loss suffered because of the closure.[91] This principle was also enunciated in the *Breedenkamp* SCA decision where it was held that Standard Bank SA could not be forced to contract with the appellant if the bank had decided to terminate its contract. The suggestion is that whether the banking contract contains an express

85 Schulze "The Bank's Right to Cancel the Contract Between it and its Customer Unilaterally" (2011) 32 *Obiter* 219.
86 *National Commercial Bank of Jamaica Ltd v Olint Corporation Ltd* [2009] UKPC 16.
87 The Code of Banking Practice (2012) para 7.3.2. Available at http://www.banking.org.za/consumer-information/legislation/code-of-banking-practice (assessed on 2018-09-19).
88 Du Toit "Closing Bank Accounts: Recent Developments" in Hugo and Du Toit *et al*, Annual Banking Law Update: Recent Developments of Special Interest to Banks (2017) 31-42 32, footnote 10.
89 Ellinger and Lomnicka 208.
90 [1923] 39 TLR 372.
91 Ellinger and Lomnicka 209.

cancellation clause or not, it would be desirable for the banker to issue a notice of termination prior to the termination of the banking service contract. The absence of a termination clause in the banking contract should not discharge the banker from issuing a reasonable notice.[92] This view emanates from the common law principle that a party could only unilaterally resile from the contract if the breach is material or serious.[93]

The banking practice, as shown above, depicts that there is nothing stopping the bank from unilaterally closing the account of the client if it perceives that the circumstances permit such termination. However, the bank must bear in mind that if it does not comply with the abovementioned requirements, it is likely that such termination may be set aside for being objectively and/or subjectively unreasonable considering all relevant facts. To sum up, it is essential to note that the BC relationship is governed by the law of contract. As such, either party may cancel the banking contract subject to compliance with the termination requirement.

Finally, considering the above decisions, it seems that adverse publicity regarding the client could encourage the banker to cut its ties with the client. Whether or not these allegations are accurate is irrelevant.[94] This suggests that the duty of the banker to uphold and comply with the banking practice,[95] carries more weight than the individual's interest. Therefore, if the banker subjectively perceives that whatever conduct by its client may negatively impair its business reputation, it could be argued that the bank's termination of its relationship with its client would be justifiable.

6 The exception to reasonable notice compliance

It should be mentioned that there are some exceptions to the obligation to comply with the reasonable notice-requirement. There are instances in which the banker may close the bank account of its client with immediate effect, without dispensing a notice informing the client of its

92 *Annex Distribution (Pty) Ltd v Bank of Baroda supra*.
93 *National Commercial Bank of Jamaica Ltd v Olint Corporation Ltd* [2009] UKPC 16. See also Schulze 220. See *Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers* 2004 1 SA 538 (SCA), where the court pointed out that an indefinite contract may come to an end through a reasonable notice.
94 *Breedenkamp II supra*, para 24.
95 See further the Financial Intelligence Centre Act 38 of 2001; Financial Intelligence Centre Amendment Act 11 of 2008; Prevention of Organised Crime Act 121 of 1998; South African Reserve Bank Act 90 of 1989. Kersop and Du Toit "Anti-money Laundering Regulations and the Effective Use of Mobile Money in South Africa-(part 1)" 2015 *Potchefstroom Electronic Law Journal* 1603-1635.

intention to close the account. These include but are not limited to the following:[96]

(a) if a banker is obeying a court order;
(b) if a client has acted unlawfully;
(c) if the client has breached the bank's terms and conditions;
(d) if the client has acted abusively towards bank staff.

It seems as if under these special circumstances the banker's action to immediately close its client's bank account would be justified. In other words, the court is more likely to find that the banker was compelled by the circumstance to respond with immediate closure of the client's account.

7 Conclusion

In the above discussion, I have shown that both the banker and its client have rights and obligations in terms of their banking contract. It has also been illustrated that the BC relationship may end in several ways for different reasons. However, the point of departure to determine the validity of the termination of this contract should be the terms and conditions that the parties have agreed to.

It has further been explained that the banker may unilaterally terminate its banking facilities subject to reasonable notice to the client. Subjectively speaking, whether such reasons are wrong or not is irrelevant, except if there is an abuse of the right of termination. Although either party may cancel the banking contract, it is, however, instructive to note that the facts and circumstances of each case will determine the manner and means of termination of the contract in question.

Imperatively, it is further submitted that once the banker has decided to close the client's bank account it is unlikely that the court would make a mandatory order to reopen the account. It seems that the most appropriate relief the client has is to claim damages he\she suffered if he\she can prove that the bank did not give a reasonable notice of termination, or that the closure in itself was unreasonable.[97]

Finally, it should also be mentioned that the bank does not only owe the duty to its clients. The international banking community also requires the bank to uphold and protect the banking sector, the standard as well as the dignity thereof. Therefore, it is submitted that where the interests of the individual conflicts with the banking industry regulations and standard practice, it is likely that the protection of the banking sector will prevail.

96 Du Toit 32.
97 *Annex Distribution (Pty) Ltd v Bank of Baroda* par 14; *Joachimson v Swiss Bank Corp supra*, 110.

The corruption race in Africa: Nigeria versus South Africa, who cleans the mess first?

Prince Pius Imiera
LLB BL LLM, BA, MA Phil
Post Doctoral Research Fellow, University of South Africa, College of Law, Institute for Dispute Resolution in Africa

SUMMARY

The aim and objective of this article is to unpack in a comparative format the fiend of corruption in Africa, using Nigeria and South Africa as the giant in corruption alongside Somalia, South Sudan and Madagascar in the continent of Africa. It is true that corruption has been imported and/or incorporated into the African political space; although, the dimension and effects of corruption differ from country to country in Africa. In Africa, corruption is clearly visible culminating in several high-profile scandals standing out. In Nigeria for instance, former and late military head of State, Sani Abacha and South Africa's Jackie Selebi were some among many public office bearers indicted in corruption mess. Kofele-Kale noted that corruption is punishable in all African countries, prohibited in their Constitutions and in various regional and pan-African anti-corruption instruments. In fact, Africa's leaders are concerned about the problem of corruption that hardly a day goes by without some government entity criticising corruption and its cancerous effects on African society, yet, Africa has made little or no progress on this front.

The article examines corruption in Nigeria and South Africa and tries to find out which of these two countries will be first in the complete eradication of corruption.

1 Introduction

Corruption is endemic and has become part of every day routine in the continent of Africa, this is no longer news. What may be news however to the international communities and Africa is that the evil of corruption has been completely wiped out in Africa and has become history because:

> "As long as corruption continues to go largely unchecked, democracy is under threat around the world because corruption chips away at democracy to produce a vicious cycle, where corruption undermines democratic institutions, weak institutions are less able to control corruption, over and above this, with many democratic institutions under threat across the globe – often by leaders with authoritarian or populist tendencies – we need to do more to strengthen checks and balances and protect citizens' rights."[1]

1 Transparency International, *Corruption Perceptions Index* 2018 (2019) 1.

How to cite: Imiera 'The corruption race in Africa: Nigeria versus South Africa, who cleans the mess first?' 2020 *De Jure Law Journal* 70-89
http://dx.doi.org/10.17159/2225-7160/2020/v53a5

The major and principal challenges confronting the African continent is the need to develop and sustain positive socio-economic results which may lead to structural transformation processes.[2] To achieve structural transformation in Africa, three vital requisites are important in this regards: first, is good governance, which is extremely important; secondly, is that decision-making processes should be implemented by African leaders; and thirdly, Africa needs to keep up great administration and manufacture strong administration organisations, not exclusively to battle defilement, yet in addition to quicken and support its endeavors towards social and financial improvement.[3]

As a corollary to the foregoing, the Africa agenda 2063 states unequivocally that:

> "Africa shall be a continent where democratic values, culture, practices, universal principles of human rights, … justice and the rule of law are entrenched."[4]

In addition, institutional transformation for Africa's development is very critical in wiping out corruption from Africa, this comes on the heels of the African Agenda 2063, which further affirms:

> "Africa shall also have capable institutions and transformative leadership in place at all levels. Corruption and impunity will be a thing of the past."[5]

Corruption is a social menace and global phenomenon, it is however more pronounced in some jurisdictions than the other; for instance, corruption is more common in all African countries as shown in the chart below than in any other part of the world.[6] Corruption through its perpetrators undermines and twists public policy leading to resource misallocation which ultimately affects private sector growth and produces negative economic effects that bring untold hardship and hurt the common man.[7]

The World Financial Institution (World Bank) perceives corruption as an international and domestic problem,[8] individual wealth accumulation attitude by public office holders culminating in the misuse of public goods for individual and/or private benefits and enrichment, this takes the form of payment of bribes to bypass laid-down procedural principles. As a result, corruption becomes widespread in places where people in fiduciary trust and privileged positions monopolise the use of public funds to their advantage in the discharge of their constitutional duties with less or no

2 United Nations Economic Commission for Africa Measuring corruption in Africa: The international dimension matters *African Governance Report IV* (2016) 2.
3 United Nations Economic Commission for Africa 2.
4 Agenda 2063 *The Africa we want: The vision for 2063 Aspiration* (2015) 5.
5 Agenda 2063 28-29.
6 Gamuchirai "Corruption in Africa: Implications for development" 2014 *Polity* 1.
7 Gamuchirai 1.
8 The World Bank *Helping Countries Combat Corruption* Operational (2000) 43.

accountability to tax payers, which results into the abuse of private gains.[9] Although, corruption cuts across all phases of human endeavour globally, the impact is however felt by poorer and underdeveloped countries, particularly in Africa where corruption robs the commonwealth and brings the diversion of public monies into private coffers to the impoverishment of the people.[10] In general, corruption hinders sustainable economic growth, peace and good governance. The former United Nations Secretary General, Ban-Ki Moon puts it succinctly in these words:

> "We all know the heavy toll taken by corruption. More than a trillion dollars stolen or lost, every year-money needed for the Millennium Development Goals."[11]

There are several types of corruptions: first is political corruption.Political corruption prevents the government from implementing, enforcing and upholding the rule of law; the second type of corruption is the one called the bureaucratic corruption which comes in the form of bribes collected by public office bearers to circumvent due diligence and process in the public sector giving space to the violation of constitutional duties to the central government.[12] The danger inherent in bureaucratic corruption is that it does not take into consideration the ability of governments to serve the people.[13] The third type of corruption is the economic corruption where an insider of a particular organisation trades information and inflates tenders in exchange for financial gains, whilst disregarding due process in economic transactions.[14]

2 A brief overview of corruption in Africa

> "If Africa fails to stop corruption, corruption is most likely going to stop Africa."[15]

The Transparency International has asserted in many instances that Africa ranked highest in the world when it comes to corruption issues.[16] The genesis of corruption in the continent is linked to the footprint of European rule from slave trade and the industrial revolution in the nineteenth

9 Amundsen "Political Corruption: An Introduction to the Issues" 1999 *Chr. Michelsen Institute Development Studies and Human Rights* 7.
10 United Nations Economic Commission For Africa & African Union Advisory Board on Corruption "Combating Corruption, Improving Governance in Africa" *Regional Anti-Corruption Programme for Africa* (2011 – 2016) 3.
11 Ban Ki Moon *The ONE campaign: the trillion dollar scandal* (2014) 2.
12 United Nations Economic Commission 10.
13 United Nations Economic Commission 10.
14 Fitzsimons "Economic models of corruption" 2011 *Researchgate* 4.
15 Udombana "Fighting Corruption Seriously? Africa's Anti-corruption Convention" *Singapore Journal of International & Comparative Law* 2003 447.
16 Transparency International Corruption Perceptions Index 2010 https://www.transparency.org (accessed 2019-23-5).

century.[17] The local leaders held powers for the colonial masters through indirect rule which in the final analysis turned leadership into a corrupted enterprise, the local leaders asked for money from the community with a view to manipulating the bureaucratic process put in place by colonial administrators.[18] The consequences of the institutionalised corrupt system was where self-enrichment became the stock in trade in the African continent and corruption increased progressively from one historical era to another with the complex nature of corruption involving finances being introduced in Africa through colonialism.[19]

Over and above the foregoing is that it has been estimated that corruption in Africa takes away about twenty to thirty percent of funds earmarked for basic service provision.[20] In addition, African leaders embezzled billions of dollars on a regular basis stashed away in foreign bank accounts.[21]

For instance, the UN estimated that African leaders siphoned more than $200 billion out of Africa in 1991.[22] Scholars have argued that the 200 billion dollars stolen from Africa by corrupt leaders is far and above of Africa's foreign debt and that the money go far beyond the total amount of foreign aid to the whole of Africa put together.[23]

Corruption has caused and fueled organised violence through illegal utilisation of tax payers resources for private interests.[24] This is the case in circumstances where regulation of resources is premised on social identities which creates uneven allocation of resources and/or inequalities that aggrieved unrecognised or marginalised groups.[25] It has been argued that war economies, are built on corruption because the conflicting parties depend on fraud, criminal partners who give and collect bribes to execute the conflicts, for instance through acquisition of ammunitions and weaponry.[26] In September 2018 UN Security Council through John Prendergast on anti-corruption asserted that "corruption

17 Elizabeth and Tenamwenye *Corruption in Africa: A Threat to Justice and Sustainable Peace* (2014) 20.
18 Gamuchirai 1.
19 Elizabeth 20.
20 AllAfrica.com Africa: Corruption Hampers MDGs – Transparency International http://allafrica.com/stories/201010271133.html (accessed 2019-23-5).
21 Oyedoyin James Ibori in final fall http://www.odili.net/news/source/2012/apr/18/30.html (accessed 2019-23-5).
22 Owoye and Bissessar "Corruption in African countries: A Symptom of Leadership and Institutional Failure" *Challenges to Democratic Governance in Developing Countries*" https://www.researchgate.net/.../265193869 Bad Governance and Corruption in Africa (accessed 2019-23-5).
23 Gbenga "Corruption and Development in Africa: Challenges for Political and Economic Change" 2007 *Humanities and Social Sciences Journal* 1-7.
24 Murimi "Policy Breifing Arresting corruption in Africa: Role of the youth" *2018 Institute for Security Studies* 6.
25 Le Billon "Buying peace or fuelling war: The role of corruption in Armed conflicts" 2003 *Journal of International Development* 417.
26 Church "Lilies that fester: seeds of corruption and peacebuilding" 2009 *New Routes Journal* 3.

was at the root of the conflicts in the Democratic Republic of the Congo, South Sudan and the Central African Republic."[27]

It is important to examine how citizens in Africa perceive how their governments are performing in respect to the war against corruption. In all of Africa, about sixty four percent of the populace are of the opinion that the various African governments are doing a poor job at handling corruption, while only thirty two percent think that the governments are performing fairly or otherwise in the fight against corruption.[28] It is submitted therefore that this poor evaluation of Africa's leaders' effort at tackling corruption is indicative of the fact that more work need to be done by governments to clean up the public sector and bring corrupt officials to justice.

An examination at country-level evaluation in Africa showed that a small portion of governments are rated as doing well at cleaning up corruption; for example, the citizens of Botswana, Lesotho and Senegal agreed that their governments are doing well in eradicating corruption in their countries.[29] Outside of the three preceding African countries, all others scored very poor in terms of percentage in stopping corruption. Madagascar is the worst hit and most critical with ninety percent of the people asserting that the leadership has done either fairly or very badly, reason being that over forty percent of Madagascar budget is lost to corruption.[30]

Nigeria is placed at 136th over 178 countries (Transparency International, 2017),[31] South Africa, ranked 54 of the 178 countries,[32] Zimbabwe, ranked 156th over 175 countries in Transparency International 2014 Corruption Perceptions Index,[33] Liberia, ranked as 75th least corrupt out of 176 in the world and 11th in Africa,[34] and in the Benin Republic,[35] only about 45% of the Beninese believed that the government is performing below expectation in respect of corruption.

27 Murimi 6.
28 Pring *People and corruption: Africa survey global corruption barometer* (2015) 9.
29 In Botswana 54% answered well, 42% badly; Lesotho 47% well, 41% badly; Senegal 47% well, 46% badly (2015) 10.
30 Freedom House (2015) Madagascar https://www.freedomhouse.org/report/freedom world/2015/madagascar (accessed 2019-23-5).
31 Ojewale "In Nigeria, perceived corruption remains high despite praise for president's anti-graftfight" 2018 *Afrobarometer* 1.
32 Policy briefing 14: Combating corruption in South Africa https://www.democracyworks.org.za Programs Monitoring. (accessed 2019-23-5).
33 Ndoma "Zimbabweans see corruption on the increase, feel helpless to fight it" 2015 *Afrobarometer* 1.
34 Johnson Corruption remains a major problem in Liberia 2012 *CENTAL Heritage* 11.
35 Chêne "Overview of corruption and anti-corruption in Benin" 2014 *Transparency International* 1.

3 African Union anti-corruption legal documents

The African Union and the Regional Economic Communities have tried to address corruption in Africa and in its Agenda 2063, the African Union desires an Africa where corruption will be history.[36] In line with the AU Agenda 2063 with a view to eradicating corruption in Africa, the Convention on Preventing and Combating Corruption was adopted in 2003 and became operational in 2006.[37] The 2006 Convention created the African Union Advisory Board on Corruption.[38] The Board *inter alia* is saddled with the responsibility of promoting the adoption and application of anti-corruption measures in African countries and further render advise to governments on how to deal with corruption challenges at the national level.[39]

In addition to the AU Convention 2006, the following legal instruments were introduced to compliment the Convention. The African Charter on Democracy, Elections and Governance;[40] the African Union Convention on Values and Principles of Public Service and Administration;[41] the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development;[42] and; the African Union Declaration on the Principles Governing Democratic Elections in Africa.[43]

The Economic Community of West African States Protocol on the Fight against Corruption,[44] and the Southern African Development Community Protocol Against Corruption,[45] were also adopted at the regional level. It is submitted at this juncture that all of these instruments on corruption are intended to yield positive outcomes in the pursuit of AU Agenda 2063; however, the task remains on how to ensure the continental principles enshrined in these legal frameworks are achieved through efficacious and constructive implementation by African

36 Agenda 2063.
37 Adopted on 11 July 2003 and came into force on 5 August 2006.
38 Created on the 26 May 2009 under Article 22(1) of the Convention.
39 Art 22(5) of the African Union Convention on Preventing and Combating Corruption.
40 Contained in Art's 2(9), 3(9), 27(5) and 33(3) of African Charter on Democracy, Elections and Governance.
41 Contained in Art 12 of the AU Convention on Preventing and Combating Corruption.
42 Contained in Art 14 of the AU Convention on Preventing and Combating Corruption.
43 Paragraph III (g) of the AU Declaration on the Principles Governing Democratic Elections in Africa.
44 Economic Community of West African States Protocol on the Fight against Corruption (ECOWAS Protocol) was signed on 21 December 2001.
45 Protocol Against Corruption 2001. The SADC Protocol Against Corruption aims to promote and strengthen the development, within each Member State, of mechanisms needed to prevent, detect, punish and eradicate corruption in the public and private sector.

countries who are signatories to these statutes.The political will to combat the monster called corruption is a vital and critical instrumentality in effective implementation. The quantum of laws do not deter corruption, it is the will and commitment by public officer bearers that can eradicate this social evil from the African societies.To corroborate this assertion, President Buhari opined that:

> "In Nigeria, there are enough laws, rules, regulations on good governance, anti-corruption commissions and agencies and there is perhaps no need for more. What is required, is to strengthen, adequately fund and motivate existing institutions to do their jobs."[46]

4 Corruption in South Africa

According to the mid-year 2018 reports, Statistics South Africa (Stats SA) puts the South African population at 57,73 million,[47] and corruption along side with unaccountable government is noticeable both in the public and private sectors.[48] The current situation in South Africa is reflected in SA's rankings in international indices and other reports on corruption in the media.[49] One must however say at this point that there are some proofs of anti-corruption efforts in South Africa, one of which is the present Raymond Zondo Commission of Enquiry.[50]

The South African authorities have continuously made unrelented moves and quality commitments to fighting corruption in South Africa, this move is reflected in the SA's government's statement on Anti-Corruption Summit in 2016 in the UK.[51] It is interesting to note that SA is one of the founders of the Open Government Partnership (OGP),[52] and a member of the G20 group of nations.[53]

---

46 President Muhammadu Buhari "My plan to fight corruption in Nigeria" *Against Corruption: A collection of essays,* 12 May 2016. https:// www.gov.uk/ government/ publications/against corruption-a-collection-of-essays/against-corruption-a-collection-of-essays#contents (accessed 2019-24-5).

47 Stats SA Mid-year population estimates 2018 1.

48 Van Schalkwykm*"Open data and the fight against corruption in South Africa*" 2017 4.

49 South Africa remains among the world's most corrupt countries. This is after the country ranked 73rd in the 2018 Corruption Perceptions Index released by Transparency International. The Index uses a scale of 0 to 100, where 0 is highly corrupt and 100 is very clean. South Africa had a score of 43 and was placed 9th in Sub-Saharan Africa which is ranked as the worst performing region in the world. The most un-corrupt countries are Denmark and New Zealand and the most corrupt Somalia, Syria and South Sudan. https://www.sabcnews.com/Home/Homepage Featured Story Slider (accessed 2019-24-5).

50 The Raymond Zondo Commission was appointed on 23 January 2018 by former president Jacob Zuma in terms of section 84(2)(f) of South Africa's Constitution. Its purpose is to investigate allegations of state capture, corruption and fraud in the public sector, including organs of state.

51 UK anti-corruption summit: South Africa's statement - Corruption Watch https://www.corruptionwatch.org.za/uk-anti-corruption-summit-south-africas-statement (accessed 2019-24-5).

Although, SA is member of the OGP, it does not have a defined and identified open data policy and the SA government has not signed the International Open Data Charter.[54] However, the only domestic open data and anti-corruption policy in SA is captured in the National Development Plan: Vision for 2030.[55]

The SA's National Development Plan is one of the few documents with a defined focus as regards open data and anti-corruption issues.[56] In addition to the NDP, there is the National Integrated ICT information and communication technologies Policy White Paper,[57] released in 2016.[58] The principal objective of the National Integrated ICT is to provide the direction for the implementation of SA government's commitment to open governance and open data.[59]

In its third Open Government Partnership National Action Plan, SA showed signs of commitment by incorporating both the open data and anti-corruption policy into three segments

> "open budgeting, which commits to making information publicly available via an accessible platform that allows citizens to track government spending; a national open data portal, to increase government transparency; and beneficial ownership transparency."[60]

52 The Open Government Partnership was founded on 20 September, 2011. The Open Government Partnership is a multilateral initiative that aims to secure concrete commitments from national and subnational governments to promote open government, empower citizens, fight corruption, and harness new technologies to strengthen governance. Other founding members are: United States, United Kingdom, Mexico, Philippines, Brazil, Indonesia, Norway and South Africa.

53 Founded on 26 September 1999. As of 2017 there are 20 members of the group: Argentina, Australia, Brazil, Canada, China, the European Union, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom, and the United States.

54 Out of a total of 54 countries in Africa, only ten countries had held open data events, these countries include Liberia, Rwanda, Burkina Faso, Uganda, and Ghana. https://www.od4d.net/files/reportiodc-2016-web.pdf. (accessed 2019-24-5).

55 National Development Plan: Vision for 2030: Our future: Make it work. https://www.poa.gov.za/.../NPC%20National%20Development%20Plan%20Vision%202... (accesed 2019-24-5).

56 National Planning Commission, National Development Plan: Vision for 2030 (Pretoria: National Planning Commission, 2011), 408, https://www.gov.za/sites/ www.gov.za/files/devplan_2.pdf. (accessed 2019-24-5).

57 Department of Telecommunications and Postal Services, National Integrated ICT Policy White Paper (Pretoria: Department of Telecommunications and Postal Services, 2016) https://www.dtps.gov.za/images/phocagallery/Popular_Topic_Pictures/National_Integrated_ICT_Policy_White.pdf (accessed 2019-24-5).

58 Fin24Tech Cabinet Finally Approves SA ICT Policy 29 September 2016 https://www.fin24.com/Tech/News/cabinet-finally-approves-sa-ict-policy-20160929 (accessed 2019-24-5).

59 Department of Telecommunications and Postal Services (2016) 117.

In assessing the South African government's activities in general with regard to the performance and commitments to the G20 Principles, one cannot but come to the sad conclusion that South Africa as a country has not faired or done well at the national space in translating the war against corruption into alreity. This conclusion comes on the heels of the fact that no alleged public officers in South Africa, whether serving or retired has been brought to justice or convicted by a court of competent jurisdiction. It is submitted therefore that, in the absence of a stronger political governance and the de-institutionalisation of corruption, the transparency policy being pursued by South Africa by open government data will not result into accountability. It is hoped and believed that as South Africa's sixth administration comes into effect on the 25th of May 2019 and after the May 8th general elections respectively, positive and drastic measures will be taken to fight corruption to a stand still in South Africa.

The exact cost of corruption in South Africa is not certain, there are however some institutions such as Corruption Watch and Civil Society Organizations (CSOs) that are unequivocal that corruption is endemic across government parastatals in South Africa; as a result, there is no accountability.[61] Corruption in SA takes different dimensions and narratives and these include but are not limited to: gross financial misadministration, fraud, political interference in the recruitment of public sector employees, fraudulent representations by executive members of their qualifications, procurement irregularities and bribery.[62] The foregoing assertions are corroborated by South Africa's position in international indicators in corruption matters;[63] to this end, corruption is pervasive and systemic in South Africa.[64] Although, there is no specific sector and no evidential proof to buttress the selection of certain sectors as highly affected, corruption is nonetheless clearly visible in the health sector,[65] with Corruption Watch reporting in 2015 corruption in education (16% in total), traffic licensing (12%) and immigration (6%).[66]

60 Open Government Partnership The 3rd South African Open Government Partnership Country Action Plan 2015–2017 (Washington, DC: Open Government Partnership, 2015) https://www.opengovpartnership.org/sites/default/files/South_Africa_Third_%20AP.docx (accessed 2019-24-5).

61 Africa Check https://africacheck.org/reports/has-sa-lost-r700-billion-to-corruption-since-1994why-the-calculation-is-wrong (accessed 2019-27-5).

62 Open Government Partnership, South Africa Progress Report 2013–2014: Second Progress Report (Washington, DC: Open Government Partnership, Independent Reporting Mechanism, 2014) 23 https://www.opengovpartnership.org/sites/default/files/IRMReport_SouthAfrica_final.pdf (accessed 2019-27-5).

63 Transparency International's Transparency Index available https://www.transparency.org/cpi2015#results-table, the World Justice Project's Rule of Law Index http://data.worldjusticeproject.org/#/groups/ZAF and the Afrobarometer available http://afrobarometer.org/ (accessed 2019-27-5).

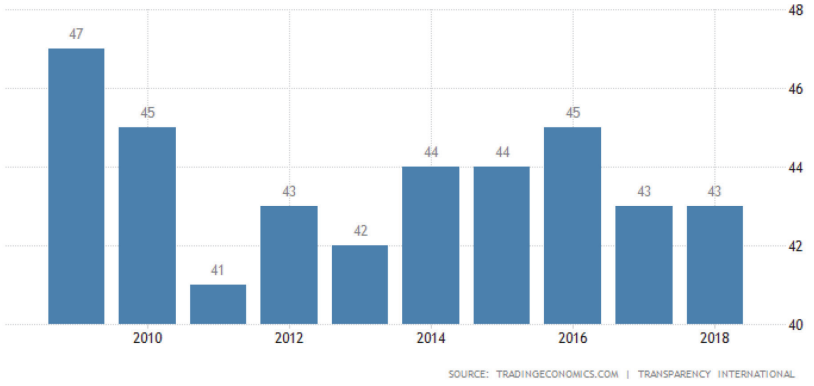
64 Merchant "A Captured State?" in Carbone *South Africa: The Need for Change* (2016) 54.

65 Rispel "Exploring Corruption in the South African Health Sector" 2015 *Health Policy and Planning* 239–249.

In addition to the above claims, The Organisation Undoing Tax Abuse (OUTA) points its fingers to entities like Eskom, the African electricity public utility, established in 1923 as the Electricity Supply Commission by the government of South Africa, South Africa Airways, the South African Broadcasting Corporation and the South African National Roads Agency.[67] In fact, the SA Auditor-General unpacked that there has been increase in reckless transactions from 2007 to 2015, with much of the unaccounted-for expenditure taking place at the subnational levels.[68] With that being said, there are several key legislations to combat corruption and robust legislative frameworks to root out corruption in South Africa. These legislations just to mention a few are: the Prevention and Combating of Corrupt Activities Act 2004; being the vital law on corruption in South Africa, and the Promotion of Access to Information Act 2000, which gives effect to the constitutional right of South Africans to access government-held information.[69]

5 South Africa Corruption Index

Transparency International scored South Africa only 43 points over 100 in the 2018 Corruption Perceptions Index, which on average gives South Africa only 46.62 scores from 1996 until 2018 as reflected in the chat below, which is about 56.80 scores in 1996 and a record low of 41 scores in 2011.[70]



66 Corruption Watch Amp Up the Volume: Annual Report 2015 (Johannesburg: Corruption Watch, 2016), https://www.corruptionwatch.org.za/wp-content/uploads/2016/03/Corruption-Watchannual-report-2015.pdf (accessed 2019-27-5).
67 Van Schalkwyk 12.
68 Merchant 54.
69 Van Schalkwyk 68.
70 South Africa Corruption Index 2019 https://www.tradingeconomics.com/South Africa (accessed 2019-21-5).

6 Corruption in Nigeria

> "Unlimited power is apt to corrupt the minds of those who posses it; and this I know, my lords: that where laws end, tyranny begins."[71]

It is no longer news that one of the social menace and phenomenon confronting the entire human race is corruption, and Nigeria is no exception in the sense that this monster evil called corruption has manifested in all areas of national life in Nigeria.[72] Pre and post independence Nigeria on October 1st 1960, every administration has promised to address corruption, up until now, there been no serious progress made in this regard.[73]

Like South Africa, corruption manifests itself in every facet of public and private sector in Nigeria since 1960. The Economic and Financial Crimes Commission (EFCC) is one of the anti-corruption agencies in Nigeria, in 2012 asserts as follows:

> "corruption in the public sector remains a sore spot in Nigeria's quest to instil transparency and accountability in the polity. The failure to deliver social services, the endemic problem of the power supply and the collapse of infrastructure are all linked with corruption."[74]

Lamenting the effect and evil of corruption in societal underdevelopment, the late Kofi Anan said:

> "This evil phenomenon (corruption) is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately – by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key element in economic underperformance, and a major obstacle to poverty alleviation and development."[75]

Over the years, the quality of life of the common man in Nigeria has been and is still negatively impacted by corrupt leaders through corruption in Nigeria. In this regard, the general opinion across Nigeria is that corruption is traceable to all tiers of governments in the country because Nigeria is famous for high profile corruption.[76]

---

71 Ogbeid "Political Leadership and Corruption in Nigeria Since 1960: A Socio-economic Analysis" 2012 *Journal of Nigeria Studies* 1.

72 Adesina "Nigeria and the burden of corruption" 2016 *Canadian Social Science* 12.

73 Tignor "Political corruption in Nigeria before independence" 1993 *The Journal of Modern African Studies* 176.

74 Ishaka "Corruption, conflict and national development in Nigeria" 2018 *Veritas international journal of entrepreneurship development* 16-17.

75 Anan *United Nations Convention Against Corruption* (2004) iii.

76 Amundsen *Good governance in Nigeria a study in political economy and donor support* (2010) 1.

The former military head of state and also President of Nigeria for two consecutive terms who himself is not free from corruption, Olusegun Obasanjo abridged the corruption scenario in Nigeria in the following words:

> "The story of my country Nigeria is fairly well known. Until 1999, the country had practically institutionalized corruption as the foundation of governance. Hence institutions of society easily decayed to unprecedented proportions as opportunities were privatized by the powerful. This process was accompanied, as to be expected, by the intimidation of the judiciary, the subversion of due process, the manipulation of existing laws and regulations, the suffocation of civil society, and the containment of democratic values and institutions. Power became nothing but a means of accumulation and subversion as productive initiatives were abandoned for purely administrative and transactional activities. The legitimacy and stability of the state became compromised as citizens began to devise extra-legal and informal ways of survival. All this made room for corruption."[77]

The Nigeria corruption situation, just like in Madagascar, South Africa, Somalia and Tanzania, can best be qualified as the criteria of systemic corruption, reason being that corruption is a daily life occurrence in Nigeria, it is tolerated, accepted, and institutionalised in a greater proportion in a way that both the giver and receiver of bribes have internalised and supported that behaviour.[78]

The major hot spots in corruption in Nigeria is identified in the following areas but are not limited to the following:

> "intentional distortion of financial records; misappropriation of assets whether or not accompanied by distortion of statement; payment for contracts of jobs not executed; ten percent kick backs from contracts awarded; intentional loss of receipts and mutilation of account documents; insertion of fictitious names in the payment voucher and the amount involved paid to unauthorized persons; using government official letter head paper to order for goods for private use purporting that it belongs to government; paying public cheques into private account for any reason best known to the officer."[79]

7 Nigeria corruption Index

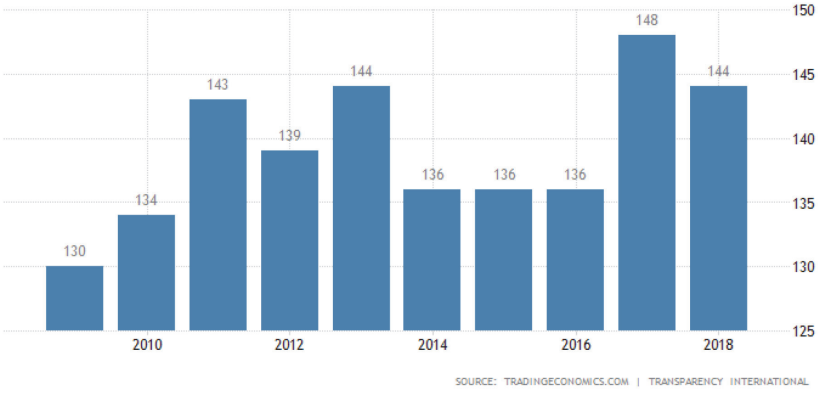
The 2018 Corruption Perception Index puts Nigeria at 144 least corrupt nation out of 175 countries as shown below, according to Transparency International. This means that corruption rank in Nigeria on the average

77 Obasanjo Nigeria: From pond of corruption to island of integrity a lecture delivered by him at the 10th Anniversary Celebration of Transparency International, Berlin, November, 7 2003.

78 Aluko "The institutionalization of corruption and its impact on political culture and behaviour in Nigeria" 2002 *Nordic Journal of African Studies* 396.

79 Agenyi "Corruption in some public sectors: Implications for sustainable socio-economic development in Nigeria" 2009 *NASHER Journal* 128- 134.

is 121.48% from 1996 until 2018, culminating in an all high level of 152 in 2005 and a record low of 52 in 1997.[80]



8 Cleaning corruption mess in Africa

The African Union has provided both legal and institutional mechanisms in its Convention to combat corruption in Africa, it is noted however that these mechanisms provided by the AU may not be able to achieve this aim since corruption is systemic in Africa.[81] Legal and institutional mechanisms must combine with collective involvement of all people; put differently, there must be social involvement or social empowerment in the fight against corruption.[82] Social empowerment includes the protection of political and economic resources available to ordinary citizens.[83] Additionally, social empowerment involves making sure that civil society is fortified with a view to strengthening political and economic vitality which ultimately culminates in providing an orderly routes of access and rules of interaction between state and society.[84] It is submitted that in circumstances where social empowerment succeeds, it may not completely eradicate corruption, it will however provide the necessary support for institutional reforms and help institutionalise reform for the long term by linking it to lasting interests contending in active political and social processes.[85]

80 Nigeria Corruption Rank 2019 Data https://www.tradingeconomics.com/Nigeria (accessed 2019-27-5).
81 Opeoluwa *A Human Rights Approach To Combating Corruption In Africa: Appraising The AU Convention Using Nigeria And South Africa* (LLM dissertation 2005 UP) 34.
82 Johnston "The Search for Definitions: The Vitality of Politics and the Issue of Corruption" 1996 *International Social Science Journal* 85-104.
83 Johnston 85.
84 Johnston 83.
85 Johnston 83.

9 Approaches to cleaning up corruption in Nigeria and South Africa

9 1 The fourth industrial revolution approach (4IR)

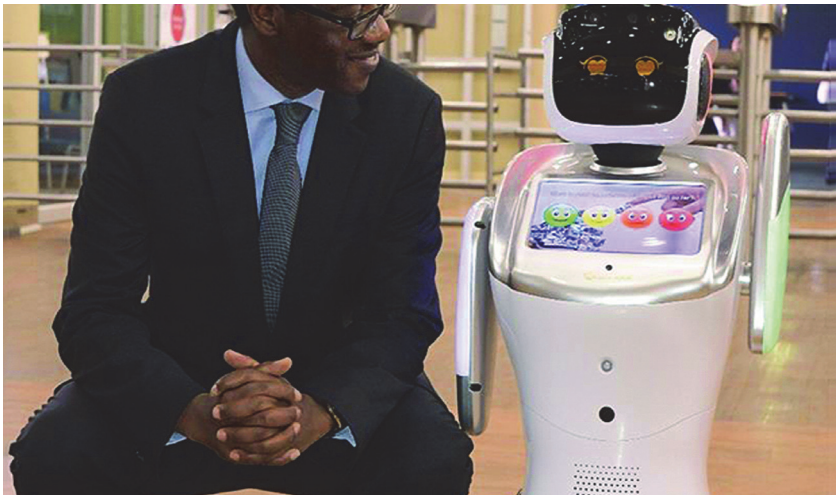
The fourth industrial revolution, (4IR) explains and depicts a situation where people move between artificial intelligence (AI) and offline reality with the assistance of interlinked technology which helps humans to manage their daily lives and activities.[86] The various industrial revolutions have chronicled chequered history. The (1STIR) changed the course of human history and economy from an agrarian and handicraft economy to that of industry and machine manufacturing dominance; the (2ndIR) brought with it oil and electricity which fastened abundance of production; while the (3rdIR) ensured that (IT) information technology was utilised to automate production.[87] It is submitted that, each industrial revolution is viewed as a separate advent, however, all the three revolutions are perceived as several phenomena building upon the creativity of the previous revolution which brings with it more advanced forms of production.

In line with the 4IR, the University of Pretoria (UP) has become the first University in the continent of Africa to hire the services of the first client robot working at the University library; according to UP, "the introduction of the robotic librarian is in keeping with its focus on evolving in line with the fourth industrial revolution."[88] In addition, UP hosted its Tuks Robot Race Day, with over seventy autonomous robotic vehicles competing for sports. The robotic librarian is called Libby, it interacts with all the library users and visitors on wheelchairs.[89] Libby commenced employment in the UP main library on Tuesday, 28 May 2019, "having over 60 sensors, cameras and software integrations that enable her to receive and process various commands and requests. She boasts a tablet integrated on her chest area for manual input. Her brain is connected to Watson, IBM's question-answering computer system, which processes queries directed at Libby."[90]

Without advocating for the loss of employment to robots in the public and private sectors of the economy, Nigeria and South Africa can borrow a leaf from the University of Pretoria and take advantage of the 4IR by robotising all of their governments institutions to monitor and report cases and incidents of corruption or even the intent to perpetrate corrupt act; South Africa can install the use of robots in all of its chapter nine institutions,[91] and other state owned enterprises (SOEs) in the country,[92]

86 Miller "Natural Language: The User Interface for the Fourth Industrial Revolution" 2016 *Opus Research Report* 3.
87 Min Xu The Fourth Industrial Revolution: Opportunities and Challenges 2018 *International Journal of Financial Research* 90.
88 Admire "University of Pretoria employs Watson-powered robotic" 2019 1.
89 Admire 1.
90 Admire 1.

while Nigeria can do same in all of its government parastatals.[93] This will ensure governmental openness and fidelity at all spheres of government because before corruption takes place, the robots would have exposed the fraud and the officials involved.



Prof. Tawana Kupe, University of Pretoria vice-chancellor and principal, with Libby in South Africa,[94]

As can be seen above, Prof. Kupe interacting with Libby for a possible instruction on the task the VC wants Libby to carry out for him.

9 2 The print, electronic and other social media platform approach

All forms of media act as institution for checks and balances in all facet of societal activities because the media can curb corruption.[95] On top of this, modern societies and the media serve as external monitor in fighting corruption.[96] The media further ensures compliance with procedural, democratically enacted legislations, values, and norms.

91 Chapter 9 State Institutions Section 181(1) of the South African Constitution.
92 Sturesson *State-Owned Enterprises Catalysts for public value creation?* (2015) 1.
93 Broadcasting Organisation of Nigeria (BON), Bureau Public Enterprises (BPE), Bureau of Public Procurement (BPP), Central Bank of Nigeria (CBN) etc.
94 Admire 1.
95 Christopher "Free to Expose Corruption: The Impact of Media Freedom, Internet Access, and Governmental Online Service Delivery on Corruption" 2016 *International Journal of Communication* 4702–4703.
96 Brunetti "A free press is bad news for corruption" 2003 *Journal of Public Economics* 1803.

Although, the media does not possess the constitutional legitimacy and powers like the three arms of government to impose sanction for the misconduct of corrupt public officials; they however influence public control indirectly,[97] by holding political decision makers accountable for their actions;[98] strengthen checks and balances between equally powerful actors i.e horizontal accountability;[99] providing a civic forum for voicing complaints and contribute to forming public opinion; providing information about corruption, contributing to a general climate of transparency within society, curbing corruption on both systemic and individual levels;[100] by having a preventive effect and highlighting the magnitude of external rewards through bribes and high severity of punishment.[101]

Finally, a nation communicates with itself and the rest of the world through the mass media because it is through the media authorities within a state sense and see the challenges and desires of the people they are constitutionally and democratically legitimised to serve. On the other hand, it is through the media that the citizens notice the strength, power, sincerity, capacity and policies of those in the position of authority because

> "A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power that knowledge brings."[102]

9 3 Philosophical approaches to cleaning up corruprion

The motivation to clean up corruption from Nigeria and South Africa in particular and in Africa in general require effective, accountable leadership and political will rather than by actual or real interest in the efficacy of a country's political and economic institutions;[103] reason being that "corruption goes with power … therefore to hold any useful discussion on corruption; we must first locate it where it properly belongs – in the ranks of the powerful."[104]

97 Stapenhurst "The Media's Role in Curbing Corruption" 2000 *World bank institute* 20-21.

98 Norris "Giving voice to the voiceless: Good governance, human development & mass communications" 2002 *New York, NY: United Nations Development Programme* 15.

99 Camaj "The media's role in fighting corruption: Media effects on governmental accountability" 2012 *The International Journal of Press/ Politics* 26-27.

100 Kolstad "Is transparency the key to reducing corruption in resource-rich countries?" 2009 *World Development* 521–532.

101 Becker Crime and punishment: An economic approach (1974) in Becker, *Essays in the economics of crime and punishment* 1–54.

102 Kilimwiko "The Role of the Media in Fighting Corruption" in Investigative Journalism in Tanzania 1996 *Arusha Tanzania* 73.

103 John "Bureaucratic Corruption in Africa: The Futility of Cleanups" 1996 *The Cato journal* 7.

Under this segment, the article tries to argue and elucidate the real character of corruption using philosophical approaches.

9 3 1 Utilitarian approach to eradicating corruption

The utilitarians are of the view that human beings should behave or act in a moral way that will result in the best outcomes.[105] On the other hand, the deontologists maintain that people should adhere to certain rules with a view to militating against acts of corruption.[106]

The utilitarian approach emphasises greatest happiness for the majority of the people, it can be deduced therefore that anyone cut in an act of corruption will give little or no attention to any laws and rules forbidding corruption because actions are considered right when they produce happiness, not the doer's happiness, but the greatest amount of happiness altogether for the populace.[107] To this end, actions are right when the actions result into or promote happiness and the actions are wrong when the actions do not promote happiness.[108] The logical conclusion from the preceding argument is that if corruption does not advance pleasure or prohibit pain for the commonwealth good they are not morally wrong from a utilitarian point of view and the utilitarians would say that corruption is valid when it benefits more individuals in a society than it harms.[109]

9 3 2 Deontological approach to eradicating corruption

The deontologists believe that in matters relating to corruption, the judge or the court will consider the issues differently, depending on the rules of reasoning or interpretation of the relevant laws. To the deontologists, rules, commandments, laws and codes of practice act as moral compasses, as a result, deontologists ascribe to strict rule-based morals when dealing with public monies. It is for this reason that Blanchard opined that:

> "Deontologists have shown a fidelity to actual moral judgment that is probably closer than that of any other contemporary school. They have argued with great force that moral judgments are really judgments, not expressions of feelings only, and here – for whatever it is worth – common sense is undoubtedly on their side."[110]

---

104 Achebe The trouble with Nigeria 1993 http://www.vanguardngr.com/2013/05/achebe-the-icon-and-greatest-anti-corruptioncrusader/ (accessed 2019-4-6).

105 The most important classical utilitarians are Jeremy Bentham (1748-1832) and John Stuart Mill (1806-1873).

106 Vorster "Fighting corruption – a philosophical approach" 2003 *Die Skriflig/ In Luce Verbi* 651.

107 Mill *Utilitarianism* (1907) 9.

108 Mill 108.

109 Ashley "A bitter pill must be swallowed: An ethics based view of corruption" 2013 *Arkansas Journal of Social Change and Public Service* 1.

110 Vorster "Fighting Corruption- A philosophical Approach" 2013 *In die Skriflig/ In Luce Verbi* 47(1) 4.

From the above reasoning, it is submitted that, a deontological perception of corruption requires a meticulous care to moral norms and their relation to conscience in the human mind.

10 Way forward in Nigeria and South Africa: developing a corruption plan

Corruption builds and brings an environment that becomes corruption-friendly.[111] In Nigeria,[112] and SA,[113] the endemic poverty, collapsed public institutions and the decaying moral values must be viewed and perceived against the backdrop of the desires for materialistic gains by few individuals in the position of authority. The role anti-corruption mechanisms have played in the fight against corruption cannot be over emphasised by adopting preventive measures in addition to criminal law measures, creating a mutual evaluation mechanism to monitor implementation and encourage international cooperation, and recognising the important role for civil society in the fight against corruption,[114] however it is imperative to stress that a long-term programme is required to improve and strengthen moral renewal and awareness of the entire population in Nigeria and South Africa. Creating awareness and moral renewal will require a well-informed programme managed by the government with special contributions by the civil society directed towards in inculcating values and practices built on honesty, integrity and responsibility. Although, a corruption prevention programme is a proactive idea modelled to radically reduce corruption, it does not completely eradicate the incidence of corruption in any society or organisation. Precedent upon the foregoing, the paper reproduces verbatim the understated programme plan for Nigeria and South Africa.[115]

10 1 The offender

This refers to the corrupt person, i.e. the person who demands and receives bribes or gratification for carrying out his normal paid duties. A corruption prevention plan developed in line with the offender would see to it that they would be caged through laws and rules making it difficult for them to intervene in official business. Similarly, the strict enforcement of the laws and rules in official business must be a priority.

111 Vorster 7.
112 Rawlings "Understanding Corruption in Nigeria and its Implications to National Security and Sustainable Development" 2013 *IOSR Journal Of Humanities And Social Science* 64.
113 Manyaka "The Phenomenon of Corruption in the South African Public Sector: Challenges and Opportunities" 2014 *Mediterranean Journal of Social Sciences* 1572.
114 Brandolino "Fighting corruption: The role of diplomacy and International agreements" 2001 *The journal of public inquiry* 11-12.
115 Mclaughlin and Muncie *Controlling Crime* (2001) 62-63.

10 2 The victim

This refers to the person who (in the case of bribery for instance) gives either willingly or unwillingly. The victim is often forgotten or even neglected in the incidence of bribery, as an aspect of corruption. However, without willing or comprising victim there would be no corruption in the first place. Developing a prevention plan along this line would encompass clearly laid out and strictly enforced sanctions against victims in corruption cases. It is important to add that the victim may be the society, organisation, or the citizenry. The problem in this case is that the application of sanctions is usually difficult as the 'victim' here may not even be aware of what is going on. In other words, there are instances where gullible persons are made "victims" thereby suffering what they are unaware of.

10 3 The environment/community

This refers to the place where corruption takes place. It can be the office, church, school, the community or indeed the highway. Developing corruption prevention plan in this section would centre on giving officials better incentives such as improved salaries, allowances and promotions as when due. Again, this should be explicitly formulated code of conducts with sever and swift execution of sanctions.[116]

11 Conclusion

> "By justice a king gives a country stability, but those who are greedy for bribes tear it down."[117]

Reducing corruption to a sustainable level is feasible in Nigeria and South Africa, however, it requires a direct attack because systemic and institutional challenges require a solid social grounding to succeed and sustain over a long period of time; in this connection, fight against corruption does not require only the ability to detect, deter and punish corrupt acts but also needs the long-term formulation of a system of public order and transparency in government.[118]

The article provided an analysis of the corruption clean up in Africa, using Nigeria and South Africa as the case study. Corruption exists in Nigerian and South African public sectors is no longer news, but what may be news are the problems and opportunities that could be harnessed more beneficially to bring to the barest minimum the extent and level of corruption in both countries. In addition, the paper also agrees that both Nigeria and South Africa public sectors have sound legal frameworks and strategies to fight corruption to a stand still, but the problem remains the

116 Mclaughlin 3.
117 The King James Bible Proverbs Chapter twenty nine verse four.
118 Antonio "The Global Programme Against Corruption" 2004 *United Nations Anti-corruption Toolkit* 22.

failure to comply with those processes and procedures as a result of the insufficient governmental dedication and devotion that provides chances for immoral, unlawful and/or corrupt practices.[119]

The article argued that corruption poses a serious obstacle to sustainable economic, political and social progress in the African continent in general but to Nigeria and South Africa in particular in every areas of development. Corruption has eroded transformation and competitiveness in Nigeria and South Africa, thereby giving space to bribery.[120] Governments officials divert public funds meant for the promotion of the wellbeing of people for their individual purposes. As a result of what has been said, corruption has brought severe and acute growth in income and wealth inequality for many years in both countries under examination. On top of this, it was submitted that corruption in a greater dimension will hindering the possibility of achieving the 2030 Sustainable Development Agenda. This is corroborated with the need to intensify concerted drive to improve leadership frameworks, strengthen actions to hold public servants accountable, to improve, prevent, detect and sanction corruption by all means possible. It was also opined that the fight against corruption requires all hands to be on deck which must be approached holistically with coordinated efforts.

Finally, the role of the media is vital in creating public awareness, promote integrity, detect, and report acts of corruption. The media owe an obligation to the people they serve because a successful action against corruption depends on the information disseminated by the media. To this end, media gives information on corruption, its sources, repercussion and possible solutions; additionally, media can investigate, detect and report incidences of corruption, bringing corruption cases into the public space and instituting judicial prosecution.[121]

119 Manyaka 1579.

120 Angel "Putting an end to corruption" 2016 *Organisation for economic co-operation and development* 1.

121 Organisation for economic co-operation and development (OECD) (2018), The Role of the Media and Investigative Journalism in Combating Corruption https://www.oecd.org/corruption/The-roleof-media-and-investigative-journalism-in-combatingcorruption.htm (accessed 2019-6-6).

Is the requirement of integration of the bride optional in customary marriages?

Siyabonga Sibisi
LLB LLM (UKZN)
Lecturer, School of Law, University of KwaZulu-Natal, Howard College Campus

SUMMARY

Section 3(1) of the Recognition of Customary Marriages 120 of 1998 provides for the requirements for a valid customary marriage entered into after the commencement of the Act. The requirements are, the parties must be 18 years of age or above; they must consent to being married under customary law and the marriage must be negotiated and entered into or celebrated in terms of customary law. The result of entering into or celebrating a customary marriage is the bride be integrated into her new family. The question is, may the parties agree to waive the integration of the bride? This depends on whether this is a dispensable or indispensable requirement. The article forwards two school of thoughts; the first favours the view that integration of the bride is dispensable, whereas the second forwards the view that integration of the bride is indispensable. These two schools are analysed using largely case law. The article begins from the premise that integration of the bride is an indispensable requirement. This being said, it forwards the view that integration comprises many events, some of which are dispensable; one of these event is the handing over of the bride, which cannot be waived.

1 Introduction

The recent judicial and popular treatment of customary law creates the impression that there exist uncertainty regarding various aspects of customary marriages; central to this uncertainty is the question of when is a valid customary marriage concluded? This perceived uncertainly is further fueled by the fact that, in South Africa, various ethnic groups differ in practices. Nonetheless, there are common practices such as the negotiation and payment of *ilobolo*. Does finalisation of *ilobolo* alone conclude a valid customary marriage? Is there a need for further practices such as the handing over of the bride or the integration of the bride? Is it permissible for parties to omit any of the practices? In addition, what are the consequences should any of the practice be omitted? In light of various judicial decisions, some recent, answers to these questions are not unanimous.

The purpose of this article is to investigate whether, under customary law, the parties may waive the requirement of integration of the bride. It will focus heavily on how the courts have approached matters dealing with this topic. It will open by introducing the two schools of thoughts to integration of the bride. The first school argues that integration of the

How to cite: Sibisi 'Is the requirement of integration of the bride optional in customary marriages?' 2020 *De Jure Law Journal* 90-103
http://dx.doi.org/10.17159/2225-7160/2020/v53a6

bride is a dispensable or variable requirement that parties may waive if they so choose. The second school argues the opposite – that integration of the bride is an indispensable requirement. Below it will be shown that our courts have not settled on any school.

The decision in *Mabuza v Mbatha,*[1] is central to the question of integration of the bride. Courts that have purported to follow the latter decision interpret it as authority for the view that integration of the bride in dispensable. Below, it will be argued that this is an incorrect interpretation of the judgment. It will show that the judiciary, especially the Supreme Court of Appeal (SCA), has not reached certainty on this matter. This will be illustrated using two decisions of the SCA that are opposed to each other. This article take the position that the integration of the bride is an indispensable requirement that comprise various preliminaries, some of which may be waived, varied or abbreviated, however, complete waiver is impermissible. Among these preliminaries is the physical handing over of the bride,[2] which cannot be waived.[3]

2 Statutory requirements for a valid customary marriage

Section 3(1) of the Recognition of Customary Marriages Act (the Recognition Act)[4] provides for the requirements for a valid customary marriage entered into after the commencement of the Act.[5] In order to be valid, the marriage must meet three requirements: the parties must both be 18 years or above,[6] they must consent to be married in terms of customary law,[7] and the marriage must be negotiated and entered into or celebrated in accordance with customary law.[8]

The first requirement is straightforward. Whereas the second requirement can be a subject of dispute before courts. In *Maropane v Southon*,[9] the court had to determine whether the parties had consented to being married in terms of customary law. The court held that by initiating *ilobolo* negotiations, an integral part of a customary marriage,[10] the parties had consented to being married in terms of customary law.[11] It is the third requirement that has been, and continues to be, debated

1 *Mabuza v Mbatha* 2003 4 SA 218 (C).
2 Bekker and Rautenbach *Introduction to Legal Pluralism in South Africa* (2014) 52.
3 *Fanti v Boto and others* 2008 (5) SA 405 (C) para 22.
4 Recognition of Customary Marriages Act 120 of 1998 (the Recognition Act).
5 The commencement date is 15 November 2000.
6 S 3(1)(a)(i) of the Recognition Act.
7 S 3(1)(a)(ii) of the Recognition Act.
8 S 3(1)(b) of the Recognition Act.
9 *Maropane v Southon* (755/12) [2014] ZASCA 76 (24 May 2014).
10 In this regard see Maithufi and Bekker "The Recognition of Customary Marriages Act of 1998 and its impact on family law in South Africa" 2002 *CILSA* 182 187.
11 *Maropane v Southon supra,* para 28.

about by lawyers, judges and academics – that is whether a customary marriage was negotiated and entered into or celebrated in accordance with customary law.[12] Although the Recognition Act is unequivocal about this requirement, however it is silent on how exactly the marriage should be "negotiated" and "entered into" or "celebrated" in accordance with customary law. The reason for this omission lies in our beautiful rainbow nation and the different ethnic groups of South Africa.[13] As it has been pointed out above, different ethnic groups celebrate marital unions in their unique ways; even within the same ethnic group, practices do differ.[14] Therefore no good could have been achieved in the legislature prescribing how a customary marriage should be celebrated; such would have been in ignorance of the living and flexible nature of customary law. Further, it would not have been in keeping with the principle of deference when it comes to the treatment of customary law as emphasised by the Constitutional Court in *Shilubana v Nwamitwa*.[15] In *Mbungela v Mkabi* the Supreme Court of Appeal reiterated:

> "The Constitutional Court has cautioned courts to be cognisant of the fact that customary law regulates the lives of people and that the need for flexibility and the imperative to facilitate its development must therefore be balanced against the value of legal certainty, respect for vested rights and the protection of constitutional rights. The courts must strive to recognise and give effect to the principle of living law, actually observed customary law, as this constitutes a development in accordance with the 'spirit, purport and objects' of the Constitution within the community…"[16]

This being said, it is accepted that "negotiated" is associated with negotiations for the payment of *ilobolo*.[17] What is required is that the two

12 See also *Motsoatsoa v Roro* [2011] 2 SA 324 (GSJ) para 10 where the court states that a factual determination must be carried out in order to determine whether the requirements of s 3(1)(b) are present.

13 *Maropane v Southon supra,* para 35.

14 Nkosi, Customary marriage as dealt with in *Mxiki v Mbata in re Mbata v Department of Home Affairs and others* (GP) (unreported case no A844/2012, 23-10-2014) (Matojane J) Feb 2015 DR Feb available at http://www.derebus.org.za/customary-marriage-as-dealt-with-in-mxiki-vmbata-in-rembata-v-department-of-home-affairs-and-others-gp-unreported-case-noa8442012-23-10-2014-matojane-j/ accessed on 13 September 2019; see also Nkosi and Van Niekerk "The unpredictable judicial interpretation of section 3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998: *Eunice Xoliswa Ngema v Sifiso Raymond Debengwa* (2011/3726) [2016] ZAGPJHC 163 (15 June 2016)" 2018 THRHR 345, 348; see also *Mbungela v Mkabi* unreported case number 820/2018 of 30 September 2019 (SCA) para 17 wherein variations in local practices are acknowledged.

15 *Shilubana v Nwamitwa* 2008 9 BCLR 914 214 (CC) para 49.

16 *Mbungela v Mkabi supra*, para 18.

17 Himonga and Nhlapo *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 103. At this state one must pause to point out that *ilobolo* is referred to by other names, depending on the ethnic group involved, such as *bogadi, bohali, xuma, lumalo, thaka, ikhazi, magadi* or *emabheka* (section 1 of the Recognition of Customary Marriages Act); Bekker and Rautenbach *Introduction to Legal Pluralism in South Africa* (2010) 57; Maithufi and Bakker 186.

families negotiate and reach an agreement on the payment of *ilobolo*.[18] The *ilobolo* need not be paid in full; partial payment suffices.[19] Whether a valid customary marriage may result, where no payment has been made towards *ilobolo* is unclear.[20] However, in *Fanti v Boto*,[21] the Cape High Court found that a marriage was invalid because, *inter alia*, no *lobolo* had been delivered.[22] This judgment has been criticised for not paying attention to the requirements of a customary marriage as set out in the Recognition Act despite the year of the alleged marriage being 2005.[23] It is submitted that the groom's emissaries must pay something; otherwise, the negotiations would be an exercise in futility.[24]

Ilobolo is merely one of the indispensable essentials of a customary marriage.[25] Reaching an agreement on *ilobolo* does not, on its own, conclude a customary marriage.[26] The purpose of *ilobolo* is not to 'buy' the bride. Any alignment to this view is demeaning as it drives the unacceptable perception, still held by unscrupulous individuals of various racial and ethnic groups, that women are a possession. Rather, *ilobolo* is a show of love, sacrifice and respect. It builds relations between the two families. It stems from the old age saying that "… where your treasure is, there the desires of your heart will also be".[27]

In addition to the negotiation, the marriage must also be "entered into" or "celebrated" in accordance with customary law. It is submitted that entering into or celebrating a marriage is one of the same thing. This must follow the *ilobolo* negotiations and at least partial payment thereof. As stated above, each ethnic group has its own way of entering into a customary marriage. Regardless of how a customary marriage is entered into, the result must be the integration of the bride into the groom's family. In other words, the entering into or celebration of a customary marriage results in the integration of the bride into the groom's family.

18 Ngema "Considering the Abolition of *Ilobolo*: *Quo Vadis* South Africa?" 2012 Speculum Juris 30, 35; Bekker and Rautenbach 52.
19 Nkosi; see also *Modiko v Sethabela* unreported case number 4856/2016 FSB (4 August 2017) para 10.
20 Nkosi and Van Niekerk 346 submit that it was possible for the bride's family to waive the right to *ilobolo*; Bayi and Hawthorne "Colonialisation of *lobolo*" 2018 *THRHR* 576, 588 submit that the handing-over of the bride will only take place after partial or full performance of the *ilobolo* agreement.
21 *Fanti v Boto supra*.
22 *Fanti v Boto supra*, para 28; *Ndlovu v Mokoena* 2009 (5) SA 400 (GNP) para 11 endorses *Fanti v Boto* in that *ilobolo* is one of the essentials of a customary marriage which non-compliance render a marriage invalid.
23 Bekker and Rautenbach 56.
24 Hlophe "The KwaZulu Act on the Code of Zulu Law, 6 of 1981 – a guide to intending spouses and some comments on the custom of *lobolo*" 1984 *CILSA* 164 166; see also Himonga and Nhlapo 103; *Fanti v Boto supra*, para 28.
25 *Fanti v Boto supra*, para 20.
26 Himonga and Nhlapo 97; *Ndlovu v Mokoena* 2009 (5) SA 400 (GNP).
27 This saying stems from the Bible. See the book of Matthew 6:21.

This leads to a provocative question regarding the integration of the bride. The question is whether it is permissible for the parties (bride and groom or their families) to waive the integration – after all, it is a requirement that the parties must consent to be married to each other in terms of customary law.[28] In other words, can the parties agree that their customary marriage shall be concluded on reaching an agreement on *ilobolo*? Alternatively, that the handing over will occur at the bride's residence and not the physical handing over where the bride is accompanied to the groom's residence. The point of departure is this: for a customary marriage to be valid, it must comply with customary law. Therefore, the real question is whether customary law permits the waiving of the requirement of integration of the bride.

3 Judicial approaches to integration of the bride

Fortunately, there is a relatively rich pool of decided cases dealing with the requirement of integration of the bride in customary marriages. These cases follow the two schools of thought. To reiterate, the first school argues that the requirement is dispensable and may be waived by the parties;[29] and the second school argues that the requirement is indispensable and must be complied with.[30] What is very strange about these schools of thought is that they may be drawn from the same case as authority.[31] The case is *Mabuza v Mbatha*. This case is discussed below followed by notable cases in the respective schools of thought.

3 1 Integration of the bride as a dispensable requirement

The notion that the integration of the bride is a dispensable requirement, which the parties may, if they so decide, waive, is attributable to *Mabuza v Mbatha*. Although, as it will be argued below, this case lends itself to both schools of thought, most court decisions that purport to follow it do so on the premise that the integration of the bride is a flexible requirement.

In *Mabuza v Mbatha* the plaintiff (the wife) sought, among others, a decree of divorce as well as ancillary relief.[32] She alleged that she and the defendant had concluded a valid Swati customary law marriage. The defendant opposed the action arguing that there was no valid marriage as the *Ukumekeza* custom had not been performed. *Ukumekeza* is an old-age Swati practice that also involved the bride appearing naked before

28 S 3(1)(a)(ii) of the Recognition Act.
29 *Mkabe v Minister of Home Affairs* 2016 ZAGPPHC 460 (9 June 2016).
30 *Ngema v Debengwa* unreported case no 2011/3726 GJ (15 June 2016); *Dalasile v Mgoduka and another* unreported case no 5056/2018 ECM (2 October 2018).
31 Bekker "Integration of the Bride as a requirement for a Valid Customary Marriage: *Mkabe Minister of Home Affairs* [2016] ZAGPPHC 460" 2018 *PER/PELJ* 1 7.
32 *Mabuza v Mbatha supra*, para 1.

her female in-laws.[33] It was not in dispute that the parties started their relationship in 1989. This relationship soon resulted in pregnancy in September 1989. Two months later, the respondent's family approached the plaintiff's family to discuss the payment of damages and *ilobolo*.[34] The *ilobolo* was fixed at R2500 and subsequently paid in full by the defendant.[35] In 1992, the plaintiff was officially handed over by her family to the defendant and they lived like husband and wife.[36] Around June of year 2000, the relationship between the parties deteriorated and could not be restored.

The court accepted that according to isiSwati (both parties were Swati) customary law, there were three requirements for a valid customary marriage: the payment of *ilobolo*, *ukumekeza* and the formal handing over of the bride to the bridegroom's family.[37] It was common cause that these requirements had been met except *ukumekeza*. Was *ukumekeza* a *sine qua non*? Both the parties answered this in the affirmative; the plaintiff explained that, essentially, they regarded themselves as married. She regarded herself as the defendant's wife and the defendant regarded her as his wife. She had all the benefits of being the defendant's lawful wife.[38] Further, the defendant had said that he was happy with the type of marriage that they had and there was no need for *ukumekeza*.[39]

The defendant testified that non-compliance with *ukumekeza* was a fatal blow to the validity of a Swati customary marriage.[40] He also denied that he had waived *ukumekeza*.[41] He added that *ukumekeza* had not taken place because the plaintiff did not co-operate. He failed to address the court as to the manner in which the plaintiff did not co-operate.[42] The court also pointed out the following: the defendant had on numerous occasions referred to the plaintiff as his wife,[43] and he had previously sought a divorce in terms of customary law.[44] The defendant could not explain this, instead he "was very evasive" and unable to "proffer any

33 *Mabuza v Mbatha supra*, para 2. One must caution against this misguided reference to *ukumekeza*. What really happens is that the bride, accompanied by maidens, will sing around the kraal at the groom's residence.
34 The damages related to the fact that the defendant had impregnated the plaintiff out of wedlock. See para 4.
35 *Mabuza v Mbatha supra*, paras 4 and 7.
36 *Mabuza v Mbatha supra*, paras 4 and 7.
37 *Mabuza v Mbatha supra*, para 9.
38 *Mabuza v Mbatha supra*, para 8.
39 *Mabuza v Mbatha supra*, para 9.
40 *Mabuza v Mbatha supra*, para 17.
41 *Mabuza v Mbatha supra*, para 17.
42 *Mabuza v Mbatha supra*, para 17.
43 *Mabuza v Mbatha supra* para 18. The defendant had deposed to an opposing affidavit in terms of the Domestic Violence Act 116 of 1998 and in that affidavit, he referred to the plaintiff as his wife that he had married according to custom.
44 *Mabuza v Mbatha supra*, para 5.

sensible explanation". In the court's view, he was "being economical with the truth."[45]

The court held that the practice of *ukumekeza* has no doubt evolved and could thus be waived.[46] The court found that there was, in fact, a valid isiSwati customary marriage between the plaintiff and the defendant.[47] The court went on to note that prior to the Constitution of 1996, customary law was not allowed to develop and therefore take its rightful place.[48] It was only recognised if it was not repugnant to public policy or natural justice.[49] With the advent of a supreme Constitution based on equality, any form of discrimination cannot be countenanced. Any cultural practice that fell short of the spirit, purport and object of the Bill of Right had to be developed.[50] Whether the court developed isiSwati customary law in as far as the practice of *ukumekeza* is concerned is unclear.

It has been pointed out above that the court found that in terms of isiSwati customary law there are three requirements for a valid marriage: *ilobolo*, *ukumekeza* and the formal handing over of the bride. Accordingly, the court was of the view that *ukumekeza* and the formal handing over of the bride were two distinct requirements. The court settled with *ukumekeza* as the integration of the bride into the groom's family and the handing over as a separate act. The finding that parties may waive compliance with *ukumekeza* inevitably led to the conclusion that parties could waive compliance with the integration of the bride into the groom's family.

It is submitted that the finding above is flawed because it loses sight of the fact that customary marriages are not a once-off event, but a process of many events or preliminaries.[51] It is submitted that the correct position is that in terms of isiSwati customary law, the requirements for a valid marriage are *ilobolo* and the integration of the bride.[52] These requirements are non-dispensable.[53] However, the integration of the bride comprises a series of event, some of which may be waived, condoned or abbreviated by the parties.[54] For instance, in isiSwati customary law, the necessary integration rituals that must be observed include, among others, *ukumekeza* and the handing over of the bride. It

45 *Mabuza v Mbatha supra*, para 20.
46 *Mabuza v Mbatha supra*, para 25.
47 *Mabuza v Mbatha supra*, para 27.
48 *Mabuza v Mbatha supra*, para 28.
49 *Mabuza v Mbatha supra*, para 28.
50 See also Sibisi "Breach of promise to marry under customary law" 2019 *Obiter* 340 341.
51 Nkosi; see also Himonga and Nhlapo 97.
52 Bekker 9.
53 It is essential to point out that these requirements are uniform in all customary marriages, however the ethnic groups approach integration differently.
54 *Mbungela v Mkabi* unreported case number 820/2018 of 30 September 2019 (SCA) para 21.

is open for the parties to waive *ukumekeza*, being one event towards the integration of the bride.[55] However, it is not open to parties to waive compliance with the entire integration requirement. At least some aspect of integration must be complied with. In the words of Professor Bekker "It is not the essential requirements that can be waived but rather the rituals associated with the essential requirements."[56] The judgment is also criticised for overlooking the real issue.[57] According to Bekker, the real issue was whether the bride had been integrated into her in-laws and not whether *ukumekeza* is practiced differently than what it was centuries ago.[58]

3 2 A symbolic handing over of the bride

What should be observed is that the bride must at least be handed over to her in-laws in compliance with the integration requirement. This has to take place at the groom's home.[59] The bride is welcomed and counselled by her in-laws. A beast is slaughtered; gull may be smeared or anointed on her. The families celebrate this occasion. This way she is integrated.[60] With this said, and taking into account the flexible nature of customary law,[61] has customary law evolved to such an extent that a bride may now be integrated into the groom's family at her own residence? In other words, may the families agree that the bride will not be physically handed over; instead, a "symbolic handing-over" will be preferred.

In *Sengadi v Tsambo; In re Tsambo*,[62] the court set precedent symbolic handing over. The *Sengadi v Tsambo* case follows the death of popular rapper HHP (Jabulani Tsambo). The deceased met the applicant during their days at the Witwatersrand University. They soon cohabited. A few years into their relationship, the deceased's father dispatched a letter to the applicant's mother requesting the families to meet "to discuss the union of their son and her daughter."[63] The families met and reached an agreement on the *ilobolo*, partial payment was made. On the same day, the deceased changed into an attire. The applicant was taken into a room where she was given a dress to wear. The dressed matched the deceased's attire. The families then celebrated and congratulated the parties. The celebrations were captured on video.[64] The parties resumed

55 Bekker 10.
56 Bekker 10.
57 Bekker and Rautenbach 52.
58 Bekker "The requirement for the validity of a customary marriage: *Mabuza v Mbatha*" 2019 *THRHR* (2004) 146, 149.
59 *Motsoatsoa v Roro supra* para 19; *Mxiki v Mbata, In re: Mbata v Department of Home Affairs* unreported case no A844/2012 GNP of 23 October 2014 para 10.
60 Himonga and Nhlapo 103.
61 *Mabena v Letsoalo* 1998 2 SA 1068 (T) 1074I.
62 *Sengadi v Tsambo: In re Tsambo* 2019 1 All SA 569 (GJ). The case is also reported as *LS v RL* 2019 4 SA 50 (GJ).
63 *Sengadi v Tsambo: In re Tsambo supra*, para 5.
64 *Sengadi v Tsambo: In re Tsambo supra*, para 7 and 8.

cohabitation. Following the death of HHP, and before the burial, the deceased father, the respondent, rejected the applicant. She approached the South Gauteng Division of the High Court, Johannesburg for, amongst other thing, a declaratory confirming that she was the customary law wife of the deceased.

The respondent (the deceased's father) admitted that *ilobolo* negotiation were concluded between the families, however a customary marriage was not concluded as the applicant was not handed over to her in-laws.[65] This, according to the respondent, is a crucial part of a customary marriage. He further contended that the families intended to conclude the marriage on a subsequent date, on this date, the applicant would be handed over to her in-laws and thus integrated into the family. According to custom (not clear of what group the deceased belonged to), marriage is concluded by the handing over of the bride, and on this day a lamb or goat is slaughtered and the bile is smeared on both intending spouses to cleanse them and to join the two families.[66] It was common cause that these pertinent events had not taken place.

In finding that there was a valid customary marriage, the court noted that the handing over of the bride is not an "indispensable sacrosanct *essentiallia*" for a lawful customary marriage. It further noted that in this particular case, the deceased's family had tacitly waived the compliance with the handing over by allowing the parties to cohabit,[67] and opted for a "symbolic handing over" after the conclusion of *ilobolo* negotiations.[68] In particular, the court held that the parties had complied with the requirements of section 3(1) of the Recognition Act.[69] This suggests that a valid marriage was concluded upon reaching agreement on *ilobolo* negotiations. Citing *Mabuza v Mbatha*, the court went on to say that the handing over of the bride is unconstitutional and discriminates against women as it undermines values such as freedom, equality and dignity in as far as non-compliance invalidates a marriage.[70] Therefore, the question of whether the integration of the bride is optional has not been settled.

3 3 Some observations about *Sendadi v Tsambo* judgment

In *Sengadi v Tsambo*, the court placed much emphasis on the parties' cohabitation. In doing this, it is submitted, the court misdirected itself. Although it is accepted that cohabitation usually denotes consummation of a marriage, nothing turns of the cohabitation in this case as it had occurred some three years prior to the *ilobolo* negotiations. The parties

65 *Sengadi v Tsambo: In re Tsambo supra*, para 14.
66 *Sengadi v Tsambo: In re Tsambo supra*, para 16.
67 *Sengadi v Tsambo: In re Tsambo supra*, para 17.
68 *Sengadi v Tsambo: In re Tsambo supra*, para 18 and 19.
69 *Sengadi v Tsambo: In re Tsambo supra*, para 20.
70 *Sengadi v Tsambo: In re Tsambo supra*, para 24; Schulze "The law reports" May 2019 DR available at http://www.derebus.org.za/the-law-reports-may-2019/ accessed on 17 October 2019.

simply continued from where they left off. This case must be distinguished from *Mabuza v Mbatha* in this respect. In the latter the case, cohabitation took place after the marriage and therefore it was a strong pointer to consummation of a marriage. Further, the cohabitation followed the formal handing over of the bride to the respondent.[71] The only thing that was missing was *ukumekeza*.

That the parties had complied with section 3(1) of the Recognition Act is flawed. As noted above, this section provides for a valid customary marriage entered into after the commencement of the Act. It requires that the parties must be 18 years and over, they must consent to be married in terms of customary law and the marriage must be negotiated and entered into or celebrated in accordance with customary law. That the first two requirements were met is clear. However, it is the third requirement that requires scrutiny. That the marriage was negotiated is clear. However, was the marriage entered into or celebrated in accordance with customary law? The final act of a customary marriage is the handing over of the bride. This did not occur; therefore, the marriage was not entered into in accordance with customary law.

The court's finding that the practice of handing over the bride was not in keeping with living customary law in as far as non-compliance invalidated a marriage is problematic because none of the parties questioned this practice. The applicant's case was that the marriage had been concluded on the same day as the negotiations. Moreover, the respondent contended this arguing that the applicant was not handed over to the deceased's family. The handing over is crucial. It is therefore unclear what the judgment is referring to by 'living customary law'. Further, no evidence regarding living customary law of the tribe(s) to which the parties belonged was led before court. Therefore, to say that the handing over was not in keeping with living customary law is misguided.

It is hereby argued that the real question in the case was whether, in terms of living law, custom had evolved to such an extent that a bride might be handed over at her own homestead, instead of the groom's home. None of the parties made this averment. It is surprising that the court was able to make a finding in this regard in the absence of ascertaining living custom. One does appreciate that this was an urgent application; however, the court should have confined itself to the *Plascon-Evans* rule.[72] The correct approach was to dismiss the application.

It is submitted that the judgment above followed a wrong interpretation of *Mabuza v Mbatha*. This interpretation is that *Mabuza v*

71 *Mabuza v Mbatha supra*, paras 4 and 7.

72 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A). In *Modiko v Sethabela* unreported case 4856/2016 of 4 August 2017 (FSB) at para 6 the court endorsed the *Plascon-Evans* approach for a case with related facts. See also *Gama v Mchumu* 2012 2 SA 253 (GSJ) para 9.

Mbatha is authority for the view that the *ukumekeza* and the handing-over are unrelated acts and any of them may be dispensed with. This is incorrect. These separate events comprise the integration of the bride. The handing-over is an integral part of the integration of the bride. The parties cannot waive this requirement.[73] Correctly interpreted, *Mabuza v Mbatha* is authority for an assertion that *ukumekeza* may be waived; all that is required is the handing over of the bride.[74]

3 4 Integration of the bride as an indispensable requirement

The second school of thought argues that the integration of the bride is an indispensable requirement that culminates in the handing over of the bride.[75] In *Maropane v Southon* the Supreme Court of Appeal (SCA) had to decide whether the requirements of a valid customary marriage had been complied with. In this case, the appellant sent his emissaries to the home of the respondent on 17 April 2002. This resulted in the payment of an amount of R6 000. The parties were in dispute regarding the purpose of this payment.[76] The respondent averred that it was for the purposes of negotiations for marrying her (*go batla sego sa metsi)*,[77] and the appellant disagreed, arguing that it was given as a symbolic gesture for opening negotiations, the so-called *go bula molomo/go kokota* (which literally means to open mouth).[78]

In addition to the payment, the two families exchanged gifts in accordance with baPedi custom. The appellant's family gave the respondent's family two blankets, cutlery and money.[79] In return, the respondent's family gave a sheep, which was slaughtered and shared between the two families.[80] The appellant's family draped the respondent in a blanket and the families celebrated. Her elders on what is expected of her as a bride counseled the respondent. She was then driven to the appellant's family home where the appellant's sisters who counselled her regarding what was expected of her received her. This too was followed by celebrations.[81] The celebrations were captured in photographs.[82]

73 *Maropane v Southon supra*, para 40; Bakker 3.
74 Ngema 35 submits the opposite. According to his interpretation of the judgment, it is the handing-over of the bride that is not an essential requirement. As noted above, this view is followed by the *Sengadi v Tsambo supra*, case.
75 *Motsoatsoa v Roro supra* para 20; this school of thought also finds support in *Fanti v Boto supra*, para 22; *Mxiki v Mbata, In re: Mbata v Department of Home Affairs* para 10.
76 *Maropane v Southon supra*, para 2.
77 *Maropane v Southon supra*, para 6.
78 *Maropane v Southon supra*, para 2.
79 *Maropane v Southon supra*, para 7. Money was given in place of a missing gift due to the respondent's father.
80 *Maropane v Southon supra*, para 8.
81 *Maropane v Southon supra*, para 11.
82 *Maropane v Southon supra*, para 9.

The court *a quo* (the South Gauteng High Court) found that a valid marriage had been concluded.[83] On appeal, the SCA found that besides the 17 April 2002, there were various subsequent events that warranted an explanation from the appellant in support of his contention that no customary marriage had been concluded by him and the respondent:

> "Amongst these are that the appellant bought the respondent an 18 carat yellow ring which he arranged with a jeweler to redesign as a wedding ring; he organized a lavish 50th birthday for her which was captured on a DVD; he admitted that at this birthday he freely referred to her as his customary law wife; Strike also referred to her as the appellant's wife at this party; the appellant further referred to her mother as his mother-in-law and Gilbert, as his brother-in-law; when he applied for her to be a member of the prestigious Johannesburg Country Club, he described her as his customary law wife and also when he applied for a protection order against her at the Rensburg Magistrates' Court, he described her as his customary law wife. Crucially all these events are not in dispute."[84]

The court rejected the appellant's explanation that he referred to the respondent as his wife because it was embarrassing for an older person to be referred to as a girlfriend. He also said that he was entitled to refer to her as his wife because he had "ring-fenced" her by paying the R6 000. It is submitted that it is common among Africans to refer to a fiancé as a wife. Therefore, reference to a person as a wife on its own should not necessarily be regarded as a concession that a customary marriage did take place. Nonetheless, the court held that according to baPedi custom, the handing over of the bride to her in-laws is the most crucial part of a marriage. Through this practice, the bride is welcomed and integrated into her new family.[85] This having being complied with, there was a valid Pedi customary marriage.[86]

3 5 The approach of the Supreme Court of Appeal

Despite its decision in *Maropane v Southon*, the SCA has decided that the parties had validly waived the requirement of handing over of the bride. In *Mbungela v Mkabi* the parties had concluded *ilobola* negotiations and then exchanged gifts. The bride was not physically handed over to the groom's family. The court endorsed the decision of the South Gauteng Johannesburg Division in *Sengadi v Tsambo* above, in that the handing over of the bride ritual could be waived.[87] Perhaps, like *Sengadi v Tsambo*, the court had a symbolic handing over in mind. Take another similarity between *Sengadi v Tsambo* and *Mbungela v Mkabi* is that, although there was cohabitation in both cases, such cannot, on its own, as consummation of a marriage because it pre-existed the *ilobolo*

83 *Maropane v Southon supra*, para 4.
84 *Maropane v Southon supra*, para 17.
85 *Maropane v Southon supra*, para 40.
86 See Mwambene "The essence vindicated? Courts and customary marriages in South Africa" 2017 *AHRLJ* 35 50.
87 *Mbungela v Mkabi supra*, para 26.

negotiations. The parties simply resumed cohabitation after the *ilobolo* negotiations.

The court endorsed *Mabuza v Mbatha* as authority for the assertion that non-observance of the handing over of the bride does not invalidate a marriage;[88] as submitted above, in doing this, the court followed the arguably incorrect, albeit popular,[89] interpretation of *Mabuza v Mbatha*. The latter decision is only authority for the view that non-observance with *ukumekeza* (being but one of the events towards the integration of the bride) does not invalidate a marriage. This is the case if the bride is physically handed over to her new family, as was the case with *Mabuza v Mbatha*. The SCA did not acknowledge *Maropane v Southon*, its own decision.[90] The proper approach was to deal with *Maropane v Southon* and reject it if need be.

3 6 What is the correct legal position regarding the integration of the bride?

Judicial precedent requires courts to follow previous decisions. It also requires lower courts to follow decisions of higher courts on similar matters.[91] However, in matters relating to customary marriages it is important not to lose sight of ethnicity. For instance, *Mabuza v Mbatha* is precedent for Swati customary marriages in the Western Cape. *Mbungela v Mkabi* is also authority for Swati marriages - although in this case the wife was of Shangaan origin, however, the *lex loci domicile* prevails. The Constitutional Court in *MM v MN* resorted to a similar approach.[92] In this case, the court confined the requirement of consent of the first wife for the husband's subsequent polygamous marriage to only Tsonga marriages.[93]

This being said, what is the correct legal position regarding the integration of the bride in customary marriages. Is it mandatory to comply with this practice? The divisions of the High Court are not unanimous.[94] In such cases, the Supreme Court of Appeal or the Constitutional Court should pronounce decisively on that matter. This

88 *Mbungela v Mkabi supra,* para 21.

89 Bekker 8 observed that this interpretation is followed by *Msutu v Road Accident Fund* 2011 ZAGPPHC 232 (10 July 2011); *C v P* 2017 ZAFSHC 57 (6 April 2017) and *Mkabe v Minister of Home Affairs* 2016 ZAGPPHC 460 (9 June 2016). One may add *Sengadi v Tsambo supra*.

90 The case is simply referred to in note 7 as authority for the accepted view that different cultures have a lot in common.

91 Ryan "The Balance between Certainty and Flexibility in Horizontal and Vertical *Stare Decisis*: *Bosch v Commissioner for South African Revenue Services*" 2015 SALJ 230, 233. See also Wallis "Whose decisis must we stare?" 2018 *SALJ* 1.

92 *MM v MN* 2013 4 SA 415 (CC).

93 Bekker "The validity of a customary marriage under the Recognition of Customary Marriages Act 120 of 1998 with reference to section 3(1)(b) and 7(6) – Part 2" 2016 THRHR 357, 364.

94 *Mabuza v Mbatha supra* and *Sengadi v Tsambo supra* say it is not mandatory; whereas *Ngema v Debengwa supra*; *Dalasile v Mgoduka supra* say otherwise.

has not been the case with the integration of the bride. The SCA in *Maropane v Southon* has held that integration of the bride is mandatory in customary marriages; whereas the very same court in *Mbungela v Mkabi* decided the opposite. A careful study of both these cases shows that they speak for all customary marriages and not just a specific tribe (unlike *Mabuza v Mkabi*) – it is accepted that customary marriages have a lot in common despite the diverse ethnic groups.[95]

In the midst of the prevailing uncertainty, what is the way forward? In other words, how should a court deal with matters where the integration of the bride is at issue? Should it follow *Maropane v Southon* or *Mbungela v Mkabi*? None of these decisions has been overturned. The solution is that the divisions of the High Court must take each case on its facts. However, the position is different with respect to the SCA; here the court has to pronounce of uncertainly due to *Maropane v Southon* and *Mbungela v Mkabi*.

4 Conclusion

The requirements for marriages concluded after the effective date of the Recognition Act are clear. If the parties are of age, and in addition to consenting to being married in terms of customary law, the marriage must be negotiated and entered into or celebrated in terms of customary law. The customary marriages is finally concluded with the bride being integrated into the groom's family. The integration is not a once-off event, but a series of events. Some of these events may be waived, varied or abbreviated by time or parties; however, it is not open to the parties to waive integration completed, at least some aspect of integration must be complied with, usually the handing over of the bride into the groom's family.

In light of the above, it is submitted that the SCA in *Mbungela v Mkabi* did not interpret the decision in *Mabuza v Mbatha* correctly. Instead, the correct approach is that of *Maropane v Southon*. This approach is in line with living customary law, which still requires that the bride should be integrated into her in-laws; failing this, there is no customary marriage. This approach is most efficient because it has the potential to eliminate all uncertainty; if a party alleges that integration of the bride is not a requirement within a particular ethnic group, they must prove this. So far, the judgments that follow the narrative that integration of the bride is dispensable have not enjoyed the benefit of proof to this effect.

95 *Mbungela v Mkabi supra*, para 17.

Recent case law

From mere Christmas decorations to concrete constitutional ethics

EFF v Speaker of the National Assembly; DA v Speaker of the National Assembly 2016 3 SA 580 (CC)

1 Prelude

> "There's a President who's sure all that glitters is gold
> and he's building a homestead at Nkandla.
> When he gets there, he knows, even if the tuck shop is closed
> with a word he could get what he came for.
> Ooh, ooh, and he's building a homestead at Nkandla."

The above is an adaptation of the first verse of the 1971 hit song "Stairway to heaven" by Led Zeppelin (see http://bit.ly/2gCXfnb, accessed on 2017-04-14). The original song was composed by the guitarist Jimmy Page and the vocalist Robert Plant. Plant explained the lyrics as referring cynically to a woman who got everything she wanted, all of the time, without giving back any thought or consideration. It is suggested that this particular attitude can also be attributed to the former South African President, Mr Jacob Zuma, since he allowed taxpayers' money to be utilised for his private benefit.

2 Introduction

On 31 March 2016, the Constitutional Court per Moegeng Moegeng CJ, on behalf of a unanimous court of 11 judges, handed down judgment in the case of *EFF v Speaker, National Assembly* (2016 3 SA 580 (CC)). The case has become known and is hereafter referred to as the Nkandla decision. The decision has been hailed from various quarters as ground breaking and precedent-setting (see http://bit.ly/2gCJhBP, accessed on 2017-07-07). Although a variety of legal principles, such as the rule of law; the role of Parliament; the jurisdiction of the Constitutional Court and the powers and functions of the Public Protector, have been traversed in many prior judicial decisions (see, eg, *In re: Certification of the Constitution of the RSA,1996* 1996 4 SA 744 (CC); *Pharmaceutical Manufacturers Association of SA: Ex parte President of the RSA* 2000 2 SA 674 (CC); *Minister of Health v New Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC); *NNP v Government of the RSA* 1999 3 SA 191 (CC) and *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC)), the Nkandla decision has also created an important legal precedent in relation to the reading and interpretation of the South African Constitution. This reading, which encapsulates the recognition and enforcement of

How to cite: Bekink 'From mere Christmas decorations to concrete constitutional ethics. *EFF v Speaker of the National Assembly; DA v Speaker of the National Assembly* 2016 3 SA 580 (CC) 2020' *De Jure Law Journal* 104-114
http://dx.doi.org/10.17159/2225-7160/2020/v53a7

constitutional ethics and the subsequent moral reading of the Constitution of the RSA, 1996 (hereafter "the Constitution"), is the specific subject of this case discussion.

In an almost routine manner, the highest court in the South African judicial system has again confirmed that the South African constitutional scheme is not only founded on a particular value-laden system, but also that it is imperative that one and all, the state and society, should be driven by a moral obligation to ensure the continuous survival of the Republic's democratic order. In this regard, the court in its introduction stated as follows:

> "One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of state power and resources that was virtually institutionalised during the apartheid era. To achieve this goal we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason public-office bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck" (585J 586A–B).

The court quoted with approval the following statement by Madala J in *Nyathi v MEC Council for Department of Health, Gauteng* 2008 5 SA 94 (CC) para 80:

> "Certain values in the Constitution have been designated as (the) foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to insure the continuous survival of our democracy."

It is against this background that the principles of moral obligations and debate about the application of constitutional ethics have been reignited and redirected to be much more than mere "Christmas decorations" on a dining room table in the month of December.

3 Background and facts

Between December 2011 and November 2012, various members of the public and also members of Parliament lodged complaints with the Public Protector concerning certain aspects of security upgrades that were effected at President Jacob Zuma's Nkandla private residence. These complaints triggered, what the court described as "a fairly extensive investigation" by the Public Protector into the Nkandla project (587E–F para 5; see also the Public Protector's report "Secure in comfort: Report by the Public Protector on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at

Nkandla in the KwaZulu-Natal province, Report no 25 of 2013/24, March 19 2014", available at http://bit.ly/2lcGKDn, accessed on 2017-07-07 (hereafter the *Nkandla report*). Note also that under s 182 of the Constitution, as well as ss 6–7 of the Public Protector Act 23 of 1994 and ss 3–4 of the Executive Members Ethics Act 82 of 1998 (hereafter the Ethics Act), the Public Protector has the power to investigate an alleged breach of the code of conduct provided for by the Ethics Act.

The complaints in essence alleged that the conduct of the President in relation to the implementation of certain security upgrades at his private residence may have been unethical and in violation of the Ethics Act and the Ethics Code created under the Ethics Act. Section 2 of the Ethics Act provides that the President, after consultation, and via a proclamation, must publish a code of ethics that prescribe standards and rules aimed at promoting open, democratic and accountable government (the Executive Ethics Code was published on 28 July 2000 in Government Gazette no 21399, notice 41, regulation 6853). The Ethics Act further provides that the code of ethics must include, *inter alia*, provisions requiring the members of the executive to at all times act in good faith and in the best interests of good governance; meet all obligations imposed on them by law; not act in a way inconsistent with their specific offices; not expose themselves to a situation involving risk of a conflict between official responsibilities and private interests and not act in a way that may compromise the credibility or integrity of their office or of the government. (see s 2(a)–(c) of the Ethics Act). Although the complaints and investigation into the conduct of the President was primarily in the pursuit of ethical standards imposed on members of the executive in terms of section 96 of the Constitution, certain aspects of the Executive Ethics Code, including regulations: 2(1)(a) to perform duties and exercise powers diligently and honestly and 2(1)(b) to fulfil obligations imposed by the Constitution and the law, were also considered. The Public Protector then also took into account various other provisions of the Constitution, including sections 1(d) and 237 as well as the values of accountability, responsiveness and openness, the latter being founding values of the South African democratic order (see *Nkandla report* 11 16 and s 1 of the Constitution).

After completion of the investigation, the Public Protector concluded that several improvements on the Nkandla estate were of a non-security nature. It further followed that since the state in this instance was under an obligation only to provide security for the President at his private residence, any installation that had nothing to do with such security amounted to undue benefit or unlawful enrichment for the President and his family. Against this background, the Public Protector confirmed that the President has acted in breach of his constitutional obligations in terms of sections 96(1), (2)(b) and (c) of the Constitution. (*Nkandla* case 587H para 7). The Public Protector further concluded that the President also violated the provisions of the Ethics Act as well as the Ethics Code as provided for in the Ethics Act. Specific mention was made that the President acted in a manner inconsistent with his position; that he used

his position to enrich himself and that he has exposed himself to a situation involving the risk of conflict between his official responsibilities and his private interests (refer to regulations 2(3)(c); 2(3)(d) and 2(3)(f)).

The Public Protector's finding on the violation of section 96 was based on what the court termed "the self-evident reality" that the features identified were unrelated to the security of the President (588B–C para 8). Based on the aforementioned, the court held that a direct connection existed between the position of President and the reasonable foreseeability by which the specified non-security features, asked for by the President or not, were installed at his private residence, and that this situation extended to the principle of undue enrichment (para 9E–F). The court further mentioned that the mere fact of the President allowing non-security features, about whose construction he was reportedly aware, to be built at his private residence at government expense, exposed him to a situation involving the risk of a conflict between his official responsibilities and his private interests. The court explained the potential conflict as follows (588F–G para 9):

> "On the one hand, the President has the duty to ensure that state resources are used only for the advancement of state interests. On the other hand, there is the real risk of him closing an eye to possible wastage, if he is likely to derive personal benefit from indifference. To find oneself on the wrong side of section 96, all that needs to be proven is a risk. It does not even have to materialise"

Having arrived at the conclusion that the President and his family were unduly enriched as a result of the non-security features, the Public Protector took remedial action against the President in terms of section 182(1)(*c*) of the Constitution. In a written report, the Public Protector directed the President to determine the reasonable cost of the measures implemented at his private residence that did not relate to security; to pay back a reasonable percentage of such costs of the measures implemented; to reprimand certain ministers for how the Nkandla project was handled and finally to report to the National Assembly on the President's comments and actions within a period of 14 days (589A–C para 10).

4 Decision

After a comprehensive evaluation of the background and facts, the court held that the executive, as lead by the President, as well as Parliament, bear very important responsibilities and that each institution plays a crucial role in the affairs of the South African state. As such, the executive and the President deserve, and are indeed provided, with space to discharge their constitutional obligations unimpeded by the judiciary, unless where the Constitution otherwise permits (see 615C–D para 90). Mindful of the importance of the principle of separation of powers, the court held that the President's failure to comply with the remedial action taken against him by the Public Protector was inconsistent with his obligations to uphold, defend and respect the Constitution as the

supreme law of the Republic (620). In particular, the failure by the President was inconsistent with section 83(b) read together with sections 181(3) and 182(1)(c) of the Constitution, and as such, was invalid (620E–F para 104; see also s 2 which provides that any law or conduct inconsistent with the Constitution is invalid). It is also important to amplify that the Constitution not only demands ethical compliance of the President, but also from other organs of state. With specific relevance to the merits of the *Nkandla* case, the Constitution obligates Parliament, which consists of both the National Assembly and the National Council of Provinces, to be bound by the provisions and limits of the Constitution, including its ethical requirements, when exercising legislative authority (read ss 42(1) and 44(4) of the Constitution respectively). Section 55 of the Constitution then further demands that the National Assembly, in exercising its legislative power, must provide for mechanisms to ensure that all executive organs of state in the national sphere of government, which obviously includes the President, are accountable to it and that the Assembly must also maintain oversight of the exercise of national executive authority by such organs. The powers and functions of the President, as head of the national executive authority, are undoubtedly covered under such responsibility (note ss 55(2)(a)-(b) and 85 of the Constitution). In essence, the Constitutional Court thus confirmed that the failure of both the President and the National Assembly to comply with their constitutional obligations, founded amongst others on specific pre-determined values, flaunted their ethical and moral responsibilities as demanded by the supreme law of the Republic (611D 612C–613D–F paras 76–78 81–83).

5 General principles regarding the concept of "ethics" revisited

The debate about the origin, foundation and extent of ethics and moral standards has, perhaps since the beginning of time, been at the forefront of tolerable human coexistence. Over the centuries, philosophers, religious scholars and even legal commentators have searched and debated such principles. Even in modern times there is still significant dispute about these concepts. Commentators have observed that in a modern world people have learned to become more sensitive about the physical environment, as we know we depend on it. Nonetheless, mankind still seems insensitive towards what is referred to as 'the moral or ethical' environment (see Blackburn *Ethics: A very short introduction* (2003) 1). Although the scope of this case note falls outside an extensive investigation into the various philosophies and theories relating to the concepts of ethics and moral standards, it is perhaps of value to revisit at least some basic principles in order to substantiate the main thesis of this discussion.

In essence the ethical environment refers to the surrounding climate of ideas about how people should seek to live. It seeks to provide certain standards of behaviour, which in turn, according to certain commentators, shape mankind's very identity (Blackburn 1–4).

According to the French philosopher Badiou, the word "ethics" comes from the Greek word that denotes a philosophy that searches for a good way and a wise cause of action (Badiou *Ethics: An essay on the understanding of evil* (transl Hallward 2001) 1). The *Collins concise dictionary* (2004) further defines the words "ethics" and "ethical" as moral principles or a set of moral values that are held by an individual, a profession or a particular group of people. The word "ethics" also relates to the philosophical study of those moral values of human conduct and the rules and principles that ought to govern it. The behaviour can relate to an individual, or a group or a profession (see *idem* 495). In building on this basic definition, the German theologian, Helmut Thielicke, further pointed out that the term "ethics", although referring to how the behaviour/conduct of people ought to be, cannot be left to human beings to automatically or freely comply with and hence a minimum coercion (mostly through fear of punishment) must be added to guarantee its functioning. This coercive element has further developed into the practice that codes of ethics and morals are often linked and incorporated into the legal system of a particular community (see Thielicke *Theological ethics Vol II: Politics* (ed Lazareth 1969 157-158). According to the legal commentator Lewis, codes of ethics, even for lawyers and those holding public office, have their origins in general in the legal system (see *Legal ethics: A guide to professional conduct for SA attorneys* (1982) 1–2). Other writers have also indicated that terms such as values, ethics and morality are often intertwined and used interchangeably (Church "The question of ethics revisited" 2006 (2) *Codicillus* 16). Church further submits that both values and ethics are seen to stem from and are determined by a broader social morality that involves an evaluation of societal conduct on the basis of a broader cultural context or religious standard (17).

Founded on the aforementioned, it seems acceptable to conclude that principles such as ethics, values and morals are linked with the concepts of law and legal systems. However, as certain commentators have underscored, law is made for and by people but there is no universal or uniform definition of the principle or concept of "the law" (Kleyn and Viljoen *Beginner's guide for law students* (2015) 3; see also Van der Westhuizen "Madiba would have agreed: The law is for the protection of the people" 2013 *De Jure* 878 879 who mentions that the oldest question in legal philosophy is "what is law and why is it there?"). Kleyn and Viljoen 3 further submit that often the concept of "the law" refers to a set of norms that distinguish and determine good from bad. A legal norm is thus a rule that regulates human conduct. However, as the writers correctly point out, it is common cause that not all norms are legal rules. Many other normative systems exist that influence human existence and coexistence. Such systems include religion, individual morality as well as communal mores. Different normative systems are often interlinked and portray similar standards such as the value for human life and prescriptions against crimes such as murder or assault. However, different normative systems do not overlap completely. (Kleyn and

Viljoen 4 point out that a "sin" in Christianity is not necessarily a "crime" in a particular legal system. Thielicke 162 in this regard also points to the possible contradiction between law and ethics. He submits that what is regarded as immoral can be lawful and what is morally right, can be illegal.)

It would seem that most commentators agree that although the concepts of "law" and "morality", which include the concept of ethics, are distinguishable from one another, there are clear links between the two and to separate them completely would be a mistake (Thielicke 158). Thielicke in this respect submits that the law is often grounded in basic moral convictions and is further sustained by ethical distinction between good and evil. Law is, however, "outward" whilst morality and ethics are termed "inward" (159–160). The writer uses the example that law is concerned to punish the theft (deed) and not per se the thief (person). Notwithstanding the aforementioned, there seems to be consensus that law in general does not enforce morality on its own. Only when a moral norm has been enacted into a legal rule, can the law be used to enforce such a norm (Kleyn and Viljoen 6). One should, however, note again, as was mentioned above, that not all wrongdoing for example is criminal. The moral compass of a society often shows the extent to which the law allows the liberty to do or feel certain things. Furthermore, it is not the function of the law to forbid and banish every departure from the so-called ideal world. The challenge is again to determine a common ground (Blackburn 53 56).

6 Ethics and the South African Constitution

Within the South African legal context, many legal commentators have, over many decades, discussed and debated the approach by lawyers on how to deal with ethics or morality and their relationship to the law. Mureinik has referred to this debate as the "important controversy in jurisprudence about the relationship between law and morality" ("Law and morality in SA" 1988 *SALJ* 457). The writer also pointed out that for some time, the controversy was reduced to a simple polemic between two fundamentally irreconcilable camps, namely, the approach by natural lawyers and the approach by positivists. In essence, natural lawyers hold the view that what is immoral, cannot be law. Positivists to the contrary argue that there is no necessary connection between law and morality and they insist on a clear separation between law and morality (See confirmation in this regard by Kroeze "When worlds collide: An essay on morality" 2007 *SAPL* 323–324 and Kleyn and Viljoen 11). Kleyn and Viljoen 10-11 further point out that contrary to the legal positivists view, that law is what it is, the school of natural law argues that law is what it ought to be. For natural lawyers, there exists in the human world a moral code/set of moral principles, irrespective of human interaction or the existence of positive law. Any law that conflicts with these "higher norms" is unjust and as such not law and therefore unlawful/invalid. The legality of legal rules for natural lawyers thus depends on the moral content of the law. Kroeze 328-329 further

expands on this theory by submitting that natural law supporters posit a pre-political or pre-social set of moral rules that determine both the content and validity of positive rules. Such pre-political or pre-social codes can have their origins in different sources, depending on one's particular approach. In this regard she makes a distinction between so-called pre-modern thinkers and the modern thinkers. Pre-modern thinkers are mostly tied up to metaphysical explanation of the world, which implies a natural order that prescribes both behaviour and morality. Such thinkers, like Plato and Aristotle did not concern themselves too much with morality and context, since such issues according to them were regarded as being part of the natural order (see http://stanford.io/2xmFQpq, accessed on 2017-10-14). In contrast, modern thinkers no longer regard moral rules as emanating from God or the metaphysical world. Moral rules and ethical codes are seen as products of human rationality and include characteristics such as individualism and relativism. This modernistic view on morality is essentially based on the work of Emanuel Kant, who in essence separated the principle of morals from metaphysics and linked it up with logic and human reason (see http://stanford.io/2zOUM1d, accessed on 2017-10-14; see also Kroeze 328 and Badiou 2–3) Notwithstanding these two opposing approaches, Mureinik 457 points out that the debate has since moved on and that the jurisprudence has matured to such an extent that there are not two camps any more, but a densely populated spectrum of opinion on the topic.

As part of the densely-populated spectrum of opinion mentioned above, the concepts of ethics and morals are often also perceived to relate only to the private sphere, which perception of course is misplaced. Many contemporary societies make a distinction between private, public and professional ethics. It is not only private individuals that are required to act and conduct themselves in an acceptable ethical manner. Public office bearers and members of certain professional institutions are also required to comply with a variety of ethical codes and requirements. In this respect, Lewis points out that, since public officials and certain key organs of state have become necessary instruments in modern societies, it has become essential that such officials conduct themselves and fulfill their duties ethically according to what the particular community requires of them (Lewis 2). The writer further opines that the general experience in South Africa and elsewhere indicates that the needs of society are such that it is not enough to leave prescriptions of duty and honour to people's own conscience, but that such aspects must be specified and enforced through the law. Kleyn and Viljoen 5-8 also distinguish between individual and community morality. Contrary to individual morality, which relates to a person's ideal self image of him or her founded on his or her conscience, community or also called collective morals, are those morals and values of a particular community as a whole, which are supported and required by such community.

Notwithstanding the aforementioned debate, it is not uncommon for contemporary constitutional schemes to incorporate sets of predetermined values and provisions that relate to the moral behaviour of not only private citizens but state institutions alike. The South African constitutional dispensation since 1994 is a good example of such a system. Various legal commentators have indicated that the Constitution provides a general benchmark and broader framework for a general guiding morality (Church 17; see also Bohler-Muller "When things fall apart: Ethical jurisprudence and global justice" 2005 *SAPL* 29 30). It has further been pointed out that when a Constitution entrenches certain values and ethical requirements, it becomes much more than just a law that determines and establishes the powers and functions of organs of state that comprise of particular state. The incorporation of ethical prescriptions further requires that all legal authority provided for under the law, including the Constitution, should be consistent with a particular moral code that was decided upon when the particular constitutional/ legal system was created. In many instances, the constitutional drafters often carefully consider a variety of factors before deciding on which moral and ethical requirements to incorporate. However, once incorporated as part of the constitutional scheme, such principles and requirements then establish the term "constitutional ethics" and further require an ethical or moral reading/interpretation of constitutional issues and disputes (see Bekink *Principles of South African constitutional law* (2016) 7). However, it should be noted that the principle of the moral reading of a Constitution is not something new. In his seminal work, *Freedom's law: The moral reading of the American Constitution*, Ronald Dworkin has commented that many contemporary Constitutions declare individual rights against their governments in broad and abstract language. The moral reading of such Constitutions then proposes to interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice. Such a moral reading, according to Dworkin, then brings "political morality" into the heart of constitutional law (see *idem* (1996) 2). Dworkin further mentions that since political morality is inherently uncertain and controversial, any system of government that incorporates such principles as part of its law, must decide whose interpretation and understanding will be authoritative. However, he then confirms that there is nothing revolutionary about the moral reading of such a legal system (2–3). He also opines that the advantage of such moral reading is that constitutional interpretation is then directed and disciplined. Judicial officers may not read their own convictions into the Constitution, but must do so in line with the structural design of the Constitution as a whole, including examples of past constitutional interpretation (10).

Upon a closer evaluation of the Constitution, 1996, it becomes evident that the South African constitutional drafters intentionally incorporated a variety of ethical requirements and moral standards in the provisions of South Africa's supreme law. These principles may be summarised as follows: Already in the preamble it is mentioned that the Constitution

aims to establish a society based on a variety of values, social justice and a democratic and open society; the founding provisions further confirm that the Republic of South Africa is a democratic state with various core values, the rule of law and an open and accountable government (s 1); in chapter 2, the Bill of Rights is defined as a cornerstone of democracy and it is said to affirm democratic values such as human dignity, equality and freedom. The state is further obliged to respect, protect, promote and fulfill these rights (see s 7(1)–(3)). Chapter three further requires that the three spheres of government must act in an effective, transparent and accountable manner and be loyal to the Constitution and its people. Principles such as good faith and mutual trust are also required amongst spheres of government. Furthermore, specific ethical conduct is required from members of the legislature and the executive. They are obliged to be faithful and obedient to the Constitution and must, before taking office, swear/affirm faithfulness to the Republic and obedience to the Constitution. Many executive members are further required to act in terms of a code of ethics prescribed by national legislation and may not act inconsistently with their offices and may not create a conflict between their official duties and their private interests (see ss 48 83 87 90 96 107 129 135 136 of the Constitution, Sch 2 of the Constitution and the Executive Members Ethics Act mentioned above). Even judicial officers must uphold the Constitution, ensure impartiality and are subject to the Constitution and the law. All judicial officers are also required to make an oath/affirm to uphold and protect the Constitution (ss 165 and 174 and Sch 2 of the Constitution). Finally the Constitution also provides for so-called "administrative ethics" and "financial ethics". For example, the public administration is to be governed by democratic values and principles enshrined in the Constitution, including high standards of professional ethics and compliance with the law. Furthermore, the financial affairs of the state must be regulated by processes providing transparency, accountability and effectiveness whilst recognising uniform norms and standards (see ss 195 and 215–217). Notwithstanding the clear and pronounced provisions of the Constitution, some commentators surprisingly still seem to argue against the concept of constitutional ethics as being part of the South African normative legal system. It has been suggested in this regard, that in trying to pin the essence of constitutional ethics down more precisely, one is reduced to either a pre-modern metaphysical speculation or a modernist construction (see Kroeze 331–334). The writer seems to favour a more post modernist approach to constitutional ethics based on the view of plasticity and the constant change of reality and knowledge. She further supports the idea that all knowledge is interpretation and no interpretation is final (334). This approach, however philosophically attractive it may seem to some, is directly in conflict with the jurisprudence of the highest court in South Africa (for more detail on South Africa's normative approach to constitutional law, see for example *Minister of Home Affairs v NICRO* 2005 3 SA 280 (CC); *K v Minister of Safety and Security* 2005 6 SA 419 (CC) and *Walele v City of Cape Town* 2008 6 SA 129 (CC)).

7 Final comments and conclusion

Notwithstanding the academic debate about the origin, content and acceptability of the philosophy of ethics in general and constitutional ethics in particular, the *Nkandla* precedent has put beyond doubt the importance and application of ethics in the supreme legal dispensation of the South African state. Such ethical principles are clearly not intended to be mere decorative add-ons, but indeed are concrete enforceable legal provisions that form an important part of the overall legal system. In practice it is not really of importance to determine whether one falls in the school of natural lawyers or perhaps positivists regarding the origin and foundation for legal/constitutional ethics, a possible trap that the Constitutional Court has also expertly avoided. What is important is that the South African legal system, and its supreme constitutional foundation, provides for ethical provisions that must be complied with. Perhaps this important legal milestone in recognising and emphasising the importance of constitutional ethics, is best encapsulated in the following closing quotation by Kriegler J in his supporting judgment in *S v Makwanyane* 1995 3 SA 391 (CC):

> "The issue is not whether I favour the retention or the abolition of the death penalty, nor whether this Court, Parliament or even overwhelming public opinion supports the one or the other view. The question is what the Constitution says about it. In answering that question the methods to be used are essentially legal, not moral or philosophical. *To be true the judicial process [including the law] cannot operate in an ethical vacuum.* After all, concepts like 'good faith', 'unconscionable' or 'reasonable' import value judgments into the daily grind of courts of law" (paras 206–207; emphasis added).

BERNARD BEKINK
University of Pretoria

An analysis of the rationale behind the distribution of shares in terms of the Islamic law of intestate succession

SUMMARY

There are 35 verses in Al Quraan that refer to succession. A daughter always inherits half the share of a son in terms of the Islamic law of intestate succession. (See Khan *The Noble Qur'an – English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females…"). The reason why females (at times) inherit less favourably than males in terms of the Islamic law of intestate succession is not clearly stated in the primary sources of Islamic law. This note analyses the question as to whether the discrimination against females is consistent throughout the Islamic law of intestate succession. It also analyses the possible rationale behind the unequal distribution. The note concludes with an overall analysis and concluding remarks.

1 Introduction

A daughter always inherits half the share of a son in terms of the Islamic law of intestate succession. (See Khan *The Noble Qur'an – English Translation of the Meanings and Commentary* 1404H (4)11 where it states that "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females…"). The reason why females (at times) inherit less favourably than males in terms of the Islamic law of intestate succession is not clearly stated in the primary sources of Islamic law. It should be noted that the law of intestate succession applies the estate of a deceased person not governed by a will.

Al Quraan is one of the primary sources of Islamic law that is applicable to Muslims. There are 35 verses in Al Quraan that refer to succession laws. (See Hussain *The Islamic Law of Succession* (2005) 29). There are, however, only three verses in Al Quraan that provide specific details of succession laws. These three verses are Al Quraan (4) 11, 12, & 176. Prophetic traditions are the second primary source of Islamic law. These traditions elaborate and clarify how these succession law verses should be interpreted and applied to various scenarios.

Al Quraan 4(11) states that "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half. For parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts. You know not which of them, whether your parents or your children, are nearest to you in benefit, (these fixed shares) are

How to cite: Abduroaf 'An analysis of the rationale behind the distribution of shares in terms of the Islamic law of intestate succession' *De Jure Law Journal* 115-122
http://dx.doi.org/10.17159/2225-7160/2020/v53a8

ordained by Allah. And Allah is Ever All-Knower, All-Wise." (See Khan 1404H (4) 11).

Al Quraan (4) 12 states "[i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies he (or she) may have bequeathed or debts, so that no loss is caused (to anyone). This is a Commandment from Allah; and Allah is Ever All-Knowing, Most-Forbearing." (See Khan 1404H (4) 12).

Al Quraan (4) 176 states that "[t]hey ask you for a legal verdict. Say: 'Allah directs (thus) about Al-Kalalah (those who leave neither descendants nor ascendants as heirs). If it is a man that dies, leaving a sister, but no child, she shall have half the inheritance. If (such a deceased was) a woman, who left no child, her brother takes her inheritance. If there are two sisters, they shall have two-thirds of the inheritance; if there are brothers and sisters, the male will have twice the share of the female. (Thus) does Allah make clear to you (His Law) lest you go astray. And Allah is the All-Knower of everything.'" (See Khan 1404H (4) 176).

This note investigates the question as to whether the discrimination against females is consistent throughout the Islamic law of intestate succession. It also analyses the possible rationale behind the unequal distribution. The note concludes with an overall analysis and concluding remarks.

2 The consistency of discrimination against females

It can be firmly stated that discrimination against females in terms of the Islamic law of intestate succession is not consistent. This can be illustrated through a few examples. A father and mother would inherit equal shares where, for example, X dies leaving behind a mother, a father, and a son as the only intestate beneficiaries. The mother would inherit 1/6, (See Khan 1404H (4) 11 where it states that "… [f]or parents, a sixth share of inheritance to each if the deceased left children…"), the father would inherit 1/6, (See Khan 1404H (4) 11 where it states that "… [f]or parents, a sixth share of inheritance to each if the deceased left children…"), and the son would inherit the residue which is 4/6. (See Khan *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 8, 477 where it states that "[t]he Prophet said, 'Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased.'").

A uterine brother and uterine sister would inherit equal shares where, for example, X dies leaving behind a uterine brother, a uterine sister, and a full brother as the only intestate beneficiaries. The uterine brother would inherit 1/6, (See Khan 1404H (4) 12 where it states that "…[i]f the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth…"), the uterine sister would inherit 1/6, (See Khan 1404H (4) 12 where it states that "…[i]f the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth…"), and the full brother would inherit the residue which is 4/6. (See Khan (2004) vol 8, 477 where it states that "[t]he Prophet said, 'Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased.'").

A daughter would indirectly inherit more favourably than a son where, for example X dies leaving behind a mother, father, widower and a child as the only intestate beneficiaries. The first calculation is based on the child being male and the second calculation is based on the child being female. The mother would inherit 1/6 = 4/24, (See Khan 1404H (4) 11 where it states that "… [f]or parents, a sixth share of inheritance to each if the deceased left children…"), the father would inherit 1/6 = 4/24, (See Khan 1404H (4) 11 where it states that "… [f]or parents, a sixth share of inheritance to each if the deceased left children…"), the widower would inherit 1/4 = 6/24, (See Khan 1404H (4) 12 where it states that "… [i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts…"), and the son would inherit the residue which is 10/24. (See Khan (2004) vol 8, 477 where it states that "[t]he Prophet said, 'Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased.'"). The calculation is now based on the child being female. The mother would inherit 1/6 = 4/24, (See Khan 1404H (4) 11 where it states that "… [f]or parents, a sixth share of inheritance to each if the deceased left children…"), the father would inherit 1/6 = 4/24, (See Khan 1404H (4) 11 where it states that "… [f]or parents, a sixth share of inheritance to each if the deceased left children…"), the widower would inherit 1/4 = 6/24, (See Khan 1404H (4) 12 where it states that "… [i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts…"), and the daughter would inherit 1/2 = 12/24. (See Khan 1404H (4) 11 where it states that "…if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half…"). The doctrine of increase would find application and the new denominator would be 26. It should be noted that the doctrine of increase refers to a situation where the numerator of

an equation is more than its denominator. The mother in this instance would inherit 4/26, the father would inherit 4/26, the widower would inherit 6/26, and the daughter would inherit 1/2 = 12/26. 12/26 is greater than 10/24 that a son would inherit. It would therefore be favourable for the child to be female.

3 Rationale behind the distribution of shares

Some authors have identified three rules that govern the distribution of shares within the Islamic law of intestate succession. (See Dar Al Ifta Al-Misriyyah 'Do Women Take Unequal Shares of Inheritance in Islam?' available at http://eng.dar-alifta.org/foreign/ViewArticle.aspx?ID=120& (accessed 28 November 2017)). The rules have been formulated upon closer inspection of how the Islamic law of intestate succession operates. The following should be noted. Descendant intestate beneficiaries generally inherit more favourably than ascendant and collateral intestate beneficiaries. Intestate beneficiaries with stronger intestate succession ties would generally inherit more favourably than intestate beneficiaries with weaker intestate succession ties. Intestate succession beneficiaries who have more financial Islamic law obligations generally inherit more favourably than intestate beneficiaries with less financial Islamic law obligations, in the event where they are of the same generation and have the same intestate succession tie. It should be noted that the three rules apply to the distribution of the intestate estate regardless of whether the intestate beneficiaries are male or female. (See Dar Al Ifta Al-Misriyyah).

A daughter belongs to the generation of "descendants" whereas a father belongs the generation of "ascendants". A daughter would therefore generally inherit more favourably than a father. This rule would apply, for example, where X dies leaving behind an intestate estate, and a father, a widow, and two daughters as the only intestate beneficiaries. The father would inherit 1/6 = 4/24, (See Khan 1404H (4) 11 where it states that "… [f]or parents, a sixth share of inheritance to each if the deceased left children…"), the widow would inherit 1/8 = 3/24, (See Khan 1404H (4) 12 where it states that "[i]n that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts."), and each of the two daughters would equally share 2/3 = 16/24. (See Khan 1404H (4) 11 where it states that "…if (there are) only daughters, two or more, their share is two thirds of the inheritance…"). The father would also inherit the remaining 1/24 as a residuary beneficiary. (See Khan (2004) vol 8, 477 where it states that "[t]he Prophet said, 'Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased.'"). Each daughter would inherit 8/24 which is more than the 5/25 share that the father inherits.

A full sibling has a stronger intestate succession tie to the deceased than a half sibling. A full sister would therefore inherit more favourably

than a consanguine brother. This rule would apply, for example, where X dies leaving behind an intestate estate, and a daughter, a full sister and a consanguine brother as the only intestate beneficiaries. The daughter would inherit 1/2, (See Khan 1404H (4) 11 where it states that "…if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half…"), and the full sister would inherit the remainder. (See Khan (728) vol 8, 480 where it states that "Abu Musa was asked regarding (the inheritance of) a daughter, a son's daughter, and a sister". He said, "The daughter will take one-half and the sister will take one-half. If you go to Ibn Mas'ud, he will tell you the same." Ibn Mas'ud was asked and was told of Abu Musa's verdict. Ibn Mas'ud then said, "If I give the same verdict, I would stray and would not be of the rightly-guided. The verdict I will give in this case, will be the same as the Prophet did, i.e. one-half is for the daughter, and one-sixth for the son's daughter, i.e. both shares make two-thirds of the total property; and the rest is for the sister." Afterwards we cam[e] to Abu Musa and informed him of Ibn Mas'ud's verdict, whereupon he said, 'So, do not ask me for verdicts, as long as this learned man is among you'"). It should be noted that the consanguine brother would not inherit as he has a weaker intestate succession tie to the deceased.

An intestate succession beneficiary who has more financial obligations in terms of Islamic law would generally (but not always) inherit more favourably than an intestate beneficiary with less financial obligations in terms of Islamic law, in the event where they are of the same generation and have the same intestate succession tie. (See Dar Al Ifta Al-Misriyyah for a discussion on this issue.) A son would inherit double the share of a daughter as he has more financial obligations in terms of Islamic law. This rule would apply, for example, where X dies leaving behind an intestate estate, and a son and a daughter as the only intestate beneficiaries. The son would inherit 2/3 and the daughter would inherit 1/3. (See Khan 1404H (4) 11 where it states that "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females…"). There is no definitive evidence in the primary sources of Islamic law to back up the assumption that the reason why the son inherits more favourably than the daughter is because of his financial obligations. There is no direct link found in Islamic law between the Islamic law of intestate succession and the financial responsibilities of males. The argument is weakened by the fact that there are instances within the Islamic law of intestate succession where males and females inherit equally. There is, however, a basis for the financial obligations argument when one examines Islamic law as a whole. Males have more financial obligations than females in terms of Islamic law. Al Quraan (4) 4 states: "[a]nd give to the women (whom you marry) their Mahr (obligatory bridal money given by the husband to his wife at the time of marriage) with a good heart, but if they, of their own good pleasure, remit any part of it to you, take it, and enjoy it without fear of any harm (as Allah has made it lawful)." (See Khan 1404H (4) 4).

Payment of a dower is a financial obligation upon a male and not a female in terms of Islamic law. It is stated in Al Quraan (4) 34 that "[m]en are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means…" (See Khan 1404H (4) 34). It should be noted that responsibility of financial support does not lie with females.

The financial obligation placed on males can be further explained by way of an example. X dies, leaving behind an intestate estate of R900 000.00. He also leaves behind a son and daughter who are both on the verge of marriage as his only relatives. The son would inherit R600 000.00 whereas the daughter would inherit R300 000.00. (See Khan 1404H (4) 11 where it states "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females…"). The son is required, in terms of Islamic law, to pay a dower to his future wife. (See Al Juzayree *Al Fiqh 'Alaa Al Madhaahib Al Arba'ah* (2000) vol 4, 85-86; and Khan 1404H (4) 4).There is no stipulation as to what the maximum amount that may be requested by his future wife may be. It could possibly be more than the R600 000.00 he inherited. Arrangements could even be made for the dower to be paid off in instalments in the event where he does not have the cash at hand. The obligation does not lie with the daughter as far as her marriage is concerned. She is entitled to request a dower of her choice from her future husband. Al Quraan (4) 20 states that "… and you have given one of them a Cantar (of gold i.e. a great amount) as Mahr [dower], take not the least bit of it back; would you take it wrongfully without a right and (with) a manifest sin?" (See Khan 1404H (4) 20).

The son is further required in terms of Islamic law to maintain his wife (or wives) and his future children born from the marriage. The financial obligation does not lie with his wife (or wives). (See Al Juzayree A *Al Fiqh 'Alaa Al Madhaahib Al Arba'ah* (2000) vol 4, 497-498). The daughter in this scenario is not required to maintain herself, her husband, and/or her future children born from the marriage. She may even claim arrear maintenance from her husband in the event where he has not maintained her in the marriage if it subsequently ends in a divorce. A male intestate beneficiary who inherits double the share of his female counterpart could argue that the Islamic law of dower and maintenance favours females while the law of intestate succession at times (but not always) favours males and that the balance is then restored.

The above can clearly be seen when analysing the primary sources of Islamic law in this regard. (See Khan 1404H (4) 11 where it states that "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half. For parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of

legacies he may have bequeathed or debts. You know not which of them, whether your parents or your children, are nearest to you in benefit, (these fixed shares) are ordained by Allah. And Allah is Ever All-Knower, All-Wise."; Khan 1404H (4) 12 where it states "[i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies he (or she) may have bequeathed or debts, so that no loss is caused (to anyone). This is a Commandment from Allah; and Allah is Ever All-Knowing, Most-Forbearing."; Khan 1404H (4) 176 where it states "[t]hey ask you for a legal verdict. Say: 'Allah directs (thus) about Al-Kalalah (those who leave neither descendants nor ascendants as heirs). If it is a man that dies, leaving a sister, but no child, she shall have half the inheritance. If (such a deceased was) a woman, who left no child, her brother takes her inheritance. If there are two sisters, they shall have two-thirds of the inheritance; if there are brothers and sisters, the male will have twice the share of the female. (Thus) does Allah make clear to you (His Law) lest you go astray. And Allah is the All-Knower of everything.'"; Khan (2004) vol 8, 477 where it states that "[t]he Prophet said, 'Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased.'"; Khan 1404H (4) 34) where it states that "[m]en are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means…"; Khan 1404H (4) 4 where it states that "[a]nd give to the women (whom you marry) their Mahr (obligatory bridal money given by the husband to his wife at the time of marriage) with a good heart, but if they, of their own good pleasure, remit any part of it to you, take it, and enjoy it without fear of any harm (as Allah has made it lawful)."; and Khan 1404H (4) 20) where it states that "… and you have given one of them a Cantar (of gold i.e. a great amount) as Mahr [dower], take not the least bit of it back; would you take it wrongfully without a right and (with) a manifest sin?").

It should be noted that a female intestate beneficiary who inherits half the share of her male counterpart could argue that males (at times) do not fulfil their religious obligations regarding maintaining their dependants as is required in terms of Islamic law. There is therefore a need for Muslim males to do as required in terms of Islamic law in order to restore balance.

4 Conclusion

The note analysed the position of females within the Islamic law of intestate succession. The findings show that discrimination against females is not consistent as there are instances where males and females inherit equal shares and other instances where females inherit more than males. The findings of this note show that rationale behind the unequal distribution of shares in terms of the Islamic law of intestate succession is not clearly stated within Islamic law. The findings show that the instances where males inherit more favourably than females could be based on the extra financial obligations placed on males in terms of Islamic law. It is therefore recommended that Muslim males must fulfil their obligations imposed on them in terms of Islamic law in order to restore balance.

MUNEER ABDUROAF
University of the Western Cape

The dissolution of universal partnerships in South African law: Lessons to be learnt from Botswana, Zimbabwe and Namibia

Liesl Hager
LLB LLM (UP)
Research, Marketing and Publishing Assistant, Pretoria University Law Press, Centre for Human Rights, Faculty of Law, University of Pretoria

SUMMARY

The universal partnership is a unique common-law creature that offers valuable benefits during its subsistence and especially upon its dissolution. This article is concerned with the application of the dissolution of universal partnership as an interchangeable legal remedy, by providing litigants with contractual remedies. Foreign jurisdictions such as Botswana, Namibia and Zimbabwe have used the consequences of the dissolution of the universal partnership in various cases from putative marriages to customary law cases in order to do justice between the parties. These foreign courts have applied the consequences of dissolution in a reformative and liberal manner, without being side-tracked by legislative departures and debates. Although much debate surrounds the interchangeable approaches followed by the courts when using this contract in cases of putative marriages, unrecognised religious marriages, cohabitation and customary law, it is nonetheless applied as a remedial measure. The intended "single marriage statute" and relevance thereof on the universal partnership is also explored in this article. The difference between intimate and commercial universal partnerships as well as the drawbacks of using the universal partnership in the context of cohabitation is shortly discussed. It is suggested that our courts more willingly provide contract-based relief to litigating parties by following a liberal application the universal partnership. Unmarried cohabiting persons are often left without legislative recourse and remedies as the intended "single marriage statute" and the Domestic Partnership Bill of 2008 has not yet been enacted into law. For this reason a reformative, progressive and liberal application of the universal partnership, as observed in foreign law, may certainly allow our courts to protect these vulnerable parties.

1 Introduction to universal partnerships

The universal partnership in South Africa has secured a very unique niche in our modern multi-cultural pluralistic legal system. A universal partnership will only exist if its three essentials are present. Firstly, each party brings something into the partnership, whether it be money, labour

How to cite: Hager 'The dissolution of universal partnerships in South African law: Lessons to be learnt from Botswana, Zimbabwe and Namibia' 2020 *De Jure Law Journal* 123-139
http://dx.doi.org/10.17159/2225-7160/2020/v53a9

or skill.[1] Secondly, the partnership should be carried on for the joint benefit of both parties. Thirdly, the object should be to make a profit and lastly, the contract should be a legitimate one.[2]

In this article the dissolution of universal partnership is viewed through multiple lenses from ancient Roman law to customary law. As the universal partnership is constantly developing, adapting and finding application in our law, the main inquiry of this article is concerned with the remedial application of the dissolution of the universal partnership in South Africa and abroad. The instances where the universal partnership is often employed to a remedial extent is usually rooted in putative marriages, unrecognised religious marriages, unregistered customary law marriages and unmarried intimate or cohabitation relationships, where women often find themselves with little or no legal recourse, except for the contractual remedies offered by the universal partnership.

2 Choice of foreign law

Zimbabwe has a dual legal system, comprised of general law (Roman-Dutch common law and legislation) and customary law.[3] Zimbabwe retained a large part of South African private law which it inherited from its predecessor, Southern Rhodesia which attained independence from Britain in 1980.[4] Botswana inherited most of its private law from the Cape of Good Hope; therefore it shares a common law heritage with South Africa.[5] Botswana has a pluralistic legal system in which both the common law and customary law operate. Namibia was previously administered by South Africa until its independence in 1990 and as a result thereof the private law of Namibia is largely inherited from South Africa.[6] The Constitution of the Republic of Namibia, 1990 makes

1 Cassim *et al*, *The law of business structures* (2015) 13. See also Gibson *et al, South African mercantile and company law* (2003) 241 and Pothier *A treatise on the contract of partnership: With the civil code and code of commerce relating to that subject in the same order* translated by Tudor (1854) 5-6.

2 *Bester v Van Niekerk* 1960 2 SA 779 (A) confirmed that this last requirement has been discounted by our courts for being common to all contracts.

3 S 192 of the Constitution of Zimbabwe, 2013 provides that the law to be administered in the country is the law in force on the effective date of the Constitution. The law in force was provided for in S 89 of the Lancaster House Constitution, which provides that the law applicable in Zimbabwe is Roman Dutch Law and African Customary Law, as modified by subsequent legislation.

4 Zimmermann *et al*, *Southern Cross: Civil law and common law in South Africa* (1996) 4. See also SADC website: https://www.sadc.int/member-states/ (accessed 2019-09-01).

5 Zimmermann *et al*, 3.

6 Zimmermann *et al*, 3.

express provision for customary law and common law to operate in its pluralistic legal system.[7]

It is also noteworthy that Botswana, Namibia, Zimbabwe and South Africa are all member States of the Southern African Development Community (SADC) which was established in1992. The vision of SADC includes freedom, social justice, peace and security for the people of Southern Africa.

In very recent case law these three countries recognise the existence of universal partnerships and Pothier's influence on partnership law. According to these jurisdictions, universal partnerships are only recognised as a general law concept and is unknown to customary law. Despite this, these courts have applied the universal partnership in multiple customary law cases, in order to provide litigants with contractual remedies offered by the universal partnership upon its dissolution. These three countries offer valuable judicial lessons regarding the consequences of the dissolution of the universal partnership and the remedial application thereof. As these three countries geographically border South Africa, this close geographical proximity may imply that universal partnerships could also easily extend across these country borders.[8] For this reason, it makes sense to acquire some uniformity to the application of the universal partnership and the consequences of its dissolution, in order to promote legal certainty in South Africa, in line with the liberal approaches adopted by these foreign jurisdictions and the guiding SADC principles.

3 The universal partnership in South Africa

The majority of South African case law on universal partnerships is focused on the validity requirements of the universal partnership, whether or not the partnership legally came into existence and how dissolution and distribution should accordingly take place.[9] The recognition of a universal partnership is most common in cases where the surviving partner wishes to inherit from the deceased partner.[10] The universal partnership is also common in cases where either one of the partners is insolvent or the partnership itself is insolvent and the court is faced with the liquidation of the partnership, the sequestration of the partner(s) and incidentally the recognition of rights and duties in terms

7 The Constitution of the Republic of Namibia, 1990 S 66(1) states that: "Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law".

8 Thomas *et al*, *Historical foundations of South African private law* (2000) 7. Zimmermann *et al*, 3. South Africa, Botswana, Namibia and Zimbabwe all have mixed legal systems.

9 See *Butters v Mncora* 2012 2 ALL SA 485 (SCA).

10 See *Bergman v Master of the High Court* 2015 JDR 0281 (GJ).

of insolvency law.[11] The fact that a universal partnership may extend beyond commercial undertakings contributes to the popularity of this partnership type, especially among cohabiting or unmarried individuals, although the universal partnership is not limited to them. Due to the ease with which universal partnerships may be created, the notion that universal partnerships have fallen into disuse must be disregarded, as very recent domestic and foreign case law have recognised universal partnerships.[12]

Although there is no single piece of legislation dealing with partnerships in particular, this does not imply that partnerships are solely regulated under the common law. In South Africa there are various pieces of legislation that deal with certain aspects of partnerships to a limited extent.[13]

Despite the availability of other works of De Groot, Van Leeuwen, Voet, Van der Keessel, Van der Linde and Felicius-Boxelius, the South African courts "virtually exclusively rely on the work" of Pothier.[14] *Traité du Contrat de Société* by Pothier is recognised by our courts as being one of the leading sources of our common law of partnership.[15] The reason for this is presumed to be the fact that *Traité du Contrat de Société* was translated into English and Dutch during the 19th century.[16] The requirements for a universal partnership, as formulated by Pothier, have become an engrained part of our law and that of Botswana, Namibia and Zimbabwe. Despite the universal partnership's Roman law origin, it has managed to secure itself a place in our modern day democratic legal system and abroad.

Not only does this partnership form offer contractual remedies to persons excluded from legislative assistance, this partnership has also managed to offer women in customary-law unions, putative marriages and unrecognised religious marriages, an opportunity to share in the

11 See for example the Insolvency Act 24 of 1936 and the Administration of Estates Act 66 of 1965. See also Cassim *et al*, 37.

12 See for example *Bergman v Master of the High Court supra*; *DA v AA* 2015 JDR 2611 (GJ); *CG v HG* 2014 JDR 1650 (GP). See also Cassim *et al*, 21 which mentions that "this type of partnership has neither fallen into disuse nor is it an unimportant type of partnership".

13 See for example the National Credit Act 34 of 2005, the Consumer Protection Act 68 of 2008, the Firearms Control Act 60 of 2000 as amended by the Firearms Control Amendment Act 28 of 2006, the Customs Control Act 31 of 2014, the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004, the Prevention of Organised Crime Act 121 of 1998 and the Restitution of Land Rights Act 22 of 1994.

14 Olivier and Honiball *International tax – A South African perspective* (2011) 167.

15 Rule "A square peg in a round hole? Considering the impact of applying the law of business partnerships to cohabitants" 2016 *Stellenbosch Law Review* 615. The importance of Pothier in South African law was emphasised by the court in *Robson v Theron* 1978 1 SA 841 (A).

16 Olivier and Honiball 167.

property jointly acquired by them and their partners.[17] Before discussing the judicial application of the universal partnership, a short overview of the partnership contract and its *essentialia* is necessary.

3 1 Universal partnership *essentialia*

In *Butters v Mncora*,[18] the court explains that the requirements for a partnership as formulated by Pothier have become a well-established part of our law and that these requirements have been applied by our courts to partnerships in general and universal partnerships in particular.[19] The *essentialia* for a partnership in general is the same for a universal partnership.[20] The three essential elements of a partnership, as discussed above, thus also apply to the universal partnership.[21]

There are two types of universal partnerships recognised in South African law as dictated by early Roman and Roman-Dutch law, namely the universal partnership of all property and the universal partnership of all profits. Although it is trite in our law that these two forms of the universal partnership exist Bonthuys,[22] has drawn an interesting distinction between "commercial universal partnerships" and "intimate universal partnerships". Bonthuys notes that for an intimate universal partnership there are additional requirements to that of Pothier.

17 Barratt "Whatever I acquire will be mine and mine alone: Marital agreements not to share in constitutional South Africa" 2013 *South African Law Journal* 688-689: "[W]omen are usually the economically weaker spouses at the end of a marriage". See also Barratt 2013 *South African Law Journal* 698: "It is universally recognized that the economically weaker spouse will almost always be the wife, because of gender roles usually assumed during marriage". See also Bonthuys "Proving express and tacit universal partnership agreements in unmarried intimate relationships" 2017 *South African Law Journal* 263; and Bonthuys "Developing the common law of breach of promise and universal partnerships: Rights to property sharing for all cohabitants?" 2015 *South African Law Journal* 99: "In the absence of legislation, however, the courts' treatment of unmarried same-sex cohabitation shows that undertaking financial and other caring responsibilities and sharing financial benefits is evidence of an agreement that financial benefits should be equally shared at the end of the relationship".

18 *Butters v Mncora supra* 17-18.

19 See also *Isaacs v Isaacs* 1949 1 SA 952 (C) 956; *Pezzutto v Dreyer* 1992 3 SA 379 (A) 390A-390C; *Bester v Van Niekerk supra* 783H-784A; *Mühlmann v Mühlmann* 1981 4 SA 632 (W) 634C-634F.

20 *Isaacs v Isaacs supra* 955; *Sepheri v Scanlan* 2008 1 SA 322 (C) 338C-D; *Ally v Dinath* 1984 2 SA 451 (T); *V* (also known as *L*) *v De Wet NO* 1953 1 SA 612 (O) 615; *Festus v Worcester Municipality* 1945 CPD 186 (C).

21 Cassim *et al*, 23. See also *Vermeulen v Marx* 2016 JDR 1435 (GP); *Davidson v Davidson* 2016 JOL 35109 (GP) 12; and *Pezzuto v Dreyer supra* 390.

22 Bonthuys 2017 *South African Law Journal* 263: "Nevertheless, universal partnerships in intimate relationships – to which I refer as intimate universal partnerships – differ from commercial universal partnerships, largely because of the different context within which they operate, which imply, in turn, different modes of bargaining, different contractual aims, and different behavioural norms during the subsistence and at the end of these contracts".

Bonthuys notes that:

> "In intimate universal partnerships the additional element of cohabitation could be used as a proxy for establishing the presence of *animus contrahendi* which, in turn, distinguishes a legal obligation from a promise made in the heat of a short-lived passion".[23]

This suggestion by Bothuys should not lead to the inference that normal cohabitation amounts to the *animus contrahendi* of a universal partnership, as cohabitation is not a requirement for a universal partnership and it is trite in our law that even longstanding cohabitation relationships do not have any legal consequences attached to them.[24] Furthermore, the distinction between an intimate and commercial partnership may be unnecessary as the requirements for both are exactly the same and there are no additional requirements.[25]

The benefits of utilising the universal partnership in the cases of putative marriages, unregistered (or even registered) customary-law unions and cohabiting relationships are wide-ranging. The remedial application of the universal partnership is shortly discussed in the following paragraphs, in order to indicate the beneficial judicial application of the dissolution of this partnership contract.

4 Remedial application of the universal partnership in Botswana, Zimbabwe and Namibia

It is noteworthy that the requirements for the universal partnership as formulated by Pothier also apply in Botswana, Zimbabwe and Namibia. Accordingly, the requirements for a universal partnership in Botswana, Zimbabwe and Namibia are the same as in South African law.[26]

4 1 Botswana

The High Court of Botswana, in *Tokoyame v Bok*,[27] declared that a universal partnership had existed between the deceased and the respondent, despite the fact that they were never married. The significance of this case is attributed to the liberal approach the court followed by declaring that a universal partnership had existed, despite arguments that the concept of a universal partnership is a common law

23 Bonthuys 2017 *South African Law Journal* 267.
24 Sinclair and Heaton *The law of marriage* (1996) 274.
25 *Butters v Mncora supra* 17. See also Bonthuys 2017 *South African Law Journal* 265: "According to proponents of this argument, parties in intimate universal partnerships must also prove 'cohabitation, sharing of profits and freedom of accounting to each other'. These additional requirements were rejected as being unnecessary in the *Butters* case".
26 See for example *Bodutu v Motsamai* 2006 2 BLR 252 (HC) 257B-257C, *Ntini v Masuku* 2003 1 ZLR 638 (H) 640 and *LM v JM* 2016 2 NR 603 (HC).
27 *Tokoyame v Bok* 2008 1 BLR 384 (CA).

idea which is foreign to *Kisa* customary law.[28] The respondent accordingly received a half share of the deceased estate.

In the case of *Makobela v Kemodisa*,[29] the court willingly inferred a tacit universal partnership in a putative marriage. Despite the criticism against using the universal partnership in cases of putative marriages, the court in *Tape v Matoso*,[30] applied the principles of a universal partnership to a customary marriage. In this case the court correctly mentioned that it should be quite obvious that the universal economic partnership is different from the statutory marriage in community of property. The court however added that in appropriate circumstances, the finding of a universal partnership may be made with respect to the way a couple married under customary law.

It is vital to observe that complying with the *essentialia* of the universal partnership is of utmost importance, as the partnership cannot simply exist for convenience sake. In the case of *Maoto v Maoto*,[31] the applicant failed to demonstrate how cohabitation could be elevated to the level of a universal partnership. Consequently the application was dismissed with costs. Had the applicant been successful in proving the universal partnership *essentialia*, the court in this case could have possibly entertained the argument that the cohabitation relationship had been elevated to universal partnership status. This elevation may seem insignificant, but it is important to remember that according to South African law, even longstanding cohabiting relationships do not have any legal consequences attached to them.[32]

4 2 Zimbabwe

The concept of a tacit universal partnership is unknown to customary law, as confirmed by the court in *Chivise v Dimbwi*.[33] In *Maenzanise v Ratcliffe No*,[34] the court held that although the concept of a universal

28 It is noteworthy that in South African customary law, a customary marriage entered into after the commencement of the Recognition of Customary Marriages Act 120 of 1998 (the RCMA) may legally exist despite the fact that it has not been registered, provided that the requirements as set out in S 3 of the RCMA are complied with. See Rautenbach and Bekker *Introduction to legal pluralism in South Africa* (2014) 105: "A customary marriage entered into before the commencement of the Act had to be registered at the Department of Home Affairs before 15 November 2002".

29 *Makobela v Kemodisa* 2002 2 BLR 112 (CA).

30 *Tape v Matoso* 2007 1 BLR 512 (CA).

31 *Maoto v Maoto* 2011 2 BLR 136 (HC).

32 *Ally v Dinath supra*.

33 *Chivise* v *Dimbwi* 2004 1 ZLR 12 (H) 14. The court mentioned that there is no known principle of tacit universal partnership under customary law. In this case the court mentioned that the general principles to be applied for a just and equitable distribution of the estate include unjust enrichment, universal partnership and joint ownership. See also *Muringaniza v Muringaniza* 2003 2 ZLR 342 (H).

34 *Maenzanise v Ratcliffe No* 2001 2 ZLR 250 (H). In this case the plaintiff contracted an unregistered customary-law marriage with a man of British

partnership is a general-law concept and unknown to customary law, the "way of life" of the plaintiff and her husband indicated that, in terms of section 3 of the Customary Law and Local Courts Act 20 of 1990,[35] the general law should apply to the case.[36]

The court in *Chivise v Dimbwi*,[37] noted that the approach to property of persons in an unregistered union relate to the general principles of law (including unjust enrichment, universal partnership and joint ownership) and concluded that these general-law principles have been resorted through judicial innovation, aimed at providing a just and equitable distribution of such customary law estates.[38]

The court in *Jengwa v Jengwa*,[39] embarked on a discussion of using the universal partnership in customary law cases where a man has more than one wife. Consequently, various questions arise, such as with which wife or wives such a tacit universal partnership was formed, bearing in mind that the wives themselves may form universal partnerships with each other, to the exclusion of the husband.

Adopting a reformative approach to the application of customary law may fully justify the application of the tacit universal partnership concept to customary law, as expressed by the court in *Chapeyama* v *Matende*.[40] The court in this case expressed the view that the general-law concept of tacit universal partnerships may be relied upon in circumstances where the application of customary law would have led to injustice. The court concluded that the justice of the case required that general law should apply as the elements of a universal partnership had been established

extraction and lived with him in Harare until his death 25 years later. Overall, her contribution towards the acquisition of the assets that constituted the man's deceased estate was about equal to his. She claimed half the estate on the ground that she and the man had entered into a tacit universal partnership in which they had pooled their resources for their mutual benefit.

35 Customary Law and Local Courts Act 20 of 1990 S 3 states that: "When general law is the correct choice, then a recognised cause of action must be pleaded. Such a cause of action may be unjust enrichment, a tacit universal partnership or joint ownership. An averment merely to the effect that parties were in an unregistered customary union is not sufficient to found a cause of action at general law".

36 See Rautenbach and Bekker. These factors indicating the choice of law is similar to that of South Africa.

37 *Chivise v Dimbwi supra.*

38 *Chivise v Dimbwi supra* 15.

39 *Jengwa v Jengwa* 1999 2 ZLR 121 (H) 121.

40 *Chapeyama v Matende* 2000 2 ZLR 356 (S). On appeal the court held, that where a husband and wife marry under customary law, and that marriage is not registered, customary law will apply to a dispute arising out the marriage or its dissolution. It is only possible to bring in the general-law concept of a tacit universal partnership if the court lays a foundation for applying such law.

tacitly.[41] In the case of *Chapendama v Chapendama*,[42] the learned judge was quite emphatic as to the inappropriateness of invoking the common law concept of a universal partnership where the parties were married according to customary law. The learned judge mentioned that:

> "However unsatisfactory the application of the general law concept of a tacit universal partnership to an unregistered customary marriage scenario may be, it is currently the only legal régime available in order to do justice to the parties".[43]

Despite the recognition of the duty of the court to assist women who "still find themselves being shifted to backward and meaningless positions in society, even where they now commercially contribute to their households", the court in *Ntini v Masuku*,[44] strictly adhered to the requirements of the universal partnership. The court therefore did not use the tacit universal partnership as a legal vehicle to award a half-share of property in this unregistered marriage as the requirements for a universal partnership were not met.[45]

In this case the court correctly noted that the judicial duty "to follow a positive and progressive approach" in addressing the injustices in the legal system, does not renounce or negate the requirements of a universal partnership, and only where "practically possible, will it be used to assist individuals in their endeavour to find justice".[46]

4 3 Namibia

The case of *Frank v Chairperson of the Immigration Selection Board*,[47] is regarded as one of the leading cases in Namibian equality jurisprudence. In this case, the Immigration Selection Board denied the application of a permanent residence permit to a German citizen, Elizabeth Frank, who was in a long-term lesbian relationship with a Namibian citizen. The Immigration Selection Board assumed that the long-term relationship between the two women was not one recognised by the courts.

---

41 *Chapeyama v Matende supra* 357. The court also referred to the case of *Matibiri v Kumire* 2000 1 ZLR 492 (H), where the court ruled that on the facts there was no tacit universal partnership, but made it clear that it would have applied the common law, had the facts warranted such an approach.

42 *Chapendama v Chapendama* 1998 2 ZLR 18 (H) 27-32. In this case the conduct of the parties was indicative of a tacit universal partnership (*societas universorum quae ex quaestu veniunt*). The plaintiff was therefore entitled to a share of the assets on that basis.

43 *Chapendama v Chapendama supra* 31.

44 *Ntini v Masuku supra* 642.

45 *Ntini v Masuku supra*. In this case the court held that an unregistered customary-law marriage on its own does not entitle a party to claim property under the principle of tacit universal partnership. In order to establish such a claim, the party must lay a foundation under the general law and show that the requirements for such a partnership were fulfilled.

46 *Ntini v Masuku supra* 642.

47 *Frank v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC).

The Namibian High Court ruled that the concept of a universal partnership is a relationship recognised by the courts. The High Court noted that such a partnership may be concluded, expressly or tacitly, between a man and a woman who are not legally married, but who live together as husband and wife. Following this logic, the High Court concluded that the long-term relationship between these two women is in fact a universal partnership which is recognised by Namibian law. The High Court accordingly ordered the Immigration Selection Board to issue a permit within 30 days.[48]

The Immigration Selection Board thereafter appealed to the Supreme Court of Namibia against the decision of the High Court.[49] The Supreme Court concluded that the Constitution of the Republic of Namibia, 1990 and the Immigration Control Act 7 of 1993, did not discriminate against Frank or her partner and overturned the decision of the High Court. The majority of the Supreme Court judges in the appeal case concluded that homosexual relationships are not equal to heterosexual relationships and are therefore not afforded the same protection under Namibian law.[50]

The constitutional right to administrative fairness however required the Immigration Selection Board to adhere to the *audi alteram partem* rule. On this basis Frank was afforded the opportunity to reapply for the permanent residence permit. The permit was eventually granted, not on the basis of the universal partnership, but on the grounds of her work as gender researcher, gender trainer and gender journalist in Namibia.[51]

Although the decision of the High Court was overturned, it must be understood that this is not because the courts do not recognise the existence of universal partnerships. The conclusion of the High Court and confirmation by the Supreme Court of Appeal that same-sex partners can conclude a universal partnership, in the same way as opposite-sex partners, is correct and valid.[52]

The basis on which the High Court decision was overturned by the Appeal Court, is attributed to the constitutionality of section 26(3)(g) of the Immigration Control Act, which only referred to "spouse" which does not include a partner in a same-sex life partnership. The Appeal Court did not read into the word "spouse" to mean "partner in a same sex life

48 Morgan and Wieringa *Tommy boys, lesbian men and ancestral wives: Female same-sex practices in Africa* (2005) 78.

49 *Chairperson of the Immigration Selection Board v Frank* 2001 NR 107 (SC).

50 *Chairperson of the Immigration Selection Board v Frank supra* 143 O'Linn AJA stated that "although homosexual relationships must have been known to the representatives of the Namibian nation and their legal representatives when they agreed on the terms of the Namibian Constitution, no provision was made for the recognition of such a relationship as equivalent to marriage or at all. If follows that it was never contemplated or intended to place a homosexual relationship on an equal basis with a heterosexual marital relationship".

51 Röhrs *et al In search of equality: Women, law and society in Africa* (2014) 35.

52 *Chairperson of the Immigration Selection Board v Frank supra* 113.

partnership".[53] The Appeal Court did, however, add that the Immigration Selection Board should have considered this relationship.

Currently persons unable to marry in terms of Namibian law, are left with only one option, which is to conclude a legally recognised, binding and protected relationship, namely a universal partnership. This alternative may seem irrelevant to the discussion at hand, but upon further evaluation it is essential to remember that a cohabiting relationship does not secure any legal consequences. The universal partnership is currently the only legal alternative available to these individuals who are unable to marry in terms of Namibian law.

4 4 A reflection on the foreign law

From the above discussion it is clear that the judiciary of Botswana and Zimbabwe rarely hesitate to apply the consequences of the dissolution of a universal partnership in order to attempt to protect the contributions of the parties and distribute the estate in a just and equitable manner. The courts of Botswana and Zimbabwe however caution against the dangers of inferring a universal partnership in instances where the *essentialia* is absent or where it was never the intention of the parties to create a partnership. The reformative and liberal approach of the Botswana and Zimbabwe courts do not negate the importance of the *essentialia* and proof of contribution. These cases illustrate the versatile application of the universal partnership to various cases in order to effect a just and equitable distribution of the property, in pursuit of the judicial duty to assist.

It is evident from the case law that the universal partnership, in essence, offers a legal avenue to share in the partnership property, jointly acquired by them, upon the dissolution of the partnership,[54] in addition to joint ownership or unjust enrichment. Furthermore, the discretion of the court to infer such a partnership in appropriate circumstances may avoid an unfair outcome, although the judicial discretion of inference should always be exercised with extreme caution.[55]

The courts should refrain from assuming an automatic discretion and imposing a private contract on the parties, as the universal partnership contract is not one which should be deemed to exist. Accordingly, litigants should plead and prove the existence of a universal partnership in order to avoid an unfavourable outcome. Hence, the judiciary should

53 *Chairperson of the Immigration Selection Board v Frank supra* 156-157 the court mentioned that: "Whether or not an amendment shall be made to S 26(3)(g) to add the words 'or partner in a permanent same-sex life partnership', is in my view a matter best left to the Namibian Parliament".

54 Please refer to Bonthuys 2017 *South African Law Journal* 264.

55 Barratt "Private contract or automatic court discretion? Current trends in legal regulation of permanent life-partnerships" 2015 26 *Stellenbosch Law Review* 110-118: This is referred to as the "inferred contract model" which is described by Barratt as a "precarious form of protection for economically vulnerable life-partners".

not develop new default rules that long-term cohabiting or life partners are deemed to be universal partners, as this may not be the intention of the parties.

Utilising the universal partnership in cases where it is not intended will inevitably lead to a degree of disappointment and frustration.[56] As mentioned by the court in *Chapendama v Chapendama*,[57] however unsatisfactory the application of the universal partnership concept to customary law may be, it is currently the only legal régime available in order to do justice between parties. This amount of dissatisfaction is, however, lessened by the fact that without the contractual remedies offered by the partnership upon its dissolution, litigants would be left with barely no legal recourse.[58] Nevertheless, a cohabitee may invoke one or more of the remedies available in private law such as unjust enrichment, joint ownership or the universal partnership, provided, of course, that the requirements for that remedy are established.

4 5 Versatile utilisation of the universal partnership: Benefits and drawbacks

Despite the vast benefits offered by the universal partnerships in these cases, the drawbacks of the universal partnership's application should be mentioned. In a 2010 publication by the Gender Research and Advocacy Project, Legal Assistance Centre (LAC) titled "A family a?air: The status of cohabitation in Namibia and recommendations for law reform",[59] the LAC explored the drawbacks of utilising a universal partnership as the basis for asset division between cohabiting partners. Although this paper is based on Namibian law and cohabitation, it is nevertheless relatable to South Africa in this context too.

The first drawback the LAC mentions is that proving a universal partnership is difficult and that the person attempting to rely on the contract bears the onus of proof. As a universal partnership may be

56 Bonthuys 2017 *South African Law Journal* 264: "The relational elements of intimate universal partnerships do not fit easily into the classical or neo-classical contractual paradigm which remains dominant in South African law. These characteristics might make it more difficult to prove the existence and the terms of intimate universal partnerships in litigation".

57 *Chapendama v Chapendama supra* 27.

58 *Booysen v Stander* 2018 6 SA 528 (WCC) 65 referred to *Butters v Mncora supra*. The general rule in our law is that cohabitation does not give rise to special legal consequences. Despite their cohabitation, those who remain unmarried do generally not enjoy the protective measures established by family law, see *Volks NO v Robinson* 2005 5 BCLR 446 (CC).

59 LAC "A family affair: The status of cohabitation in Namibia and recommendations for law reform" https://www.lac.org.na/projects/grap/Pdf/cohabitationsummary.pdf (accessed 2019-09-01). It should be noted that the research done by the LAC is focused on cohabiting partners. Universal partnerships are not necessarily between cohabiting persons.

concluded tacitly, proving its existence may be very burdensome.[60] Additionally, proving the contribution of each party may also be very difficult. Bonthuys mentions that another serious problem with the universal partnerships' jurisprudence is the percentage of the partnership assets awarded to female plaintiffs.[61]

Secondly, the LAC explains that if a cohabiting partner is married to someone else, it may be nearly impossible to establish a universal partnership in respect of the cohabitation. Although marriage does not prohibit the existence of a universal partnership between the married spouses or between a spouse and a third party, the matrimonial property regime could possibly exclude the existence of the universal partnership. Consequently, it may render proving the existence of the universal partnership nearly impossible.

The LAC continues to explain that in cases where one of the cohabiting parties is married in community of property to another party, the process of untangling which assets belong to the universal partnership versus the community of property is extremely complex. The LAC mentions that the utilisation of the universal partnership in cohabitation cases may pose severe disadvantages, if the main asset is the home where the parties live together. Moreover, even if a party is able to prove a right to a half-share in a universal partnership, this does not automatically entitle her to a half-share in the partnership's immovable property assets.[62]

Thirdly, the LAC mentions that remedies offered by the universal partnership do not provide definite protection to vulnerable parties and that this remedy is unpredictable and largely limited to litigants with the necessary financial recourses to litigate in an action in the civil court. Accordingly, the LAC remarks that this is not a useful approach to the majority of Namibians. Not only are the majority of Namibians prejudiced by the costly litigation system, the majority of South Africans, Zimbabweans and Botswanan's are also prejudiced by their expensive litigation structures.

5 Current issues

In South Africa, section 7(6) of the Recognition of Customary Marriages Act 120 of 1998 (RCMA) makes provision for a husband in a customary marriage to enter into a further customary marriage with another woman

60 Bonthuys 2015 *South African Law Journal* 92 notes that treating these contracts as tacit in the face of evidence of oral agreements places additional evidentiary burdens on the female plaintiffs, while providing further opportunities for the defendants to cast doubt on the existence of the contract.

61 Bonthuys 2015 *South African Law Journal* 94.

62 In *Botha NO v Deetlefs* 2008 3 SA 419 (N), the court held that in the absence of an agreement between the partners on how the dissolution of the partnership is to be achieved, the normal course of action is to appoint a receiver to liquidate the partnership.

after the commencement of this Act. According to this section the husband must make an application to court in order to approve a written contract, intended to regulate the future matrimonial property system of his marriages. In the case of *MN v MM*,[63] the court declared that non-compliance with section 7(6) does not render the subsequent marriage void, but results in the marriage being out of community of property.[64] Although this registration is not a validity requirement and the avenue for declaring the subsequent unregistered customary marriage as a putative one exists, much legal uncertainty prevails. It is appropriate to mention the universal partnership as an interim alternative to this problem, until the Domestic Partnership Bill of 2008 is enacted in South Africa.[65]

In South Africa, parties to Muslim, Jewish, Hindu or other religious marriages must register their marriages in terms of the Civil Union Act 17 of 2006 or the Marriage Act 25 of 1961, in order for it to be legally recognised. Couples married in terms of Islamic or Jewish rites are excluded from concluding polygamous marriages in terms of the Civil Union Act, the Marriage Act and the RCMA. For these polygamous couples, the universal partnership is currently the only available legal vehicle to obtain legal recognition of their relationship. The South African Law Reform Commission (SALRC) has recently reiterated the fact that:

> "[P]artners in unmarried intimate relationships have very few legal rights, except for the occasional cases granting rights to share in partnership assets on the basis that the partners had concluded tacit partnership agreements".[66]

From the above statement made by the SALRC, it is clear that the universal partnership is currently one of the few legal remedies available to partners in unmarried intimate or cohabiting relationships, or unrecognised religious marriages. The SALRC added that:

> "[T]he lack of a statutory remedy to claim a share of partnership property outside of valid marriages, is a problem with significant gendered consequences, potentially leading to the social and economic vulnerability of women (and often children) when intimate relationships end".[67]

63 *MN v MM* 2012 4 SA 527 (SCA).

64 See also *Ngwenyama v Mayelane* 2012 4 SA 527 (SCA) which was confirmed by the Constitutional Court in *Mayelane v Ngwenyama* 2013 8 BCLR 918 (CC) 89. S 7(6) is not a validity requirement.

65 See Rautenbach and Bekker 110: It is suggested that the only option is a total division of all the assets of the estate.

66 South African Law Reform Commission (SALRC) http://www.justice.gov.za/salrc/ipapers.htm (accessed 2019-09-01) 12. See also Bonthuys "Exploring universal partnerships and putative marriages as tools for awarding partnership property in contemporary family law" 2016 *Potchefstroom Electronic Law Journal* 1; and Barratt 2013 *South African Law Journal* 688-704.

67 SALRC http://www.justice.gov.za/salrc/ipapers.htm (accessed 2019-09-01) 46.

In order to attempt remedying this legal problem, the SALRC has suggested a "single marriage statute" which will be based on the principles of equality, human dignity and non-discrimination.[68]

As the "single marriage statute" is intended for submission to cabinet by March 2021, the universal partnership is currently the only available remedy to parties in unmarried intimate or cohabiting relationships, unrecognised religious marriages and putative marriages.[69] This single marriage statute may provide some harmonisation and potentially remedy current legislative gaps and conflicts.

Although the legality and recognition of homosexual relationships is not the focus of this current article, it is interesting to note that the Constitution of Zimbabwe, 2013 expressly prohibits same sex marriages in section 78(3). To date, the Constitutions of Namibia, Botswana and Zimbabwe do not prohibit discrimination based on sexual orientation, like the South African Constitution.[70] It is trite that the similarities and differences between the universal partnership and valid marriages or unions are largely debated. Despite this debate, it is suggested that because these countries do not provide for same-sex marriages, the

68 SALRC http://www.justice.gov.za/salrc/ipapers.htm (accessed 2019-09-01) 1-6: The aim of this project according to the SALRC is to send a clear message that discrimination will no longer be tolerated and to enable South Africans of different religious and cultural persuasions to conclude legal marriages. This suggested "single marriage statute" may be replacing or additional to the suggested Domestic Partnership Bill of 2008.

69 South African customary law legislation has not been free of criticism and scrutiny and is in the process of reform and amendment. In the interim, it is noteworthy that the universal partnership may be utilised in order to do justice between parties that are in a relationship that is not legally recognised and protected. See Rautenbach and Bekker 110 and *Volks NO v Robinson supra* 124: "At present our law makes no express provision for the regulation of the affairs of cohabiting partners upon termination of their relationship. In several other jurisdictions, the law of implied or constructive trusts has been used to re-allocate property rights between partners at the termination of a cohabitation relationship to achieve equity. This remedy is not available in our law, given the different legal basis of the law of trusts in South African law. However, the common law rules governing universal partnership may in some circumstances assist the partners at termination". See Cameron and De Waal *Honoré's South African law of trusts* (2002) 110.

70 S 56 of Constitution of Zimbabwe, 2013 does, however, prohibit discrimination based on sex and gender, but not sexual orientation. S 10 of the Constitution of the Republic of Namibia, 1990 only prohibits discrimination based on sex, but not sexual orientation or gender. S 15 of the Constitution of Botswana, 1966 protects persons against discrimination based on sex, but not gender or sexual orientation. On 11 June 2019 the Botswana High Court in Gaborone decriminalised homosexuality and declared certain sections of the penal code banning gay sex, unconstitutional. See "Botswana legalizes same-sex relationships: Bucking trend in Africa" (2019-06-11) *Bloomberg* https://www.bloomberg.com/news/articles/2019-06-11/same-sex-relationships-decriminalized-by-botswana-s-high-court (accessed 2019-09-01).

universal partnership may currently be the only means to attach legally binding consequences to homosexual relationships.

As more than half of the African countries have laws penalising same-sex relationships, South Africa has become a "safe haven" for homosexual persons in other African countries, who often travel to South Africa to flee persecution in their home countries.[71] The relevance hereof on South Africa relates to the application of the *lex causae* of the foreign jurisdiction, where a couple from Zimbabwe, for example, flee to South Africa. If this couple, for example, concluded a universal partnership in Zimbabwe, the application of the *lex causae* is appropriate. This simple scenario indicates the potential cross-border use of this ancient contract form and its modern-day relevance.

6 Lessons to be learnt

Outlining the lessons to be learnt from the foreign-law research is no easy task. Despite this difficulty which is rooted in the abundance of detail, there are some key aspects which should be reiterated. The most important lessons to be drawn from the foreign-law research may be summarised as follow:

a In the endeavour to do justice and exercising its judicial discretion, our courts may imply the existence of a universal partnership in appropriate circumstances, such as: putative marriages; unregistered marriages or unions; unrecognised religious marriages and cohabiting relationships.
b The judicial discretion and duty to assist does not negate the universal partnership *essentialia* and the *essentialia* thereof must be pleaded and proven.
c In order to prevent imposing on litigants a mindset which they do not have, our courts should not assume any automatic discretion and an inference of a tacit universal partnership should be exercised with extreme caution in appropriate circumstances.
d Although the concept of a universal partnership is unknown to customary law, this fact must not preclude persons in customary or other unrecognised religious marriages from relying on the remedial benefits of the universal partnership upon its dissolution.
e Although choice of law rules allow litigants to choose between customary- or common law, the basis for relying on the universal partnership should be made unambiguously.
f The universal partnership may purposefully be applied to polygamous customary law marriages until legal certainty is attained regarding the regulation of subsequent unregistered polygamous customary law marriages;
g Wives in polygamous customary marriages may conclude universal partnerships with each other, to the exclusion of the husband, as contemplated by the Zimbabwe High Court;

71 See "Anti-gay laws widespread in Africa despite gains" (2016-06-10) *News24* https://www.news24.com/Africa/News/anti-gay-laws-widespread-in-africa-despite-gains-20190610-2 (accessed 2019-09-01).

h In cases where one or both of the parties are married in community of property to someone else, the form of universal partnership is more analogous to an ordinary commercial partnership than to any form of community of property arising from a matrimonial relationship;

i A reformative, progressive and liberal application of the universal partnership, as observed in foreign law, may certainly allow our courts to do justice until the enactment of the intended "single marriage statute" and the Domestic Partnership Bill of 2008.

7 Conclusion

"The *societas universorum bonorum* is alive and well in South African law".[72]

The unique niche that the universal partnership has managed to secure in our multi-cultural pluralistic legal system is extraordinary.

The universal partnership is not only beneficial upon its dissolution, but its creation and legally recognised existence may offer great remedial benefits and legal recourse to persons excluded from legislative protection. In Namibia, it is evident that the value of the universal partnership lies in proving the existence thereof, as observed in the *Frank,*[73] case. On the other hand, the remedial benefits of the universal partnership are mainly attributed to the effects of its dissolution as observed in Botswana and Zimbabwe case law, where the courts focus on employing the consequences of the dissolution of the universal partnership in order to do justice. In light of this liberal approach followed by these foreign jurisdictions, it is suggested that our courts more willingly provide contract-based relief to persons in putative marriages, unregistered civil- and customary law marriages, unrecognised religious marriages and cohabiting relationships. Until the enactment of the intended "single marriage statute" and the Domestic Partnership Bill of 2008, persons in legally unrecognised relationships are offered an opportunity to share in the jointly acquired property by relying on the universal partnership as contractual remedy.

72 Henning "Perspectives on the universal partnership of all property (*societas universorum bonorum*) and the origin and correction of a historical fault line: Part 2" 2014 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 427-439.

73 *Frank v Chairperson of the Immigration Selection Board supra*.

The processing of personal information using remotely piloted aircraft systems in South Africa

Nomalanga Mashinini
LLB LLM (UP)
Lecturer, Faculty of Law, Rhodes University

SUMMARY

Remotely piloted aircraft systems are becoming a commodity all over the world. Typically known as "drones", remotely piloted aircraft systems allow pilots to record videos and take photographs without being physically present. Such systems are used in both private and commercial ways that vary from service delivery to surveillance. As such, the protection of the right to privacy faces new challenges under South African law. This paper is concerned with the irresponsible use of remotely piloted aircraft systems, that results in privacy infringement. The article also includes a discussion of the obstacles that come with identifying users of remotely piloted aircraft systems, and the burden that such constraints place on people who seek to enforce their right to privacy. Therefore, the paper is a critical analysis of whether the existing data protection and civil aviation laws can withstand the invasion of remotely piloted aircraft systems in South Africa.

1 Introduction

No one knows how many RPAS exist in South Africa. Not all RPAS are registered.[1] In 2017, the South African Civil Aviation Authority (SACAA) reported that the number of registered remotely piloted aircraft systems (RPAS) has increased from 216 to 468 in total. By the end of 2018, this number had further grown to a total of 663 RPAS.[2] People often use RPAS for private purposes, either as a toy or to take photographs;[3] but RPAS can provide commercial or essential benefits such as service

1 McKinley "New terrains of privacy in South Africa: Biometrics/smart identification systems, CCTV/ALPR, drones, mandatory sim card registration and Fica" 2016 *Right to Know Campaign and the Media Policy & Democracy Project* 12.

2 IT Web Daily (2017-02-09) http://www.itweb.co.za/mobilesite/news/159283 accessed on 13 February 2017; "State of RPAS report in South Africa" available at https://www.rocketmine.com/wp-content/uploads/2019/07/ROC008-STATE-OF-RPAS-REPORT-2018-email.pdf (accessed 2019-11-21).

3 Clarke "The regulation of civilian drones' impact on behavioural privacy" 2014 *Computer & Security Law Review* 287.

How to cite: Mashinini 'The processing of personal information using remotely piloted aircraft systems in South Africa' 2020 *De Jure Law Journal* 140-158
http://dx.doi.org/10.17159/2225-7160/2020/v53a10

delivery.[4] Since an RPAS has a camera,[5] it can be used to collect photographic data remotely without obtaining permission from anyone.[6] An RPAS provides real-time feedback to the pilot; giving them the uncontrolled ability to store other people's photographs and videos. Given how people interact on social media, a pilot may share the data on their social media account as well. As a result, the right to privacy withers when people use their RPAS negligently.

In general, privacy is under threat because of the irresponsible use of technology such as RPAS.[7] Besides, RPAS are becoming more accessible and inexpensive to purchase.[8] The cheapest RPAS costs R1 999 and has a camera that takes 5-megapixel images and records high definition videos while the pilot views a live feed. [9] Such RPAS can also be used to track people, animals and objects without the need for a tracking bracelet. Therefore, it may allow a remote pilot to track a person and keep stored records about the latter without their consent.[10] Personal data generates money and helps to predict people's preferences and hobbies. As such, the law must be concerned about the implications of people and businesses acquiring data-collecting RPAS.

This paper involves an analysis of the enforceability of the right to privacy in civil aviation. The relevant laws to consider in South Africa are the Civil Aviation Act 13 of 2009 (CAA), read along with the Civil Aviation Regulations, 2015 (CARs).[11] The existing regulations for the recreational use of RPAS prohibit certain forms of irresponsible use. Whether these laws are sufficient to protect individuals from unlawful infringement of their right to privacy will be discussed throughout this paper. Furthermore, the protection of privacy also entails protection against unlawful processing of personal information, which may include photographic data of individuals. Therefore, a critical analysis of the

4 Cash "Droning on and on: A tort approach to regulating hobbyist drones" 2016 *University of Memphis Law Review* 696; McKinley 2016 *Right to Know Campaign and the Media Policy & Democracy Project* 11; Washington "Survey of drone use for socially relevant problems: Lessons from Africa" 2018 *Afr. J. Comp. & ICT* 2.

5 Cash 2016 *University of Memphis Law Review* 696.

6 Cash 2016 *University of Memphis Law Review* 696; Huneberg "The rise of the drone: Privacy concerns" 2018 *THRHR* 267.

7 Cash 2016 *University of Memphis Law Review* 697 and 704; Loubser and Midgley *The Law of Delict* (2017) 327; Huneberg 2018 *THRHR* 264 & 267; Washington 2018 *Afr. J. Comp. & ICT* 6.

8 Cash 2016 *University of Memphis Law Review* 696; Washington 2018 *Afr. J. Comp. & ICT* 5.

9 See https://broadcasthub.co.za/product_details/ryze-tech-tello-quadcopter-iron-man-edition for an example of the cheap model described in this paper (accessed on 2020-04-05).

10 Clarke 2014 *Computer & Security Law Review* 287.

11 S 155(g)-(i) of the Civil Aviation Act 13 of 2009 empowers the minister of transport to make regulations for purposes of recreational activities specified in the regulations and establish regulatory bodies for such purposes; Civil Aviation Regulations, 2011 published in GG 38830 of 2015-05-27.

Protection of Personal Information Act 4 of 2013 (POPI Act) is included in this study to determine whether RPAS users are bound to the principles aimed at protecting the right to privacy in the POPI Act.

2 Regulation of RPAS in South Africa

RPAS, commonly known as drones, are aircraft operated from a remote pilot station, excluding a model aircraft and toy aircraft.[12] The pilot of an RPAS manages the flight thereof from a remote pilot station.[13] Part 101 of the CARs applies to RPAS used for private and commercial flight operations.[14] Commercial operations involve the use of RPAS in farming, mining, media, journalism, film and entertainment.[15] Private operations refer to the use of an RPAS for personal purposes where there is no commercial outcome, gain or interest.[16] Subparts 101.01 and 101.05 of the CARs regulate such private use.[17] The regulations have three main parts: (a) rules relating to the requirements for operating RPAS and the required distance between the pilot and the RPAS; (b) restrictions that limit the distance between the RPAS and other aircraft, other people and their property and (c) exemptions from liability.

2 1 License and distance requirements for RPAS pilots

A pilot who uses an RPAS for private operations is not required to have a license.[18] However, pilots using RPAS for personal reasons must have a certificate of registration for each RPAS they own.[19] As opposed to private RPAS pilots, commercial RPAS pilots must undergo training and require a license to operate RPAS lawfully.[20] The CARs require the pilot using RPAS for commercial operations to have an operations license which specifies the kind of operation the pilot may participate in, hence training is required.[21] Furthermore, the holder of an RPAS operational license for commercial use is required to have insurance against third-party liability.[22] Whether insurers satisfy violation of privacy claims will depend on the contractual arrangements between parties.

12 R 2(k) Civil Aviation Regulations, 2011.
13 *Supra*.
14 Part 101.01.1(1) read with subpart 101.01.1(2)(d) Civil Aviation Regulations, 2011; McKinley 2018 *Right to Know Campaign and the Media Policy & Democracy Project* 12.
15 McKinley 2016 *Right to Know Campaign and the Media Policy & Democracy Project* 13.
16 R 2(i) Civil Aviation Regulations, 2011; McKinley 2016 *Right to Know Campaign and the Media Policy & Democracy Project* 12.
17 Part 101.01.2(1) Civil Aviation Regulations, 2011.
18 Part 101.01.2(2) Civil Aviation Regulations, 2011; McKinley 2016 *Right to Know Campaign and the Media Policy & Democracy Project* 12-13.
19 Part 101.05.10(1)(c) Civil Aviation Regulations, 2011.
20 Part 101.04 Civil Aviation Regulations, 2011; McKinley 2016 *Right to Know Campaign and the Media Policy & Democracy Project* 13.
21 Part 101.04.1 Civil Aviation Regulations, 2011.
22 Part 101.04.12 Civil Aviation Regulations, 2011; McKinley 2016 *Right to Know Campaign and the Media Policy & Democracy Project* 13.

All pilots must fly RPAS within a visual-line-of-sight (VLOS),[23] 400 feet above ground level while maintaining direct and unaided visual contact with the RPAS at a distance not exceeding 500 metres.[24] Although, commercial RPAS can also be operated beyond the visual-line-of-sight (B-VLOS) if they have the approval to fly B-VLOS.[25] The CARs aim to ensure that the pilot actively and continually monitors the RPAS while it is in flight, not allowing it to move outside of their VLOS. Therefore, the mentioned regulations deal with the distance required between the pilot and the RPAS. Additionally, the CARs also provide restrictions that must be observed by RPAS pilots concerning other people affected by RPAS operations.

2 2 Restrictions on private and commercial RPAS operations

The CARs prohibit RPAS operations directly above any person or a group of persons within a lateral distance of 50 metres unless such persons are under the direction of the RPAS pilot.[26] These provisions apply to both private and commercial operations. RPAS may not be operated within a lateral distance of 50 metres from any structure or building without permission from the owner thereof.[27]

The cumulative effect of these regulations makes it unlawful to fly RPAS less than 50 metres away from a person, above a person or someone's property while the remote pilot of the RPAS is, at most, 500 metres away from the RPAS. Not complying with CARs can amount to an offence and may result in a fine of up to R50 000 or a period of imprisonment not exceeding ten years or both.[28]

Moreover, all RPAS pilots are prohibited from engaging in negligent or reckless RPAS operations that endanger the safety of people, property or any other aircraft.[29] This provision relates explicitly to the safety of other people concerning the use of RPAS. SACAA issued a notice on their website explaining that the dangers of the negligent operation of an RPAS may result in "legal liability for breaking privacy laws and other laws enforceable by other authorities".[30] However, the CARs do not

23 R 3(l) read with 101.05.11(1) and (2) Civil Aviation Regulations, 2011.
24 R 2(n) Civil Aviation Regulations, 2011; McKinley 2016 *Right to Know Campaign and the Media Policy & Democracy Project* 12.
25 Part 101.05.11 Civil Aviation Regulations, 2011; McKinley 2016 *Right to Know Campaign and the Media Policy & Democracy Project* 14.
26 Part 101.05.13 Civil Aviation Regulations, 2011; McKinley 2016 *Right to Know Campaign and the Media Policy & Democracy Project* 12.
27 Part 101.05.14(1)(b).
28 S 112(b) of the Civil Aviation Act 13 of 2009.
29 Part 101.05.9(2) Civil Aviation Regulations, 2011.
30 South African Civil Aviation Authority "Remotely Piloted Aircraft Systems – General Information" http://www.caa.co.za/Pages/RPAS/Remotely%20Piloted%20Aircraft%20Systems.aspx accessed on 27 May 2017.

explicitly prohibit the invasion of privacy through RPAS.[31]

Although the CARs do not place a specific duty on RPAS pilots to refrain from violating the right to privacy of others, such a duty can be inferred based on the communication of SACAA's expectations of RPAS users, in conjunction with the wording of the regulatory rules that bind RPAS pilots. Therefore, the regulations are all indirectly aimed at protecting the right to privacy, but they fail to provide enforcement of this right effectively.[32]

2 3 Exemptions and limitations on liability

The CAA explicitly states that no action for trespassing can arise merely because an aircraft passes at a reasonable height over private property at a reasonable distance.[33] The CAA does not stipulate what the term 'reasonable' means in this context. One can assume that a reasonable height to fly over one's property would be one that does not exceed the restrictions under the CARs. A reasonable height may also include an operation that exceeds the CARs restrictions only as far as it is necessary to do so, based on the surrounding facts and circumstances. The provision seems to take the form of a rule of reason, tested against the standard of a reasonable man in the same position as the RPAS pilot. As a result, owners of RPAS may enjoy a statutory exclusion from claims if their conduct is proved reasonable under the circumstances.

Nonetheless, the SACAA urges all RPAS users to observe and avoid the possibility of infringing on other people's right to privacy, but there are no remedies or penalties prescribed for non-compliance or failure to observe the CARs in a way that violates the right to privacy. On the contrary, both the CARs and CAA omit the invasion of the right to privacy under the listed types of offences which can be committed by an RPAS pilot. This omission leaves an aggrieved party seeking other means to protect their rights in terms of either the common law of delict or legislation that regulates privacy if such legislation applies to their circumstances. As such, an analysis of the regulatory framework for the protection of privacy is essential for this paper.

3 The right to privacy under the Constitution

The right to privacy finds protected under section 14 of the Constitution, the common law and various statutory laws.[34] Everyone in South Africa has the right to privacy, but certain limitations of this right can be

31 McKinley 2016 *Right to Know Campaign and the Media Policy & Democracy Project* 12.
32 Huneberg 2018 *THRHR* 271-272.
33 S 8 of the Civil Aviation Act 13 of 2009.
34 Papadopoulos and Snail *Cyberlaw@SA III: The law of the internet in South Africa* (2012) 277.

justified in terms of section 36 of the Constitution.[35] The right to privacy includes the claim not to have one's person, home and property searched or possessions seized.[36] However, the right to privacy is not limited to searches, seizures and communications only.[37]

3 1 The scope of the right to privacy

The right to privacy is the right to be left alone;[38] the scope of which becomes narrower, the more a person interrelates with the world.[39] It relates to an individual's family life, sexual preference and home environment, which should be shielded from erosion through conflicting rights in the community. The right strongly relates to the individual's way of life as characterised by seclusion from the public and publicity.[40] Despite this, the right to privacy also extends beyond the inner sanctum of the home.[41] Therefore, even in public places, such as a hotel room, private business or public bathroom, an individual can still expect their right to privacy to be protected.

3 2 Protection and enforcement

Section 38 of the Constitution provides that anyone acting in own interest or acting in the public's interest can approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened.[42] A court hearing the matter may grant appropriate relief

35 S 36(1) of the Constitution of the Republic of South Africa, 1996 is known as the limitations clause. In terms of the limitations clause, a general law of application may limit any right under the Bill of Rights if that limitation is justifiable and reasonable in an open and democratic society based on human dignity, equality and freedom. To test whether a limitation of constitutional rights passes the constitutional muster, the following factors are considered: (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 the less restrictive means to achieve the purpose. See further s 16 of the Constitution of the Republic of South Africa, 1996 for a layout of the right to freedom of expression.

36 S 14 of the Constitution of the Republic of South Africa, 1996; Papadopoulos and Snail 277; Freedman and Robinson *LAWSA* (edJoubert) 5(4) (2012) para 91; Huneberg 2018 *THRHR* 266.

37 Currie and De Waal *The Bill of Rights Handbook* (2013) 295; De Vos and Freedman *South African Constitutional Law in Context* (2015) 462.

38 *Investigating Directorate: Serious Economic Offences and Others; Curtis v Minister of Safety and Security and Others* 2000 (10) BCLR 1079 (CC) para 16; Loubser and Midgley 326.

39 *Bernstein v Bester* 1996 (4) BCLR 449 (CC) para 77; Papadopoulos and Snail 281.

40 *Bernstein v Bester supra* para 67; Neethling, Potgieter and Visser *Neethling's Law of Personality* (2005) 30; De Vos and Freedman 322.

41 *Investigating Directorate: Serious Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) para 16; *Magajane v Chairperson, North West Gambling Board and Others* 2006 (10) BCLR 1133 (CC) para 42.

42 S 38(a) and (d) of the Constitution of the Republic of South Africa, 1996; Currie and De Waal 177-178.

and must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.[43] However, if the court finds that there is legislation that regulates RPAS concerning the right to privacy, it will determine the matter based on such a statute first.[44] without legislative or common law remedies, constitutional litigation may arise when a person claims that there has been a violation of their right to privacy through an RPAS.

The plaintiff would have to establish that they were entitled to enjoy the right to privacy under the circumstances.[45] This investigation involves finding out whether the alleged infringer is bound to the duties imposed by the constitutional right to privacy of the plaintiff. The scope of the right to privacy under the facts and circumstances must be determined.[46] If it appears that the infringer violated the right to privacy of the plaintiff, the question arises whether such infringement was a justifiable infringement of the right. If the violation of the right to privacy is proven to be unjustifiable, the court may grant appropriate relief.[47] The court can be flexible with the relief that it grants to the plaintiff and adapt to the damaging effects of new technologies.

Nevertheless, constitutional litigation is expensive for persons who cannot afford legal counsel in South Africa.[48] More so, a claim is almost impossible to prove when the alleged infringement happens through an RPAS. The burden is on the plaintiff to identify the wrongdoer who used an RPAS to invade their privacy. All South African-registered RPAS must be marked with identification numbers that are engraved, etched or stamped and affixed conspicuously on the exterior.[49] However, the make of an RPAS is not easy to identify while it is in flight, making it even more difficult for anyone to identify a wrongdoer who conceals their identity using an RPAS. Such considerations increase the burden on individuals to enforce the right to privacy against violations committed through an RPAS.

When applying the right to privacy as contained in the Bill of Rights, a court must give effect to that right by either applying enabling legislation or developing the common law to the extent that legislation does not give effect to that right.[50] Therefore, in subsequent paragraphs, an analysis of the common law protection of the right to privacy in the context of RPAS follows. After that, the POPI Act is also discussed to determine the

43 S 38 read with s 39(1)(a) of the Constitution of the Republic of South Africa, 1996.
44 De Vos and Freedman 338.
45 Freedman and Robinson *LAWSA* 5(4) para 93; De Vos and Freedman 322.
46 *Supra*.
47 S 38 of the Constitution of the Republic of South Africa, 1996; Currie and De Waal 180; De Vos and Freedman 685.
48 Fowkes "Constitutional Review in South Africa: Features, changes and controversies" in Fombad *Constitutional adjudication in Africa* (2017) 170.
49 South African Civil Aviation Technical Standards part 101.02.4.
50 S 8(3) and s 39(2) and (3) of the Constitution of the Republic of South Africa, 1996; Currie and De Waal 45; De Vos and Freedman 685.

effectiveness of the regulatory framework relating to the right to privacy, in the context of RPAS.

4 Common law protection

The courts have recognised that the right to privacy is an independent personality right under the common law of delict.[51] The courts perceive privacy claims as related to the infringement of the right to human dignity,[52] although they maintain that dignity and privacy claims are different.[53] When a person acquaints themselves with private facts,[54] against the will or permission of the owner of those private facts, their conduct may amount to a violation of the right to privacy.[55] A claim based on the invasion of privacy will only succeed if the alleged violation is proved to be intentional and unlawful, without a valid ground of justification.[56] In order for the invasion to be deemed unlawful, the plaintiff must have a legitimate expectation of privacy. Additionally, the invasion of privacy must be objectively unreasonable when viewed through the eyes of the community and in light of constitutional values and norms.[57]

4 1 Requirements for liability

In order to incur liability, the wrongdoer must have manifested an intention to acquire personal information by invading others' privacy using an RPAS.[58] South African courts have not yet had an opportunity to test whether the common law protection is sufficient to hold that an RPAS pilot acted with the necessary intention when an RPAS had been used to capture images and videos during flight, whether the pilot intended to capture such images or not.[59] It also remains to be seen whether the common law may be sufficient to protect an individual from the infringement of their right to privacy, to the extent that their personal information is merely collected using an RPAS, but not perused or published without their consent.[60]

---

51 Neethling, Potgieter and Visser 29; Huneberg 2018 *THRHR* 266.
52 Often when the right to privacy is violated, they are not treated with respect, thus violating their human dignity, see De Vos and Freedman 463; Loubser and Midgley 325.
53 Neethling, Potgieter and Visser 218; Loubser and Midgley 325.
54 Neethling, Potgieter and Visser 222; Huneberg 2018 *THRHR* 265.
55 Currie and De Waal 296; Huneberg 2018 *THRHR* 265.
56 Currie and De Waal 296; Grounds of justification that can operate against the infringement of the right to privacy include necessity, private defence, public interest in information relating to a public figure or a newsworthy event, and consent – see Neethling, Potgieter and Visser 240-251.
57 Neethling, Potgieter and Visser 55; Currie and De Waal 298; De Vos and Freedman 462.
58 Neethling, Potgieter and Visser 292 and 221.
59 McKinley 2016 *Right to Know Campaign and the Media Policy & Democracy Project* 14.
60 Roos "Data protection: Explaining the international backdrop and evaluating the current South African position" 2007 *SALJ* 423.

4 2 Requirements for the *actio iniuriarum*

The *actio iniuriarum* allows recourse for the violation of the right to privacy. Specific forms of infringements of the right to privacy include setting up bugging and listening devices;[61] unauthorised use of photos;[62] unauthorised entry into a private residence;[63] listening to private conversations and disclosing private facts acquired through an unlawful act of intrusion;[64] shadowing of a person;[65] publishing someone's photograph without their consent;[66] and peeping through the window to see a person undressing.[67] All these forms of infringement can also be committed using an RPAS. For instance, one can look into a window to see a person undressing using an RPAS without them having to be physically present outside that window.[68] Therefore, the courts must decide on a case-by-case basis, whether a claim for the infringement may succeed if the acts mentioned above could not have been committed without using an RPAS.[69]

The *actio iniuriarum* can never be used against negligent actions because is aimed at satisfaction for non-patrimonial loss caused by intentional, wrongful conduct.[70] When the courts assess satisfaction in a privacy claim, the facts and circumstances of the case determine the outcome.[71] The court considers the plaintiff's social standing, the seriousness of the violation, and the defendant's attitude at the time of the infringement and afterwards. The courts further consider the nature of the infringement and its effects on the plaintiff.[72] Therefore, the *actio iniuriarum* provides a restricted approach in protecting the right to privacy. It does not sufficiently protect an individual from the negligent collection of their personal information using an RPAS camera;[73] let alone an RPAS operated contrary to the CARs. Whether the *action iniuriarum* requires development to remedy negligent acts was previously raised in the Constitutional Court.[74] However, the court found it unnecessary to deal with this question because it held that the matter related to the intentional infringement of the right to privacy.[75]

61 Loubser and Midgley 326.
62 Loubser and Midgley 327.
63 *S v Boshoff* 1981 (1) SA 393 (T) 394H.
64 *Financial Mail v Sage Holdings* 1993 (2) SA 451 (A) 469G.
65 *Epstein v Epstein* 1906 TH 87 at 88.
66 *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C) 248H-249A.
67 *Rex v Holliday* 1927 CPD 395 at 401.
68 Clarke 2014 *Computer & Security Law Review* 287; McKinley 2016 *Right to Know Campaign and the Media Policy & Democracy Project* 13.
69 *Supra*.
70 *NM v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (7) BCLR 751 (CC) para 55; Neethling *LAWSA* (ed Joubert) 20(1) (2009) para 399; Currie and De Waal 297; Loubser and Midgley 326 and 329-331.
71 Loubser and Midgley 429.
72 *Supra*.
73 Currie and De Waal 297.
74 *NM v Smith supra* para 21; Currie and De Waal 297.
75 *NM v Smith supra* para 57; Currie and De Waal 297.

A pilot should not be allowed to circumvent the law by using an RPAS to violate people's privacy. An RPAS flown in VLOS may indirectly violate the privacy of anyone around it. Arguably, the RPAS under these conditions assists the pilot to invade the right to privacy negligently. The common law is not sufficient to protect the right to privacy from RPAS.[76] Consequently, the POPI Act regulates the collection and processing of personal information in South Africa, to protect the right to privacy, cognisant of the right to freedom of expression and the impact of technological advancements that threaten the right to privacy.[77]

5 Protection of Personal Information Act 4 of 2013

According to section 2 read with section 3(1)(a) of the POPI Act, this legislation aims to protect the right to privacy by regulating the processing of personal information that forms part of a filing system or intended to form part thereof.[78] It specifically deals with personal information that is entered into a record by or for a responsible party, by making use of automated or non-automated means.[79] The words used in the POPI Act to define its scope of application have specific meanings. For instance, a person to whom the information regulated under the POPI Act relates is a data subject.[80] It is the processing of personal information that belongs to such data subjects that the provisions of the POPI Act refers. As such, in subsequent paragraphs, the definitions of the words "processing"; "personal information"; "record"; "responsible party"; "automated" and "filing system" are explained in order to test whether the use of RPAS can be subject to the POPI Act.

5 1 Meaning of "processing"

The meaning of the word "processing" is cast broadly in the POPI Act.[81] The term processing means: [82]

> "… any operation or activity or set of any operations, whether or not by automatic means, concerning personal information, including -
>
> a collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;
> b dissemination by means of transmission, distribution or making available in any other form; or
> c merging, linking, as well as restriction, degradation, erasure or destruction of information".

76 Huneberg 2018 *THRHR* 267.
77 Preamble of the Protection of Personal Information Act 4 of 2013.
78 S 2 of the Protection of Personal Information Act 4 of 2013.
79 S 3(1)(a) of the Protection of Personal Information Act 4 of 2013.
80 S 1 of the Protection of Personal Information Act 4 of 2013.
81 Van der Merwe *Information and communications technology law* (2016) 435.
82 S 1 of the Protection of Personal Information Act 4 of 2013.

The primary rule of statutory interpretation is to determine the intention of the legislature, by giving the words in the provision their ordinary grammatical meaning unless to do so would lead to absurdity that the legislature could not have contemplated.[83] A literal interpretation of the words used in the above definition may render the use of an RPAS as processing under the POPI Act. For example, the most apparent forms of processing using an RPAS involve collecting and storing photographs.[84] One the one hand, the ordinary meaning of "collection" refers to the action or process of gathering together or seeking to acquire items of a particular kind as a hobby. On the other hand, the word "storage" means to retain for future electronic retrieval.[85] Consequently, any photographic data captured with an RPAS camera would have been collected and stored by the RPAS pilot. However, such collection and storage would have to relate to personal information as defined in the POPI Act.

5 2 Definition of "personal information"

Section 1 of the POPI Act provides the following definition for personal information: [86]

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

The POPI Act does not provide an exhaustive list of items that can be personal information. The term "reveal" is used more than once in this provision to illustrate that personal information may include data that an

83 Du Plessis *LAWSA* (edJoubert) 25(1) (2011) para 349; *Ngweyama v Mayelane* [2012] 3 All SA 408 (SCA) 409.
84 Clarke 2014 *Computer & Security Law Review* 287.
85 Oxford University Press *Oxford Dictionary of English* (2016).
86 S 1 of the Protection of Personal Information Act 4 of 2013.

individual does not want to disclose to the public. The right to privacy associates with one's ability to decide what they want to disclose to the public and such an expectation is reasonable.[87] Such information could be a person's presence at a particular location, which may be disclosed by an RPAS pilot if they post a photo of that person on the internet.

For example, location falls under the definition of personal information in the POPI Act.[88] It may be argued that photographic data collected by an RPAS pilot can reveal the location of a person while the individual does not wish for such a location revealed to others. Therefore, depending on the photographic data collected using RPAS, the use of an RPAS may be the processing of personal information.[89]

A purposive approach to interpreting the definition of personal information requires a broad construction to apply its provisions to achieve the purpose of the legislation.[90] It would be absurd for the legislature to attempt regulating the processing of personal information, with the effect that photographic data that reveals personal information, such as location, falls outside of its ambit. This outcome would inevitably allow RPAS pilots to circumvent the purpose of the POPI Act, even though their actions might be a violation of the right to privacy using technological means. The right to privacy would erode if a purposive approach is not applied, and any conflicting interpretation would thwart the spirit, purport and values of the Constitution. Nevertheless, the legislature has included a list of activities excluded from the meaning of personal information to curb the far-reaching effects of the purposive approach.

5 2 1 General exclusions from the definition of "personal information"

Section 6(1)(a) of the POPI Act excludes purely household activities or personal activities from the scope of personal information. The term purely "household or personal activities" is not defined in the Act. This exclusion creates a gap in the scope of the POPI Act for instances where an RPAS is used to look through the window of a person's private home. Unfavourable outcomes may arise if the videos that remote pilots record about people's day-to-day household activities do not amount to processing personal information within the meaning of the Act.[91]

The scope of personal activities may range from everything a data subject does with their life, save for activities undertaken in the workplace, or at a public event. Considering what may be viewed

87 *Investigating Directorate: Serious Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit supra* 16; Neethling, Potgieter and Visser 226; Currie and De Waal 302-303.
88 S 1(c) of the Protection of Personal Information Act 4 of 2013.
89 Clarke 2014 *Computer & Security Law Review* 287.
90 Du Plessis *LAWSA* (2011) para 327.
91 Clarke 2014 *Computer & Security Law Review* 289.

subjectively as "personal activities", it appears that the meaning of "personal activities" is broad or unfairly limited. However, the meaning must be viewed objectively and reasonably in line with the legal convictions of the community.[92] One person may consider a day spent at the park as a personal activity which they would prefer to enjoy without an RPAS hovering above them. Another person may restrict personal activities to their home, and thus considering activities carried outside their yard as not forming part of personal activities.

Notably, what is "personal" may differ from person to person, as everyone has the right to "determine what they would like to keep private".[93] Drawing a line between what is and what is not purely personal household activity may be difficult in some instances. Therefore, the exclusion of purely household activities remains to be tested in court or addressed by the Information Regulator when determining the margins of personal information under the POPI Act.[94]

5 2 2 Exclusions for journalistic, literary or artistic purposes

The legislature aimed to balance the right to privacy with freedom of expression in circumstances where it is in the public's interests to reconcile the two.[95] Accordingly, the processing of information for journalistic, literary and artistic expressions is not subject to the POPI Act.[96] However, the meaning and extent of "journalistic, literary and artistic expressions" is not provided. The ordinary meaning of these words applies, given the context and purpose of the statute.[97] As such, using RPAS to collect news for reporting or public comment and expressions of photography and videography may fall under this provision and exempt from the conditions set out in the POPI Act. The exemption must account for the importance of the right to freedom of expression, seeing that the legislature cleared tried to balance with privacy in this context.[98]

Based on the abovementioned exclusions for certain types of information, it is evident that photographs are neither included nor excluded explicitly in the ambit of the word personal information.

92 Neethling, Potgieter and Visser 55. Determining the legal convictions of the community requires a constitutionally transformative approach because the Constitution applies to all law. Therefore, the meaning of "personal activities" must be informed by the norms and values that underpin the Constitution of the Republic of South Africa, 1996.

93 Loubser and Midgley 326.

94 The Information Regulator is the office empowered to ensure the administration and enforcement of the Protection of Personal Information Act 4 of 2013 in terms of s 39 thereof.

95 S 2(a) read with s 7(1) and (3) of the Protection of Personal Information Act 4 of 2013.

96 S 7 of the Protection of Personal Information Act 4 of 2013.

97 Du Plessis *LAWSA* (2011) para 349; *Ngweyama v Mayelane supra* 409.

98 S 7(3) of the Protection of Personal Information Act 4 of 2013; Duhnkrack "The art of regulating arts – artistic street photography and the limits of EU regulation" 2020 *JIPLP* 69.

Therefore, this provision would call for a case-by-case determination of whether photographic data falls under personal information because the legislature has left room for discretion to determine what constitutes personal information under the POPI Act. Since photographic data is personal information, it follows that it must be entered into a record by or for a responsible party, by making use of automated or non-automated means.[99]

5 3 Meaning of "record"

The POPI Act refers to a record as:[100]

> "… any recorded information –
> a regardless of form or medium, including any of the following-
> (i) writing on any material;
> (ii) information produced, recorded or stored by means of any tape-recorder, computer equipment, whether hardware or software or both, or other device, and any material subsequently derived from information so produced, recorded or stored;
> (iii) label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means;
> (iv) book, map, plan or drawing;
> (v) photograph, film, negative, tape or other device in which one or more visual images are embodied so as to be capable, with or without the aid of some other equipment, of being reproduced;
> b in the possession of or under the control of a responsible party;
> c whether or not it was created by a responsible party; and
> d regardless of when it comes into existence".

The POPI Act provides that information produced or recorded using computer equipment, whether hardware or software, refers to a record, regardless of form or medium.[101] A photograph is defined as a record,[102] even when produced by an RPAS because the latter is computer equipment.[103] It is not a requirement for the responsible party to have created the record and the time of its creation is irrelevant. Nonetheless, a responsible person must ensure that the processing of personal information stored in a record follows the POPI Act.

5 4 Meaning of "responsible party"

The responsible party referred to in the POPI Act is a juristic person in the form of a private or public body which determines the purpose of processing personal information.[104] The statutory provisions expressly restrict its jurisdiction to organisations and do not extend to private persons. This definition immediately excludes private operations of

99 S 3(1)(a) of the Protection of Personal Information Act 4 of 2013.
100 S 1 of the Protection of Personal Information Act 4 of 2013.
101 S 1 of the Protection of Personal Information Act 4 of 2013.
102 S 1(a)(v) of the Protection of Personal Information Act 4 of 2013.
103 S 1(a)(ii) of the Protection of Personal Information Act 4 of 2013; Van der Merwe 435.
104 S 1 of the Protection of Personal Information Act 4 of 2013.

RPAS from the scope of the POPI Act, which is somewhat understandable because the penalties provided for contravening the POPI Act may be too harsh for a private individual to bear for flying an RPAS.[105] Nevertheless, juristic persons who use RPAS for private and commercial operations still fall within the scope of the meaning of a responsible party, provided that they are processing personal information as defined in the POPI Act, using either automated or non-automated means.

5 5 "Automated" means versus "non-automated" means

The POPI Act applies to the processing of information using both "automated" and "non-automated" means. The term "automated" refers to any equipment that can operate automatically in response to instructions given for processing information.[106] It seems that the legislature intended to include any possible means that could be employed to process personal information, in response to instructions, but without human intervention. Therefore, collecting data using RPAS amounts to processing using automated means. If found to be non-automated means, the use of RPAS would still be within the scope of the POPI Act, provided that the responsible party stores the collected photographic data in a filing system.

5 6 Meaning of "filing system"

A filing system refers to a structured set of information. The information can be stored on a database, server or network, as the data can be centralised, decentralised or dispersed on a functional and geographical basis.[107] An RPAS has a filing system that it uses to record and store all the data it collects while it is in flight because it connects to a computer that provides a live feed to the pilot.[108] Such information is stored on a chip or server while the RPAS communicates with the computer.[109]

Based on the terms stipulated above, RPAS operations may fall within the POPI Act when used by a responsible party to collect and store photographic data containing personal information. It is therefore necessary to establish whether the POPI Act would provide sufficient remedy for private and commercial RPAS operations that intentionally or negligently infringement on the right to privacy. A look at the findings about the constitutional protection, the common law *actio iniuriarum* and the civil aviation hurdles also follows.

105 S 107 read with s 109 of the Protection of Personal Information Act 4 of 2013 provides penalties in the form of imprisonment or a fine not exceeding R10 million.
106 S 3(4) of the Protection of Personal Information Act 4 of 2013.
107 S 1 of the Protection of Personal Information Act 4 of 2013.
108 Clarke 2014 *Computer & Security Law Review* 287; Washington 2018 *Afr. J. Comp. ICT* 3.
109 Cash 2016 *University of Memphis Law Review* 705.

6 Findings and recommendations

6 1 Accessibility of the Constitution

South African law subscribes to the principle that where there is a right, there is a remedy.[110] As discussed throughout this paper, a data subject can legitimately expect protection from unauthorised collection and storage of photographic data about their person using RPAS, subject to justifiable limitations. Conversely, the common law and statutory protection avenues for enforcing the right to privacy seem flawed.

6 2 Limited common law protection

Under the common law of delict, the *action iniuriarum* is available for those who want to litigate on the matter in a traditional court, instead of pursuing the POPI Act. An aggrieved person can also be rely on the common law to pursue a claim against natural and juristic persons who invade their privacy using RPAS to collect information relating to purely household or personal activities and literary, artistic and journalistic activities. However, the *actio iniuriarum* can only protect the right to privacy against intentional acts of violation. It is impossible to prove intent when a pilot threatens the right to privacy without directing their will to that effect.

The common law remedy fails to accommodate the automated nature of new technologies such as RPAS and thus proves to be insufficient to protect the right to privacy in this context. This position is disappointing, especially given the fact that privacy infringement may also result in the violation of the right to human dignity. The *action iniuriarum* must develop to include negligence as a requirement for this remedy to apply to the use of RPAS.[111] Then again, as mentioned earlier, the development of the common law mainly rests with our courts if and when the relevant issue comes before the court.[112]

Perhaps relying on the POPI Act for protection may prove to be less burdensome, and more flexible than the common law because the dispute process involves laying a complaint with the Information Regulator who then investigates both negligent and intentional conduct.

110 Currie and De Waal 23.
111 Neethling, Potgieter and Visser 58-59.
112 S 8(3) read with s 39(2) and (3) of the Constitution of the Republic of South Africa, 1996.

6 3 Legislative barriers

6 3 1 Challenges in regulating the processing of personal information using RPAS

The purpose of the POPI Act is to provide remedies to protect personal information against processing that is contrary to its provisions.[113] However, the POPI Act is too restrictive regarding its scope of application. Natural persons who operate RPAS privately are left with too much discretion to use their RPAS without licenses, and they do not even fall under the regulation of the POPI Act.[114] RPAS hobbyists are probably the most concerning group of pilots because they may share live streams of their flight operations on social networks. The risk that comes with unauthorised disclosure is that photographs can be misinterpreted and result in a false representation of a person.[115]

At least the POPI Act finds some application to juristic commercial pilots or natural persons who use RPAS under the instructions of juristic persons, making them subject to the principles of processing personal information in terms of the POPI Act.[116] However, the open-ended definition of personal information, which does not explicitly include or exclude photographs leaves a gap in our law. As a result, privacy infringement will be determined on a case-by-case basis when an RPAS pilot is accused of violating the right to privacy in terms of the POPI Act.

It seems that the POPI Act does not afford adequate protection from private and commercial operations of RPAS. A data subject who wishes to object to their personal information being processed using an RPAS will have to file their objection by submitting a form to the responsible party, using a data message, registered post or personal delivery.[117] However, the method of reporting is ineffective and potentially costly for the plaintiff to pursue because it is nearly impossible to identify the RPAS pilot when the RPAS is in flight or unlicensed.

Furthermore, the option to object to processing information is only operational against those who are processing information that is within from the ambit of the legislation. The POPI Act cannot provide a remedy against pilots who use RPAS to collect personal data during private operations. The listed exclusions of information collected for literary, artistic and journalistic purposes could also prohibit the application of the POPI Act to the collection of personal information through RPAS.

113 S 2(c) of the Protection of Personal Information Act 4 of 2013.
114 Part 101.01.2(2) Civil Aviation Regulations, 2011; s 1(a)(v) of the Protection of Personal Information Act 4 of 2013.
115 Clarke 2014 *Computer & Security Law Review* 287.
116 McKinley 2016 *Right to Know Campaign and the Media Policy & Democracy Project* 14.
117 R 2(1) of the Regulations Relating to the Protection of Personal Information GN R 1383 in GG 42110 of 2018-12-14.

6 3 2 Obstacles in civil aviation rules

Additionally, a pilot may take images of others and process such without incurring any statutory liability under the CAA because the CARs allow the private use of RPAS for up to 50 metres away from any person, aircraft or building without permission. Considering that people are inclined to purchase RPAS, combined with the fact that RPAS are becoming relatively inexpensive;[118] lack of direct protection of the right to privacy against exploitation through RPAS creates the need for development in the law of privacy in information technology and civil aviation.[119]

A specific provision in the CARs that regulates the invasion of privacy through RPAS is vital in ensuring that there is some form of regulation directed at the irresponsible use of RPAS. The CAA and the CARs must also incorporate a specific remedy for the violation of privacy using RPAS because the POPI Act cannot apply to private operations as defined in the CARs. This incorporation can take the form of referring to the POPI Act in the CAA to address the privacy concerns that come up in civil aviation.[120] However, the legislature should not create arbitrary rules that unnecessarily restrict the right to freedom of expression, innovation and development, since civil aviation is mainly concerned with operational and safety requirements, rather than privacy regulation.[121] The rights of South Africans must be balanced carefully in order to ensure that RPAS users can freely enjoy their hobbies without violating the privacy of others. At the moment, it seems that private users are self-regulated.[122]

An analysis of existing legislation suggests that amending the POPI Act or the CARs is best to deal with the insufficiency of protection against the invasive use of RPAS. However, if the POPI Act were to be amended to regulate how private individuals handle personal information, the consequences of the contravention of the POPI Act would have to be tailored to suit the relevant contravention. The penalties imposed under the POPI Act would be too exorbitant for the kind of infringement that an RPAS pilot commits.

Nonetheless, the Constitution remains available to all South Africans to protect them from unjustifiable limitations of their right to privacy. However, as discussed earlier, the direct enforcement of this right under the Constitution can prove to be burdensome,[123] and can only be

118 Cash 2016 *University of Memphis Law Review* 696; Washington 2018 *Afr. J. Comp. & ICT* 5.
119 McKinley 2016 *Right to Know Campaign and the Media Policy & Democracy Project* 14.
120 Clarke 2014 *Computer & Security Law Review* 300.
121 *Supra*.
122 *Supra*.
123 Fowkes 170.

accessed after attempting to rely on applicable legislation, such as the POPI Act.[124]

7 Conclusion

Amending the statutory rules that regulate RPAS operations is the best option for South Africa. The proposed amendments would have to deal with all operations of RPAS, whether commercial or private purposes. Seeing that the use of RPAS increases annually, the more we become a nation that uses RPAS for entertainment, economic growth and service delivery, the more such uses will threaten the right to privacy. The legislature must guard, protect and preserve the right to privacy against the rise of RPAS in South Africa.

124 Du Plessis *LAWSA* 25(1) para 327; De Vos and Freedman 338.

Re-visiting the powers of the King under the Constitution of Lesotho: Does he still have any discretion?

Hoolo 'Nyane
LLB LLM LLD
Associate Professor, School of Law, University of Limpopo

SUMMARY

The powers of the monarch have been a subject of protracted political and legal controversy since colonialism in Lesotho. When the country got independence from Britain in 1966, the long drawn-out gravitation towards British model of constitutional monarch was confirmed in the Independence Constitution. Nevertheless, the Independence Constitution had categories of powers for the monarch. There were powers reposed in the King exercisable "on the advice" and those that were exercisable in his own "deliberate discretion". When the current Constitution was adopted in 1993, the discretionary powers of the King were effectively abolished; all his powers became exercisable "on the advice". That the powers of the King under the current Constitution are only exercisable on advice has been a long-held view in judicial policy and in legal scholarship. It was not until 2017 when the Court of Appeal in the case of *Phoofolo v The Right Honourable Prime Minister* suggested that the King may have discretion on whether to accede to Prime Ministers "recommendation" to dissolve parliament or not. The decision of the Court of Appeal in *Phoofolo* has reinvigorated a fresh debate in constitutional scholarship about the real powers of the monarch under the Constitution. The purpose of this paper is to investigate the extent of the legal powers of the monarch under the Constitution – whether indeed the King still has any discretionary power.

1 Introduction

The Kingdom of Lesotho acquired statehood in the1820s after the *lifaqane* wars.[1] The country was formed by King Moshoeshoe and became organised around his kingship.[2] It was later colonised in 1868 by Britain.[3] When the country was preparing for independence, in the early

1 Generally see Thompson *Survival in Two Worlds: Moshoeshoe of Lesotho 1786-1870* (1975); Machobane *Government and Change in Lesotho 1800-1966* (1990) 5-6.

2 Weisfelder "The Basotho monarchy: a spent force or a dynamic political factor?" (Fourteenth Annual Meeting of the African Studies Association, Denver, 3-6 November 1971) at 5; Duncan *Sotho Laws and Customs* (1960) 43.

3 The colonisation of the country was a unique one because it was proclaimed as a British Protectorate on March 12, 1868. The initial idea was to secure the Basotho from further Boer aggression. But in the end, the country became a colony like any other British colony. In November 1871 responsibility to administer the country was transferred to the Cape Colony

How to cite: 'Nyane 'Re-visiting the powers of the King under the Constitution of Lesotho: Does he still have any discretion?' 2020 *De Jure Law Journal* 159-174
http://dx.doi.org/10.17159/2225-7160/2020/v53a11

1960s, the powers of the monarch was the single most captivating subject of the constitution-making process.[4] Even the political landscape was divided along the same subject.[5] The main question was whether, in the post-independence design, the monarch would have executive powers or be titular in the British style.[6] All indications were that the institution is going to take on British style because of the long history of building the Westminster design in the country.[7] When the Independence Constitution was made in 1966, it became apparent that Westminster triumphed over the voices calling for more executive powers for the monarch.[8] In fact, the 1966 Constitution, without any equivocation, provided that the exercise of the King's powers shall be "in accordance with any constitutional conventions applicable to the exercise of a similar function by Her Majesty in the United Kingdom".[9] Consequently, the executive powers of the monarch shifted to the Prime Minister and the cabinet. The King was to act "in accordance with the advice of the cabinet or a minister acting in the general authority of cabinet".[10] Nevertheless, the Constitution still had powers reserved for the King's "absolute discretion".[11] These are functions that the King

which gained self-governing status in 1872. See Lagden *The Basutos* (1909); Eldredge *A South African Kingdom: The Pursuit of Security in Nineteenth-Century Lesotho* (1993).

4 Machobane 5-6.

5 Gill *A Short History of Lesotho* (1993).

6 Mahao "Constitutional orders and the struggle for the control of the state in lesotho from 1966 to 1989" 1991 *Lesotho Law Journal* 1; see also the case of *Molapo v Seeiso* 1963 – 66 HCTRL 150.

7 The definition of what a Westminster constitution is has eluded scholars of constitutional and political studies. Anckar "Westminster Lilliputs? parliaments in former small British colonies" 2007 *Parliamentary Affairs* 637. At 637 the author argues that the term "Westminster refers to the main characteristics of British parliamentary and governmental institutions." See also de Smith *The New Commonwealth and its Constitutions* (1964). Also see de Smith "Westminster export model the legal framework of responsible government" 1961 *Journal of Commonwealth Political Studies* 2. For a systematic analysis of the Statute of Westminster 40 years since its adoption in 1931, see de Smith "Fundamental rules forty years on" 1971 *International Journal: Canada's Journal Global Policy Analysis* 347.

8 See Nwabueze *Presidentialism in the Commonwealth Africa* (1973). At 74 the author rightly observes that: "[t]he situation in the Kingdom of Lesotho had been no less disturbing, and provides perhaps the most glaring testimony of the incompatibility of a constitutional Head of the State with the African traditional method of government. The problem was how to make an African King, accustomed by tradition to the exercise of executive authority, abide by the role of a constitutional monarch cast upon him by the Constitution … King of Lesotho, Motlotlehi Moshoeshoe II showed a disinclination to abide by this role, conceiving of himself and his chiefs as the real authorities of the country, just as old".

9 S 76(2) of the 1966 Constitution.

10 S 76(1) of the 1966 Constitution.

11 S 76(2) of the 1966 Constitution.

could exercise without the need for an advice from anybody – not even his Privy Council.[12]

The 1966 Constitution was suspended in 1970.[13] The new Constitution was only adopted in 1993. When the new Constitution was adopted, the absolute discretion of monarch was removed from the panoply of the powers of the King. All the powers of the King are to be exercised in accordance with the advice of five main institutions: the Prime Minister,[14] the Cabinet,[15] the Council of State,[16] Judicial Service Commission,[17] and Public Service Commission.[18] The general view held both in constitutional scholarship and judicial authority has been that indeed under the current design, as opposed to the independence design, the King no longer has functions in which he may act on his own absolute discretion.[19] That notwithstanding, the Court of Appeal in the case of

12 S 80 of the Constitution had established a structure styled Privy Council. In terms of section 80(3) thereof, the main duty of the Privy Council was to advise the King on the exercise of the functions in which the King had absolute discretion. However, section 80(4) provided that: "The King shall not be required to act in accordance with the advice of his Privy Council in any case in which he has obtained its advice".

13 Khaketla *Lesotho 1970: An African coup under the microscope* (1972).

14 The Prime Minister advises the King in cases of prorogation and dissolution of parliament (s 83(4)); appointment of ministers (s 87(3)); removal of ministers (s 97(7)); appointment of the nominated members of the Council of State (s 95(2)(i)); appointment of Chief Justice (s 120(1)); appointment of acting Chief Justice (s 120(4)); removal of Chief Justice (s 121(7)); appointment of the President of the Court of Appeal(s 124(1)); removal of the President of the court of Appeal (s 125(7)); appointment of Ombudsman(s 134(1)); appointment of Attorney General (s 140(1)): removal of Attorney General (s 140(8)); appointment of Auditor General (s 142(1)); removal of Auditor General (s 142(7); appointment of ambassadors (s 143); appointment of the Commander of the Defence Force(s 145(4); appointment of the Commissioner of Police(s 147(3)).

15 S88(2); see also the decision of the Court of Appeal in the case of *President of the Court of Appeal v The Prime Minister and Others* (C of A (CIV) No 62/2013) LSCA 1 (unreported, decided on 4 April 2014) available on https://lesotholii.org/ls/judgment/court-appeal/2014/1-0 (accessed 2019-11-17).

16 On appointment of some members of the National Planning Board (s 105(1)(a)); nomination of eleven senators (s 55); appointment and removal of the members of the Independent Electoral Commission (s 66).

17 Appointment of judges of the High Court (s 120(2)); appointment of the judges of the Court of Appeal (s 124(2)); appointment of members of the Public Service Commission (s 136)

18 Removal of Director of Public Prosecutions (s 141).

19 Refusal to dissolve parliament where the Prime Minister recommends a dissolution and the King considers that the Government of Lesotho can be carried on without a dissolution and that a dissolution would not be in the interests of Lesotho (s 83(4)(a)); dissolution of parliament where the National Assembly has passed a resolution of no confidence in the Government of Lesotho and the Prime Minister does not within three days thereafter either resign or advise a dissolution (s 83(4)(b)); dissolution of parliament where "the office of Prime Minister is vacant and the King considers that there is no prospect of his being able within a reasonable time to find a person who is the leader of a political party or a coalition of political parties that will command the support of a majority of the

Phoofolo v The Right Honourable Prime Minister,[20] ruled that on matters related to dissolution of parliament, the King can act on the advice of the Prime Minister without a need to seek advice from the Council of State. This decision has reinvigorated a question which was otherwise deemed settled of whether indeed the King still has any space under the current Constitution where he can act on his own absolute discretion. The purpose of this article is to investigate this question. In the end, the paper contends the suggestion by the Court of Appeal in the *Phoofolo* case that the King may alone consider whether dissolution of parliament would be in the interest of the country, without a need to consult the Council of State, is incorrect.

2 Problematising the notion of "acting on the advice"

In a constitutional monarchy,[21] like Lesotho, the King is ordinarily expected to work "on the advice" from several institutions such as the Prime Minister, the Cabinet, the Council of State or, in some instances, even the Judicial Service Commission. This advisory relationship has been a matter of long scholarly engagement in countries that subscribe to the Westminster constitutional designs. The main question which has captivated the constitutional scholarship is whether the "advice" given to the monarch is mandatory or it remains an advice in the ordinary usage of the word – where the person being advised has a choice on whether to accept the advice or reject it. There appears to be some sense of consensus that, due to the political position that the constitutional monarchs ended up occupying after losing a lot of its powers to electoral politics,[22] the monarch may not ordinarily decline the advice given.[23] The point of divergence is on whether the rule is absolute or it has some exceptions. This divergence of views is also accentuated by the fact that histories and designs of many Westminster constitutional designs differ. In some designs, the exceptions under which the advice may be declined

members of the National Assembly" (s 83(4)(c)); appointment of Prime Minister (s 87(1)); removal of Prime Minister(s (87)(5)).

20 *Phoofolo v The Right Honourable Prime Minister* C OF A (CIV) No 17/2017) LSCA 8 (unreported, decided on 12 May 2017), available on https://lesotholii.org/node/10843 (accessed 2019-11-19).

21 Generally see Bogdanor "The monarchy and the constitution" 1996 *Parliamentary Affairs* 407; Blackburn "Monarchy and the personal prerogatives" 2004 *Public Law* 546.

22 Bogdanor 16. The author argues that during the 19th century, "two interconnected factors – the expansion of franchise and the development of organized political parties – were to limit, not the power of the sovereign … but his or her influence."

23 Heard "The reserve powers of the crown: the 2008 prorogation in hindsight" in Smith & Jackson(eds) *The Evolving Canadian Crown* (2012) 87.

are fairly established.[24] In the case of United Kingdom, for instance, Markesinis makes an apt classification of monarchical powers into three.[25] Firstly, there are those powers performed under the prerogative but are not necessarily performed by the crown. These are powers that are performed by Ministers and officials of government under the aegis of royal prerogative.[26] Secondly, there are powers performed by the monarch on the advice of Minsters or government officials.[27] The majority of the powers of the monarch fall under this category. Most of them are real executive powers. In a Westminster constitutional design, executive authority is *de jure* reposed in the monarch but *de facto* exercised by the Prime Minister and the cabinet.[28] As such, in the majority of cases, the executive "advises" the monarch on what to do. The last category is where the monarch acts alone. This category of powers is very rare. In fact, Markesinis sceptically asks whether these powers still exist in relation to the British system.[29]

When Lesotho got independence from Britain in 1966, more or less the same classification was enshrined in the Independence Constitution.[30] However, the two most prominent categories of powers were those in which the King had to work "on the advice" – sometimes called "agency powers",[31] – and those in which he had absolute discretion. The summary of the nature of monarchical powers under the Lesotho's Independence Constitution was enshrined in section 76(1).[32]

The section embodies the Westminster principle that the King is ordinarily expected to work on the advice from his government. The Independence Constitution, however, had occasions in which the King had absolute discretion.[33] This was in keeping with the longstanding principle of Westminster constitutional designs that while the sovereign is ordinarily expected to work on the basis of the advice provided by his government, there are certain situations where he may act on his own

24 Newman **"**Of dissolution, prorogation, and constitutional law, principle and convention: maintaining fundamental distinctions during a parliamentary crisis" *National Journal of Constitutional Law* 217.; Blackburn "The dissolution of parliament: the crown prerogatives (house of commons control) bill" 1988 The *Modern Law Review* 837.

25 Markesinis "The royal prerogative re-visited" 1973 *The Cambridge Law Journal* 287.

26 Markesinis 288.

27 Markesinis 288.

28 S 86 of the 1993 Constitution of Lesotho Provides that: "The executive authority of Lesotho is vested in the King and, subject to the provisions of this Constitution, shall be exercised by him through officers or authorities of the Government of Lesotho."

29 Markesinis 290. The author says: "[t]his was the original form in which the prerogative powers were exercised. The question, however, is are there any powers that can still be included in this category?".

30 S 76(2) of the 1966 Constitution.

31 Palmer and Poulter *The Legal System of Lesotho* (1972) 241.

32 S 76(1) of the Lesotho Constitution of 1966.

33 S 76(2) of the 1966 Constitution.

absolute discretion.[34] Those exceptional situations were: on appointment of senators,[35] appointment of Prime Minister,[36] removal of Prime Minister,[37] performance of Prime Ministerial functions during absence or illness,[38] designation of members of the Privy Council and National Planning Board,[39] allocation of land and disciplinary control over chiefs.[40]

Although the 1966 Constitution provided that these functions may be exercised by the King "in his own deliberate judgment",[41] it still provided that he would exercise them "so far as may be, in accordance with any constitutional conventions applicable in the exercise of similar function by Her Majesty in the United Kingdom".[42] Under the 1993 Constitution, because of the political losses that the King experienced since independence and the ascendance of electoral democracy,[43] the King no longer has this category of powers specifically created by the Constitution. He remains only with agency powers – where he acts on the advice. The concept, "acting on the advice of" received a definitive interpretation in the case of *Makenete v Lekhanya.*[44] The case concerned the interpretation of section 6(2) (b) of the Lesotho Order, 1986.[45] The section related to the appointment of Ministers. It provided that the cabinet shall be comprised of "such other members as may be appointed by the King on the advice of the chairman".[46] The court interpreted the section as thus: "[t]he words 'on the advice of the chairman' can only mean, therefore, that the King is obliged to act in accordance with the advice of the Chairman".[47]

This position is widely shared by other jurisdictions that have the Westminster pedigrees. In the case of South Africa, for instance, the Constitution,[48] provides that, "[t]he President must appoint the judges of all other courts on the advice of the Judicial Service Commission".[49]

34 Russell "Discretion and the reserve powers of the crown" 2011 *Canadian Parliamentary Review* 19; Evatt *The King and his Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (1967) 6.
35 S 76(2)(a) of the 1966 Constitution.
36 S 76(2)(c) of the 1966 Constitution.
37 S 76(2)(d) of the 1966 Constitution.
38 S 76(2)(e) of the 1966 Constitution.
39 S 76(2)(f) and (g) of the 1966 Constitution.
40 S 76(2)(h) and (j) of the 1966 Constitution.
41 S 76(2) of the 1966 Constitution.
42 The proviso to s 76(2) of the 1966 Constitution.
43 Proctor "Building a constitutional monarch in Lesotho" 1969 *Civilizations* 64; Moodie "The crown and parliament" 1956 *Parliamentary Affairs* 256; Mothibe "Lesotho: the rise and fall of military-monarchy power-sharing 1986–1990" 1990 *Africa Insight* 242.
44 [1991-1996] LLR 486.
45 Lesotho Order 2 of 1986.
46 S 9(2).
47 *Yong Vui Kong supra* para 39-40.
48 Constitution of South Africa, 1996.
49 S 174(6) of the Constitution of South Africa, 1996.

Murray rightly points out that '[i]t is clear that the Judicial Service Commission (JSC) is fully responsible for the choice ... and that the President is constitutionally bound to appoint those it selects.'[50] In Singapore, the Court of Appeal had an occasion in the case of *Yong Vui Kong v Attorney-General,*[51] to determine whether the President has any discretion in a situation where the Constitution provides that in granting clemency to convicts, the President shall act "on the advice of cabinet".[52] The court categorically stated that:

> "It is trite law that the Head of State in a Constitution based on the Westminster model, such as the Singapore Constitution, is a ceremonial Head of State who: (a) must act in accordance with the advice of the Cabinet in the discharge of his functions; and (b) has no discretionary powers except those expressly conferred on him by the Constitution. In our local context, Art 22P is not a provision which expressly confers discretionary powers on the President."[53]

The court raises an intriguing point in relation to this established Westminster principle. It contends that where the exception to the general principle will be where the Constitution has specifically granted the head of state such discretionary power – like the 1966 Constitution of Lesotho.[54] It may be added that other situations where the head of state may act on his own discretion are not unforeseeable. For instance, by operation of the doctrine of legality,[55] the head of state may not be bound by an "advice" that is unlawful or unconstitutional.[56] Furthermore, the head of state may not be bound by advice that is palpably against the interest of the country. It can never be the purpose of the Constitution to grant powers that can be used against the interests

50 Murray "Who chooses constitutional court judges?" 1999 *South African Law Journal* 865. The author at 865 goes on to suggest that: "In Westminster style systems an obligation to act on advice removes any discretion from the actor. Just as previous Constitutions instructed heads of state (or Governors-General) to carry out various acts, so section 174 casts the President in the role of 'Head of State' when appointing those judges and requires him to implement the JSC's decision."

51 [2011] SGCA 9.

52 See Art 22P of the Singaporean Constitution.

53 *Yong Vui Kong* supra *para* 19. See also the decision of the Court of Appeal of Botswana on the same question in the case of *Law Society of Botswana v The President of Botswana* Civil Appeal No CACGB-031-16.

54 See s 76 of the 1966 Constitution of Lesotho.

55 See *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708; 1997 (4) SA 1; *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000(2) SA 674 (CC); Hoexter "The principle of legality in South African administrative law" 2004 *Macquarie Law Journal* 16.

56 Heard "The Governor General's decision to prorogue parliament: a chronology and assessment (2009) 18 *Constitutional Forum*. See also Heard "The Governor General's decision to prorogue parliament: a dangerous precedent" available on http://www.law.ualberta.ca/centres/ccs/issues/heard.php (accessed 2019-11-08).

of the country or to defeat the fundamental principles of constitutionalism.[57]

3 The power to dissolve and prorogue Parliament: Is there any discretion for the King?

Despite a fairly established principle that the head of state would ordinarily accede to the advice of his government, the advice to dissolve or prorogue parliament has always evoked divergent scholarly and judicial opinions.[58] The reason for dissolution and prorogation to be normally controversial is that governments of the day oftentimes use these devices to attain political ends.[59] Dissolution and prorogation are the antique monarchical prerogatives that were created to enable the monarch to control parliament.[60] With the ascendance of electoral politics, and the gradual emasculation of monarchism, the prerogatives effectively shifted to the Prime Minister. Like most prerogatives of the monarch under modern-day constitutional designs, the prerogative to dissolve and prorogue parliament are exercisable on the advice of the sitting Prime Minister. The general consensus in constitutional scholarship within the Westminster constitutional systems is that while there is a general rule that the monarch will accept the advice of the Prime Minister; he may, under certain circumstances decline the advice. The powers that the monarch has to decline the advice to dissolve parliament do not seem to exist in relation to prorogation.[61] This is strange because the threat of abuse of political power by Prime Ministers in relation to dissolution still exists in relation to prorogation.[62] Oftentimes, Prime Ministers find dissolutions to be too drastic. As a result, they find prorogation to be an easier avenue to provide for much

57 See *R (on the application of Miller) v Prime Minister, Cherry and others v Advocate General for Scotland* [2019] UKSC 41.

58 Forsey *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1943); Blackburn "The dissolution of parliament: the crown prerogatives (House of Commons Control) Bill 1988" 1989 *The Modern Law Review* 837.

59 Tremblay "Limiting the government's power to prorogue parliament" 2010 *Canadian Parliamentary Review* 16; Horgan "Partisan-motivated prorogation and the Westminster model: a comparative perspective" 2014 *Commonwealth & Comparative Politics* 455.

60 Hicks "British and Canadian experience with the royal prerogative" 2010 *Canadian Parliamentary Review* 18; Ghany "The Evolution of the power of dissolution: the ambiguity of codifying Westminster conventions in the Commonwealth Caribbean" 1999 *The Journal of Legislative Studies* 54. Bogdanor *Monarchy and the Constitution* (1995) 16.

61 See s 83 of the Constitution of Lesotho, 1993; see also Twomey "Prorogation–can it ever be regarded as a reserve power?" 2016 Public *Law Review* 144.

62 Payne "The Supreme Court and the *Miller* case: more reasons why the UK needs a written constitution" 2018 *The Round Table: The Commonwealth Journal of International Affairs* 441.

needed political cool-off period; but the effect is normally the same. In both situations, the Prime Minister removes parliament as a constitutional mechanism created for his scrutiny.

In Lesotho, parliament hardly ever finishes its five-year course.[63] The problem of short-lived parliaments, and prorogations that are used to avoid parliamentary scrutiny, became rampant with the advent of hung parliaments in 2012.[64] In June 2014, hardly two years into a five-year parliamentary term, Prime Minister Thomas Thabane sent the parliament to a nine-months prorogation in order to ward off the impending motion of no confidence against his fledgling coalition government.[65] The King readily acceded to the advice of the Prime Minister. The country went for an early election in 2015. The parliament that was elected thereafter did not finish its five year course either. It also had to be dissolved in 2017 after a successful vote of no confidence against the then Prime Minister, Pakalitha Mosisili.[66] The "Mosisili dissolution" of 2017 is the one that culminated with the decision of the Court of Appeal in the case of *Phoofolo v The Right Honourable Prime Minister;*[67] which decision laid the principle that a Prime Minister who has lost a vote of no confidence can advise the King to dissolve parliament without a need to seek advice from the Council of State.[68]

A brief statement of the facts of this case may be necessary before re-visiting the provisions of the Constitution on the matter. In March 2017, it became apparent that the main coalition party, the Democratic Congress, experienced a huge split after the fallout between its leader, Mosisili and his deputy, Monyane Moleleki. The "Moleleki faction" crossed the floor and voted with the opposition on the vote of no confidence. The Prime Minister lost the vote.[69] Upon losing the vote, he advised the King to dissolve parliament; in which case election was

63 Parliaments in Lesotho since 1993 hardly complete the five-year term due to internal party conflicts within the ruling parties. The main reason for short-lived parliaments is often intra-party conflicts. With the advent of coalition politics, the situation became rife; it even extended to inter-party conflicts. See Shale "Political parties and instability in Lesotho" in Thabane *Towards an Anatomy of Political Instability in Lesotho 1966-2016* (2017) 23.

64 'Nyane "The advent of coalition politics and the crisis of constitutionalism in Lesotho" in Thabane *Towards an Anatomy of Political Instability in Lesotho, 1966-2016* (2017) 77.

65 See Weisfelder "Free elections and political instability in Lesotho" *Journal of African Elections* (2015) 50; Letsie "Lesotho's February 2015 snap elections: a prescription that never cured the sickness" 2015 *Journal of African Elections* 81.

66 See Legal Notice 22 of 2017.

67 *Phoofolo* case.

68 *Phoofolo* case at 3, the court said "The King [is] not required to consult the Council of State where after a vote of no confidence in Government, Prime Minister advises dissolution of Parliament".

69 Aljazeera "Pakalitha Mosisili loses parliament vote" 1 March 2017 https://www.aljazeera.com/news/2017/03/lesotho-pakalitha-mosisili-loses-parliament-vote-170301165711605.html (accessed 2019-11-14).

supposed to be held in three months.[70] The King acceded to the advice and dissolved parliament on 6th March 2017 and declare the 3rd June 2017 as the date of elections. Some opposition members of parliament approached the courts alleging that the dissolution of parliament is not an affair between the King and the Prime Minister – there is also the Council of State in the equation. Their hope was that the Council would have given an advice contrary to Prime Minister's, and the country would have been saved from yet another election in two years. The main issue for determination was whether indeed the King could consider the advice for dissolution from the Prime Minister without a need for the advice from the Council of State. As stated earlier, the court answered the question in the affirmative. In order to assess the finding of the court it may be proper to quote the relevant section of the Constitution *in extenso* because the court became very literal about the words used in the section. Section 83(4) of the Constitution provides that:

> "In the exercise of his powers to dissolve or prorogue Parliament, the King shall act in accordance with the advice of the Prime Minister:
> Provided that –
> a if the Prime Minister recommends a dissolution and the King considers that the Government of Lesotho can be carried on without a dissolution and that a dissolution would not be in the interests of Lesotho, he may, acting in accordance with the advice of the Council of State, refuse to dissolve Parliament;
> b if the National Assembly passes a resolution of no confidence in the Government of Lesotho and the Prime Minister does not within three days thereafter either resign or advise a dissolution the King may, acting in accordance with the advice of the Council of State, dissolve Parliament."[71]

Instead of asking a purposive and broader question of whether the King under the Constitution may act without consulting the Council of State, the court became narrow and literal about section 83(4). It narrowly framed the question for determination as thus: "[t]he questions that this Court has to answer is therefore: [d]id the proviso apply? Before that question is considered, it will be helpful to see what light will be thrown on the matter by section 83(4) (b)".[72] Admittedly, section 83(4) provides that "[i]n the exercise of his powers to dissolve or prorogue Parliament, the King shall act in accordance with the advice of the Prime Minister".

---

70 S 84(1) of the Constitution provides that, Subject to the provisions of subsection (2), a general election of members of the National Assembly shall be held at such time within three months after any dissolution of Parliament as the King may appoint.

71 It is important to note that the parliament of Lesotho is currently considering the Ninth Amendment to the Constitution. The amendment seeks to change paragraph (a), (b) and (c) of section 83(4). The effect of the amendment is that the Prime Minister should not advise dissolution of parliament after the vote of no confidence unless dissolution id supported by two-thirds of the members of the National Assembly. Otherwise the Prime Minister will be expected to resign. See Clause 3 of the Ninth Amendment to the Constitution, 2019.

72 *Phoofolo supra* para 71.

However, the *proviso* thereto provides for three exceptions to the main principle in section 83(4); that is, the *proviso* embodies three circumstances under which the King may dissolve parliament without the advice of the Prime Minister. The first one is that if the "Prime Minister recommends a dissolution and the King considers that the Government of Lesotho can be carried on without a dissolution and that a dissolution would not be in the interests of Lesotho, he may, acting in accordance with the advice of the Council of State, refuse to dissolve Parliament".[73] The second one is that if a resolution of no confidence is passed against the Prime Minister, and he does not either resign or advice dissolution within three months, the King may then, upon the advice of the Council of State, dissolve Parliament.[74] The third scenario in which the King may dissolve parliament without the advice of the Prime Minister is when the King considers that there is no prospect of finding a person who commands majority in the National Assembly for purposes of appointment to premiership.[75] Even under this scenario, the King is advised by the Council of State.

The Court of Appeal in the *Phoofolo* case took the approach that once the Prime Minister advises the King to dissolve parliament, and none of the exceptions provided for in the *proviso* arises, the King has to comply with the advice without a need to seek advice from the council.[76] This approach is flawed in that it suggests that the process of *considering* is done by the King alone. In that way, it presumes that the King has a discretion, for instance, to determine whether the dissolution is in the interest of the country in terms of section 83(4)(a). While the judgment in effect sought to suggest that the King does not have a discretion, the opposite effect has been attained; that actually the King has a discretion to determine whether the Council of State is necessary or not.

This approach is not in keeping with both the history and purpose of the section in question. Under the 1966 Constitution, the power to dissolve and prorogue parliament was in the absolute discretion of the King; he was not supposed to be advised by either the Prime Minister or the Privy Council.[77] The only requirement was that it was to be exercised

73 S 83(4)(a).
74 S 83(4)(b).
75 S 83(4)(c).
76 At para 72, the court said: "It is clear, in our view that the second proviso to section 83(4), subparagraph (b) does not directly apply. This is because the main clause of that subparagraph (which empowers the King, acting in accordance with the advice of the Council to dissolve Parliament without having been advised to do so by the Prime Minister) is qualified by a conditional clause, namely, if the National Assembly passes a resolution of no confidence in the Government of Lesotho and the Prime Minister does not within three days thereafter either resign or advise a dissolution) and that condition was satisfied because the Prime Minister did advise a dissolution within the three day period.
77 S 76(2) of the 1966 Constitution.

in line with the existing conventions in England.[78] When the 1993 Constitution was adopted, the section which specifically embodied circumstances under which the King may exercise absolute discretion was removed. All those powers were to be exercised on the advice. Thus, section 83 has been drafted against this backdrop. As such, the King does not seem to have a space for personal discretion under the current design; even the mere *consideration* on whether the dissolution is in the interest of the country must be taken on advice. In 2017, after the King was advised by the Prime Minister to dissolve parliament after two years,[79] a *consideration* had to be made on whether the dissolution was in the interest of the country in terms of section 83(4)(a) of the Constitution. Such *consideration* is the one that would require the advice of the Council of State. The approach preferred by the Court of Appeal in the *Phoofolo* case lost sight of this important historical and purposive factor. It was carried away by the literal interpretation of the section; contrary to established canons for interpretation of Constitutions.[80]

It would seem that the Constitution treats prorogation and dissolution separately. While the King is expected to exercise both of them upon the advice of the Prime Minister, the Constitution does not create the space to decline the prorogation upon the advice of the Prime Minister.[81] With the discussion of the notion of "on the advice of" discussed above, it can safely be said that the advice of the Prime Minister in relation to prorogation is binding. However, it is not unimaginable in modern constitutional law that devices such as legality, separation of powers and rule of law may still provide exceptional avenues which the King may use to decline the advice of the Prime Minister to prorogue a parliament.[82] The British Supreme Court has already laid the principle in the case of

78 See the *proviso* to s 76(2) of the 1966 Constitution.

79 On the 1 March 2017 the National Assembly passed a motion of no confidence in the Government of Lesotho. Subsequent to this motion, the 9 Parliament of Lesotho was dissolved with effect from 6 March 2017. The dissolution was done in terms of Legal Notice 22 of 2017.

80 The same court has on several occasions stated that the interpretation of the constitution must be purposive and generous. See for example, *Sekoati v President of the Court Martial* LAC (1995-99) 812; *Sechele v Public Officers Defined Contribution Pension Fund and Others* (C of A (CIV) NO.43B/10) [2011] LSCA 23 (20 April 2011) available in https://lesotholii.org/ls/judgment/court-appeal/2011/23/ (accessed 2019-11-21).

81 See s 83 of the Constitution of Lesotho, 1993.

82 Monahan *Constitutional Law* (2006). At 75-76 the author captures the argument pointedly in that: "As a general rule, the governor general should continue to act on the advice of the prime minister, assuming that he/she continued to enjoy the confidence of the House and should leave issues of legality or constitutionality to be adjudicated before the courts. … There may be one exception to this rule arising where a government was persisting with a course of action that had been declared unconstitutional or illegal by the courts. In the event that the government sought the governor general's participation in a decision or action that had previously been declared unconstitutional, it might well be appropriate for the governor general to refuse to approve or participate in the illegal or unconstitutional conduct".

R (on the application of Miller) (Appellant) v The Prime Minister,[83] that prorogation may not be used by the Prime Minister to avoid scrutiny. The court therein pointedly said:

> "… the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive."[84]

Thus, it can be equally contended in relation to Lesotho that although the Constitution itself does not provide for exceptions in which advice for prorogation of parliament may be declined by the King. The King may not be expected to agree to advice that is palpably unlawful or unconstitutional. The authority derived from the *Miller* case is that it is unconstitutional to prorogue parliament with a view to avoid scrutiny.[85] This is because the animating doctrine of parliamentary accountability is violated by prorogation whose patent purpose is to avoid scrutiny.[86] As such the prorogation of parliament by Prime Minister Thabane in 2014 would hardly pass the constitutional mast because it was done with a view to avoid an already filed motion of no confidence.[87]

4 The King's right to be consulted and informed

While ordinarily the King is obliged to work in accordance with the advice of either the Prime Minister or his government in general, the Constitution gives him the rights to be consulted and to be fully informed concerning the general conduct of the governmental matters. The Prime Minister has a corresponding obligation to "furnish him with such information as he may request in respect of any particular matter relating to the government of Lesotho".[88] What these rights entail is always a matter of tight secrecy as the actual encounter between the King and the

83 *R (on the application of Miller) v Prime Minister, Cherry and others v Advocate General for Scotland* [2019] UKSC 41.
84 *R (on the application of Miller) v Prime Minister* para 50.
85 *R (on the application of Miller) v Prime Minister* para 50.
86 *R (on the application of Miller) v Prime Minister* para 48, The court said: "That principle is not placed in jeopardy if Parliament stands prorogued for the short period which is customary, and as we have explained, Parliament does not in any event expect to be in permanent session. But the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model". For further application of the doctrine in practical situations see the cases of *R v Secretary of State for the Environment, Ex p Nottinghamshire County Council* [1986] AC 240; *(Mohammed (Serdar) v Ministry of Defence* [2017] UKSC 1.
87 On the 10th March 2020, Prime Minister Thabane again prorogued parliament citing the outbreak of the Corona virus. The prorogation has been challenged in the courts on the ground that it was not procedural. It remains to be seen how the courts will resolve it.
88 S92 of the Constitution.

Prime Minister are hardly ever published; neither have these rights been a subject of judicial pronouncement in Lesotho. However, the contents of these rights may not be hard to fathom because they have their taproots from the British constitutional scheme. The Constitution of Lesotho only provides for the two rights, the right to be consulted and the right to be informed. However, the rights are originally three – the right to be consulted, the right to encourage and the right to warn – as formulated by the eminent British monarchist, Bagehot.[89] In practice the right to be consulted means the Prime Minister has regular consultation meetings with the Prime Minister on all matters of government; the King even has a right to see all cabinet papers. There is therefore no part of government business that may be deemed 'secret' against the King. Although the Constitution of Lesotho does not expressly provide for the right to warn, it may be argued that this right is implied in the two rights expressly provided.[90] It may be absurd to give the King, who is the *de jure* repository of the executive authority in Lesotho,[91] only the rights to be consulted and informed without him having an opportunity to advise and warn.[92] The King's right to be informed corresponds with his overarching constitutional schematisation where the Constitution vests executive powers in the King exercisable on the advice of his government.

Ordinarily, the monarchs, or heads of state in parliamentary systems,[93] use these rights to warn governments about certain dangers in policy direction and the procedural improprieties in executing certain

89 Bagehot *The English Constitution* (1991). At 113 Bagehot formulates the rights rather adroitly as thus, "[t]o state the matter shortly, the Sovereign has, under a constitutional monarchy, three rights-the right to be consulted, the right to encourage and the right to warn. And a King of great sense and sagacity would want no others."

90 Brazier expands the three rights expounded by Bagehot into the rights to five rights, namely: the rights to be informed, to be consulted, to advise, to encourage, and to warn. See Brazier "The monarchy" in Bogdanor (ed.) *The British Constitution in the Twentieth Century* (2003) 69. See also the endorsement of this expanded formulation in UK Cabinet Office *The Cabinet Manual* (2011) 8.

91 S 86 of the Constitution provides that: "The executive authority of Lesotho is vested in the King and, subject to the provisions of this Constitution, shall be exercised by him through officers or authorities of the Government of Lesotho".

92 Twomey "From Bagehot to Brexit: the monarch's rights to be consulted, to encourage and to warn" 2018 *The Round Table: The Commonwealth Journal of International Affairs* 420.

93 For instance, article 78 of the Indian Constitution of 1949 provides that:
It shall be the duty of the Prime Minister:
(a) to communicate to the President all decisions of the council of Ministers relating to the administration of the affairs of the union and proposals for legislation;
(b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; and
(c) if the President so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

laws.[94] Speaking in relation to India where the Constitution has equally codified this conventional rights of heads of state in a Westminster design, Malik contends that:

> "It is noteworthy that President's right to call for information is central to his function under the Constitution, to persuade the council of ministers and state all his objections to any proposed course of action and to reconsider the matter as he is the guardian of the Constitution and has to protect the Constitution and the laws … office."[95]

It may be contended that this applies in equal measure to Lesotho. The rights envisaged under section 92 of the Constitution of Lesotho arguably entail the King's rights to express his disagreement to, or at least advise against, a certain government course of action. However, it must be recalled that neither the Prime Minister nor his cabinet is responsible to the King. The government is responsible, and as such accounts to parliament.[96] As such, the King's rights under section 92 are subject to the cardinal constitutional principle that the King must work in accordance with the advice of his government.[97] The Constitution of Lesotho, perhaps at variance with other Westminster designs, is a bit brute against the King if he refuses the advice of his government. It provides that if the King refuses the advice of his government, the Prime Minister will do the act and that act will be deemed to have been done by him.[98]

5 Conclusion

The foregoing analysis demonstrates that the Constitution of Lesotho remains fundamentally Westminster-based.[99] Hence, the powers of the King remain, by and large, exercisable on advice of his government. The

94 Towmey 420.

95 Malik "President's right to seek information under article 78 of the Constitution of India" 2015 *Journal of the Indian Law Institute* 187.

96 S 88(2) of the Constitution provides that: "The functions of the Cabinet shall be to advise the King in the government of Lesotho, and the Cabinet shall be collectively responsible to the two Houses of Parliament for any advice given to the King …"

97 Quentin-Baxter "The Governor-General's constitutional discretions: an essay towards a re-definition" *Victoria University of Wellington Law Review* 289.

98 S 91(3) of the Constitution provides that, "where the King is required by this Constitution to do any act in accordance with the advice of any person or authority other than the Council of State, and the Prime Minister is satisfied that the King has not done that act, the Prime Minister may inform the King that it is the intention of the Prime Minister to do that act himself after the expiration of a period to be specified by the Prime Minister, and if at the expiration of that period the King has not done that act the Prime Minister may do that act himself and shall, at the earliest opportunity thereafter, report the matter to Parliament; and any act so done by the Prime Minister shall be deemed to have been done by the King and to be his act".

99 Macartney "African Westminster? the parliament of Lesotho" 1970 *Parliamentary Affairs* 121.

suggestion by the Court of Appeal, in the *Phoofolo* case, that when advised by Prime Minister to dissolve parliament the King can "consider", without the involvement of the Council of State, whether the advice is "in the interest of the country" or not is correct. The correct process, looking at the broader schematisation of the Constitution,[100] is that when the Prime Minister advises the King to dissolve parliament, the Council of State has to sit and "consider" whether the dissolution is in the interest of the country; and consequently advise the King accordingly. It is then that the King may accept or reject the advice for dissolution by the Prime Minister. As such, it would seem that there is no discretion, or some space to act alone, for the King in relation to dissolution.

In relation to prorogation, it would seem the process is different. The matter is between the King and the Prime Minister; there is no Council of State in the equation. As a general rule, the King will ordinarily accede to the Prime Minister's advice.[101] However, as demonstrated above, it would seem that the King may not be bound by the advice that is unconstitutional or in some way unlawful. The Supreme Court of England in the *Miller* case has already indicated that when parliament is prorogued with a view to avoid scrutiny or when it is broadly intended to defeat parliament to execute it constitutional mandate, it will be regarded as unconstitutional.[102] As such, the King may not be expected to comply with such an advice for prorogation.

The King can also use his rights to be consulted, to be informed and to be consulted to raise the issues he may have with the advice received from his government.[103] As demonstrated above, however, these rights are intended for harmony between the King and his government rather than for acrimony. While the King may use these rights to warn and advise his government, he may not prevail when his government insists on its position;[104] as long as the advice from government is constitutional and lawful.[105] Under the Lesotho design, the government has a broader space of operation because of the animating principle of

100 As demonstrated in the foregoing discussion, the 1993 constitution, unlike the 1966 Constitution, has removed all manner of discretion for the King.
101 Monahan 75.
102 Payne 441.
103 Malik 187.
104 See Jennings Cabinet *Government* (1969) 337, quoting from the *Esher Papers* thus: "If the Sovereign believes advice to him to be wrong, he may refuse to take it, and if his minister yields the Sovereign is justified. If the minister persists, feeling that he has behind him a majority of the people's representatives, a constitutional Sovereign must give way".
105 Jennings 337.

democracy.[106] The rights of the King to be consulted and to be informed – even when it is interpreted to include the rights to warn and advise – may not be used to limit the government operational space.[107]

106 Referring to the British design, on which the Lesotho system is cast, Jennings at 13-14 contends that: "The fundamental principle is that of democracy. … The Queen, the Cabinet, the House of Commons and even the House of Lords are the instruments which history has created as, or political conditions have converted into, instruments for carrying out the democratic principle … The Revolution of 1688 finally settled that in the last resort the King must give way to Parliament. The Cabinet was the means by which the King on the one hand made certain that his actions had parliamentary approval and on the other hand enabled him to control Parliament through its majority".

107 Brazier *Constitutional Practice: The Foundations of British Government* (1999) 187.

Understatement penalty in terms of the Tax Administration Act – a critical analysis of the interpretation of a *bona fide* inadvertent error

Maryke Wiesener
MCom Taxation, Chartered Accountant (SA)
Lecturer, School of Accountancy, Stellenbosch University

SUMMARY

The Tax Administration Act stipulates that in the instance of an understatement by the taxpayer, an understatement penalty must be levied by the South African Revenue Service (SARS) for each shortfall in relation to each understatement, unless the understatement is due to a *bona fide* inadvertent error. The term "*bona fide* inadvertent error" is only used in the context of an understatement penalty. This term is, however, not defined in the Tax Administration Act, any other tax act, or the Interpretation Act. Initially, when the term was first introduced into the Tax Administration Act in 2013, certain factors that need to be considered in the context of factual errors and in the case of a legal interpretive error were listed in the Draft Memorandum on the Objects of the Tax Administration Laws Amendment Bill of 2013. However, the final version of the Memorandum on the Objects of the Tax Administration Laws Amendment Bill of 2013 did not include examples of what would constitute a *bona fide* inadvertent error when SARS must consider whether or not to impose an understatement penalty, but it stated that guidance will be developed in this regard.

Subsequently, during 2016, judgement was delivered in Income Tax Case (ITC) 1890 and the court held that a *bona fide* inadvertent error is "an innocent misstatement by a taxpayer on his or her return, resulting in an understatement, while acting in good faith and without the intention to deceive". Thereafter, during 2018, SARS issued guidance in respect of the use of the term "*bona fide* inadvertent error" in the context of understatement penalties. SARS concluded that "the only errors that may fall within the *bona fide* inadvertent class are typographical mistakes – but only properly involuntary ones", and further clarified that a lack of reasonable care will also not be excused.

There is a conflicting view between the court in ITC 1890 and the guidance provided by SARS. It is, however, important that clear-cut guidance be provided regarding what would constitute a "*bona fide* inadvertent error", as this would absolve the taxpayer from an understatement penalty.

How to cite: Wiesener 'Understatement penalty in terms of the Tax Administration Act – a critical analysis of the interpretation of a bona fide inadvertent error' 2020 *De Jure Law Journal* 176-187
http://dx.doi.org/10.17159/2225-7160/2020/v53a12

1 Introduction

Taxpayers would naturally wish to avoid having to pay penalties, in addition to income tax imposed. Compliance with laws and regulations is therefore required. However, the law acknowledges specific circumstances where non-compliance may not automatically result in a penalty. The South African Revenue Service (SARS) must levy an understatement penalty in terms of the Tax Administration Act 28 of 2011 (hereafter referred to as the TAA) in the event of an understatement[1] by a taxpayer, unless the understatement is due to a *bona fide* inadvertent error.[2] None of the items listed in section 102(1)(a) to (f) of the TAA, however, places the burden of proof on the taxpayer to demonstrate that the understatement was due to a *bona fide* inadvertent error. The burden of proving the facts on which the imposition of an understatement penalty under chapter 16 of the TAA is based, rests on SARS.[3]

Due to the burden of proof being on SARS to corroborate the facts on which the imposition of the understatement penalty is based, SARS must therefore first identify the understatement by the taxpayer, and secondly, before the imposition of the understatement penalty, determine whether or not the understatement is due to a *bona fide* inadvertent error, before the understatement penalty can be levied by SARS. Van Zyl is of the view that this is an "implied" burden of proof that rests upon SARS and that the specific facts and circumstances that resulted in the understatement by the taxpayer must be taken into account by SARS, based on a balance of probabilities.[4]

Previously, before the enactment of the TAA, additional tax could be levied in terms of section 76,[5] of the Income Tax Act 58 of 1962, as amended (hereafter referred to as the ITA). The additional tax was levied, as a starting point, at 200% and reduced to an appropriate level if extenuating circumstances existed for SARS to be taken into account.[6] Due to the subjectivity involved in the determination of this additional tax, it resulted in taxpayers with similar circumstances being levied different levels of additional tax.[7] SARS's discretion was, however, limited by the introduction of the new understatement penalty regime,

1 An "understatement", as defined in s 222(1) of the TAA, refers to any prejudice to SARS or the *fiscus* as a result of the failure to submit a return as required, an omission from a return, an incorrect statement in a return, the failure to pay the correct amount of tax if no return is required, or an impermissible avoidance arrangement.
2 S 222(1) of the TAA.
3 S 102(2) of the TAA.
4 Van Zyl "The new understatement penalty regime: a sharp 'sword'?" 2014 Journal of Economic and Financial Sciences 909.
5 S 76 of the ITA was deleted and replaced by chapter 16 of the TAA with effect from 1 October 2012.
6 Croome & Olivier *Tax Administration* (2015) 474.
7 Croome & Olivier 474.

as set out in chapter 16 of the TAA, which is designed to ensure consistent treatment of taxpayers in similar circumstances.[8]

The SARS Short Guide to the Tax Administration Act (hereafter referred to as the SARS Short Guide)[9] lists the following three interpretive rules that must be considered in the context of the interpretation of provisions:

- Firstly, when interpreting the provisions of the TAA, a term that is defined in another tax act[10] will have the meaning as set out in that tax act, unless the context in the TAA indicates otherwise;
- Secondly, when interpreting the provisions of a tax act, a term that is defined in the TAA will have the meaning as set out in the TAA, unless the context in the tax act indicates otherwise; and
- Lastly, the tax act prevails in an instance where there is an inconsistency between the TAA and another tax act.[11]

It may also be necessary to take into account the effect of the Interpretation Act 33 of 1957 (hereafter referred to as the Interpretation Act) when interpreting the provisions of the TAA.[12] The provisions of the Interpretation Act apply to the interpretation of every law in force in South Africa, unless the context indicates otherwise.[13] The relevant context of the TAA thus needs to be considered in this case.

The TAA defines certain words or phrases (indicated in double quotation marks in section 1) that deal with more general definitions. Furthermore, chapter-specific definitions (indicated in single quotation marks) appear in the first section of the chapters of the TAA. Chapter definitions give meaning to certain words or terms that relate to a specific chapter.

The term "*bona fide* inadvertent error" is only used in the context of an understatement penalty in section 222(1) of the TAA. This term, however, is not defined in the TAA, any other tax act, or the Interpretation Act. When the term was first introduced into the legislation, certain factors to be considered in the context of factual errors and in the case of a legal interpretive error were listed in the Draft Memorandum on the Objects of the Tax Administration Laws Amendment Bill of 2013 (hereafter referred to as the Draft Memorandum).[14] National Treasury, however, removed all these

8 National Treasury *Memorandum on the Objects of the Tax Administration Bill* (2011) 198.
9 SARS *Short Guide to the Tax Administration Act, 2011 (Act No 28 of 2011) (Version 3)* 6.
10 "Tax act", as defined in s 1 of the TAA, refers to the TAA or an act, or portion of an act, referred to in s 4 of the SARS Act, excluding customs and excise legislation. It therefore includes the following: the ITA, the Value-Added Tax (VAT) Act, the Estate Duty Act 45 of 1955, and the Transfer Duty Act 40 of 1949.
11 SARS *supra.*
12 Croome & Olivier 29.
13 S 1 of the Interpretation Act.

examples from the final version of the Memorandum on the Objects of the Tax Administration Laws Amendment Bill of 2013 and stated that SARS would develop guidance, for the use of taxpayers and SARS officials, when an understatement will not result in the imposition of an understatement penalty.[15]

Subsequently, on 4 November 2016, judgement was delivered in Income Tax Case 1890 (hereafter referred to as ITC 1890),[16] which dealt with, *inter alia*, the imposition of an understatement penalty. Boqwana J considered the dictionary meaning of a *bona fide* inadvertent error. The court held that a *bona fide* inadvertent error is "an innocent misstatement by a taxpayer on his or her return, resulting in an understatement, while acting in good faith and without the intention to deceive".[17] The judgement resulted in the understatement penalty not being imposed as Boqwana J was of the view that the understatement was as a result of a *bona fide* inadvertent error.

Only thereafter, in 2018, SARS issued guidance in respect of the use of the term "*bona fide* inadvertent error" in the context of understatement penalties.[18] SARS concluded in the guidance that "the only errors that may fall within the *bona fide* inadvertent class are typographical mistakes – but only properly involuntary ones", and it further clarified that a lack of reasonable care would also not be excused.[19]

2 Problem statement and research objective

The research objective of this article is to critically analyse the interpretation of a *bona fide* inadvertent error. The discussion commences with an analysis of the reason for the introduction of this term in the context of an understatement penalty in section 222(1) of the TAA and the examples contained in the Draft Memorandum. This is an important discussion to consider, as it was never the intention that an understatement penalty must be levied where the understatement is due to a *bona fide* mistake.[20] Secondly, case law that deals with a *bona fide* inadvertent error will be considered. This will be analysed in order to determine which factors were considered in judgements in this regard. Thirdly, the guidance issued by SARS will be critically analysed. This analysis will also consider the comments from recognised controlling bodies (hereafter referred to as RCBs) on the SARS Guide to Understatement Penalties (hereafter referred to as the SARS Guide). The

14 National Treasury *Draft Memorandum on the Objects of the Tax Administration Laws Amendment Bill* (2013) 12-13.
15 National Treasury *Memorandum on the Objects of the Tax Administration Laws Amendment Bill* (2013) 40.
16 79 SATC 62.
17 ITC 1890 79 SATC 62 (2016) 45.
18 SARS *Guide to Understatement Penalties (Issue 1 and 2)* 2018.
19 SARS *supra*.
20 Croome & Olivier 476.

purpose of this analysis is to determine which factors were considered by SARS, as this document constitutes guidance issued for use by taxpayers and SARS officials. Finally, the conclusion will consider the guidance given in case law and by SARS, in order to determine whether or not SARS's interpretation of a *bona fide* inadvertent error is too narrow and whether further guidance is required.

3 *Bona fide* inadvertent error

3 1 Background

The TAA contains provisions that deal with understatement penalties in chapter 16, and these were introduced with effect from 1 October 2012. Prior to this date, the administrative provisions, dealing with, *inter alia*, penalties, were duplicated in the various acts administered by the Commissioner.[21] The then Minister of Finance, Trevor Manuel, stated in the 2005 Budget Speech[22] that the purpose[23] of the TAA was to consolidate certain generic administrative provisions, as these provisions were duplicated in different tax acts.[24]

The new provisions that deal with the imposition of an understatement penalty are set out in sections 221 to 224 of the TAA.[25] An understatement is specifically defined for purposes of chapter 16 and refers to any prejudice to SARS or the *fiscus* as a result of failure to submit a return required under a tax act or by the Commissioner; an omission from a return; an incorrect statement in a return; if no return is required, the failure to pay the correct amount of tax;[26] or an impermissible

21 The legislation administered by the Commissioner is set out in schedule 1 of the SARS Act 34 of 1997.
22 Dated 23 February 2005.
23 2005 Budget Review chapter 4 (Revenue trends and tax proposals) 98.
24 The TAA consolidates the general administrative provisions of the Transfer Duty Act 40 of 1949, the Estate Duty Act 45 of 1955, the ITA 58 of 1962, the VAT Act 89 of 1991, the Skills Development Levies Act 9 of 1999, the Unemployment Insurance Contributions Act 4 of 2002, the Diamond Export Levy (Administration) Act 14 of 2007, the Securities Transfer Tax Administration Act 26 of 2007, and the Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008, as set out in the Memorandum on the Objects of the Tax Administration Bill of 2011.
25 Chapter 16 part A (imposition of understatement penalty) of the TAA.
26 "Tax" is defined (for purposes of chapter 16) in s 221 of the TAA and refers to "tax" as defined in s 1 (which includes a tax, duty, levy, royalty, fee, contribution, penalty, interest, and any other moneys imposed under a tax act), excluding a penalty and interest.

avoidance arrangement.[27, 28]

Where there is an understatement (as defined) by the taxpayer, an understatement penalty must be levied by SARS for each shortfall in relation to each understatement, unless the understatement is due to a *bona fide* inadvertent error.[29] If the taxpayer is guilty of an understatement, this results in an amount that must be paid in addition to the tax payable for the relevant tax period.[30] The percentage of the penalty is determined by SARS by way of using the understatement penalty percentage table,[31] which takes into account the type of behaviour or degree of culpability involved, as follows:

1	2	3	4	5	6
Item	Behaviour	Standard case	If obstructive, or if it is a repeat case	Voluntary disclosure after notification of audit or criminal investigation	Voluntary disclosure before notification of audit or criminal investigation
(i)	"Substantial understatement"	10%	20%	5%	0%
(ii)	Reasonable care not taken in completing return	25%	50%	15%	0%
(iii)	No reasonable grounds for "tax position" taken	50%	75%	25%	0%
(iv)	"Impermissible avoidance arrangement"	75%	100%	35%	0%
(v)	Gross negligence	100%	125%	50%	5%
(vi)	Intentional tax evasion	150%	200%	75%	10%

27 "Impermissible avoidance arrangement" is defined (for purposes of chapter 16) in s 221 of the TAA and refers to an arrangement in respect of which part IIA of chapter III of the ITA is applied and includes, for purposes of chapter 16, any transaction, operation, scheme, or agreement in respect of which s 73 of the VAT Act or any other general anti-avoidance provision under a tax act is applied.

28 "Understatement" is defined (for purposes of chapter 16) in s 221 of the TAA.

29 The wording "unless the 'understatement' results from a *bona fide* inadvertent error" was inserted in s 222(1) of the TAA by way of an amendment in terms of the Tax Administration Laws Amendment Act 2013 in Government Gazette 37236 of 16 January 2014 (deemed to have come into operation on 1 October 2012) at 46.

30 S 222(1) of the TAA.

31 S 223 of the TAA.

In the 2013 Budget Review, the then Minister of Finance, Pravin Gordhan, announced that the understatement penalty provisions will be refined and relief will be provided for *bona fide* inadvertent errors.[32] SARS indicated during a workshop held to discuss the TAA amendments that it was never intended that the understatement penalty must be levied where the taxpayer made a *bona fide* mistake.[33] The Draft Memorandum[34] explained that a SARS official will generally consider the circumstances in which the error was made, as well as other factors, in order to determine whether the understatement resulted from a *bona fide* inadvertent error.

The examples listed were as follows:

> "In the context of factual errors –
> - if the standard of care taken by the taxpayer in completing the return is commensurate with the taxpayer's knowledge, education, experience and skill and the care a reasonable person in the same circumstances would have exercised;
> - the size or quantum, nature and frequency of the error;
> - whether a similar error was made in a return submitted during the preceding years; or
> - in the case of an arithmetical error, whether the taxpayer had procedures in place to detect arithmetical errors.

> In the case of a legal interpretive error, whether –
> - the relevant provision of a tax act is generally regarded as complex;
> - the taxpayer took steps to understand it including following available explanatory material or making reasonable enquiries; or
> - the taxpayer relied on information that, although incorrect or misleading, came from reputable sources and a reasonable person in the same circumstances would be likely to find the relevant information complex."[35]

The final version of the Memorandum on the Objects of the Tax Administration Laws Amendment Bill of 2013, however, did not include the abovementioned examples of what would constitute a *bona fide* inadvertent error when SARS must consider whether or not to impose an understatement penalty in terms of section 222(1) of the TAA. It was stated that the reason for the omission of the abovementioned examples from the final version was "due to the broad range of possible errors" and that it "has the potential to inadvertently exclude deserving cases and include underserving cases" if the term "*bona fide* inadvertent error" is defined for purposes of section 222(1) of the TAA.[36] It further stated that SARS will develop guidance in this regard, which taxpayers and SARS officials can use to determine whether the understatement is due to a *bona fide* inadvertent error. The SARS Short Guide has, to date, not

32 2013 Budget Review chapter 4 (revenue trends and tax proposals) 63.
33 Croome & Olivier 476.
34 Dated 2 July 2013.
35 National Treasury 12-13.
36 National Treasury *supra*14.

provided any guidance regarding this matter.[37] SARS, however, only issued guidance, five years since the announcement was made in 2013 that guidance will be provided, in the Guide to Understatement Penalties, which was issued on 29 March 2018 (first issue) and 18 April 2018 (second issue). The guidance issued by SARS is discussed in further detail in point 3 3.

3 2 Case law

To date, ITC 1890[38] is the only South African case that has considered the meaning of a "*bona fide* inadvertent error", which is not defined in the TAA, any other tax act, or the Interpretation Act, with judgement being delivered by Boqwana J in the Cape Town Tax Court on 4 November 2016. In this matter, between ABC Holdings (Pty) Ltd (hereafter referred to as the taxpayer) and the Commissioner for SARS (hereafter referred to as the Commissioner), the issue was whether the taxpayer was entitled to claim a deductible allowance for future expenditure in terms of section 24C of the ITA in respect of the 2011 year of assessment. The Commissioner conducted an audit on the taxpayer during January 2014, whereby the taxpayer was notified that it incorrectly claimed the section 24C allowance. In addition, the Commissioner levied an understatement penalty in terms of section 222 of the TAA. Sections 222 and 223 of the TAA were under scrutiny, and Boqwana J had to consider whether the Commissioner was correct to levy a 10% understatement penalty in respect of a "substantial understatement" (as defined). The taxpayer, however, submitted that it could have never made a substantial understatement and, if the appeal was refused, it asked that the court must excuse it from paying the penalty, as the alleged understatement resulted from a *bona fide* inadvertent error. This was due to the taxpayer submitting that it had acted on tax advice received from Prof T by way of a tax opinion. Boqwana J had to determine whether the taxpayer's acting on tax advice received by way of a tax opinion constituted a *bona fide* inadvertent error, which would result in the penalty being remitted.

The Oxford Dictionary was quoted in the judgment, having considered the origin of the word "*bona fide*", which is Latin and literally means "with good faith", and also refers to "genuine", "real", and "without intention to deceive".[39] The word "inadvertent" is defined as "not resulting from" or "achieved through deliberate planning".[40] The Merriam-Webster Online Dictionary was also consulted for synonyms for the word "inadvertent", which were quoted as "accidental", "unintentional", "unintended", "unpremeditated", "unplanned", and "unwitting".[41] The Oxford Dictionary defines "error" as "a mistake",

37 The SARS Short Guide 2018.
38 ITC 1890 *supra* 17.
39 ITC 1890 *supra* para 44.
40 ITC 1890 *supra* para 44.
41 ITC 1890 *supra* para 44.

with synonyms quoted as "the state or condition of being wrong in conduct or judgement".[42] Based on the above dictionary meaning analysis of the words "*bona fide* inadvertent error", Boqwana J concluded that it must mean that the term refers to "an innocent misstatement by a taxpayer on his or her return, resulting in an understatement, while acting in good faith and without the intention to deceive".[43] In this case, Boqwana J was of the view that the taxpayer "acted in good faith with no intention to deceive".[44]

3 3 The South African Revenue Service's (SARS) Guide to Understatement Penalties

The SARS Guide is a general guide on the understatement penalties.[45] As mentioned in the preface of the SARS Guide, it is not an "official publication"[46] and it therefore does not create a practice generally prevailing.[47]

The SARS Guide refers to the English Oxford Living Dictionaries for the ordinary definition of the terms "error" and "inadvertent". It defines an error as "a mistake", and the words "fallacy", "misconception", and "delusion" are listed as synonyms.[48] It further defines the word "inadvertent" as "not resulting from or achieved through deliberate planning", and lists the following words as synonyms: "unintentional, accidental, unpremeditated, unmeant, uncalculated, unthinking, unwitting, and involuntary".[49] The SARS Guide further explains that the understatement must be the result of an "unintentional default, an accidental omission, an unplanned statement, and involuntary failure to pay the correct tax, and an unpremeditated impermissible avoidance arrangement".[50] The English Oxford Living Dictionaries further defines "*bona fide*" as "genuine" and "real" and lists the following as synonyms: "authentic, true, actual, legitimate, valid and proper".

The SARS Guide states that even though in ITC 1890 the court added the words "with good faith" and "without intention to deceive" to the definition of "*bona fide*", the SARS Guide is of the view that the court "lost sight of the fact that an error cannot have good or bad faith, and cannot have the intention to deceive".[51] The SARS Guide further explains in

42 ITC 1890 *supra* para 44.
43 ITC 1890 *supra* para 45.
44 ITC 1890 *supra* para 48.
45 Chapter 16 of the TAA.
46 "Official publication" is defined in s 1 of the TAA and refers to a binding general ruling, interpretation note, practice note, or public notice issued by a senior SARS official or the Commissioner.
47 A "practice generally prevailing", as described in s 5 of the TAA, refers to a practice set out in an official publication regarding the application or interpretation of a tax act.
48 SARS *supra* 15.
49 SARS *supra* 15.
50 SARS *supra* 15.
51 SARS *supra* 15.

footnote 70 that this is one of the reasons why SARS disagrees with the judgment. The SARS Guide is therefore of the view that the "trigger" must be *bona fide* inadvertent, and not the person who made it.[52]

The SARS Guide further explains that an inadvertent error refers to an error that "does not result from deliberate planning", and that a *bona fide* inadvertent error refers to an error that "genuinely does not result from deliberate planning".[53] It emphasises the point that the "lack of deliberate planning" must relate to the error, which in turn refers to "the default, omission, incorrect statement, failure to pay the correct tax, or impermissible avoidance arrangement must be genuinely involuntarily".[54]

The SARS Guide concludes by stating that the only example of a *bona fide* inadvertent error is a typographical mistake, but only a properly involuntary one.[55]

3 4 Recognised controlling bodies' (RCB) commentary on the SARS Guide

The South African Institute of Chartered Accountants' National Tax Committee (hereafter referred to as SAICA) and the South African Institute of Tax Professionals Tax Administration Technical Work Group (hereafter referred to as SAIT), both institutes being RCBs,[56] submitted their comments on the SARS Draft Guide to Understatement Penalties respectively on 12 February 2018 and 19 February 2018 to SARS. It, however, appears that the following issues regarding part 5, dealing with the meaning of "*bona fide* inadvertent error", have not yet been addressed in the SARS Guide:

3 4 1 South African Institute of Chartered Accountants (SAICA)

Example 14 of the SARS Guide describes the following scenario:

> Based on a statement obtained from a charity, the taxpayer filed a return that included a deduction of R2 500 for a donation. It later transpires that the charity's system developed an error and the deduction should only have been for R1 000. Although clearly a mistake, the incorrect statement is precluded from the ambit of a *bona fide* inadvertent error as the amount was deliberately captured in the return, and a penalty must be imposed. However, none of the listed behaviours in the table encapsulates the cause of the understatement. In fact, the opposite is true – the taxpayer took reasonable care when completing his return (the positive from of item (ii)). He relied on information and documentation that, although incorrect, came from reputable sources. In the absence of other relevant factors, a reasonable person in the same circumstances would likely have acted in a similar

52 SARS *supra* 15.
53 SARS *supra* 16.
54 SARS *supra* 16.
55 SARS *supra* 17.
56 S 240A(1)(d) of the TAA.

> fashion. A penalty cannot be imposed, although interest will be payable on the underpaid tax.[57]

The SAICA submission was concerned about the statement in this example that, even though the taxpayer based the deduction on a statement obtained from a charity, it fell outside the ambit of a *bona fide* inadvertent error. The SAICA submission expressed its concern with SARS's view, as it considered that this view may extend the matter to all third-party reports such as banks, medical schemes, employers, etc.[58] The SAICA submission requested that guidance should be provided in respect of the difference between a "*bona fide* inadvertent error" and "reasonable care not taken", especially in the context of relying on third-party reporting.

3 4 2 South African Institute of Tax Professionals (SAIT)

The SAIT submission highlights the fact that the SARS Guide "explicitly contradicts existing judicial precedent";[59] in this instance, ITC 1890. The SAIT is of the view that SARS, being an executive authority, should apply the law as it stands, including the precedents provided by the judiciary, where complex matters were the subject of a dispute before the court. Although both SARS and ITC 1890 included a similar analysis of the dictionary meaning of "*bona fide*" and "inadvertent", SARS does not accept the conclusion reached in ITC 1890, which is based on these definitions.[60]

The SAIT submission further expresses the concern that there is insufficient guidance regarding the meaning of the terms "*bona fide*" and "inadvertent". It requested further guidance in respect of these terms, as well as factors that SARS would consider in respect of both terms.

4 Conclusion

The SARS Guide states that an ITC case, such as ITC 1890, is a result of a tax court judgment and is therefore instructive, but has no binding effect. This may be true, but it should be noted that the guidance provided by SARS, in the form of a guide, does not constitute authority either and cannot be regarded as practice generally prevailing (as defined).

It is therefore submitted that the judicial view, as expressed by Boqwana J in ITC 1890, should take preference above the narrow view of SARS when considering the meaning of the term "*bona fide* inadvertent error". Therefore, until further guidance is provided, a *bona fide* inadvertent error, as expressed in ITC 1890, should be regarded as "an innocent misstatement by a taxpayer on his or her return, resulting in an

57 SARS *supra* 18.
58 SAICA Comments on the Draft Guide to Understatement Penalties (2018) 10.
59 SAIT Comments on SARS Draft Guide to Understatement Penalties at 4.2.
60 SAIT Comments on SARS Draft Guide to Understatement Penalties at 4.2.

understatement, while acting in good faith and without the intention to deceive", and not only properly involuntary typographical mistakes, as viewed by SARS.

Furthermore, it is recommended that the guidance be included as a defined term in the TAA, or, alternatively, documented in the form of an official publication, such as a binding general ruling or an interpretation note, for the guidance to be regarded as practice generally prevailing.

Recent case law

RS v Road Accident Fund (49899/17) [2020] ZAGPPHC (21 January 2020)

Third party claim- Eleventh hour rejection of seriousness of injury- Not to follow the appeal process in terms of Regulation 3

1 Introduction

In this case the plaintiff, *Salig*, claimed damages from the defendant, the *RAF*, for the harm that it had suffered arising from the negligent driving of a motor vehicle by the insured driver. The defendant accepted liability in respect of all of the harm suffered by the plaintiff, but the *quantum* pertaining to loss of income and general damages remained in dispute. This case note concerns solely the part of the judgment that dealt with general damages.

2 Applicable law

General (or '*non-patrimonial*') damages is a reduction in a legal subject's quality of highly personal interests that does not change his/her economic position [Visser & Potgieter *Skadevergoedingsreg* (2003) 97; *Edouard v Administrator Natal* 1989 (2) SA 368 (D) at 386]. According to Visser and Potgieter, personality interests includes a person's physical integrity, pain and suffering, emotional shock, disfigurement, a reduced life expectancy and loss of life amenities, and because of the personal, non-pecuniary and subjective nature of these interests, it is difficult to quantify, yet it remains recoverable [*Hendricks v President Insurance* 1993 (3) SA 158 (C); Visser & Potgieter *Skadevergoedingsreg* (2003) 101-105].

Prior to 1 August 2008, road accident victims (or third parties) could claim general damages from the Road Accident Fund (hereinafter '*the Fund*' or '*RAF*') without any limitations:[see *Road Accident Fund v Duma, Road Accident Fund v Kubeka, Road Accident Fund v Meyer, Road Accident Fund v Mokoena* 2013 (6) SA 9 (SCA) para 3]. On 1 August 2008 the Road Accident Fund Amendment Act 19 of 2005 took effect, thereby amending section 17(1) of the Road Accident Fund Act 56 of 1996, by introducing limitations on the Fund's liability for general damages. The '*obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.*' [see Section

How to cite: Kehrhahn '*RS v Road Accident Fund* (49899/17) [2020] ZAGPPHC (21 January 2020)' *De Jure Law Journal* 188-193
http://dx.doi.org/10.17159/2225-7160/2020/v53a13

17(1)(b) of the Road Accident Fund Act 56 of 1996, as amended]. Section 17(1A) provides that the assessment of the seriousness of an injury shall be premised on a prescribed method. Section 26(1A) provides that the Minister may make regulations regarding the method of assessment of a serious injury.

The Road Accident Fund Regulations of 2008 were promulgated by publication in the Government Gazette of 21 July 2009. Regulation 3 deals with the method of assessing a serious injury. Regulation 3(1)(a) provides that a third party wishing to claim general damages must be assessed by a medical practitioner. Regulation 3(3)(a) provides that such a third party shall obtain a serious injury assessment report (defined by Regulation 1 as a duly completed RAF 4 form) from this medical practitioner.

In terms of Regulation 3(3)(c), the Fund is only liable to compensate the third party for general damages in the event that the Fund is satisfied that the injury has been correctly assessed as prescribed by the Regulations in general. When the Fund is not satisfied that the third party's injuries were correctly assessed, the Fund can reject the third party's RAF 4 form and give reasons for its rejection [Regulation 3(3)(d)(i)] or direct the third party to a further assessment to establish if the injury is serious [Regulation 3(3)(d)(ii)]. In the event of the latter, Regulation 3(3)(e) allows the Fund to either accept the further assessment or to dispute it.

The Supreme Court of Appeal in *Duma* at para 19 held that the model which the legislature chose in deciding whether the third party's injuries are serious or not, confer the decision on the Fund and not the court. Unless and until the Fund made such a decision, the court's jurisdiction in adjudicating the third party's claim for general damages is ousted. [*Duma* para 19]. This is premised on the absence of a jurisdictional fact for the court to adjudicate the third party's claim for non-patrimonial harm. [*Duma* para 19]. At para 20 the SCA went further to hold that, in the event that the Fund rejects the third party's RAF 4 form, whether proper reasons are submitted or not, the requirement that the Fund must be satisfied that the third party's injuries are indeed serious is not met, and the court's jurisdiction is ousted. The court further held that the Fund's rejection of an RAF 4 form cannot be ignored and the procedure deviated from merely because the RAF 4 form was not rejected within a reasonable time [*Duma* para 20].

Notwithstanding the above, the SCA in *Duma* was mindful that the Fund may avoid and frustrate claims of third parties indefinitely by not deciding on seriousness of the third party's injuries [see para 20]. At para 20, the SCA held that a third party's remedy lies in sections 6(2)(g) and 6(3)(a) of the Promotion of Administrative Justice Act 3 of 2000. These sections allow for a judicial review of administrative authorities' failure to take a decision. Claimants are often indigent and must incur further legal expenses to prosecute their claim for general damages [*Duma* para 21].

When *Duma* was handed down, there was no prescribed time period in which the Fund had to exercise its decision making right (and duty) and decide on the seriousness of a third party's injuries, as contemplated by Regulation 3(3)(d). After *Duma*, amended Regulations were promulgated by publication on 15 May 2013 in Government Gazette 36452. Regulation 3(3)(dA) now provides that the Fund must '*within 90 days from the date on which the serious injury assessment report was sent by registered mail or delivered by hand to the Fund…accept or reject the serious injury assessment report or direct that the third party submit himself or herself to a further assessment'*.

I can do no better than the SCA in *Road Accident Fund v Faria* [2014 (6) SA 19 (SCA)], at para 36, where it was held that: *The amendment Act, read together with the Regulations, has introduced two 'paradigm shifts' that are relevant to the determination of this appeal: (i) general damages may only be awarded for injuries that have been assessed as 'serious' in terms thereof and (ii) the assessment of injuries as 'serious' has been made an administrative rather than a judicial decision. In the past, a joint minute prepared by experts chosen from the contending sides would ordinarily have been conclusive in deciding an issue between a third party and the RAF, including the nature of the third party's injuries. This is no longer the case. The assessment of damages as 'serious' is determined administratively in terms of the prescribed manner and not by the courts. Past legal practices, like old habits, sometimes die hard. Understandably, medical practitioners, lawyers and judges experienced in the field may have found it difficult to adjust. As the colloquial expression goes, 'we are all on a learning curve'*.

3 A summary of *RS v RAF*

It is against this backdrop that the *RS v Road Accident Fund* (49899/17) [2020] ZAGPPHC 1 (21 January 2020) judgment by Potterill, J, which was marked reportable and of interest to other judges, must be critically considered. From para 33 it becomes clear that the experts employed by both parties agreed that the third party's injuries are indeed serious, but the Fund rejected the third party's injuries as being serious on the morning of trial [para 29], despite such an agreement between the experts.

At para 30-32, in referring to the SCA judgment of *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) para 66, [and at para 20 to *Thomas v BD Sarens (Pty) Ltd* [2012] ZAGPJHC 161 (2012) JDR 1711 (GSJ)] the court made an award of R800 000.00 for general damages, despite the Fund's rejection of the seriousness of the injuries. The court acknowledged that it does not have the necessary jurisdiction to decide whether injuries are serious or not in line with *Meyer v RAF* [(52229/2011) [2013] ZAGPPHC 446 (4 December 2013)] where the same Potterill, J held that the court does not have such jurisdiction [para 31].

Potterill, J then concluded in *RS v RAF* that the fact that the court does not have jurisdiction to adjudicate the plaintiff's claim for general

damages is still the case, but in light of the agreement by the experts employed by both parties in their joint minutes employed, it was not the court that assessed whether the injuries are in fact serious. The seriousness was established by a joint expert minute that, in line with the *Bee* judgment, binds the court. Accordingly, if a litigant wished not to be bound by such an agreement, the litigant ought to repudiate the concession by its expert timeously [para 32].

The court found that it is a norm and a practice for the RAF to reject the seriousness of a claimant's injuries on the morning of trial, causing RAF matters in general not be become finalised and where judges are overburdened with RAF matters [para 34]. Ordering that this practice must stop, the court at para 34 held that where experts agree that a third party's injuries are serious, and in the absence of a timeous repudiation based on good reasons, not a single matter will be referred to the Health Professions Council of South Africa (HPCSA). Put differently, a litigant will not be allowed to exercise the remedies as provided in Regulation 3(4) that allows a third party to dispute the Fund's rejection of its RAF 4 form, if it does not timeously repudiate a joint expert minute. No reference is made in the *RS v RAF* judgment to *dicta* of *Road Accident Fund v Faria* 2014 (6) SA 19 (SCA).

4 Discussion

It is probable that the bodily injuries suffered by the plaintiff in *RS v RAF* were indeed serious as contemplated by RAF regulation 3(3)(c) and, as was described in *Faria* at para 36, the court may have been exasperated by the stance of the Fund in rejecting the general damages. However, for the reasons listed below, it is proposed in this case note that this does not justify a departure from the legislative scheme in terms of which the Fund is not bound by the opinion of even its own experts [*Faria* para 34].

In awarding general damages in *RS v RAF*, the court made a judicial decision that is reserved for the administrator, specifically the RAF: See *Faria* at para 34. The SCA in *Duma* at paras 19-20 held that the decision to decide on the seriousness is conferred on the Fund, not the court and until the Fund decided that the injuries are serious, the court's jurisdiction is ousted. The rejection cannot be ignored merely because it is not made timeously. The fact that experts agree in a joint minute that the third party's injuries are serious does not amount to a jurisdictional fact, as the SCA in *Duma* clearly held at para 20 that: *'To recapitulate; if the Fund rejects the RAF 4 form – with or without proper reasons – it means that the requirement that the Fund must be satisfied that the injury is serious has not been met. In that event the plaintiff cannot continue with its claim for general damages in court. The court simply has no jurisdiction to entertain the claim.'* The judge in *RS v RAF* also failed to appreciate that the law does not permit her to reject the RAF's repudiation of general damages based on an expert joint minute, which was a question of law and not one of fact to be agreed by experts [See *Faria* at para 22] and to this end, experts cannot by compiling a joint expert minute bind a court

on questions of law: See *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) para 72.

Potterill, J failed to consider the well-known *dicta* of *Faria* 2014 (6) SA 19 (SCA), which judgment dealt with the same question that the court was seized with in *RS v RAF*. At para 15 of *Faria*, the court referred to the finding in the court *a quo* (per WEINER J) which held that a court is bound by a joint minute where experts agree that a third party's injuries are serious. The court *a quo* in *Faria* held that the Fund's objection to the RAF 4 form falls away in light of the agreement between opposing experts that the third party's injuries are indeed serious.

In upholding the appeal, the SCA in *Faria* at para 34 held that: '*In the past, a joint minute prepared by experts chosen from the contending sides would ordinarily have been conclusive in deciding an issue between a third party and the RAF, including the nature of the third party's injuries. This is no longer the case. The assessment of damages as 'serious' is determined administratively in terms of the prescribed manner and not by the courts'*. The *dicta* of *Faria* is not inconsistent with the judgment of *Thomas v BD Sarens supra* where it was held at para 9 that establishing the facts is the preserve of the court, but for one exception that is where parties agree on the facts. An important distinction must be drawn between facts agreed to amongst experts that will bind a court on the one hand [See *Bee* para 66 and *Thomas* para 9] and questions of law or questions reserved for the administrator on the other hand, where the court cannot interfere in the absence of a jurisdictional fact as to do so would amount to judicial overreach.

Potterill, J in her earlier decision of *Meyer v Road Accident Fund supra* at para 9 correctly held that: '*The Fund has the jurisdiction to decide whether it is a serious injury, has the jurisdiction do so with an inordinate delay and for no good reasons, but then the exercise of their discretion under those circumstances is exercised at the risk of costs on a punitive scale being awarded against them.*'. Why judge Potterill, J strayed from this sound judgment is not known nor elucidated; and it cannot competently be ascribed to the subsequent *Bee* decision as *Bee* merely endorsed *Thomas* that was handed down as far back as 2012 and did not question or overrule *Faria*.

The essentially administrative nature of the process was emphasised by the SCA in *Mahano and Others v Road Accident Fund and Another* 2015 (6) SA 237 (SCA) and *Road Accident Appeal Tribunal v Gouws* 2018 (3) SA 413 (SCA).

In *SG v RAF*, Potterill, J at para 34 held that not a single case will be allowed to be referred to the HPCSA where: (a) opposing experts in a joint minute agree that a third party's injuries are serious and (b) where the repudiation of such a joint minute is not timeously made. This is in direct contradiction of the *Bee* decision at para 69 where the court held that, whether a trial court will allow a disruption (late repudiation), will depend on the circumstances. Thus, irrespective of any other existing facts or

circumstances, where the above two conditions are met, the Fund will be barred from employing the remedies established in terms of Regulation 3(4) and will be compelled to compensate the third party for non-pecuniary damages. The SCA in *Faria* at para 36 already held that there are conceivable situations where further exploration may be justified notwithstanding an expert agreement that a third party's injuries are serious. The court in *Bee*, at para 67 held that it was not necessary to consider if a litigant need to have a good cause for repudiating a joint expert minute, giving credence to the notion that there may well be good cause for repudiating a joint minute, even at the proverbial eleventh hour.

5 Conclusion

The correct decision in *Salig* would have been to order that the general damages be referred to the HPCSA in terms of the Appeal process prescribed by regulations 3 and to punish the Fund with a punitive cost order as was the case in *Meyer v Road Accident Fund* at para 9 where the general damages claim was rejected on the morning of the trial and in *Jacobs v Road Accident Fund* 2013 JDR 2276 (GNP) where the general damages claim was rejected on the morning of the trial and the court ordered that the person at the Fund be identified who gave instructions that the RAF 4 form to be rejected only on the morning of trial and that this identified person must give reasons why costs should not be awarded on a de *bonis propriis* scale.

FHH KEHRHAHN
Advocate of the High Court of South Africa

"We'll fight this little struggle": alleviating hunger in South Africa

Bright Nkrumah
Mphil, Dphil
Postdoctoral Research Fellow, University of KwaZulu Natal

SUMMARY

In post-apartheid South Africa, citizens have on several instances resorted to the use of social protest or public dissent as a means of improving their access to essential socioeconomic amenities. The protection of citizens from chronic hunger has been a dominant theme among policy actors in South Africa, most of whom have expansive mandates to ensure citizens have adequate access to food. However, the number of people facing hunger remains high, giving rise to questions about the best approach to address chronic hunger, specifically, through social protest. Social protest, as used here, consists of struggles or resistance against government actions or inactions. Ironically, whiles social protest has been used on different fronts (housing, health, education and wrongful eviction), chronic hunger or lack of people's access to adequate food hardly becomes a pivot around which protesters seek to bring about reform. Based on examples from selected countries, the discussion notes that protest is an effective tool for protecting citizens from food poverty. However, before protest could influence food policy, there is the need for mobilisation of all relevant actors to challenge existing (inadequate) food policies. The paper identified various factors that have contributed to and acted as a hindrance against food protest in various jurisdictions and examined how these factors have prevented widespread food protest in South Africa.

"Every man gotta right to decide his own destiny
And in this judgment there is no partiality
So arm in arms, with arms
We'll fight this little struggle
'Cause that's the only way
We can overcome our little trouble."[1]

1 Introduction

In terms of food sovereignty, South Africa is food-secured, with adequate calories to sufficiently feed its citizens. However, the painful truth is that in reality, it is estimated that 6.8 million South Africans face chronic hunger and malnutrition.[2] This paradox brings to bear two important

1 Marley, *Zimbabwe* (1979).
2 StatsSA "The extent of food security in South Africa" 2020 http://www.statssa.gov.za/?p=12135 (last accessed 2020-04-20).

How to cite: Nkrumah '"We'll fight this little struggle": alleviating hunger in South Africa' 2020 *De Jure Law Journal* 194-211
http://dx.doi.org/10.17159/2225-7160/2020/v53a14

issues worth examining: are the steps (policies) taken by the state (in)adequate, or are these steps poorly implemented?

Ironically, South Africa which has been dubbed as the "protest capital of the world" rarely use protest to promote one essential human need – access to adequate food. To this end, the paper seeks to provide insight on a more radical, robust approach – social protest – and how it can be used to improve human needs. The discussion also offers an analysis of why food protest is rare and offers recommendations on how it could be triggered in South Africa.

2 From discontent to protest

Citizens, when confronted with unjust decisions or laws, or seek to satisfy their needs, often engage in a more traditional form of political activities – including attending political meetings, persuading friends, discussing politics with acquaintances to vote in particular ways, contacting public officials, following politics in the newspapers, and working for political parties and their candidates – to the unconventional and new forms, such as blocking traffic, withholding taxes or rent, wildcat strikes, sit-ins, occupations, boycotts, demonstrations and signing petitions.

In South Africa, the country has been rocked by an increasing number of popular protests. By the end of 2019, this number has escalated to 15 957 incidents of which 11 431 were peaceful, and 3 526 turned violent.[3] Besides workers and students who often participate in these marches, members of political parties, civil society organisations (CSOs), residents of informal shack settlements and townships also engage in protest actions.

Overall, social protest has played an enormous role in enhancing the participation of poor people in decision-making. Although some of the numerous service delivery protests have not been very successful in compelling the government to change policy, it somewhat made an impact in the #FeesMustFall protest.[4] Besides the success of the student protest leading to policy change, there are three cases where social protest has been instrumental in bringing about policy change. First, following a wave of strikes by farmworkers in the Western Cape from August 2012 to January 2013, due to low worker pay of R69, the official

3 South African Police Service "Annual Report 2018/2019" (2019) http://pmg-assets.s3-website-eu-west-1.amazonaws.com/SAPS_Annual_Report_20182019.pdf (last accessed 2020-04-20) 151.

4 Laccino "South Africa: Jacob Zuma announces 0% university fee increase following fees must fall protest" http://www.ibtimes.co.uk/south-africa-jacob-zuma-announces-0-university-fee-increase-following-fees-must-fall-protest-1525398 (last accessed 2020-04-20).

minimum wage was increased by 52 percent in order to end the protest.[5] Second, in 2007, the squatters' movement Abahlali baseMjondolo took to the streets in protest against the Slums Act, which sought to eliminate and prevent re-emergence of slums in the KwaZulu-Natal province.[6] After the Constitutional Court declared the Act unconstitutional in 2009, members of the movement continued with their occasional protest until the state abandoned its plans to evict shack dwellers in the province by 2014.[7] Third, while facing a continuing refusal by the state to implement a Constitutional Court order to make antiretroviral available, the Treatment Action Campaign (TAC) in 2002 began a series of marches and civil disobedience campaigns against the state.[8] The movement only suspended its protest action in 2003 when the state initiated steps to operationalise a nationwide treatment plan, which until today, it is still in operation. These cases indicate that social protests have implication in terms of bringing satisfying human needs. It is against this backdrop that the discussion assesses why similar protest has not been directed at hunger, given that millions are chronically hungry.

3 Protesting for food

Protesting for food or food protest (as it is commonly called) is a spontaneous reaction to hunger.[9] It may also be defined as an event of mob violence or unrest relating to food.[10] In addition, it could be interpreted as the struggle between the hungry population and government over food.[11] To this end, the paper will define food protest as individuals confronting the state to provide them with (subsidised or free) food. These contentions often take the form of food looting, parading effigies, burning tyres and singing.[12] In order to attract popular support and media attention, these rebellious acts are usually located in common public places, such as busy streets, market places, government departments and the office of the president.[13] This rebellion of the poor can be considered as defensive conducts, used by citizens to enforce

5 SA History "Western Cape 2012 farm workers' strike" http://www.sahistory.org.za/article/western-cape-farm-workers-strike-2012-2013 (last accessed 2020-04-20).
6 Provincial Act No. 6 of 2007.
7 *Abahlali Basemjondolo Movement SA and Another v Premier of Kwazulu-Natal And Others* (1874/08) [2009] zakzhc 1; 2009 (3) SA 245 (d).
8 Friedman & Mottiar "A rewarding engagement? The treatment action campaign and the politics of hiv/aids" (2005) 33(4) *Politics & Society* 533.
9 Erdkamp '"A starving mob has no respect" urban markets and food riots in the roman world, 100BC-400 AD" (1971) 50 *Past and Present* 77.
10 Bohstedt *Riots and community politics in England and Wales, 1790-1810* (1983) 57.
11 Schneider *We are hungry! A summary report of food riots, government responses, and states of democracy in 2008* (2008) 12.
12 Bohstedt *Crowd actions in Britain and France from the middle ages to the modern world* (2015) 103.
13 Patel *International encyclopedia of revolution & protest* (2009) 7.

their constitutionally guaranteed rights, which they consider as being denied by their government.

The next section sets out the factors which might enable or hinder food protest in South Africa by drawing inspiration from other countries. It is divided into two parts, section provides a mapping of the material factors and while section B discusses the procedural factors which could induce or limit the upsurge of food protest. It must be stated that factors set out below are not exhaustive, considering that some individuals could utilise an unrelated (food) protest to press for their right to food.

3 1 Material factors

Material factors constitute those circumstances or events that can the foundation for citizens' discontent. Such factors include food shortage, lack of access to social security, poor food rations and poor socioeconomic condition. The discussion takes a brief look at how these factors triggered food protest and whether such factors are prevalent in South Africa.

3 1 1 Food shortage

Food shortage may refer to scarcity (persistent lack) of food. A lack of access to food, due to cut in crop yields or inability to meet demands for sufficient quantity is a recipe for food protest. This assertion is underpinned by the 1789 French revolution, which was inflamed by a "disastrous harvest and famine".[14] During the course of the protest, the food poor attacked traders, shopkeepers, and farmers as a means of pressuring them to reduce the prices of their foodstuffs. This approach in the words of Charles Tilly is termed *taxation populaire* i.e. a circumstance where the actors in the food supply chain are forced to pay "popular tax" by incurring a loss or forgoing a profit due to the price ceiling imposed by the protesters.[15]

Equally, British India experienced a sequence of famine from 1860-1877 which caused loss of lives.[16] The resultant high mortality rate created political discontent which generated into full brown food protest in India in 1880. To end the hunger and restore peace, the British officials in 1880 formed the Indian Famine Commission to find short, medium and long-term relief to the hunger situation in the Raj, which led to the adoption of the 1883 Famine Code.[17] The Indian Famine Code was one of the earliest hunger interventions.[18] The Code identifies three phases

14 Rudé *The crowd in history* (1964) 18.
15 Tilly "The food riot as a form of political conflict in France" (1971) 2(1) *J of Interdisciplinary History* 23.
16 Bbrennan "The development of the Indian famine codes personalities, politics, and policies" *Springer* 91.
17 Bowbrick "The causes of famine: a refutation of professor Sen's theory" (1986) 11(2) *Food Policy* 105.
18 Waal "Social contract and deterring famine: first thoughts" (1996) 20(3) *Disasters* 194.

of food insecurity: famine, scarcity, and near-scarcity.[19] "Famine" was defined as the increase in the prices of food to above 140 percent, widespread mortality, and the movement of people in search of food.[20] "Scarcity" was perceived as large populations in distress due to three successive years of crop failure, crop yields of one-third or one-half normal.[21] By presenting an early warning system to detect and respond to food shortages, this famine code was one of the first attempts to predict famine.[22] The Famine Commission also set out in the Famine Code that artisans and agricultural labourers' loss of wages from lack of employment were principal causes of food shortages and price spikes. The Famine Code further relied on open-ended public works in order to apply a strategy creating jobs for these sections of the population.[23] In independent India, the Famine Code has been updated and renamed as the Bombay Scarcity Manual. Famine or shortage of food is therefore an important trigger of food protest. Unlike these cases, the availability of food in the South African market could be argued as preventing the rise of food protest in the country.

3 1 2 Liberation and redistribution: Social grants in South Africa

Before and during the early 20th century, while some states (New Zealand and Australia) institutionalised some form of social assistance, which provided financial or direct food supply to children whose parents or caregivers were unemployed, others did not.[24] The burden of providing food for children, in some instances, rested squarely on the aged, disabled and single or widowhood mothers, some of whom found it difficult to provide for their households. A price hike in food therefore worsened their already difficult economic condition and spurs discontent among the already cash strapped households. Three of such food protests occurred in 1917 in New York, 1918 in Barcelona and 1924 in Toronto.[25]

Similarly, in the last century, rising food prices without concomitant social welfare sparked food protest in several African countries such as Senegal in November 2007, Morocco in September 2007, Mauritania in November 2007, Madagascar in May 2008, Guinea Conakry between

19 Mayer "Coping with famine" (1974) 53(1) *Foreign Affairs* 98.
20 Stone *Canal irrigation in British India: perspectives on technological change in a peasant economy* (1984) 217.
21 Passmore "Famine in india an historical survey" (1951) 258 (6677) *The Lancet* 303.
22 Sen *The balance between industry and agriculture in economic development* (1988) 105.
23 Kalpagam "Colonial governmentality and the 'economy"' (2000) 29(3) *Economy and Society* 418.
24 New Zealand established social security as early as 1898. Mcclure *A civilised community: a history of social security in New Zealand 1898-1998* (2013) 1.
25 For a detailed discussion of these protests, see Frank "Housewives, socialists, and the politics of food: the 1917 New York cost-of-living protests" (1985) 11(2) *Feminist Studies* 258.

January and February 2007, Côte d'Ivoire in March 2008, Cameroon in February 2008, Burkina Faso in February 2008 and Algeria January 2011.[26]

In sharp contrast to the norm of the 20th century New York, Barcelona and Toronto, as well as above African countries, South Africa has a range of social assistance programme, which arguably prevents citizens from taking to the streets in search of food protest. It is important to indicate that the various forms of grants (namely old age, war veterans, grant in aid, child support, care dependency, foster care and disability grants) serve as a means of acquiring some quantity of food and have therefore kept beneficiaries and their dependents off the streets.

3 1 3 Politics of the pantry: Food rations

In the course of the World War II, there was food protest during the German military occupation of northern France.[27] This particular protest erupted because of the perceived injustices in the allocation of rations, and/or the inadequacy of the allotted food rations. These protests occasionally involved large crowds, ranging from dozens to hundreds of women (and often accompanied by their children) from the immediate village, neighbourhood, or community, who gathered in front of the mayor's office (locally responsible for the distribution and rationing system).[28] Generally, the demonstrators were (in a limited way) successful, obtaining redress in the form of a temporary soup kitchen or an extra distribution of food. Thus, where a state is responsible for the direct provision of food, and such a provision abruptly stops, the citizens will mobilise themselves into a collective force to demand a continuation of such practice.

Similar factor triggered protest in Venezuela in May 2016. In the case of Venezuela, residents of Caracas were informed the state was coming to provide chicken meat and queues were formed. When two trucks finally arrived, national security guardsmen instructed the trucks to drive to another town, which instantly sparked anger and mass protest for food.[29] However, in democratic South Africa, the government does not directly provide food, but rather indirectly provides rations in the form of

26 In the case of Morocco, the government was forced to cancel a 30 percent hike in price of bread. Sneyd, Legwegoh & Frazer "Food riots: media perspectives on the causes of food protest in Africa" (2013) *Food Security* 6.

27 Taylor *Between resistance and collaboration: popular protest in northern France, 1940-45* (2000) 73.

28 Steinert *Food and conflict in Europe in the age of the two world wars* (2006) 266.

29 Felicien, Schiavoni & Romero "The politics of food in Venezuela" (2018) *Monthly Review* 15.

grants and zero-taxation on some food items, which has arguably hindered the protest on grounds of unjust allocation of food.[30]

3 1 4 Hunger Pangs and failure to thrive

It is important to indicate here, that hunger does not always lead to food protest (with South Africa being a case in point).[31] To some journalists and political scientists new to the field of starvation, food protest is triggered by the hungriest people. This assertion, however, seems to lack proof. To the contrary, extreme hunger appears to weaken the hungry and starved.[32] The non-involvement of the chronically hungry in the 2008 food protests in Haiti underscores this assertion. The centre of the protests was in the city of Les Cayes.[33] Protesters started by looting food markets as well as trucks of grain.[34] Ironically, in the course of this protest, one of the capital's largest slums, Cité Soleil, remained uninterested.[35] One resident when asked about the community's lack of interest explained that "[m]any people just don't have the energy to take to the streets"[36] Yet, in responding to the pressure from the masses through a televised address to the nation, President Rene Préval announced an emergency plan to reduce the price of food by intimating that the "international aid money would be used to subsidise the price of rice and that the private sector had agreed to reduce the cost of each bag by $3 [15 percent]".[37] The Haitian example demonstrates that hunger can weaken people's physical and mental ability to resist unfair treatment and agitate for reform.

The chronically hungry alone, as shown in the case of Haiti, lacks the energy to mobilise and embark on food protest. In cases where food

30 South Africa has zero-taxation on some foodstuffs, namely, lentils, frozen or fresh vegetables and fruits, eggs (from hens), edible legumes and pulses, dried mealies, dried beans, cooking oil (excluding olive oil), canned or tinned pilchards, samp, rice, milk, maize meal, brown bread, and brown bread flour. Yet, these foodstuffs lose their zero-taxation status once they are sold as part of meal, refreshment or prepared further for sale. Therefore, processed fruit or vegetables attract the standard vat rate of 14%. Mzizi "Did you know: only these 14 foodstuffs are zero-rate accounting and tax club" (2014) www.accountingandtaxclub.co.za (last accessed 2020-04-20).

31 Auyero & Moran "The dynamics of collective violence: dissecting food riots in contemporary Argentina" (2007) 85(3) *Social Forces* 1346.

32 Holt-Gimenez & Patel *Food rebellions: crisis and the hunger for justice* (2012) 5.

33 Collier "The politics of hunger-how illusion and greed fan the food crisis" (2008) 87 *Foreign Affairs* 67.

34 The peacekeepers were perceived as foreign invaders.

35 Al Jazeera "Morocco rolls back bread price hike: violent protests force government to withdraw 30 per cent hike in bread prices" (2007) https://www.aljazeera.com/news/africa/2007/09/200852514458769269.html (last accessed 2020-04-20).

36 Brown "The great food crisis of 2011" (2011) 10 *Foreign Policy* 5.

37 Al Jazeera "Haiti Senators vote to remove PM" https://www.aljazeera.com/news/americas/2008/04/200861423382544881 9.html last accessed 2020-04-20).

protest has been successful like in Egypt, a broad range of actors (students, lecturers, lawyers and NGOs) come together to confront the government on food-related issues. However, since some of the food poor lack the ability to protest, the chronically hungry are demobilised. This perhaps explains the reason why some of the people confronted with chronic hunger have not embarked on food protest in South Africa.

3 2 Procedural factors

Procedural factors refer to the actors who galvanise or incite (food) protest, including political representatives, the media, civil society organisations (CSOs), the courts and charismatic leaders.

3 2 1 (Two faces of) CSOs

The 2007 Egypt food protest was triggered not by spontaneous urban protesters, but by existing labour movements and non-governmental organisations (including students and organised associations).[38] These networks collectively acted to counter excessive price hikes in bread.[39] In this case, when the workers from Mahalla factory complained of inadequate access to bread as a result of its high price, the Cairene opposition movements readily partnered with them to trigger a strike. The protest achieved national prominence when dozens of students and faculty members from Cairo and Helwan Universities joined the strike in solidarity. Members of the Bar Association who joined the protest chanted 'The strike is legitimate against poverty and starvation', and spent several hours providing free legal services to arrested protesters.[40] In light of the gravity of the situation, Egypt's neoliberal prime minister, in just two days rushed to Mahalla to cut a deal for wage increases and renewed food subsidies. Between 2007 and 2008, the government increased its food and fuel subsidies by more than 20 percent.[41] This improvement, in many ways could be interpreted as a tactical victory for social protest.

The Indian experience is also uniquely relevant for this section as it represents a typical role of right to food movement in triggering food protest. On the morning of 16 September 2007, whiles the leaders of the Communist Party of India were educating the Radhamohanpur villagers in West Bengal on the negative effects of the Indo-US nuclear agreement, the villagers spontaneously requested the party leaders to provide food grains instead.[42] This incident intensified when a CSO, termed the Rights

38 Bienen & Gersovitz "Consumer subsidy cuts, violence, and political stability" (1986) 19(1) *Comparative Politics* 25.

39 Beinin *The journey to Tahir: revolution, protest, and social change in Egypt* (2012) 92.

40 Wimmen & Al-Zubaidi *Democratic transition in the Middle East: unmaking power* (2013) 109.

41 Harrigan & El-Said *Economic liberalisation, social capital and Islamic welfare provision* (2009) 83.

42 Birchfield & Corsi "Between starvation and globalization: realizing the right to food in India" (2009) 31 *MJIL* 691.

to Food Campaign (RFC) took to the streets to oppose the rising inflation of food.[43] The RFC was particularly active in this light, especially by given a particular form and visibility to high food prices, which have historically been a political issue in India.[44] As a short-term response, the state government suspended the operations of 113 grain dealers who were accused by the demonstrators as inflating grain prices.[45]

Akin to West Bengal, Madhya Pradesh also had its share of social movement activism around the right to food as well as activating accountability for chronic hunger.[46] Here, right to food movements tied increasing food prices to a range of other issues such as declining access to local food sources and rising cost of living. With malnutrition being an acute issue, the national media on several occasions was used as a platform to draw political representatives' attention to the prevalent malnourishment. The West Bengal riot was rooted in the price difference between market and subsidised grains. In early 2012, prices of wheat (which previously were lower in the market) increased due to inflation, the villagers turned to the state's subsidised wheat. The people, however, became discontent when owners of ration shops alleged that the wheat were unavailable, because of central government's imposition of quotas. Mobilised and led by RFC activists, the villagers protested by accusing ration shop owners of corruption and demanded that they replenish the supplies they had diverted to the open market. The central government responded in a form of a reduction in the price of rice allocated through Public Distribution System (PDS) as well as providing larger allocations of subsidised wheat.

After the protest, the RTC launched a campaign demanding the adoption of a comprehensive food security policy. This campaign did not only gain national prominence, but attracted the attention and support of hundreds of grassroots social movements.[47] The central government's policy response was significant: it finally adopted the 2013 National Food Security Act (also termed Right to Food Act).[48] The major aim of the Act is on the one hand, to convert into legal entitlements existing food

43 Niehaus & Sukhtankar "The marginal rate of corruption in public programs: evidence from India" (2013) 104 *JPE* 54.

44 Rah, Gard, Naidu, Agrawal, Pandey & Aguayo "Reaching the poor with adequately iodized salt through the supplementary nutrition programme and midday meal scheme in Madhya Pradesh, India" (2013) 91(7) *BWHO* 540.

45 Singh, Park & Dercon "School meals as a safety net: an evaluation of the midday meal scheme in India" (2014) 62(2) *EDCC* 275.

46 Bhagwan, Rani & Joshi "National food security act, 2013: retrospect and prospect" (2014) 4(6) *ACADEMICIA* 171.

47 Hossain, Brito, Jahan, Joshi, Nyamu-Musembi, Patnaik, Sambo, Shankland, Scott-Villiers '"Them belly full (but we hungry)': food rights struggles in Bangladesh, India, Kenya and Mozambique" Synthesis report from DFID-ESRC research project "Food riots and food rights" (2014) *Brighton* 21.

48 DDFPD "National Food Security Act 2013" http://dfpd.nic.in/nfsa-act.htm (last accessed 2020-04-20).

security programmes, and on the other, provide subsidised grain to around two-thirds of the country's 1.2 billion population.[49]

The striking feature of the Act are its Midday Meal Scheme (MMS), the Integrated Child Development Services scheme (ICDS) and the PDS. The MMS is a state-run school meal programme designed to enhance the nutritional values of children by supplying free lunches on working days for pupils in lower and upper primary classes in various schools.[50] The programme provides "adequate nutritious food" to 120,000,000 children in over 1,265,000 schools.[51] The ICDS on the other hand is a government welfare scheme, which aims at fighting malnutrition by providing food to children less than 6 years of age and their mothers.[52] The programme seeks to provide nutritional food to mothers of young children, reduce instances of mortality, and raise the health and nutritional level of poor Indian children below 6 years of age.[53] Established by the Ministry of Consumer Affairs, Food, and Public Distribution, the PDS distributes subsidised food and non-food items to the impoverished.[54] The most basic of these commodities are staple food grains which includes rice, sugar, wheat, as well as kerosene (through a network of ration shops or fair price shops established across the country). Whereas the PDS reaches approximately two-thirds of the population (50 percent in urban areas and 75 percent in rural areas), the MMS and ICDSS are universal in nature.[55] The Right to Food Act equally recognises maternity entitlements.[56] Consequently, pregnant women, lactating mothers and certain group of children are eligible for free daily meals.[57] Therefore, 50 percent of the urban population and 75 percent of the rural population are entitled to 5 kilograms for three years at US$4.5 (R66), US$ 3.0 (R44), US$1.5 (R22) per kg of rice, wheat and millet, respectively.[58] It was in this light that Drèze affirmed that the Act

49 Pradhan "Fiscal sustainability of India's National Food Security Act 2013" (2015) 9(2) *Margin* 133.
50 Ali & Akbar "Understanding students' preferences on school mid-day meal menu in India" (2015) 117(2) *BFJ* 805.
51 Hrivastava, Shrivastava & Ramasamy "The mid-day meal scheme: a holistic initiative to augment the nutritional and educational status of the children" (2014) 28(1) *JMS* 38.
52 Anand, Rahi, Sharma & Ingle "Issues in prevention of iron deficiency anaemia in India" (2014) 30(7) *nutrition* 764.
53 Jain "India's struggle against malnutrition- is the ICDS program the answer?" (2015) 67 *World Development* 72.
54 Kishore & Chakrabarti "Is more inclusive more effective? The 'new style' public distribution system in india" (2015) 55 *Food Policy* 117.
55 Khera "Mid-day meals: looking ahead" (2013) 48(32) *EPW* 12.
56 Hossain "Building responsible social protection in South Asia India's food security act as a new direction" 2014 34(2) *SAR* 133.
57 Babu, Gajanan & Sanyal *Food security, poverty and nutrition policy analysis: statistical methods and applications* (2014) 7.
58 Jayaraman & Simroth "The impact of school lunches on primary school enrolment: evidence from India's midday meal scheme" (2015) 117(4) *SJE* 1176.

> "is a form of investment in human capital. It will bring some security in people's lives and make it easier for them to meet their basic needs, protect their health, educate their children, and take risks."[59]

In sharp contrast to South Africa's current special needs based system of social grants, one distinguishing feature of the 2013 Act worth citing is its universal approach to food distribution. The focus of the Indian Act (unlike the 2004 South African Social Security Agency Act) is to address the hunger needs of more than 194 million food poor Indians by providing rice, wheat and coarse grains to each individual at subsidised rates.[60] The adoption of similar Act in South Africa would undoubtedly go a long way in addressing the food needs of millions in the country.

The success of local leaders in mobilising the food poor may be linked to their networks with the state and national level actors, which also offered the organisation access to media networks, new repertoires of action (including public hearings), mobilising strategies and new sources of information, which enabled the organisation to punch above its weight. Though lack of nutrition was the main trigger of the protests, political opportunities (rarely predictable) created new spaces for public action.[61] Hundreds of such grassroots groups at the national level provided support and legitimacy to the Right to Food campaign thereby enabling it to press for a comprehensive right to food policy, in the form of the National Food Security Act, which guarantees a range of entitlements to food through government led programmes.[62]

It must be noted that whilst the passage of legislation does not guarantee an automatic eradication of chronic hunger, it has at least moved one step towards the robust food politics, and citizens could invoke the provisions to justify any future legal suit for violation of their right to food. The achievement of this feat by the campaign was partly made possible in light of its simultaneous and constructive stance.[63] Whiles the NFSA has opened up new possibilities in the fight against the eradication of chronic hunger, the country is still a long way from addressing structural inequities (including restrictions on access to natural resources, gender relations, land and agrarian crisis, which are mainly responsible for people's impoverishment.[64] This development creates the impression that the Food Act was merely to contain popular

---

59 Drèze "The food security debate in India" https://www.world hunger.org/the-food-security-debate-in-india-opinion/ (last accessed 2020-04-20).

60 FAO, IFAD & WFP *Meeting the 2015 international hunger targets: taking stock of uneven progress* (2015) 46.

61 Kotwal & Power "Eating words: a discourse historical analysis of the public debate over India's 2013 National Food Security Act" 23(3) (2015) *On the Horizon* 174.

62 Lang & Heasman *Food wars: the global battle for mouths, minds and markets* (2015) 61.

63 Kaur "Food security in India-some issues and challenges" (2014)4(11) *EIJMMS* 14.

64 Manhas & Dogra "Awareness among Anganwadi workers and the prospect of child health and nutrition: a study in integrated child development services (ICDS)" (2012) 14(2) *Jammu & Kashmir* 172.

discontent rather than ameliorate universal food distress.[65] The Indian experience indicates that to varying degrees, citizens place accountability for hunger squarely at the doorstep of the government; and public authorities, at least rhetorically, acknowledge this obligation.[66] The institutionalisation of such accountability ultimately occurred through the entry into force of the 2013 National Food Security Act.[67]

South Africa, unlike India, lacks effective right to food movements or non-governmental organisation (NGO) which advocates for the right of the food poor. In South Africa, there is arguably no clear-cut social movement or NGO, which advocate or represents the interest of the chronically hungry in South Africa. This factor has limited the prospect of the community of the food poor to mobilise and protest for adequate food in South Africa. It is therefore important that the few CSOs with right to food related mandated (Oxfam, Ekurhuleni Environmental Organisation, Studies in Poverty and Inequality Institute) engage in more active engagement with the government to advance the rights of the constituency they seek to represent.

3 2 2 Wave propagation and protest

The media in Kenya played a critical role in disseminating information and raising awareness on the impact of rising prices of food on the poor in both rural and urban centres. The country suffered from an annual rate of food price inflation as high as 27 percent in 2008, because of poor harvests nationally and rising food prices globally. This, and perceived lack of government intervention, triggered food riots nationwide, the most memorable and visible being the *Unga Revolution* in 2008.

When food prices shot up yet again at the beginning of March 2008, members of the *Bunge la Mwananchi*, (the ordinary people's parliament') used the electronic and print media as a tactic to agitate loudly about the rising cost of living, especially food prices. Among the numerous messages advanced by the agitators was that government policies encouraged larger producers of maize, Kenya's staple food to be exported rather than sold locally for higher profits. It is however not clear whether this argument had merits since Kenya, by 2008 relied heavily on imports from Uganda, Tanzania and beyond for maize in light of its poor local harvest. Nonetheless, the media gave wide coverage to the weekly outdoor debates and campaigns of activist leaders in low-income neighbourhoods. On 31 May 2008, similar campaigns by *Bunge la Mwananchi* in Nairobi and other city centres attracted local residents and

65 Khera *Global economic cooperation* (2016) 73.
66 Niehaus & Sukhtankar "The marginal rate of corruption in public programs: evidence from India" (2013) 104 *PubEc* 52.
67 National Food Security Ordinance, No. 7 of 2013, 5 July 2013.

sparked protest when television and radio stations (such as the Citizen, NTV, Kiss FM, and Radio Jambo) broadcasted widely their campaign.[68]

Like in Kenya, the media in South Africa function in an environment where the press is guaranteed the freedom of expression and free from government manipulation. The media has, to some extent, attempted to draw the publics' attention to the discontent or protest action of a group seeking to oppose certain measures, which might affect their jobs. An example of such coverage is found in *BusinessDay*, which covered the demonstration of poultry workers belonging to the Food and Allied Workers Union (FAWU) who protested against imports of frozen chicken.[69] Unfortunately, this demonstration does not meet the threshold of food protest for three reasons: first, the demand did not address the question of lack of food or high food prices; second, it was not directed against the government but the European Union to cease dumping chicken in the country; third, it was composed of only members of FAWU and therefore lacked popular support. The *Sunday Times* published an article, which details how South Africans are being driven into debt because of spiralling food prices.[70] Since this article shifted its focus to unhygienic food rather than emphasis on rising food prices and how this can be addressed, it merely argued that escalating food costs affects diets and the health of consumers', it could not serve as the rallying point around which the food poor could mobilise. Finally, the *Citizen*'s story of Tshwane University of Technology (TUT) students demonstrating against the selling of *unhealthy* food in February 2017 was significant. The memorandum of grievances to campus management alleged that the food is "crappy" and "doesn't even look appetising".[71] Although this food related protests were reported by these newspapers, they were not widely broadcasted by the media (specifically TV and radio stations) to transform the local protest into a national (large-scale) food protest.

3 2 3 Courts and hunger: the hollow hope

With the entry into force of a new Constitution in 2010, the right to be free from hunger, and to have adequate food of acceptable quality' was for the first time guaranteed to all Kenyans. With the failure of the state to fulfill this obligation, the Consumer Federation of Kenya (COFEK) in 2011 filed a legal case against the government for failing to reduce high food prices and looming food shortage. When the court ruled that the

68 Downing *Radical media: rebellious communication and social movements* (2001) 43.

69 M Allix "FAWU workers protest against chicken dumping" *businessday* https://www.businesslive.co.za/bd/business-and-economy/2016-11-25-fawu-workers-and-their-employers-protest-against-chicken-dumping/ (last accessed 2020-04-20).

70 Govender "Spiraling food prices driving south Africans into debt" https://www.radiofreesouthafrica.com/spiralling-food-prices-driving-south-africans-debt/ (last accessed 2020-04-20).

71 African News Agency "TUT students protest against 'unhealthy' campus food" (15 February 2017) *The Citizen*.

rising cost of food is not the fault of the state and therefore dismissed the application), urban slum dwellers in the capital, Nairobi, felt a mix of outrage and despair, and therefore thronged the streets calling for lower food prices.[72] The state, in an attempt to calm the situation, lifted the 50 per cent import tax on all grain imports, which subsequently reduced the price of food.[73] In order to avoid a relapse of similar protest, the government instituted (with the assistance of donors) a hunger safety nets programme (in the form of conditional cash transfers) for those living with HIV/AIDS, orphaned and vulnerable children, and the elderly.[74] Besides having a limited coverage (as it excludes other groups such as the disabled, refugees and the unemployed), the heavy dependence of the programme on donors raises serious concern over its sustainability.[75] It is important to indicate that the acceptance of the case by the court in this case served as an eye-opener for the poor, most of who were not aware of their constitutional right to food. Courts therefore have an essential role to play in the interpretation of the right to food to citizens through litigation.

In contrast to Kenya where the right to food was only introduced in the 2010 Constitution, there has not been a single case brought before the South African Constitutional Court or other courts seeking for enforcement of the right to food since the entry into force of the 1996 Constitution. The series of cases which have been brought before the lower courts dealt mainly with social grants or land related issues, but not similar to the *COFEK* case which called on the court to intervene in high food prices The lack of legal case in South African on the right to food has limited dissemination of information on this right, and perhaps, prevented the rise of food protest. However, as discussed above (specifically in the *Abahlali Basemjondolo Movement SA* and *TAC* cases), some successful protest action in the country has been linked to litigation.

3 2 4 Empowerment and dependency: the leadership factor

The Mozambique food protest suggests that the involvement of charismatic leaders in society in the fight against hunger can equally trigger food protest. In 2010, after the state's announcement of price hikes in state-regulated goods such as bread and rice,[76] rap musicians openly satirised government officials as out of touch with the hardships

72 Verpoorten, Arora, Stoop & Swinnen "Self-reported food insecurity in Africa during the food price crisis" (2013) 39 *Food Policy* 60.

73 De Janvry & Sadoulet *The global food crisis: identification of the vulnerable and policy responses* (2008) 13.

74 Schiffman "Hunger, food security, and the African land grab" (2013) 27(03) *EIA* 239.

75 Ivanic, Martin & Zaman "Estimating the short-run poverty impacts of the 2010-11 surge in food prices" (2012) 40(11) *World Development* 3.

76 Bertelsen "Effervescence and ephemerality: popular urban uprisings in Mozambique" (2016) 81(1) *Ethnos* 29.

of the people, and thus, called for the advent of "people power".[77] Voices of dissent began to flood online social networks and heard across the previously pro-government news media. According to one protester, the collective action "was for the government to relax the prices, because it's the prices that are killing here in Mozambique. It's the chapa, the rice, the charcoal. Basic things that are very expensive."[78] Although the government initially tried to suppress them, it eventually made concessions, which ended the protest. The state did not only extend subsidies to bakers, but also reduced customs duties on the import of sugar and third grade rice, expanded the District Development Fund to the urban districts, and announced the introduction of a "basic basket" of subsidised goods.[79]

The Brazilian experience also provides a useful lesson for understanding the role of charismatic leaders in triggering food protest. The key actor to consider in this context is the 1950s contributions made by the Brazilian geographer, sociologist and physician Josué de Castro.[80] He avowed the fight against hunger requires better food distribution and that the state should adopt adequate measures towards equitable distribution of wealth.[81] Following his death, the military regime in 1964 adopted a series of repressive measures to silence his adherents who advocated for adequate food for the poor.[82] Nonetheless, social protest did emerge. In the late 1970s, in light of the food price hikes which affected millions of Brazilians, his followers' mobilised workers and housewives to resist rising prices. In view of the indifference of the military regime to tackle the price hikes, approximately 1.3 million signatures were collected and a large protest was staged to coerce the government to act.[83] Whiles the protesters were not specifically successful in their demand; the collective action laid the foundation for the launch of fundamental food security policies and programs. Two of such programs were the *Fome Zero* (Zero Hunger) and the *Bolsa Familia* programmes which many policy makers have hailed as 'magic bullets' for rapidly reducing chronic and absolute poverty.

The *Fome Zero* aims to ensure attendance at schools by fostering joint responsibility between the government and families, thereby specifically

77 Bumich "Politics after the time of hunger in Mozambique: a critique of neo-patrimonial interpretation of African elites" (2008) 34(1) *JSAS* 112.
78 Cunguara "An exposition of development failures in Mozambique" (2012) 39(131) *ROAPE* 167.
79 Walton & Seddon *Free markets and food riots: the politics of global adjustment* (2008) 24.
80 Kesavan & Iyer "MS Swaminathan: a journey from the frontiers of life sciences to the state of a 'zero hunger' world" (2014) 107(12) *Current Science* 2037.
81 Wittman & Blesh "Food sovereignty and fome zero: connecting public food procurement programmes to sustainable rural development in Brazil" (2015) *JAC* 97.
82 Hall "Brazil's bolsa família: a double edged sword?" (2008) 39(5) *Development and Change* 799.
83 Menezes *The fome zero (zero hunger) program: The Brazilian experience* 250.

placing the onus on parents to educate their children. Besides being regarded as a break away from clientelism, the *Fome Zero* "has been heralded as an alternative to more traditional, paternalistic approaches to social assistance and has helped counter criticisms of [conditional cash transfer] programmes as handouts".[84] However, irrespective of its enormous potential for addressing the chronic hunger situation, the *Fome Zero* was riddled with several constraints only a few months into Lula da Silva's administration.[85] First, there was no overall co-ordination, leading to independent operationlisation of each of the sub-projects (with separate banking arrangements, beneficiary selection methods, administrative structures and reporting procedures).[86] This lack of coherence resulted in duplication and high implementation costs of the project.[87] There were in addition widespread allegations of political manipulation in the selection of recipients, harking back to the 1990s during the *cesta basica* food distribution scheme. In light of the constraints, a group of beneficiaries took to the streets and bemoaned the failure of the project in addressing chronic hunger and poverty. It was against this backdrop that in October 2003, the government consolidated the four separate sub-projects under the new brand *Bolsa Familia* (Family Grant) which arguably remains the largest conditional cash transfer globally.

Although *Bolsa Familia* has had a noticeable impact of decreasing school dropouts and improved the share of total household budget spent on food, it enforces the stigma that all beneficiaries are poor. Thus, given that the cash assistance does not cater for individuals but only poor families (if they fulfill certain conditions), president Lula da Silva in 2004 signed into law the basic income bill, titled Law of Citizen's Basic Income (LCB) which 'guarantees the right of all Brazilians, regardless of their socioeconomic status, to receive an annual cash transfer.'[88] Since then the LCB has been implemented through the Bolsa Familia program.[89] In sharp contrast to the LCB, South Africa's social security system only addresses the special needs of a specific group and therefore limited to those who are unable to work due to ill health, disability or age (children and the aged). It is imperative to note that opinion leader in South Africa have not demonstrated a strong commitment to improve the plight of the food poor, although there are many chronically hungry people across the country. For example, whereas the famous activist and film director Zackie Achmat represents the rights of people living with HIV and AIDS,

84 Rawlings "A new approach to social assistance: Latin America's experience with conditional cash transfer programs" (2005) 2(3) *ISSR* 139.
85 Kesavan & Swaminathan "2014 international year of family farming: a boost to evergreen revolution" (2014) 107(12) *Current Science* 1974.
86 Gas (Ministry of Mines and Energy), Cartao Alimentao (Fome Zero), Bolsa Alimentacao (Ministry of Health) and Bolsa Escola (Ministry of Education).
87 Ansell & Mitchell "Models of clientelism and policy change: the case of conditional cash transfer programmes in Mexico and Brazil" (2011) 30(3) *BLAR* 303.
88 Suplicy "Citizen's basic income" (March 2007) *LAPSR* 2.
89 10.835/2004.

former University of the Witwatersrand SRC president Mcebo Dlamini for the #FeesMustFall movement and, Archbishop Desmond for the gay community, the food poor lack such voices. The lack of such leadership has played a role in relegating the needs of the chronically hungry to the background.

3 2 5 Political parties' wrongs and food poors' rights

Political parites play a key role in the mobilisation and agitation for adequate food for citizens. The food protest in Barcelona, the food market boycott in Toronto and the protests in northern France were led by Radical Republican Party, the Jewish Communist Movement and the French Communist Party respectively.[90] Also in April 2010, the main opposition party in India, Bharatiya Janata Party led a mass protest across New Delhi demanding the Congress-led government reduce (rising prices of) grains, sugar and lentils.[91]

In stark contrast to the above protests, opposition parties in South Africa (such as the Congress of the People, Economic Freedom Fighters (EFF) and Democratic Alliance (DA)) have arguably been immune to the plight of the food poor. The few instances that these parties have attempted to advance the right to food may be linked to three specific cases. First, is the EFF's call for broad nationalisation and expropriation of land without compensation. This theme has since 2013 gained considerable political attention leading to parliament's approval of the land expropriation Bill in May 2016.[92] The Bill, which sets out the requirement for the government to lay claim to land for public interest or purpose, has attracted criticisms from economists that the untimely redistribution of land (especially as the country is emerging from a major drought) could lead to low rate of food production (similar to farm seizures in neighbouring Zimbabwe).[93] Second, is the political parties' criticism of Bathabile Dlamini (then minister for social development) for stating that an amount of R753 (approx. $65) social grant was sufficient to provide for an entire household the whole month.[94] The parties failed not only to take this debate further, but by mobilising affected individuals to demand for more grants. Third, is the DA march to the Department of

90 Bohstedt C*rowd actions in Britain and France from the middle ages to the modern world* (2015) 101.

91 Majumdar "India's opposition leads price hike protest" C*hina Daily* (22 April 2010).

92 GovSA "Expropriation Bill" http://www.gov.za/sites/www.gov.za/files/b4-2015_150213_edited.pdf (last accessed 2020-04-20).

93 Stoddard, Macharia & Roche "Zuma's radical transformation: South Africa will allow expropriation of land without compensation" https://www.fin24.com/Economy/zuma-vows-to-fast-track-land-expropriation-without-compensation-20170224 (last accessed 2020-04-20).

94 Digital "DA challenges Bathabile 'R753 is enough' Dlamini to accept invitation to go shopping for basics" https://www.polity.org.za/article/da-bridget-masango-says-da-challenges-bathabile-r753-is-enough-dlamini-to-accept-our-invitation-to-come-shopping-for-basics-2016-06-19 (last accessed 2020-04-20).

Social Development in Tshwane in the hopes of ensuring social grants are paid to beneficiaries after 1 April 2017.[95] Although this march, may to some extent be perceived as food protest (given that some beneficiaries rely on social grants to access food), it could not be clearly classified as food protest since it was not directly targeted at either food prices or lack of access to food. The likelihood of an upsurge of food protest (as a response to the state's failure to pay grants) was diminished when the Constitutional Court made a landmark ruling by instructing the South African Social Security Agency and Cash Paymaster Services to continue paying social grants.[96] Thus, the lack of interests of existing political representatives or parties to trigger large-scale food protest to ensure the poor (and not only beneficiaries of grants) is also a contributory factor why food protest has been rare in democratic South Africa.

4 Conclusion

Citizens' enforcement of their right to food through food protest faces many barriers. Food protest as its name suggests reflect the struggle of the food poor against governments to provide more food or reduce the cost of the food basket. In order to respond to the overarching question of "why food protest is rare in South Africa', selected factors, which enhanced or hindered similar protest in other countries, were examined in other to determine whether such factors were prevalent in democratic South Africa. These factors range from the (a) availability of food in the market, (b) payment of social grants (though inadequate), (c) the absence of government's food rations, (d) the impact of extreme hunger; (e) lack of active CSOs, (f) the negative role of the media in addressing hunger, (g) lack of legal action around chronic hunger, (h) lack of leadership to mobilise the chronically hungry, and (i) lack of opposition political parties' commitment to address chronic hunger. The paper specifically discovered that the commitment of key actors such as political parties, charismatic leaders, lawyers, the media, courts and social movements in mobilising and agitating for improved access to food in other places is missing in South Africa. The food poor therefore lack activists or leaders who would mobilise them to confront the government to comply with its constitutional obligation to food. In sum, in order to effectively promote the rights of the chronically hungry (outside the courtroom), it is important that right-to-food related NGOs, partner with an opinion leader and mobilise the food poor as well as members of opposition political parties, social movements, students, lawyers, lecturers, community leaders and the food poor, to call for the inclusion of the unemployed into existing g social grants or provide them the means to earn income (perhaps through job creation).

95 ENCA "In pictures: da marches for social grants" https://ewn.co.za/2020/04/09/social-grants-to-be-paid-out-earlier-in-may (last accessed 2020-04-20).

96 Nicolaides "Concourt instructs SASSA, CPS to continue paying social grants" https://ewn.co.za/2017/03/17/concourt-instructs-sassa-cps-to-continue-paying-social-grants (last accessed 2020-04-20).

Regulation 22 of the Amended Tariff Investigations Regulations and the right to "procedural fairness"

Clive Vinti
LLB LLM
Lecturer, Department of Public Law University of Free State

SUMMARY

Regulation 22 of the Amended Tariff Investigations Regulations (ATR) permits the International Trade Administration Commission (ITAC) to submit to the Minister of Trade and Industry, a "final finding" that consists of a recommendation to either approve or reject an application for a tariff amendment and a Ministerial Minute or a report explaining the reasons for ITAC's evaluation. The Minister of Trade and Industry can then decide to either approve or reject ITAC's recommendation. However, Regulation 22 of the ATR does not avail the affected parties any notice of the nature and purpose of this "proposed administrative action" nor a "reasonable opportunity to make representations" on it. Consequently, the object of this paper is to assess whether Regulation 22 complies with the right to "procedural fairness" in the manner contemplated by section 3 of the Promotion of Administrative Justice Act 3 of 2000.

1 Introduction

Regulation 22 of the Amended Tariff Investigations Regulations (ATR) permits the International Trade Administration Commission (ITAC) to submit to the Minister of Trade and Industry, a "final finding" that consists of a recommendation to either approve or reject an application for a tariff amendment together with a Ministerial Minute or a report explaining the basis of ITAC's evaluation. The Minister of Trade and Industry (the Minister) can either approve or reject ITAC's recommendation. However, Regulation 22 of the ATR does not provide affected parties with any notice of the nature and purpose of this "proposed administrative action" nor a "reasonable opportunity" to comment on it. Consequently, the purpose of this paper is to assess whether Regulation 22 complies with the right to "procedural fairness" as espoused by section 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

How to cite: Vinti 'Regulation 22 of the Amended Tariff Investigations Regulations and the right to "procedural fairness"' 2020 *De Jure Law Journal* 212-228
http://dx.doi.org/10.17159/2225-7160/2020/v53a15

2 The process of ITAC in an "application" for a tariff amendment under the ATR

A "tariff" or "customs duty" is a tax on imported goods that is imposed at the border of a country.[1] Customs duties serve a purpose as they can be a source of revenue for government and they can also be used to protect and/or promote domestic industry.[2] There are three types of tariffs: first, is an "*ad valorem* tariff", which is a tariff on the value of a product and the tariff is expressed as a percentage on the value of that product; second, a "specific duty/tariff" can also be imposed which is a "flat tariff" that is based on the number of units of merchandise imported and third, a "tariff rate quota", which has features of a quota and a tariff that specifies the importable amount of the product that may enter at one tariff rate and any products in excess of that amount will enter at a different rate.[3] Irrespective of the type of tariff imposed by a regulatory authority, a difference exists between an "applied" and "bound" tariff.[4] An "applied" tariff is the "actual" tariff imposed whereas a "bound" tariff is the maximum tariff that a country has committed to impose in its Schedule of Concessions to the World Trade Organization.[5] The Schedule of Concessions is also known as a "tariff list" or "tariff schedule", which gives details of the bound tariffs imposed on each good.[6] The Schedules of Concessions are part and parcel of the General Agreement on Tariffs and Trade, 1994 (GATT).[7] It is common cause that South Africa is a founding member of the World Trade Organization and has signed the Marrakesh Agreement Establishing the World Trade Organization and its covered agreements, including the GATT.[8] South Africa acceded to GATT and this accession was promulgated in the Government Gazette.[9] Parliament then endorsed the agreement through the Geneva General

1 Bhala *Modern GATT law: A treatise on the law and political economy of the General Agreement on Tariffs and trade and other World Trade Organisation Agreements* (2013) 529; Van den Bossche and Zdouc *The law and policy of the World Trade Organization* (2016) 420.
2 Van den Bossche and Zdouc 425-426.
3 Bhala 529-531.
4 Bhala 531.
5 Bhala 531-533.
6 Bhala 533. The Harmonized Commodity Description and Coding System, which operates under the auspices of the World Customs Organization, classifies these goods.
7 See Art II.7 of GATT; Bhala 533.
8 See *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 2; *Progress Office Machines v SARS* 2008 (2) SA 13 (SCA) para 6; *Association of Meat Importers v ITAC* [2013] 4 All SA 253 (SCA) 108 para 10; See Brink "*Progress Office Machines v South African Revenue Services* [2007] SCA 118 (RSA)" 2008 *De Jure Law Journal* 645; Ndlovu "South Africa and the World Trade Organization Anti-dumping Agreement Nineteen Years into Democracy" 2013 *SAPL* 296; Vinti "A Spring without Water: The Conundrum of Anti-dumping Duties in South African Law" 2016 *PER/PELJ* 16-21.
9 *Progress Office Machines v SARS supra*, para 5.

Agreement on Tariffs and Trade Act 29 of 1948.[10] The GATT permits Members to impose tariffs as long as they are not in excess of a Member's bound rate.[11] In pursuance of its tariff obligations under the GATT, South Africa has promulgated the International Trade Administration Act 71 of 2002 (ITAA) and the Amended Tariff Investigations Regulations (ATR).[12] In this regard, the ITAA and the ATR permit a person to apply to the ITAC for an amendment of a tariff.[13] ITAC is the official statutory body established under the ITAA that is responsible for the "administration of international trade".[14] The duties of ITAC include investigating, evaluating and making recommendations to the Minister on matters of international trade.[15]

Within this framework, a person can apply for an increase or decrease of a tariff as well as a rebate or drawback. In this regard, an increase in the rate of customs duties is used for protecting domestic producers that may be experiencing threatening import pressures to make the necessary adjustments so that eventually, they can become internationally competitive without any government intervention in the form of customs duty support.[16] The requested tariff increase occurs within the confines of the difference between the "applied" tariffs and the "bound" tariffs.[17] A reduction or removal of duties is used on a case-by case basis on resource-based inputs to lower input costs and in instances whereby intermediate goods, consumption goods, or capital goods are not produced domestically or unlikely to be manufactured domestically.[18] Lastly, rebate and drawbacks function as policy instruments which seek to provide a customs duty waiver and therefore, an availability at world competitive prices of goods that attract duties but are not manufactured or insufficiently produced domestically as an industrial or agricultural input for certain vital applications, as capital item, or as an agricultural product for consumption.[19] It is clear then, that a tariff amendment affects three different constituents: government, consumers and producers.[20]

10 *Progress Office Machines v SARS supra*, para 5.
11 Art II.1(b) of the GATT; See Appellate Body Report, *India - Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/AB/R, adopted on 17 November 2008, para 159.
12 GN R 652 in GG 39035 issued in terms of the International Trade Administration Commission Act 71 of 2002 dated 31 July 2015; *International Trade Administration Commission v SCAW South Africa (Pty) Ltd supra*, para 2; *International Trade Administration Commission v SA Tyre Manufacturers Conference* (738/2010) [2011] ZASCA 137 (23 September 2011) paras 4-5; *Progress Office Machines v SARS supra*, para 6.
13 See S 16(1)(c) read with S 26(1)(c) of the ITAA.
14 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd supra*, para 6.
15 See S 16 read with S 26 of ITAA; See *International Trade Administration Commission v SCAW South Africa (Pty) Ltd supra*, para 6.
16 ITAC *Tariff Investigations* http://www.itac.org.za (accessed 2019-03-02) 3.
17 ITAC *Tariff Investigations* http://www.itac.org.za (accessed 2019-03-02) 3-4.
18 ITAC *Tariff Investigations* http://www.itac.org.za (accessed 2019-03-02) 4.
19 ITAC *Tariff Investigations* http://www.itac.org.za (accessed 2019-03-02) 4.
20 Bhala 539.

All applications for a tariff amendment must be submitted to ITAC in writing and in the prescribed format.[21] If an application contains "confidential" information, then "non-confidential" summaries of that information must be submitted with that application.[22] In the event that the information cannot be summarised in a non-confidential version, a sworn statement will be provided to that effect.[23] ITAC has the final say on claims for the "confidentiality" of the information submitted during the investigation in a tariff amendment application.[24]

It must be noted that ITAC may decline to "process" an application in instances whereby it is "materially deficient", for instance when the application is not in the prescribed form or if it contains contradictory or incorrect information.[25] If the application is "deficient", ITAC will notify the relevant party and they will have to submit a "corrected application" within the time prescribed in ITAC's deficiency letter.[26] If an applicant fails to comply in this regard, ITAC will "refer" the matter back to the applicant.[27] It is unclear what "refer" means but it goes without saying, that the applicant can resubmit the application. However, ITAC may accept an application that is materially deficient in instances where "despite reasonable efforts", the applicant was unable to obtain the required information or has only similar information.[28]

The investigation phase of an application for a tariff amendment comprises of two stages: the "Preliminary Investigation Phase" and the "Final Investigation Phase". The "Preliminary Investigation Phase" consists of ITAC's preliminary evaluation of an application.[29] In this regard, once an application for a tariff amendment has been accepted as properly "completed", ITAC will evaluate whether to "accept" or "reject" the application.[30] If ITAC "accepts" an application, it must publish a Publication/Initiation Notice as provided for in Regulation 17.1 of the ATR.[31] The purpose of the Publication Notice is to notify "interested parties" that ITAC has "accepted" an application and that the investigation has commenced as well as providing a summary of the

21 Reg 6.1 of the ATR.
22 Reg 6.2 of the ATR.
23 Reg 3.3 of the ATR.
24 Reg 3.6 and reg 3.7 read together with s 34 of ITAA.
25 Reg 15.1 of the ATR.
26 Reg 15.3 read with reg 15.4.
27 Reg 15.5 of the ATR.
28 Reg 15.2 of the ATR. In terms of "similar information", ITAC cannot accept, except under "exceptional circumstances", an application for evaluation under reg 16 that addresses the "same or a substantially similar matter" to that of an application which was submitted and assessed by ITAC earlier in time under reg 16.
29 Part C: Sub-Part III of the ATR.
30 Reg 16.1 of the ATR.
31 Reg 16.2 of the ATR.

reasons for the investigation.[32] This will be substantiated by the opening of a "Public File" on the matter that provides all the "non-confidential" documents of the investigation.[33] It must be noted that ITAC can "self-initiate" an investigation such as when there is a request by government organ.[34] After the Initiation Notice, interested parties can request a non-confidential version of the application that has been "accepted", which can also be found in the Public File.[35] It is notable that access to the Public File is only acquired through an appointment with the relevant investigating official.[36] This could open the process to obstruction. On the other hand, if ITAC "rejects" an application, the applicant must be notified in writing of the decision and the reasons thereof.[37]

The second stage of ITAC's investigation is termed the "Final Investigation Phase".[38] This stage commences with interested parties submitting "comments" on the application where they can for instance, challenge the "confidentiality" of the submissions or that the application is "materially deficient".[39] "Comments" made on the Publication notice must be in writing and they can be "confidential" or "non-confidential" and they must be submitted within the time period specified in the Initiation Notice.[40] If the comments made are "confidential", then they must be accompanied by a non-confidential version as provided by Regulation 3 of the ATR.[41] Comments that are not accompanied by a non-confidential version or that are not properly indicated to be "confidential", will not be regarded as "confidential".[42] Interested parties can be granted an extension period on which to comment on the Publication Notice but such request for an extension must be submitted in writing "normally" at least two days before the deadline in the Publication Notice and must be properly motivated.[43] This implies that the relevant investigating official has a discretion on whether to accept a request for an extension within "two days" of the deadline in the Publication Notice. If there are "deficiencies" in the comments, the parties in question will be given a "deficiency" letter clearly outlining the deficiencies and specifying the time-period to rectify those deficiencies.[44] ITAC also has the right to "verify" the accuracy of the

32 Reg 17.1 of the ATR. "Interested parties" under the ATR include Southern African Customs Union importers, exporters, trade unions, trade associations and producers as provided by reg 1 of the ATR. ITAC is also empowered to accept on its own or upon request, any person as an "interested party".
33 See reg 8 of the ATR.
34 Reg 17.3 of the ATR.
35 Reg 18.3 of the ATR.
36 Reg 8.2 of the ATR.
37 Reg 16.3 of the ATR.
38 Part C: Sub-Part IV of the ATR.
39 See reg 20, reg 3 and reg 15 of the ATR.
40 Reg 20.1 of the ATR.
41 Reg 20.2 of the ATR.
42 Reg 20.3 of the ATR.
43 Reg 20.5 of the ATR.
44 Reg 21 of the ATR.

information submitted by an interested party including verifications at the premises of the interested party.[45] ITAC may then compile a "verification report" specifying which information was verified and a non-confidential version of that report will be placed in the public file.[46] An interested party whose submissions have been verified, has seven days to comment on the verification report.[47] Interested parties are also given an opportunity to request an oral hearing during an investigation.[48] The Final Investigation Phase concludes with the "Final Commission Evaluation of an application and finding".[49] In this regard, ITAC will evaluate the application that has been "accepted" and investigated and make its finding on a case-by-case approach employing the criteria set out in Regulation 10 of the ATR, which assesses the following factors *inter alia*:

"(a) the domestic industry's production capacity and potential;
(b) employment, including considerations of labour intensity and labour demographics of the relevant industrial sector;
(c) investment;
(d) price differentials between the domestically manufactured product and the imported product;
(e) market shares;
(f) import and export data;
(g) demand and supply conditions;
(h) the financial state of the domestic industry, including profitability and return on investment ratios;
(i) price and cost structures;
(j) the rate of effective protection; and
(k) the availability of a domestically manufactured identical or substitute product."[50]

These factors are not exhaustive and do not carry equal weight.[51] The weight attached to each factor will depend on each case.[52] Significantly, it is important to note that these factors are evaluated together with the industrial policy and economic objectives of government.[53] ITAC is also required to accord due consideration to the Policy Directive on matters ITAC shall consider in evaluating applications for amendment of customs duties (hereafter, the Policy Directive).[54] The Policy Directive requires a consideration of *inter alia*, whether it is necessary for the applicant to

45 Reg 11 of the ATR.
46 Reg 12.1 and reg 12.3 of the ATR.
47 Reg 12.4 of the ATR; See reg 7 of the ATR on the "computation of periods of time".
48 See reg 5 of the ATR.
49 Reg 22 of the ATR.
50 Reg 10.2 of the ATR.
51 Reg 10.2 of the ATR.
52 Reg 10.2 of the ATR.
53 Reg 10.1 of the ATR; See the New Growth Path, Industrial Policy Action Plan, National Industrial Policy Framework and the Trade Policy and Strategy Framework in GN 476 in GG 39945 of 2016-04-21.
54 National Industrial Policy Framework and the Trade Policy and Strategy Framework in GN 476 in GG 39945 of 2016-04-21.

make an objectively demonstrable and binding obligation as to what measures it will implement in order to ensure the raising of incomes, the promotion of investment or the promotion of employment, if the proposed measure is implemented and what commitments the applicant has made in this respect and the likely effect of these obligations on industrial output, investment in plant, equipment, skills and economic investment, economic investment and pricing of outputs.[55] Upon the evaluation of all these factors, ITAC then makes a "final finding" on the tariff amendment application, which is then submitted to the Minister for approval in terms of Regulation 22 of the ATR. Regulation 22 reads:

> "22.1 The Commission shall evaluate the information obtained in connection with an investigation and shall forward a final finding in the form of a recommendation to approve or reject an application, together with a ministerial minute or a report setting forth the results of its evaluation, to the Minister, unless the provisions of section 64 (2) of the Act are in operation, in which case such recommendation and report shall also be forwarded to the SACU Tariff Board.
>
> 22.2 The Commission shall inform an applicant in writing of, as applicable –
>
> (a) the approval of its application and the reasons therefore after the Minister has considered the Commission's recommendation and made a decision to approve the application and the Minister's decision has been implemented by the South African Revenue Service through the publication of a notice in the Government Gazette; or
> (b) the rejection of its applications and the reasons therefore after the Minister has considered the Commission's recommendation and made a decision to reject the application.
>
> 22.3 The Commission will publish the outcome of its investigations on its official website after the relevant action by the Minister and/or the South African Revenue Service contemplated in subsection 2 has been taken."

Consequently, it is clear that Regulation 22 allows ITAC to submit to the Minister, the "final finding" that consists of a "recommendation" approving or rejecting the application together with a Ministerial Minute or report, which explains the results of ITAC's assessment.[56] However, the problem here is that "interested parties" are not given any notice of the nature and purpose of the "final finding" of ITAC nor a reasonable opportunity to comment on it.[57] Consequently, the object of this paper is to establish whether Regulation 22 of the ATR complies with the right to "procedural fairness" as espoused by section 3 of PAJA.[58] This evaluation will be conducted through an analysis of relevant case law and legislation.

55 Paras 1-3 of the Policy Directive.
56 Reg 22.1 of the ATR.
57 Reg 1 of the ATR.
58 S 3(2)(b)(i) of PAJA.

3 The right to "administrative action" that is "procedurally fair"

Section 33(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution), provides that "administrative action" must be lawful, reasonable and procedurally fair. The Constitution then required that Parliament must pass legislation to give effect to this right.[59] Consequently, Parliament then passed PAJA to give effect to section 33 of the Constitution.[60] Thus, the cause of action for the judicial review of "administrative action" now resides in PAJA.[61]

This paper does not seek to discuss the definition of "administrative action" as stipulated in section 1 of PAJA. Our courts and commentators are still grappling with that enigmatic and Herculean task. For purposes of this discussion, it is accepted that it is common cause that any decision, recommendation or determination of ITAC constitutes "administrative action" and is subject to judicial review.[62] The grounds of review in this regard are located in PAJA.[63] Within this approach, the "final finding" in Regulation 22 is a determination or decision of ITAC as an organ of state exercising a public function or power in terms of the ITAA, which materially and adversely affects the rights of affected parties and has a direct and external legal effect. Thus, there is no question that the "final finding" constitutes "proposed administrative action" that is awaiting the approval or rejection of the Minister. This then means that the "final finding" in Regulation 22 must comply with section 3 of PAJA, which encapsulates the right to "procedural fairness" affecting any person.

In this regard, section 3(1) of PAJA provides that administrative action, which materially and adversely affects the rights or legitimate expectations of any person, must be "procedurally fair". This "procedural fairness" encapsulates two elements: *audi alteram partem*, which means that one is afforded an opportunity to participate in the decisions that will

59 S 33(3) of the Constitution.

60 See Long Title and Preamble to PAJA; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) paras 95-96; See Murcott "Procedural fairness as a component of legality: is a reconciliation between *Albutt* and *Masetlha* possible?" 2013 *SALJ* 266-267.

61 *Walele v City of Cape Town* 2008 (6) SA 129 (CC) para 29; *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) para 99; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 25.

62 S 46 of ITAA; *International Trade Administration Commission v SA Tyre Manufacturers Conference supra*, para 40; *Minister of Finance v Paper Manufacturers Association of South Africa* 2008 (6) SA 540 (SCA) para 8; *Associated Equipment Company CC v International Trade Administration Commission* (15201/2013) [2014] ZAGPPHC 154 (4 April 2014) para 33; Brink "Anti-dumping and Judicial Review in South Africa: An Urgent Need for Change" 2012 *Global Trade & Customs Journal* 276.

63 *International Trade Administration Commission v SA Tyre Manufacturers Conference supra*, para 40.

affect them and *nemo iudex in sua caus*a, which means no one should be a judge in their own cause.[64] Even though these principles of common law have been supplanted by PAJA, they remain relevant for interpreting the objects of section 3 of PAJA.[65] Hoexter then submits that section 3 of PAJA has a dual structure: that is to say, sections 3(1) and 3(2) of PAJA are concerned with the "proposed action", while the last three subsections refer to administrative action that has occurred.[66] Within this imperative, section 3(2)(b)(i) of PAJA provides that in order to give effect to the right to "procedural fairness", an administrator must give a person whose rights or legitimate expectations have been materially and adversely affected, adequate notice of the nature and purpose of the proposed administrative action. This notice of impending action is fundamental to administrative law in South Africa because it is required that one must have knowledge of the charges against them.[67] The term "proposed" denotes that such notice must be "prior notice".[68] The purpose of section 3(2)(b)(i) of PAJA is to guarantee the actual occasion to be afforded a hearing.[69] Its object is to afford the affected person a proper opportunity to evaluate their situation and prepare a defence.[70] However, this notice may not be required in instances in which it would hinder the purport of the given power.[71]

Unfortunately, PAJA does not define the term "adequate".[72] This depends on the circumstances of the affected party and on the nature and gravity of the matter.[73] Hoexter submits that "adequacy" connotes "sufficient information" such that one can advocate for their rights.[74] It has been held that for the notice to be "adequate", it must have all relevant details including the date and time of the proposed decision, the reason for the proposed decision and the place at which the affected parties can challenge the basis of the proposed decision.[75] Moreover, it must afford the applicants adequate time to conduct the required enquiries and investigations, to obtain legal counsel and to organise themselves collectively should they deem it necessary.[76] In respect of information about the proposed action, at common law, one was

64 Hoexter *Administrative Law in South Africa* (2012) 362; *De Lange v Smuts* 1998 (3) SA 785 (CC) para 131.
65 Hoexter 362; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 para 45; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 para 136.
66 Hoexter 367.
67 Hoexter 369; *Kadalie v Hemsworth* NO 1928 TPD 495 (TPD) 506.
68 Burns *Administrative law* (2013) 256.
69 *POPCRU v Minister of Correctional Services* [2006] 4 BLLR 385 (E) para 73.
70 *POPCRU v Minister of Correctional Services supra*, para 73.
71 Hoexter 369.
72 Hoexter 369.
73 Hoexter 369.
74 Hoexter 369; *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (Corruption Watch as amici curiae)* 2014 (1) BCLR 1 (CC) para 90.
75 *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC) para 60.
76 *Joseph v City of Johannesburg supra*, para 60.

required to be given adequate clarity on the nature and purpose, otherwise the right would be abstract rather than concrete.[77] If necessary, such notice may also specify time and place at which the submissions will be made.[78]

In the same breath, section 3(2)(b)(ii) of PAJA requires that an administrator must give a person whose rights or legitimate expectations have been materially and adversely affected by administrative action, "a reasonable opportunity to make representations". The prescripts of a "reasonable opportunity" will differ from case to case.[79] This may require written or oral submissions depending on the nature of the matter, which falls within the discretion of the administrator.[80] Significantly, this opportunity to be heard must relate to all factors that are favourable and adverse to the case of the affected persons.[81] The "reasonable opportunity" to make representations can normally be given by ensuring that "reasonable steps" are taken to alert affected persons of the decision to be made.[82] It is inconceivable that one could be said to have been given a "reasonable opportunity" to comment on the proposed administrative action without adequate notice of the nature and purpose of the proposed administrative action.[83] In simple terms, one cannot comment on what they do not know about. Thus, section 3(2)(b)(i) and section 3(2)(b)(ii) of PAJA complement each other because the lack of information on the nature and purpose of the proposed administrative action will affect the quality of the affected person's opportunity to make representations.[84] Consequently, there is a clear link between the amount and type of information availed to an affected person and the strength of their submission in this regard.[85] It can then be argued that a contravention of section 3(2)(b)(i) invariably means a violation of section 3(2)(b)(ii) of PAJA.

It must also be noted that a "fair administrative procedure depends on the circumstances of each case".[86] Courts have affirmed and emphasised the need for flexibility in the application of the tenets of "fairness" in a

77 Hoexter 370.
78 Hoexter 370.
79 Burns 257.
80 Burns 257.
81 Burns 257.
82 *Zondi v MEC for Traditional and Local Government Affairs supra*, para 112; *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC) para 11; *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 204.
83 See Hoexter 372.
84 Hoexter 372.
85 Hoexter 371; *Airports Company South Africa Limited v Airport Bookshops (Pty) Ltd t/a Exclusive Books* [2015] 3 All SA 561 (GJ) para 134.
86 S 3(2) of PAJA; Hoexter 365; See *Chairman: Board On Tariffs and Trade v Brenco Incorporated* (285/99) [2001] ZASCA 67 (25 May 2001) paras 13-14; *Metro Projects CC Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) para 13.

myriad of different contexts.[87] This flexibility is further evinced by PAJA when it provides that if it is "reasonable and justifiable in the circumstances", an administrator may disregard the procedural fairness requirements taking into consideration factors that include: the objects of the empowering provision; the nature and purpose of, and the need to take the administrative action; the likely effect of the administrative action and the urgency of taking the administrative action or the urgency of the matter.[88] A literal reading of PAJA implies that the minimum requirements under section 3(2)(b) are compulsory and must be complied with if there is no departure by the administrator in terms of section 3(4).[89] On this construction, a court, would only be permitted to review a procedure that does not meet the minimum requirements of section 3(2)(b) when the administrator makes a decision in terms of section 3(4) to depart from these requirements and when such decision is taken on review.[90] According to Skweyiya J, such an approach would be oblivious of the flexibility inherent in the concept of procedural fairness.[91] A literal approach to section 3 of PAJA would lead to "circuitous litigation" where courts would be required to defer evaluating the "reasonableness" of disregarding the minimum requirements until the administrator acts under section 3(4) and such decision is taken on review.[92] Therefore, section 3(2)(a) of PAJA must be construed as an enabling provision that permits courts to exercise a discretion in enforcing the minimum procedural fairness requirements under section 3(2)(b).[93] For purposes of this discussion, this means that the ATR must be evaluated against the "procedural fairness" requirements of section 3(2)(b) of PAJA.

Furthermore, if the administrator has information at their disposal that is prejudicial to the affected parties, it would be "unfair" not to divulge that information and give the person the opportunity of addressing it.[94] This approach has met with some judicial resistance.[95] Regardless, section 3(2)(b) encapsulates the essence of the right when "fairness" requires a hearing to be given.[96] Thus section 3(2)(b) is concerned with

87 *Chairman: Board On Tariffs and Trade v Brenco Incorporated supra*, para 14.
88 S 3(4) of PAJA.
89 *Joseph v City of Johannesburg supra*, para 56.
90 *Joseph v City of Johannesburg supra*, para 56.
91 *Joseph v City of Johannesburg supra*, para 57.
92 *Joseph v City of Johannesburg supra*, para 58.
93 *Joseph v City of Johannesburg supra*, para 58.
94 Hoexter 373; See *Du Bois v Stompdrift-Kamanassie Besproeiingsraad* 2002 (5) SA 186 (C).
95 *Simunye Developers CC v Lovedale Public FET College* [2010] ZAECGHC 121 para 37 and *Thabo Mogudi Security Services CC v Randfontein Local Municipality* [2010] 4 All SA 314 (GSJ) (7 May 2010) para 42, which described such an approach as "anathema", "impractical" and would "bog down" the process.
96 *POPCRU v Minister of Correctional Services supra*, para 70.

the *audi alterum partem* principle.[97] It is within this imperative that this paper seeks to assess whether ITAC's "final finding" complies with the right to "procedural fairness" as espoused by section 3(2)(b)(i) and section 3(2)(b)(ii) of PAJA.

4 Evaluation

It has been established in this discussion that Regulation 22 of the ATR does not give affected parties any notice of the "final finding" nor a reasonable opportunity to comment on it. Therefore, the question to be resolved here is whether Regulation 22 complies with the right to "procedural fairness" as provided by section 3(2)(b)(i) and section 3(2)(b)(ii) of PAJA. There are other grounds of "procedural fairness" under sections 3 and 4 of PAJA but they are not the focus of this paper.

At first blush, the term 'final finding' in Regulation 22 implies that there is a "preliminary finding". However, the ATR does not provide for a "preliminary finding". Rather, the ATR only refers to the "preliminary evaluation" in terms of Regulation 16, which falls under the Preliminary Investigation Phase. In this regard, Regulation 16 empowers ITAC to "evaluate" whether the application must be "accepted" or "rejected". The decision on whether to "accept" or "reject" an application hinges on the matrix of factors under Regulation 10 of ATR, the Policy Directive and the industry policy and economic objectives of the government. The factors under Regulation 10 are used for both the "Preliminary Commission evaluation" under Regulation 16, and the "Final Commission Evaluation" under Regulation 22 of the ATR. Thus, it is appears that at each stage of the investigation phase, ITAC conducts an "evaluation" and makes a "finding" or "decision".[98] It follows then that the decision to "accept" or "reject" an application by ITAC may be regarded as a "preliminary decision or finding". As already established, interested parties are afforded a reasonable opportunity to comment on the Publication Notice, which evinces ITAC's "preliminary finding". It is then my view that since the affected parties are given adequate notice of the nature and purpose of the "preliminary finding" i.e. the Publication Notice, and a reasonable opportunity to "comment" on this "finding" under Regulation 20, it follows that the same opportunity be accorded to affected parties in respect of ITAC's "final finding" under Regulation 22 of the ATR.

Secondly, it has been held that ITAC's "final finding" in the form of a recommendation and "report" is not only a fundamental link in the administrative and legislative chain; it is regarded as a "jurisdictional fact" for the Minister's decision on whether to approve or reject ITAC's

97 *Potgieter v Howie NNO* 2014 (3) SA 336 (GP) para 19; *Mobile Telephone Networks (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa; Vodacom (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa* [2014] 3 All SA 171 (GJ) para 39.

98 See reg 18.2 of the ATR.

recommendation on the application for a tariff amendment.[99] "Jurisdictional facts" refer in general, "to preconditions or conditions precedent that must exist prior to the exercise of the power and procedures to be followed or formalities to be observed, when exercising the public power".[100] These facts are regarded as "jurisdictional" because the exercise of power hinges on their existence or compliance with them, as the case may be.[101] The administrator must confirm that the "jurisdictional facts" exist prior to exercising the discretionary power.[102] This is because it is settled law that even a preliminary finding could have significant consequences in particular matters including where it is a "jurisdictional fact" especially where it constitutes the basis of a decision "which may have grave consequences".[103] This means that the legislative and administrative process hinges on a "'valid' ITAC report", which is a "jurisdictional fact" for the Minister's decision under Regulation 22.[104] Thus, an "'invalid report'" vitiates the administrative process and subsequent legislation to that extent.[105] This then means that a "fatal flaw" in the "final finding" under Regulation 22, invalidates ITAC's administrative process and the "subsequent" decisions and legislation that arise out of this process.[106] In this regard, the interested parties in the tariff amendment application will only know of ITAC "final finding", which is as a "jurisdictional fact" for the Minister's "decision", upon the publication of the said "decision" in the Government Gazette. In this way, a "fatal flaw" in the "final finding" would escape the scrutiny of interested parties who could have assisted ITAC to identify and cure the "fatal flaw". Consequently, Regulation 22 contravenes the duties of ITAC to give affected parties adequate notice of the nature and purpose of the administrative action and a reasonable opportunity to make representations.[107] This is the antithesis of the *audi alteram partem* principle. It is obvious that this approach has "grave consequences" for the validity of ITAC's administrative process, its "findings" and for the rights of affected parties.

Furthermore, upon a proper evaluation of the Board on Tariffs and Trade Act 107 of 1986, it is common cause that the Board on Tariffs and Trade (BTT) had an investigative and determinative function in deciding

99 *Minister of Finance v Paper Manufacturers Association of South Africa supra*, para 8.
100 Hoexter 290.
101 Hoexter 290.
102 *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC) para 78.
103 *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* (133/98) [1999] 2 All SA 381 (A) (12 March 1999) para 17.
104 See *Minister of Finance v Paper Manufacturers Association of South Africa supra*, para 14.
105 See *Minister of Finance v Paper Manufacturers Association of South Africa supra*, para 14.
106 *Minister of Finance v Paper Manufacturers Association of South Africa supra*, para 8; *Chairman: Board On Tariffs and Trade v Brenco Incorporated supra*, para 10.
107 See S 3(2)(b)(i) of PAJA read with S 3(2)(b)(Ii) of PAJA.

whether to approve a tariff amendment and making its final finding and recommendation to the Minister.[108] However, it was required that when the BTT exercised its deliberative or adjudicatory function, interested parties are given adequate notice of the nature and purpose of the proposed administrative action and they are accorded a reasonable opportunity to comment on it.[109] This is the encapsulation of "procedural fairness" in the manner contemplated by sections 3(2)(b)(i) and 3(2)(b)(ii) of PAJA.

In the same breath, it has been held that the *audi alteram partem* principle must apply at all stages of ITAC's administrative process, which comprises of the investigation and adjudication stages.[110] By the same token, it was held in *Brenco*, that the Board on Tariffs and Trade Act in establishing the BTT and its ""administrative system"", shows that the BTT had the duty to conduct a hearing for all interested parties before the "final finding" that is submitted to Minister to make a decision.[111] It is trite law that the functions of the BTT and ITAC are similar and that the Board on Tariffs and Trade Act and the ITAA, must be read together in interpreting the duties and functions of ITAC.[112] Since the requirements of procedural fairness are "contextual and relative", this then means that the "fairness" obligations of ITAC under the ITAA must be construed in light of the BTT. In fact, in certain instances like "dumping" investigations, ITAC is required to investigate and evaluate applications for anti-dumping duties as required by section 32 of the ITAA read with the Board on Tariffs and Trade Act, as if the latter Act had not been repealed.[113] This would then mean that ITAC has the same obligations towards affected parties like the BTT. Therefore, on the strength of the *dicta* of the courts in *Earthlife*, *SCAW* and *Brenco*, ITAC is required to give affected parties a reasonable opportunity to make representations or comment on its "final finding", which is the "determinative or adjudicatory" stage of its process in an application for a tariff amendment.

---

108 See *Chairman: Board On Tariffs and Trade v Brenco Incorporated supra*, para 29; See s 4 of Board on Tariffs and Trade Act 107 of 1986.

109 *Chairman: Board On Tariffs and Trade v Brenco Incorporated supra*, para 29.

110 See *Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism and Eskom Holdings* 2005 (3) SA 156 (C) para 54; *International Trade Administration Commission v SCAW South Africa (Pty) Ltd supra*, para 83.

111 *Chairman: Board On Tariffs and Trade v Brenco Incorporated supra*, para 15.

112 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* paras 2 and 34; *Progress Office Machines v SARS supra*, para 4; *Association of Meat Importers v ITAC supra*, paras 13- 14; See Ss 2,3 and 4 of Schedule 2 of the ITAA; See S 4 of Board on Tariffs and Trade Act 107 of 1986 and s 16 read with s 26 of ITAA.

113 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd supra*, para 34. For a discussion on "dumping" in South Africa, see Vinti "The Curious Case of the 'Non-co-operating Interested Party' in Anti-dumping Investigations in South Africa: A Critical Analysis of *Farm Frites International v International Trade Administration Commission*" 2018 *SAPL* 1-18; Brink 2008 *De Jure Law Journal* 645.

By way of comparison, the Anti-Dumping Regulations, the Countervailing Regulations and the Amended Safeguard Regulations all provide for a reasonable opportunity to comment on the "final finding" of ITAC. First, the Anti-Dumping Regulations allow affected parties to comment on the preliminary report and the "essential facts letter", which constitutes the basis of ITAC's "final finding".[114] In fact, the courts have gone as far as to hold that the "essential facts letter" contains ITAC's recommendation.[115] Thus, there is no difference between the "essential facts" as employed in the abovementioned regulations, and the "final finding" in the ATR. The Anti-Dumping Regulations also allow ITAC to grant parties an extension to "comment" on the essential facts upon proof of "good cause".[116] ITAC will then take all relevant "comments" on the essential facts into consideration in its final finding.[117] Similarly, the Countervailing Regulations provide affected parties the opportunity to comment on the preliminary report and the essential facts, which constitutes the basis of its "final finding".[118] Interested parties are also given an opportunity to apply for an extension of the time-period to comment if they prove "good cause" for such an extension.[119] ITAC will then consider these "comments" in its final finding.[120] By the same token, the Amended Safeguard Regulations make provision for interested parties to comment on the preliminary report before it makes its final determination.[121] It is clear then that at the adjudicatory stage in respect of dumping, safeguards and countervailing investigations, the relevant regulations provide affected parties adequate notice of the nature and purpose of the "proposed administrative action" and a reasonable opportunity to comment on it. This is the essence of "procedural fairness" in the manner contemplated by PAJA. The ATR does not offer a "reasonable and justifiable" basis for a "departure" from this approach.

It bears mention that "fairness" does not require that the Minister must give the affected parties a hearing or an opportunity to comment on the "final finding" once s/he receives it from ITAC.[122] That

114 Ss 35 and 37 of the International Trade Administration Commission Regulations on Anti-Dumping in South Africa of GN 3197 in GG 25684 issued in terms of the International Trade Administration Commission Act 71 of 2002 dated 14 November 2003.

115 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd supra*, para 20.

116 S 37.3 of Anti-Dumping Regulations.

117 S 37.4 of Anti-Dumping Regulations.

118 Ss 35 and 37 of International Trade Administration Commission Countervailing Regulations in GN R 356 GG 27475 issued in terms of the International Trade Administration Commission Act 71 of 2002 dated 15 April 2005.

119 S 37.3 of the Countervailing Regulations.

120 S 37.4 of the Countervailing Regulations.

121 S 19 of the International Trade Administration Commission Amended Safeguard Regulations in GN R 662 in GG 27762 issued in terms of the International Trade Administration Commission Act 71 of 2002 dated 8 July 2005.

122 *Chairman: Board On Tariffs and Trade v Brenco Incorporated supra*, para 71.

responsibility falls squarely on ITAC as the body that conducted the investigation.[123] This "underscores" the fact that it is only ITAC that must give the affected parties a reasonable opportunity to make representations on its "final finding" and recommendation.[124] It is clear then, that Regulation 22 contravenes the rights of affected parties to have adequate notice of the nature and purpose of the proposed administrative action and to be given a reasonable opportunity to comment on it as required by PAJA.

To this end, PAJA constitutes framework legislation and thus, its provisions apply when enabling legislation makes no reference to the matter of fair procedures.[125] The one approach is to "read into" the enabling legislation if this is possible, that is when the legislation in question is "actually inconsistent" with PAJA.[126] The most common iteration is that where enabling legislation addressing fairness insufficiently, such that the provisions of section 3 will address the "gaps" in the provisions and thus, PAJA and enabling legislation must be read together.[127] Regulation 22 falls into the former category. This is because Regulation 22 denies affected parties both the right to adequate notice of the nature and purpose of the "final finding" and the right to be given a reasonable opportunity to comment on this proposed administrative action. This then means that the "procedural fairness" requirements of section 3(2)(b) of PAJA must be "read into" the ATR. This would then compel ITAC to give the affected parties i.e. the interested parties under the ATR, adequate notice of the nature and purpose of the "final finding" postulated in Regulation 22 of the ATR as well as a reasonable opportunity to comment on this finding. A failure or refusal by ITAC to read the ATR with section 3(2)(b) of PAJA, would render Regulation 22 unconstitutional.

5 Conclusion

Upon a close reading of Regulation 22 of the ATR, it is my view that it is not in accordance with the rights of affected parties to be given adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to comment on it as required by section 3(2)(b) of PAJA. This is because Regulation 22 allows ITAC to submit the "final finding" to the Minister without complying with the mandate to give affected parties adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to

123 *Chairman: Board On Tariffs and Trade v Brenco Incorporated supra*, para 71.
124 See *Chairman: Board On Tariffs and Trade v Brenco Incorporated supra*, para 71.
125 Hoexter 367; *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd* 2006 (5) SA 483 (SCA) para 29; *Zondi v MEC for Traditional and Local Government Affairs supra*, para 101.
126 Hoexter 368; *Zondi v MEC for Traditional Affairs and Local Government Affairs supra*, para 101.
127 Hoexter 368.

comment on it. However, the absence of these provisions is not fatal. In this regard, section 3(2)(b)(i) and section 3(2)(b)(ii) of PAJA must be "read into" Regulation 22. This would then require that ITAC must give the "interested parties" adequate notice of the nature and purpose of the "final finding" and a reasonable opportunity to comment on this proposed administrative action. This approach would align the ATR with other legislation that ITAC administers and more importantly, bring the ATR into line with the Constitution and PAJA. A contrary approach by ITAC has profound implications for the validity of all of ITAC's decisions on applications for tariff amendments under the ATR.

Discussing the fundamental principles inherent to effective systems of caregiving leave

Elsabé Huysamen
LLB LLM
Lecturer, Department of Mercantile & Labour Law, University of the Western Cape

SUMMARY

Achieving a healthy work-family life balance is becoming increasingly difficult and is generally dependent on a combination of factors. Such factors include the nature and intensity of work engaged in, available legislative or employer provided leave and time-off for caregiving (family) responsibilities, and organisational and home support towards carrying out caregiving duties. A largely female focussed approach towards available caregiving leave must also be addressed. A truly effective system of caregiving leave should be sensitive towards a number of issues, most notably: job security and availability, and sufficiency and practicality of available caregiving leave. With the aforesaid as background, the aim of this contribution is to highlight those fundamental or core principles arguably inherent to any effective system of caregiving leave.

1 Introduction

> "We need to give working families a break … We know that the cost of the American dream must never come at the expense of the American family. You're working longer hours. More families have two parents working. Meanwhile, it's hard to get a hand. It's even harder to get a break. I'll be a president who stands up for working parents… We'll enforce laws that prohibit caregiver discrimination. And we'll encourage flexible work schedules to better balance work and parenting for mothers and fathers. That's the change that working families need." [Barack Obama – Former President of the Unites States of America].[1]

Achieving a proper work-family life balance[2] appears to be more difficult than ever. A 2016 study conducted in the United States of America (USA) indicated that two-parent families earning the median income, on average, worked 700 more hours annually compared to hours worked by

1 Barack Obama http://www.barackobama.com/2007/11/07/remarks_of_senator_barack_obam_31.php (accessed 2014-03-28); see also Garvey and Mitchell "Who's your daddy? A proposal for paid family leave to promote the growth of families" 2009 *Hofstra Lab. & Emp. L. J.* 221.

2 The term *work-life balance* is often used, though this article finds the term *work-family life balance* to be better suited to the discussion at hand. For a general discussion on the concept *work-life balance* see Cohen and Gosai "Making a Case for Work-life Balance for the South African Employee" 2016 *ILJ* 2237-2250.

How to cite: Huysamen 'Discussing the fundamental principles inherent to effective systems of caregiving leave' 2020 *De Jure Law Journal* 229-247
http://dx.doi.org/10.17159/2225-7160/2020/v53a16

two-parent families during the 1970s.[3] Increased working hours are often associated with decreasing physical and mental health of workers, lower job satisfaction and productivity, and an increase in staff turnover.[4] Achieving a healthy work-family life balance is generally dependent on a combination of factors, most notably, the nature and intensity of work engaged in, available legislative or employer provided leave and time-off for caregiving (family) responsibilities, and organisational and home support towards carrying out caregiving duties.[5] Consequently, a healthy work-family life balance is not only premised on (reducing) the number of hours individuals work, but also the availability of adequate leave entitlements to carry out caregiving responsibilities (hereafter referred to as caregiving leave).[6]

Whilst caregiving leave policies have traditionally focussed on maternity leave and associated benefits for women, the focus has in recent years broadened to include caregiving leave for both men and women.[7] This shift in focus is to a large extent contributed to a change in society's view on traditional caregiving responsibilities of men and women, together with increased female participation in formal employment.[8] Progressive caregiving leave policies support egalitarian relationships, which is representative of shared domestic responsibilities, within which a more active role by men is encouraged.[9] Similar to arguments advanced in the context of maternity leave,[10] this article proceeds on the basis that any effective system of caregiving leave should cater for at least the following elements: *job security* during, and upon the return from, any period of caregiving leave; *access to* (that is, the availability of) periods of caregiving leave; and available *benefits* (of a sufficient nature) during periods of caregiving leave.[11] The discussion in this article mainly concerns the latter two elements and their constituting principles.

With the above as background, the aim of this contribution is to highlight those fundamental or core principles (five in total) arguably inherent to any effective system of caregiving leave. The discussion will commence with a brief overview of changing societal perceptions around the traditional caregiving responsibilities of men and women

3 Albiston and Trimble O'Connor "Just Leave" 2016 *Harvard Journal of Law & Gender* 15.
4 Albiston and Trimble O'Connor 2016 *Harvard Journal of Law & Gender* 17.
5 Cohen and Gosai 2016 *ILJ* 2237.
6 Caregiving leave is used as a wide term, inclusive of all leave systems typically associated with family responsibility duties, most notably, maternity-, paternity-, adoption-, parental-, family responsibility- and commissioning parental leave; see also Cohen and Gosai 2016 *ILJ* 2238.
7 Cohen and Gosai 2016 *ILJ* 2239.
8 See discussion under para 2 below.
9 Rycroft and Duffy "Parental rights: Progress but some puzzles" 2019 *ILJ* 25.
10 Refer to discussion of *maternity rights* in Rycroft and Duffy 2019 *ILJ* 15-17.
11 Rycroft and Duffy 2019 *ILJ* 15-17; see also Field, Bagraim and Rycroft "Parental leave rights: have fathers been forgotten and does it matter?" 2012 *SA J of Labour Relations* 3041.

respectively, increased female participation in formal employment, and the ongoing struggle by families towards achieving a healthy work-family life balance. The discussion will thereafter turn to discussing the five fundamental principles as mentioned above. Lastly, the article will conclude with a brief overview of the current legislative scheme providing for caregiving leave in SA. The methodology adopted in writing this article was primarily that of a desktop study through reviewing literature published in both primary and secondary sources.

2 Factors which impact the nature of caregiving leave systems

Historically men have always been regarded as inferior to women when it came to issues of caregiving and other family responsibilities.[12] During the 19th century the so-called *ideal worker* was held to be male, with a wife at home who managed all caregiving and other family responsibilities on a full-time basis.[13] This ideal worker was seen as fully devoted to his career, free of any distractions from competing responsibilities, such as, caregiving and other family issues.[14] Women were in turn perceived as being more committed towards raising children than pursuing a career, thus rendering them less dependable and competent than their male colleagues.[15] Consequently, few women pursued long-term formal careers[16] and workplace policies providing

12 Ali "Bringing Down the 'Maternal Wall': Reforming the FMLA to Provide Equal Employment Opportunities for Caregivers" 2009 *Law and Inequality* 201.

13 Anthony "Tradition, Conflict & Progress: A Closer Look at Childbirth and Parental Leave Policy on University Campuses" 2011 *Geo. J. Gender & L.* 93; also see Dancaster and Baird "Workers with Care Responsibilities: Is Work-Family Integration Adequately Addressed in South African Labour Law" 2008 *ILJ* 28; Young "Childbearing, Childrearing, and Title VII: Parental Leave Policies at Large American Law Forms" 2008 *Yale L. J.* 1185.

14 Anthony 2011 *Geo. J. Gender & L.* 93–94; see also Collins "Home Alone: Is This the Best We Can Do? A Proposal to Amend Pending Parental Leave Litigation" 2009 *Wash. U. J. L. & Pol'y* 302, in which the *ideal worker* was held to work both full time and overtime, taking no or little time off from work for childrearing or childbearing purposes; see also Jablczynski "Striking a Balance Between the 'Parental' Wall and Workplace Equality: The Male Caregiver Perspective" 2009 *Women's Rts. L. Rep.* 310–311; Williams, Bornstein, Reddy and Williams "Law Firms and Defendants: Family Responsibilities Discrimination in Legal Workplaces" 2006 *Pepp. L. Rev.* 400.

15 Ali 2009 *Law & Inequality* 199. The American Supreme Court previously characterised women as having a "natural and proper timidity and delicacy which…[renders them] unfit for many of the occupations of civil life" - *Bradwell v Illinois* 83 U.S. 130, 141 (1872) as discussed in Collins 2009 *Wash. U. J. L. & Pol'y* 301. In this case it was held by the majority of the court that practising law was not available to women.

16 Anthony 2011 *Geo. J. Gender & L.* 94; see also Jablczynski 2009 *Women's Rts. L. Rep.* 309-336.

men with some form of caregiving leave were uncommon and widely regarded as unnecessary.[17]

Against the background of a globalised world however,[18] an increased focus on gender equality and, consequently, a general increase in women's rights, have contributed towards a growth in the rate of female participation in long-term employment. The global female labour force participation rate in 2015 was estimated at around 50% of the economically active population,[19] with 2018 statistics for South Africa (SA) specifically estimating that women accounted for approximately 44% of the country's total employment rate in the formal sector.[20] A large percentage of women nowadays also enrol for further education, particularly tertiary education, with the aim of establishing a competitive edge in the labour market and obtaining long-term employment.[21] In fact, according to a 2012 World Bank report women remain more likely than men to complete tertiary education.[22] Apart from its impact on female participation in employment, globalisation has also been said to have a definitive impact on the family environment,[23] with workers, both male and female, increasingly required to work for longer hours and away from home.[24] Not surprisingly therefore, the International Labour Organisation (ILO) views access to some form of caregiving leave as an important aspect in effectively integrating work and family responsibilities.[25]

All of the above issues have played a role in changing societal perceptions on gender and caregiving responsibilities, with child care no longer viewed as the sole, or even primary, responsibility of women alone. Child care is increasingly viewed as a social issue based on a

17 Anthony 2011 *Geo. J. Gender* & L. 94.
18 *Globalisation* is the term broadly used to describe an economic process in which capital seeks to be unencumbered by national borders - see Calder "Recent Changes to the Maternity and Parental Leave Benefits Regime as a Case Study: The Impact of Globalization on the Delivery of Social Programs in Canada" 2003 *Can. J. Women & L.* 344.
19 Rossouw *The Integration of Work and Parenting: A Comparative Legal Analysis* (2018) 33; United Nation's Statistics Division *The World's Women 2015: Trends and Statistics* https://unstats.un.org/unsd/gender/worldswomen.html (accessed 2019-06-04) at 89.
20 Stats SA *How do women fare in the South African labour market* http://www.statssa.gov.za/?p=11375 (accessed 2018-09-13).
21 Dancaster and Baird 2008 *ILJ* 24.
22 World Bank Group *World Development Report 2012: Gender Equality and Development* https://openknowledge.worldbank.org/handle/10986/4391 (accessed 2019-06-04); also see Stoneman "International Economic Law, Gender Equality, and Paternity Leave: Can the WTO be Utilized to Balance the Division of Care Labor Worldwide?" 2017 *Emory Int'l L. Rev.* 58.
23 For a detailed discussion of some of the dangers faced by families in a globalised world see Dau-Schmidt and Brun "Protecting Families in a Global Economy" 2006 *Ind. J. Global Legal Stud.* 165-205.
24 Dau-Schmidt and Brun 2006 *Ind. J. Global Legal Stud.* 167, 177.
25 Stoneman 2017 *Emory Int'l L. Rev.* 72-73.

collective responsibility,[26] which in turn has contributed towards a renewed interest in available systems of caregiving leave. Support for leave systems which enable, perhaps even encouraging, both men and women to equally carry out caregiving responsibilities are widespread.[27] The most commonly encountered leave systems catering for such caregiving responsibilities are that of maternity, paternity, and parental leave systems.[28]

Maternity leave refers to a period of leave which is exclusively available to mothers following the birth of a child. Such periods of leave are generally intended to protect the health and economic opportunities of women in the labour force.[29] Paternity leave conversely is generally understood as "[a] period of absence from work granted to a father after or shortly before the birth of his child".[30] And lastly, parental leave encompasses a inherently gender neutral policy of specialised leave that is available to parents to divide between them and to use as they see fit,[31] for purposes of "[taking] time off work to look after a child or make arrangements for the child's welfare."[32] Whereas some period of maternity leave is fairly standard in most countries, paternity and parental leave provisions remain comparatively uncommon.

In considering available caregiving leave systems (specifically parental leave) internationally,[33] two main systems emerge. The first is one in terms of which parental leave is granted as a single, shared, entitlement available to both parents. Within this shared system of parental leave parents have access to a single, specified, period of leave which they can share as they wish. It remains at the discretion of the parents to decide how, how much, and when each of them wishes to utilise the available leave.[34] The full period of parental leave does not have to be taken in one increment and may thus be divided into shorter periods, available to any

26 Campbell "Proceeding with 'care': Lessons to be learned from the Canadian parental leave an Quebec daycare initiatives in developing a national childcare policy" 2005 *Can. J. Fam. L.* 175.
27 Anthony 2011 *Geo. J. Gender & L.* 92.
28 Feldman and Gran "Is What's Best for Dads Best for Families? Paternity Leave Policies and Equity Across Forty-four Nations" 2016 *J. Soc. & Soc. Welfare* 101–102.
29 Stoneman 2017 *Emory Int'l L. Rev.* 73.
30 Oxford Languages http://oxforddictionaries.com/definition/american_english/paternity%2Bleave?region=us (accessed 2012-07-10); see also Stoneman 2017 *Emory Int'l L. Rev.* 73.
31 Stoneman 2017 *Emory Int'l L. Rev.* 72-73.
32 Oxford Brookes University http://www.brookes.ac.uk/services/hr/handbook/family/parental_leave_guidance.html#definition (accessed 2012-07-10).
33 In countries such as Belgium, Denmark and New Zealand. For a comprehensive list of the various leave systems of different countries - see International Labour Organization *Maternity at Work: A review of National legislation* https://www.ilo.org/global/publications/books/WCMS_124442/lang--en/index.htm (accessed 2019-06-04) at 52.
34 International Labour Organization *Maternity at Work: A review of National legislation* https://www.ilo.org/global/publications/books/WCMS_124442/lang--en/index.htm (accessed 2019-06-04) at 52. New Zealand is one country which uses such a shared entitlement scheme.

parent at any time. The second system is a dual system of parental leave, within which each parent has an individual entitlement to a specified period of parental leave. The entitlements may not be transferred between parents and will be forfeited if not used.[35] Again, such leave can be taken by any parent at any time, or even at the same time, as long as reasonable notice was given to the respective employers.

3 Fundamental principles inherent to effective systems of caregiving leave

Whilst challenges to balance work and family life are traditionally primarily associated with women,[36] men are increasingly faced with similar challenges. Despite the documented increase in male participation in caregiving duties[37] and female participation in fulltime employment, the number of workers, particularly men, who make use of available periods of caregiving leave remains relatively low. Many reasons have been advanced for this. With reference to men specifically, such reasons include the (perceived) reluctance by society in accepting the increased role played by modern-day men in household activities, together with questions around masculinity.[38] The view has in fact been expressed that "men would rather work than change diapers, or because there is social pressure on men to work rather than to change diapers".[39] Reasons of relevance to both men and women include: no or inadequate income protection during any periods of parental leave,[40] being viewed as lazy or unprofessional when taking leave, losing a competitive edge in the business environment, and being subjected to discrimination in the workplace.[41] Accordingly, in the absence of adequate caregiving leave systems, impediments towards obtaining a proper work-family balance are set to continue. To this extent parents who wish to place caregiving responsibilities first might have little choice but to have one parent resign from full-time employment. In fact, statistics indicate that women still remain twice as likely as men to resign from employment for caregiving reasons.[42]

From the above discussion, and against the background what has already been discussed in as far as changing societal perceptions and

35 International Labour Organization *Maternity at Work: A review of National legislation* https://www.ilo.org/global/publications/books/WCMS_124442/lang--en/index.htm (accessed 2019-06-04) at 52.
36 Ali 2009 *Law & Inequality* 189.
37 Ali 2009 *Law & Inequality* 196.
38 Garvey and Mitchell 2009 *Hofstra Lab. & Emp. L. J.* 208; Campbell 2005 *Can. J. Fam. L.* 187.
39 Suk "From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe" 2012 *Am. J. Comp. L.* 80.
40 Albiston and Trimble O'Connor 2016 *Harvard Journal of Law & Gender* 1.
41 Garvey and Mitchell 2009 *Hofstra Lab. & Emp. L. J.* 208; Campbell 2005 *Can. J. Fam. L.* 187.
42 Dancaster and Baird 2008 *ILJ* 37.

increased female participation in employment, it emerges that an effective system of caregiving leave cannot be focussed towards any single factor, but should be reminiscent of a combination of identified inherent fundamental or core principles. It is to the discussion of these principles that the discussion turns next.

3 1 The best interest of the child

Article 3(1) of the United Nations Convention of the Rights of the Child (CRC),[43] stipulates that in all actions concerning children, the best interests of the child shall be a primary consideration.[44] Similarly, section 28(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution) states that "[a] child's best interests are of paramount importance in every matter concerning the child". In the matter of *MIA v State Information Technology Agency (Pty) Ltd 2015 36 ILJ 1905 (LC)*, the Labour Court held that the right to maternity leave under the BCEA is an entitlement not solely linked to the welfare and health of the child's mother, but also connected to the child's best interests, and to disregard this duality would be to ignore section 28 of the Constitution.[45]

In discussing caregiving leave within the context of *the best interest of the child,*[46] three primary objectives in providing caregiving leave present themselves: first, providing birth giving mothers with sufficient time to physically recover, not only for their own benefit, but so as to adequately care for the child; secondly, providing for a period of bonding with a child immediately after birth or adoption (this also provides parties with the opportunity to get accustomed to the new family environment);[47] and thirdly, the period of ongoing care of a child during the remainder of childhood.[48]

---

43 The United Nations Convention of the Rights of the Child was adopted by the United Nations General Assembly in 1989 and came into force during 1990. South Africa ratified the convention in 1995.

44 See also Reyneke "Realising the Child's Best Interests: lessons from the Child Justice Act to Improve the South African Schools Act" 2016 *PELJ* 4.

45 *MIA v State Information Technology Agency (Pty) Ltd* 2015 36 ILJ 1905 (LC) para 13; also see discussion in Botes and Fourie "Werknemers as Lasgewende Ouers in Surrogasie-Aangeleenthede: Die Geboorte van Nuwe Verlof-behoeftes in Suid-Afrika" 2017 *PELJ* 1-39.

46 The *best interest of the child* principle is a field of study on its own, with an abundance of literature being available on the topic. As example, see Sloth-Nielsen "Gender normalisation surgery and the best interest of the child in South Africa" 2018 *Stell LR* 48-72; Kalverboer, Beltman, van Os and Zijlstra "The Best Interests of the Child in Cases of Migration Assessing and Determining the Best Interests of the Child in Migration Procedures" 2017 *International Journal of Children's Rights* 114-139; Reyneke 2016 *PELJ* 1-29; Nevondwe, Odeku and Raligilia "Reflection on the Principle of Best Interests of the Child: An Analysis of Parental Responsibilities in Custodial Disputes in the South African law" 2016 *Bangladesh e-Journal of Sociology* 101-114.

47 Garvey and Mitchell 2009 *Hofstra Lab. & Emp. L. J.* 199.

48 Also see discussion in Rodriguez "EU Directives on maternity leave: A misleading social risk approach and its unsatisfactory effects on both mothers and fathers" 2018 *European Labour Law Journal* 172.

While caregiving takes place during the whole of childhood (typically from birth to 18 years of age),[49] the nature and extent of such care requirements changes as a child grows older. Appropriate regulation of caregiving leave should therefore recognise the different needs of a child during the various developmental stages of childhood,[50] and in this way further safeguard the best interest of the child.

3 2 Protecting the family unit

The preamble to the CRC holds that the family unit is the fundamental group of society and should be afforded the necessary protection and assistance so as to fully assume its responsibilities within the community.

Legislative reforms at the end of the apartheid era in SA were primarily focussed towards transformation at institutional level, with few policies at the time considering and providing for the protection of the family unit specifically.[51] Within the South African context a wide array of diverse family structures are encountered, all of which are equally deserving of protection.[52] In terms of labour law, protecting the family unit is, at least indirectly so, provided for in the EEA. Section 1 of the EEA defines family responsibility as "the responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care or support". It has however been argued that this definition promises more than it actually achieves in the context of employment discrimination in SA.[53] Similarly, the LRA also, indirectly at least, provide the family unit with some protection. This is done within the Act's automatically unfair dismissal provisions, which holds that such dismissal occurs where the reason for the dismissal is that the employer unfairly discriminated against an employee on, amongst others, the ground of family responsibility.[54] Unlike the EEA, the LRA does not however define the term *family responsibility*.

More recently, protecting the family unit was also to some extent recognised in the wording of the Memorandum on the Objectives of the Labour Laws Amendment Bill 29 of 2017 (preceding the enactment of the Labour Laws Amendment Act 10 of 2018 (LLAA)). In terms of the Memorandum it was held that "[f]athers play an important role in the upbringing of their children. The ACDP is of the opinion that such a provision would facilitate early bonding between fathers and their

49 Both S 28(3) of the Constitution of the Republic of South Africa, 1996 and Art 1 of the United Nations Convention of the Rights of the Child provide that *child* means a person under the age of 18.
50 Rossouw 273.
51 Behari "The Effect of the Labour Laws Amendment Bill 2017 on Shared Parental Responsibilities" 2018 *ILJ* 2149.
52 For an overview of different family structures see Rossouw 36-41.
53 Rossouw 257.
54 S 187(1)(f) of the Labour Relations Act 66 of 1995; also see discussion under para 4.3 below.

children and that *stronger and healthier families would be one of the many potential benefits for society as a whole*."[55] [own emphasis added]

3 3 Gender equality

Despite substantial social and legal reforms over the past two decades, inequality between men and women still present itself in many areas of life.[56] In the South African employment context the gap in gender inequality has however significantly decreased, with the number of women entering, and remaining in, long term formal employment constantly on the rise.[57] One needs however be mindful that gender-based transformation in employment, in line with the transformative nature of the Constitution,[58] has to date largely been focussed towards increasing the rights of women, with comparatively little attention having been given to the disadvantaged position of men when it comes to family responsibilities and related issues.

The impact of paternity leave provisions specifically on issues of gender equality and work-family life balance has been a popular research trend over the past 15 years. The benefits of men making use of such leave entitlements are well documented in social science research and include an increased participation and involvement of men in caregiving responsibilities; men feeling more psychologically attached to their families; improved family relationships; and established norms of sharing family responsibilities.[59]

With the above as background, it is argued that, as a minimum, any leave system providing for caregiving responsibilities should be accessible to both men and women on an equal basis. Ideally, a gender neutral system of parental leave should equally equip both parents to take leave in such a manner that is most suitable towards the family unit.[60] Gender neutral parental leave systems are furthermore paramount in ensuring that men and women have access to equal career opportunities and career prospects.[61] Gender neutral leave schemes also stand to play a pivotal role in continuing to encourage equal family

55 Para 1.1 of the Memorandum on the Objectives of the Labour Laws Amendment Bill B29 of 2017.
56 Stoneman 2017 *Emory Int'l L. Rev.* 51.
57 For a detailed list of the percentage of women who formed part of the labour force of various countries during the period 1990 to 2017 see Worldbank https://data.worldbank.org/indicator/sl.tlf.totl.fe.zs (accessed 2019-09-13).
58 Phooko and Radebe "Twenty-Three Years of Gender Transformation in the Constitutional Court of South Africa: Progress or Regression" 2016 *Const. Ct. Rev.* 307-308.
59 Rycroft and Duffy 2019 *ILJ* 14.
60 Pesonen "Encouraging Work-Family Balance to Correct Gender Imbalance: A Comparison of the Family And Medical Leave Act and the Iceland Act on Maternity/Paternity and Parental Leave" 2015 *Hous. J. Int'l L.* 2015 178.
61 Collins 2009 *Wash. U. J. L. & Pol'y* 303.

involvement by parents, consequently guarding against a reinforcement of outdated gender stereotypes around caregiving responsibilities.[62]

Formally providing men and women with equal access to caregiving leave, such as parental leave, is however only one side of the proverbial coin. The other side is ensuring that, in particular, men, actually utilises available parental leave periods, without any fear of ridicule, discrimination and the like. Parental leave patterns indicate that women still remain far more likely than men to make use of such provisions.[63] As discussed previously, societal pressures and stigma continue to impact on the number of men making use of available parental leave.[64] One way of possibly increasing the number of men who make use of available caregiving leave benefits is by incentivising the use of such benefits. As example, in Italy men who take their full periods of provided parental leave are rewarded by being awarded an additional month of leave.[65] In Sweden a quota system has been introduced in terms of which fathers must take the full two months of paid paternity leave in order to receive the full government parenting benefits.[66] Swedish parents also receive financial incentives for sharing available leave on an equal basis.[67] In the Scandinavian nations of Finland, Iceland and Norway, financial bonuses and extended leave periods are also available to fathers who utilise available parental leave periods.[68]

3 4 Adequacy (length of caregiving leave)

While providing a gender neutral system of caregiving leave is important, the success of any system also largely depends on the adequacy of available leave provisions, that is, the length of leave periods provided. Below are a few examples of the periods of leave provided for at the international level.

Under the Canadian Federal Employment Insurance Scheme, parents in Canada are entitled to approximately 50 weeks of partially compensated leave after the birth or adoption of a child. The first 15 of these weeks are considered as maternity leave and thus only available to birth mothers. The remaining 35 weeks are considered as parental leave which may be taken up by either parent, and is available in the case of

62 Anthony 2011 *Geo. J. Gender & L.* 115.
63 Collins 2009 *Wash. U. J. L. & Pol'y* 301.
64 Collins 2009 *Wash. U. J. L. & Pol'y* 313.
65 Dancaster and Baird 2008 *ILJ* 37. For a detailed discussion on the benefit of providing incentives in a parental leave scheme see Ayanna "Aggressive Parental Leave Incentivizing: A Statutory Proposal Toward Gender Equalization in the Workplace" 2006 *U. PA. Journal of Labor and Employment Law* 293-324. For further suggested incentives see Collins 2009 *Wash. U. J. L. & Pol'y* 314.
66 Feldman and Gran 2016 *J. Soc. & Soc. Welfare* 97.
67 Feldman and Gran 2016 *J. Soc. & Soc. Welfare* 109.
68 Feldman and Gran 2016 *J. Soc. & Soc. Welfare* 109.

adoption as well. The benefits can be taken by one parent only, or shared between parents.[69]

Iceland's Act on Maternity/Paternity Leave and Parental Leave of 2000 generally provides for five months' leave for each parent, as well as an extra two months of jointly shared leave that parents may allocate between them as they wish.[70] Parents can choose to take available leave all at once, or to spread it out over a period of 24 months, with the provision that scattered periods of leave must be at least two consecutive weeks each time.[71]

In the European Union, working mothers are eligible for 52 weeks of maternity leave, with up to 39 of those weeks being paid.[72] In the first six weeks of maternity leave, mothers can receive up to 90 percent of their average pre-tax weekly earnings. Employees may also qualify for shared parental leave, in terms of which parents can choose how to split such leave period.[73]

3 5 Financial affordability and job protection

Lastly, the effectiveness of any system of caregiving leave is also largely dependent on the affordability for workers to actually take such periods of leave.[74] For instance, where parental leave is provided for on an unpaid basis, even if for an extended period of time, few workers would financially be able to utilise the provided leave period. Consequently, the affordability of any system of caregiving leave will be determined by the proportion of regular wages covered during the leave period, which off course raises the question as to who funds such payments.[75]

Being a third-world economy, one of the biggest, if not the biggest, impediments towards an effective system of caregiving leave in SA is the issue of financial affordability. While the LLAA,[76] provides for some paid parental, adoption and commissioning parental leave in the case of surrogacy, maternity leave (which continues to be the most comprehensive caregiving leave provision in SA as far as adequacy is concerned) is unpaid unless otherwise agreed with the employer. In the case of unpaid maternity leave, workers will have to rely on wage replacement payments under the Unemployment Insurance Act 63 of

69 Campbell 2005 *Can. J. Fam. L.* 182.
70 Pesonen 2015 *Hous. J. Int'l L.* 175.
71 Pesonen 2015 *Hous. J. Int'l L.* 177.
72 Wenger "Should I Stay or Should I Go: The Effects of Brexit On Family Leave Laws in the United Kingdom" 2017 *Duq. Bus. L. J.* 137; GOV.UK *Statutory Maternity Leave* https://www.gov.uk/employersmaternity- pay-leave/ entitlement (accessed 2016-05-27).
73 Wenger 2017 *Duq. Bus. L. J.* 137; UK Government Shared Parental Leave and Pay available at GOV.UK https://www.gov.uk/shared-parentalleave-and-pay-employer-guide (accessed 2016-05-27).
74 León and Millns "Parental, Maternity and Paternity Leave: European Legal Constructions of Unpaid Care Giving" 2007 *N. Ir. Legal Q.* 351.
75 Stoneman 2017 *Emory Int'l L. Rev.* 71.
76 See discussion under paragraph 4.4 below.

2001 (UIA). Payment in terms of the UIA is however only available to contributors to the Unemployment Insurance Fund (UIF). It is the duty of employers to register themselves and their workers with the UIF and to make the required monthly contributions to the fund. Should an employer however fail to do so, a worker could potentially be unable to claim income replacement from the fund, unless the worker first settles all arrear payments.[77]

Evidence suggests that there are a number of ways of financing paid periods of caregiving leave. The most common methods are contributory schemes (where either workers or employers, or both together, are responsible for payment of contributions) and non-contributory schemes (social assistance provided for at government level).[78] With reference to maternity leave specifically, the ILO advocates for systems of compulsory social insurance, or similar public funds, as opposed to individual employee and/or employer liability.[79]

In addressing the issue of affordability various role-players, most notably employers, workers and governments, should all play a part and work together to find ways to provide for wage replacement during periods of caregiving leave. Typical employer actions could include partially paid leave, or fully paid leave in the case of shorter periods of leave.[80] In countries such as Iceland, payment during leave periods is funded by both employers and the domestic social security system.[81] As example, the Maternity/Paternity Leave Fund is administered by the government and financed through the collection of an insurance levy paid by employers.[82]

Where providing workers with wage replacement during caregiving leave periods is unachievable, employers should investigate alternatives such as having workers become members of some form of private contributory (insurance) fund from which workers can then claim income replacement during any period of caregiving leave. The question of who pays the contributions to such private funds must be determined between the employer and worker, though, ideally, employers should stand in for contributions as far as possible. Should workers be solely responsible for such payments, it is argued that worker salaries will simply be redistributed elsewhere, effectively leaving workers with less disposable income.[83]

77 Rossouw 254.
78 Stoneman 2017 *Emory Int'l L. Rev.* 77.
79 Stoneman 2017 *Emory Int'l L. Rev.* 77.
80 Dickens "Equality and Work-Life Balance: What's Happening at the Workplace" 2012 *ILJ* 448.
81 Karr "Where's My Dad? A Feminist Approach to Incentivized Paternity Leave" 2017 *Hastings Women's L. J.* 241.
82 Pesonen 2015 *Hous. J. Int'l L.* 176.
83 Garvey and Mitchell 2009 *Hofstra Lab. & Emp. L. J.* 225.

4 The legislative framework in SA providing for caregiving leave

Under common law principles workers could be dismissed for being absent from work without the employer's permission,[84] despite the reasonableness of a request for leave. This was often the case where a woman's request for maternity, or another form of family responsibility leave, was denied by the employer. The position however changed with the adoption of the Constitution, and the enactment of dedicated employment legislation. Legislation remains crucial in breaking down barriers, such as gender inequality and stereotypes, in workplaces.[85]

4 1 International obligations

SA has ratified various international instruments which all, to some extent, provide for the integration of work and family life. Apart from the CRC (discussed earlier), SA also signed and ratified the United Nations Convention on the Elimination of all Forms of Discrimination Against Women of 1979 (CEDAW) during 1995.[86] In doing so, the South African government committed itself to take the necessary steps to facilitate and ensure that women enjoy political, social, and economic equality in society. The preamble of CEDAW recognises that at the heart of women's unequal social status lies the unequal burden they carry in respect of child care and domestic responsibilities. CEDAW recognises that there should be a shared responsibility amongst men and women towards the upbringing and care of children.

During 1997 SA ratified the ILO Discrimination (Employment and Occupation) Convention no 111 of 1958.[87] In terms of the convention ratifying states should "declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof".[88] The EEA stipulates that the Act must be interpreted in compliance with the country's international obligations, particularly those contained in Convention 111.

At the 2004 session of the African Union (AU), SA became a signatory to the Solemn Declaration on Gender Equality in Africa. By signing the Declaration, the South African government reaffirmed its commitment to

84 Grogan *Workplace Law* (2009) 189.
85 Dau-Schmidt and Brun 2006 *Ind. J. Global Legal Stud.* 196.
86 Adopted in 1979 by the United Nations General Assembly, United Nations http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm (accessed 2018-11-21).
87 International Labour Organization https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111 (accessed 2018-11-21).
88 Art 2 of ILO Discrimination (Employment and Occupation) Convention no 111 of 1958.

continue, expand and accelerate efforts to promote gender equality at all levels.[89]

To date SA has yet to ratify the ILO's Workers with Family Responsibilities Convention no 156 of 1981,[90] together with its accompanying Workers with Family Responsibilities Recommendation no 165 of 1981,[91] as well as the Maternity Protection Convention no 183 of 2000.[92] These conventions address the policies and measures that ratifying states should implement to, amongst others, integrate work and family responsibility.

4 2 The Constitution of the Republic of South Africa, 1996 (Constitution)

The adoption of the Constitution at long last signalled the end of apartheid in SA.[93] The Constitution is the supreme law of the country, which means that there is no single area of law in SA that remains unaffected by constitutional principles. All labour laws and employment related issues must therefore be considered in light of constitutional principles, particularly those entrenched in chapter 2 of the Constitution (known as the Bill of Rights).[94] The Bill of Rights contains the very minimum, or basic, human rights to which all individuals within SA are entitled. Of particular importance to employment is the right to equality (section 9) and the right to fair labour practices (section 23).

In terms of section 9 everyone is equal before the law and enjoys the right to equal protection and benefit of the law.[95] No person may be unfairly discriminated against, whether directly or indirectly, on any of the grounds listed in section 9, which includes the grounds of gender, sex, or pregnancy.[96] National legislation must be enacted to prevent or prohibit unfair discrimination.[97] Section 23 in turn holds that everyone has the right to fair labour practices. It is generally understood that e*veryone* and *fair labour practices* in constitutional terms are to be given

89 Department: Justice and Constitutional Development http://www.justice.gov.za/docs/other-docs/2004_AUdeclaration.pdf (accessed 2018-11-21).
90 International Labour Organization https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312301:NO (accessed 2018-11-21).
91 International Labour Organization https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312503:NO (accessed 2018-11-21).
92 International Labour Organization https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C183 (accessed 21-11-2018).
93 The Constitution was the successor to the Interim Constitution Act 200 of 1993.
94 Huysamen "The future of legislated minimum wages in South Africa: Legal and economic insights" 2018 *De Jure* 288.
95 S 9(1) of the Constitution.
96 Ss 9(3) & (4) of the Constitution.
97 S 9(4) of the Constitution.

broad interpretations.[98] A broad interpretation of *everyone* provides for the inclusion of all workers, that is, both employees as defined in labour legislation as well as independent contractors. *Fair labour practices* in the context of section 23(1) is much broader than the more limited meaning of *unfair labour practices* as provided for in section 186(1)(b) of the LRA, and, amongst others, includes protection against actions such as abuse and discrimination.[99]

4 3 Legislation

The most relevant legislation in labour law which gives effect to constitutional principles are the Labour Relations Act 66 of 1995 (LRA), Basic Conditions of Employment Act 75 of 1997 (BCEA) and Employment Equity Act 55 of 1998 (EEA).

The LRA contains a comprehensive definition of what constitutes a dismissal.[100] The Act also provides that dismissals must be both substantively (fair reason)[101] and procedurally fair. A dismissal will, amongst others, occur where an employer refuses to allow a female worker to resume work after she took a period of maternity leave in terms of any law, collective agreement or her contract.[102] No similar provision is however available for men or workers in the case of adoption or surrogacy. The LRA further holds that a dismissal will be regarded as automatically unfair (that is, it cannot be justified as being fair)[103] where the reason for the dismissal is "the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy"[104] or where the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including family responsibility.[105]

98 See discussion in Huysamen "An Overview of Fixed Term Contracts of Employment as a Form of Atypical Employment in South Africa" 2019 *PELJ* 5-6.

99 See Halton Cheadle's interpretation of *everyone* and *fair labour practices* in Cheadle and Davis *South African Constitutional Law: The Bill of Rights* (2005) chapter 18; see also *Nape v INTCS Corporate Solutions (Pty) Ltd* 2010 31 ILJ 2120 (LC) paragraph 63 where the court held "[t]he Constitution provides that everyone and not just employees have a right to fair labour practices. Consequently, even though a person may not be regarded by the law as an employee of the client but of the labour broker, the client still has a legal duty to do nothing to undermine an employee's right to fair labour practices unless the limitation is justified by national legislation".

100 See section 186(1) of the Labour Relations Act 66 of 1995.

101 S 188(1) of the Labour Relations Act 66 of 1995 provides that dismissals may only be based on grounds of misconduct, the capacity of the employee, and operational reasons.

102 S 186(1)(c) of the Labour Relations Act 66 of 1995.

103 The only defences to an automatically unfair dismissal are that the reason for the dismissal was based on an inherent requirement of the job, or in the case of an age dismissals, that the employee had reached the agreed or normal retirement age – see section 187(2) of the Labour Relations Act 66 of 1995.

104 S 187(1)(e) of the Labour Relations Act 66 of 1995.

105 S 187(1)(f) of the Labour Relations Act 66 of 1995.

In similar terms to that of section 187(1)(f) of the LRA, section 6(1) of the EEA provides that "[n]o person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including… pregnancy,… family responsibility, … or on any other arbitrary ground".[106] The Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices, issued under the EEA, requires employers to "provide reasonable accommodation for … parents with young children …",[107] as well as endeavouring to provide "accessible, supportive and flexible environment for employees with family responsibilities", including "considering flexible working hours and granting sufficient family responsibility leave for both parents".[108] Unfortunately no further guidance is provided for in either the Code or the EEA on how working arrangements could, or should, be structured and implemented in line with the above.[109]

As suggested by its name, the BCEA provides for the very basic conditions of employment to which all employees are entitled. Pending enforcement of the provisions of the LLAA (see discussion below), the BCEA currently provides women with four consecutive months of maternity leave per confinement.[110] Unless otherwise agreed with an employer, any period of maternity leave is unpaid, with employees having to claim benefits under the UIA. No similar period of leave is available to men. The BCEA also fails to explicitly provide for leave in the case of adoption or surrogacy births. While also available to women, men only have access to three days' family responsibility leave per annum.[111] Family responsibility leave may be taken in the event of the birth, illness or death of a child. Save for the aforesaid maternity and limited family responsibility leave provisions, and pending the implementation of the below LLAA, no further caregiving leave is available to parents.

4 4 Labour Laws Amendment Act 10 of 2018 (LLAA)

The Memorandum on the Objectives of the Labour Laws Amendment Bill of 2017 confirmed that fathers play an important role in the upbringing of children and, as such, the Bill (and subsequently the Act) set out to

106 The concern has however been raised that although family responsibility discrimination in all probability occurs in South Africa, such matters rarely come before the courts or other dispute resolution forums – see Rossouw 94.

107 Clause 11.3.4 of the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices.

108 Clause 11.3.5 of the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices.

109 Rossouw 258-259.

110 S 25(1) of the Basic Conditions of Employment Act 75 of 1997.

111 S 27(1) of the Basic Conditions of Employment Act 75 of 1997 states that family responsibility leave is only available to employees who have been in the employ of the employer for more than four months, and who work for at least four days a week for that employer.

facilitate early bonding between fathers and their children.[112] The LLAA was signed into law by President Ramaphosa on 23 November 2018. Save for sections 9 and 10 of the Act[113] which came into operation on 1 March 2019, the remainder of the Act's provisions will only come into effect on a date yet-to-be-fixed by the President.

Apart from maternity leave which is already provided for under the BCEA, the LLAA introduces further caregiving leave in the form of parental leave, adoption leave and commissioning parental leave in the case of surrogacy. In terms of the parental leave provisions parents will be entitled to 10 days continuous leave in the case of adoption or birth of a child.[114] Adoption leave and commissioning parental leave provisions allow for a continuous period of 10 weeks leave being available to adoptive and commissioning parents. In the case of two-parent adoptions or surrogate agreements with two commissioning parents,[115] only one of the parents will qualify for adoption or commissioning parental leave. The other parent will then have access to the 10 days parental leave provisions.[116] The LLAA will repeal the current three days family responsibility leave available under the BCEA, but only in cases of the birth of a child.[117]

4 5 The effectiveness of the system of caregiving leave in SA

Whilst the aim of this article is not to comprehensively consider the adequacy or otherwise of the current legislative regime providing for caregiving leave in SA, particularly in light of the five principles identified earlier, the following few observations may be made at this stage.

While the protective provisions of the LRA and EEA in as far as family responsibility, gender and pregnancy could be regarded as preventative in nature (i.e. prohibiting certain conduct by employers), reality is that available remedies provide for relief after-the-fact only, that is, only after discrimination or dismissal has already occurred. Furthermore, despite the progress that have been made since the adoption of the Constitution to address issues of gender equality and work-family life integration, the transformative focus of the Constitution has traditionally been towards increasing the rights of women specifically, with dedicated policies

112 Paragraph 1.1 of the Memorandum on the Objectives of the Labour Laws Amendment Bill B29 of 2017.
113 Ss 9 and 10 deal with amendments to sections 13 and 24 of the Unemployment Insurance Act 63 of 2001 (as amended), the discussion of which however falls beyond the scope of this article.
114 S 3 of the Labour Laws Amendment Act 10 of 2018 which inserts section 25A into the Basic Conditions of Employment Act 75 of 1997.
115 In terms of the Children's Act 38 of 2005 a commissioning parent is defined as "… a person who enters into a surrogate motherhood agreement with a surrogate mother".
116 S 3 of the Labour Laws Amendment Act 10 of 2018 which inserts sections 25B and 25C into the Basic Conditions of Employment Act 75 of 1997.
117 S 4 of the Labour Laws Amendment Act 10 of 2018.

providing for increased rights for men as caregivers, and safeguarding the family unit in general, largely remaining absent.

Subsequent to the recently introduced parental, adoption and commissioning parental leave provisions of the LLAA, maternity leave under the BCEA was effectively the only provision made in legislation towards integrating work and family life. Since maternity leave provisions were predominantly drafted with birth mothers in mind, fathers (and also adoptive or commissioning parents in the case of surrogacy) received very little, if any, legislative protection. While caregiving leave for men (in the form of parental leave), adoptive parents and commissioning parents in surrogacy agreements are now provided for in the LLAA, there still remain a number of shortcomings. A detailed discussion of these shortcomings will not be undertaken in this article,[118] with only a few brief comments to be made at this stage. Identified shortcomings mainly centre around the *nature* and *implementation* of the newly introduced caregiving leave provisions.

Adoption leave will only be available to parents where the child adopted is below the age of two. This raises a concern as to the *appealability* of adopting older children in a country where the number of older children in need of adoption is alarmingly high. Furthermore, the parental, adoption and commissioning parental leave provisions of the LLAA only remains available for a limited period, that is, immediately following the birth or adoption of a child. Leave that might be required to take care of a sick child seemingly remains limited to only three days per year (per parent) as per the existing family responsibility leave provisions of the BCEA. Lastly, when compared to periods of caregiving leave in other countries (see discussion under 3.4 above), it seems as if SA is still lacking in the *adequacy* of leave department.

It is thus submitted that the current system of caregiving leave under South African labour laws, while showing signs of progress, cannot be argued as being an effective system when measured against the five fundamental principles identified earlier in this article.

5 Conclusion

There are many issues that continue to hinder the progressive realisation of a proper work-family life balance, not only in the South African context, but at an international level. These include the socio-economic situations in countries, high unemployment and poverty rates in particularly third-world countries, outdated gender stereotypes on the caregiving roles of men and women, and individual career aspirations. Since there is no biological reason which prevents men and women from

118 For a more detailed critique of the provisions of the Labour Laws Amendment Act 10 of 2018 see Rycroft and Duffy 2019 *ILJ* 12-25, as well as Botes and Fourie 2017 *PELJ* 1-39.

being equally responsible for caregiving responsibilities,[119] it is argued that an effective system of caregiving leave should provide both genders with an equal opportunity to advance their professional careers, while also actively taking part in the care of the family.[120] Yet, social science research suggests that inequality in the workplace continues to be influenced, though perhaps to a lesser extent, by outdated gender stereotypes on caregiving responsibilities,[121] with the pay gap between men and women generally increasing with each child added to the household.[122]

While achieving proper work-family life integration through the provision of adequate caregiving leave might seem aspirational in many countries, particularly in developing nations such as SA,[123] attempts towards realising such balance should not simply be forego. Given the need for effective systems of caregiving leave, this article argues that caregiving leave policies should be based on five fundamental or core principles: the best interest of the child; protecting the family unit; gender equality; adequacy (length of caregiving leave); and financial affordability and job protection.

Providing increased substantive rights for workers with caregiving responsibilities should remain high on any government's agenda. In the South African context, available protection should not only be viewed in terms of anti-discrimination provisions or preventative measures (such as those under the EEA and LR), but also in terms of adequate leave periods being available to parents. Caregiving leave provisions should furthermore be aimed at providing parents with periods of leave for purposes of caregiving responsibilities throughout the period of childhood, and not only the period immediately following the birth or adoption of a child.

The author accepts that it is perhaps idealistic to expect there to be a perfect one-size-fits-all system of caregiving leave. Consequently, the aim of the article was not to arrive at such a conclusion. What the article however sought to achieve was to identify the fundamental principles that should form the basis of any system of caregiving leave. What will hopefully emanate from this article is further research and discussion on how the current system of caregiving leave in SA can be amended so as to be representative of the five fundamental principles identified.

119 Stoneman 2017 *Emory Int'l L. Rev.* 52.
120 Ayanna 2006 *U. PA. Journal of Labor and Employment Law* 293.
121 Farrell and Guertin "Old Problem, New Tactic: Making the Case for Legislation to Combat Employment Discrimination Based on Family Caregiver Status" 2007 *Hastings L. J.* 1473.
122 Guo "What is the best paid parental leave arrangement to promote gender-balanced caregiving in the home, and gender equality in the workplace in New Zealand?" 2017 *NZWLJ* 66.
123 Cohen and Gosai 2016 *ILJ* 2238.

Access to justice for all: a reality or unfulfilled expectations?

Lesley Greenbaum
BA LLB M Ed (Natal) PhD (UKZN)
Associate Professor of Private Law, University of Cape Town

SUMMARY

While the constitutional imperatives related to access to justice, the legislative framework of Legal Aid SA (LASA), the regulations for the attorneys' profession and the Legal Practice Act 28 of 2014 suggest that citizens are adequately catered for in accessing justice, the lived reality for poor persons is that this is not substantively attained. The formal framework creates unfulfilled expectations. First year law students at a Law faculty were required to report on their observations in the lower courts and on an interview with a litigant or official at the court visited. The focus of the assignment was on access to justice: identifying barriers and making recommendations for enhancing access to justice. The observations of the novice law students in the courts speak to the experiences of indigent and middle-class persons seeking to access the courts in largely urban areas. Ethical clearance and informed consent of the participants was obtained in accordance with the requirements of the Ethics Research Committee of the Law faculty. What is evident is that the achievement of access to justice is impeded by a number of factors, including socio-economic inequalities, systemic inefficiencies caused by poor administration at the courts and an unmet demand for legal services. It will require the allocation of significant financial and human resources to overcome the obstacles preventing those who cannot afford the cost of private legal representation from effectively accessing the legal system.

The aim of the paper is to review the position pertaining to access to justice in the various regulatory sources and then to consider the obstacles identified by the students related to 'law in practice' in the lower courts of South Africa. Finally, the paper proposes some recommendations to address the observed impediments to accessing justice by the poor.

1 Introduction

First year law students at a South African Law faculty completed an assignment based on their observations during visits to a district or regional magistrates' court. Informal interviews were also conducted there by the students with an official or litigant about access to justice. The court visit reports provide empirical evidence of how law in practice unfolds in the lower courts on a daily basis. The research and perspectives discussed are the work of student observer participants, while the data analysis was conducted by the author. Ethical clearance and informed consent of the participants were obtained in accordance with the requirements of the Law faculty Research Ethics Committee.

How to cite: Greenbaum 'Access to justice for all: a reality or unfulfilled expectations?' 2020 *De Jure Law Journal* 248-266
http://dx.doi.org/10.17159/2225-7160/2020/v53a17

The perspective of law foregrounded in the assignment is a realistic theory of law as propounded by Tamanaha.[1] This approach adopts a holistic view of law in its social totality, influenced by its social context. It requires that law be understood empirically and is built on observations about the past and present reality of law.[2]

Methodologically, observational participant research enables the researcher to understand and capture the context within which people interact.[3] The student participant/researchers were able to unobtrusively observe and collect rich data by immersing themselves in the first-hand experience of being present in the lower courts.[4] The reports were structured around research questions which interrogated the context, observed impediments to access to justice and elicited reflections on proposals to enhance access to justice. A deliberately critical framing, emphasising awareness of injustices and inequalities was adopted. Perspectives of the less powerful and the potential for change-making strategies were emphasised through the prescribed readings and design of the questions.[5] Data analysis by the author took the form of coding of the observer reports, followed by thematic content analysis.[6]

While most students visited courts in urban areas surrounding the university, their reports cover a wide geographical range across the country. Observations in rural magistrates' courts might have provided some very different perspectives. It is likely that in rural magistrates' courts additional challenges to access to justice such as difficulties of physical access to courts, language barriers and higher levels of poverty, illiteracy and lower levels of education would have had a significant impact on the conclusions.

This paper firstly defines what is meant by access to justice, then the current formalised frameworks for the provision of legal services for those who cannot afford legal representation are reviewed. Thereafter, an analysis of the observations of students during their visits to lower courts reveals that within these frameworks created to enhance access to justice for the poor, many substantive impediments and gaps exist. It is argued that the current provision of legal representation for indigent persons fails to ensure access to justice for the majority of citizens who cannot afford the fees charged by private legal practitioners. Finally, the paper makes some proposals and evaluates the feasibility of the students' recommendations to address the challenges identified during their court visits.

1 Tamanaha *A Realistic Theory of Law* (2017) 2.
2 Tamanaha *A Realistic Theory of Law* (2017) 4.
3 K DeWalt & B DeWalt *Participant observation: a guide for fieldworkers* (2002).
4 Bryant "Conducting observational research" https://www.deakin.edu.au/__data/assets/pdf_file/0004/681025/Participant-observation.pdf (accessed 2020-04-10).
5 Patton *Qualitative Research & Evaluation Methods* (2002).
6 Krippendorff *Content Analysis: An Introduction to Its Methodology* (2004).

2 Access to justice

In response to our history of exclusion and impediments to access to justice for most citizens during the dark years of apartheid, section 34 of the Constitution provides that: "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, in another independent and impartial tribunal or forum."[7] In a narrow sense, access to justice includes the formal right to a fair hearing. However, unless every citizen, including those who cannot afford legal representation, has access to legal advice and "equality of arms", it cannot be said that access to justice for all is achieved.[8] Heywood and Hassim note: "there is a necessary continuum between access to legal services and access to justice."[9] The equality clause in the Constitution reminds that: "everyone is equal before the law and has the right to equal protection and benefit of the law."[10] Clearly, substantive equality before the law is unattainable as long as the huge disparities in wealth continue to exist between the rich and poor and impact the provision and quality of legal representation in South African courts.[11]

According to the student reports, access to justice in the lower courts is compromised by a number of barriers including socio-economic inequalities, inadequate resources for legal aid provision, systemic operational inefficiencies, and lack of knowledge about legal rights, remedies and the legal system. These observations resonate with the statements of Didcott J in *Mohlomi v Minister of Defence*:

> "South Africa is [a] land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce these, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons."[12]

To establish a context, in 2017, 55.5% (30.2 million) of the population lived in poverty- with an income below R992 per month.[13] This data demonstrate a trend in rising levels of poverty, which are most prevalent among citizens below the age of 17, black South Africans, women, rural people and those with little education. The likelihood of such indigent

7 S 34 of the Constitution of the Republic of South Africa 1996.
8 *Bernstein v Bester* 1996 2 SA 751 (CC) footnote 54; *Shilubana v Nwamitwa* CCT 03/07 2007 ZACC 14.
9 Heywood & Hassim "Remedying the Maladies of 'Lesser Men or Women': The Personal, Political and Constitutional Imperatives for Improved Access to Justice" 2008 *South African Journal on Human Rights* 263.
10 S 9 of the Constitution.
11 Heywood & Hassim 2008 *SAJHR* 268.
12 1997 1 SA 124 (CC) para 14.
13 Stats SA "Poverty on the rise in South Africa" http://www.statssa.gov.za/?p = 10334 (accessed 2020-04-09).

people being able to access justice and be represented adequately in courts becomes even more remote when considering the geographical location of courts and Legal Aid South Africa (LASA) satellite offices that physically limit the opportunities for the rural poor to access the courts.[14]

Budlender opines that if "people in need" are not able to present their cases effectively when bringing their cases to court then the courts cannot fulfil their constitutional obligation.[15] In operationalising access to justice for the poor, legal services are provided through LASA and through *pro bono* work carried out by legal practitioners. These mechanisms will be examined below.

3 Legal Aid

Bodenstein comments: "Legal Aid, by its very nature, is concerned with law and poverty, and as such, constitutes a corollary for 'access to justice'."[16] In South Africa, the primary source of legal services provision for persons who cannot afford private legal services is state-funded legal aid. LASA is a national public entity established by the Legal Aid South Africa Act 39 of 2014. It is the vehicle through which legal advice and representation, at state expense is delivered. The mission of LASA is: "to be the leader in the provision of accessible, sustainable, ethical, quality and independent legal services to the poor and vulnerable."[17] The entity is mandated to provide legal advice, education about legal rights and legal representation according to the constitutional and legislative provisions imposed on it.[18]

LASA's constitutional mandate is based on the following sections: Section 35 (3) of the Constitution provides that everyone has a right to a fair trial which includes… "that every detained person, including a sentenced prisoner, has a right to have a legal representative assigned by the state, at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly". Section 35 (3) (g) of the Constitution provides the same guarantees for accused persons.[19] "Substantial injustice" has been defined in the Legal Aid Manual (2017) as: "When a person without legal aid would experience significant injustice by being sentenced, or having the possibility of being sentenced, to direct imprisonment of more than 3 months in a criminal

14 Nyenti "Access to justice in the South African social security system: towards a conceptual approach" 2013 *De Jure* 901.
15 Budlender "Access to Courts" 2004 *SALJ* 339 and 355; Dugard "Courts and the Poor in South Africa: A critique of systemic judicial failures to advance transformative justice" 2008 *SAJHR* 216.
16 Bodenstein "Access to legal aid in rural South Africa: in seeking a coordinated approach" 2005 *Obiter* 304.
17 Legal Aid South Africa "Integrated Annual Report 2016-2017" http://pmg-assets.s3-website-eu-west-1.amazonaws.com/Legal_Aid_AR_LR_201617.pdf (accessed 2020-04-10).
18 Legal Aid South Africa "Integrated Annual Report 2016-2017".
19 Dugard 2008 *SAJHR* 219.

case, or where his/her constitutional or personal rights are affected in a civil matter."[20] Both detained and sentenced persons have a right to legal representation in an appeal or review by a higher court.[21] Section 28(h) provides that every child has the right to have a legal practitioner assigned to the child by the state, and at state expense in civil proceedings affecting the child, if substantial injustice would otherwise result.[22]

The bulk of the matters undertaken by LASA each year are criminal cases: 385 972 (87%) cases out of 444 962 new cases in 2017) in order to satisfy the section 35 constitutional mandate.[23] Only 58 090 (12%) of the matters taken on were civil cases. During 2016/2017, LASA also represented the majority of appellants in criminal cases that appeared before the Supreme Court of Appeal and five impact matters supported by LASA were argued at the Constitutional Court.[24] A total of 767 656 persons were served by the entity.[25]

Several authors have critiqued the predominance of legal aid in criminal cases, as it fails to interpret section 34 sufficiently widely to include legal representation in civil matters, in line with international instruments.[26] The LASA website specifies that legal aid in civil claims may be provided in the fields of family matters, evictions, employment, contract, criminal cases and impact litigation, but an assessment of the merits of the case and the projected costs of the litigation are considerations that are taken into account before legal aid is granted.[27]

Other legislative mandates guarantee the provision of legal services and advice in accordance with LASA's budgetary and funding resources.[28]

Legal aid services are delivered through 64 Justice Centres in urban areas and 64 satellite offices.[29] Criminal legal aid is provided by salaried legal practitioners at Justice Centres.[30] LASA aims to have at least one practitioner per court at most district and regional magistrates' courts.[31] Legal services and advice in civil matters are delivered through Civil Units

20 Dugard 2008 *SAJHR* 221.
21 S 35(3)(o) of the Constitution.
22 S 28(h) of the Constitution.
23 Dugard 2008 *SAJHR* 221.
24 Dugard 2008 *SAJHR* 221.
25 Dugard 2008 *SAJHR* 221.
26 Budlender 2004 *SALJ* 339; Brickhill "The Right to a fair civil trial: the duties of lawyers and law students to act pro bono" 2005 *SAJHR* 293; Vawda "Access to justice: from legal representation to promotion of equality and social justice - addressing the legal isolation of the poor" 2005 *Obiter* 234; Dugard 2008 *SAJHR* 216.
27 Legal Aid South Africa "Legal Aid Manual" https://legal-aid.co.za/wp-content/uploads/2018/11/Legal-Aid-Manual.pdf (accessed 2020-04-10).
28 Legal Aid South Africa "Legal Aid Manual".
29 Legal Aid South Africa "Legal Aid Manual".
30 Legal Aid South Africa "Legal Aid Manual".
31 Legal Aid South Africa "Legal Aid Manual".

which are spread over a number of magisterial districts- there being 13 civil units based at the permanent seats of the various divisions of the high court.[32] Litigation is also facilitated through Judicare agreements with lawyers in private practice, through co-operation and agency agreements with law clinics; and through an impact litigation division.[33]

Despite the Legal Aid Act mentioning the provision of legal services for the "indigent", no definition is provided in the Act.[34] However, in *Smith v Mutual and Federal Insurance Company,* the court defined indigent as "those in extreme need or want, while 'poor' refers to those having few things or nothing".[35] The inability of poor people in general to fund legal services, bearing in mind that half the population of the country lives below the poverty threshold, and the extremely high fees charged by legal practitioners suggests that access to justice is the preserve of the wealthy, or a very small number of indigent persons in narrowly specified circumstances.[36]

In order to set a threshold for who is indigent and qualifies for legal aid, a means test is set for an individual at a maximum income of R7, 400.00 per month after tax, and for a household the monthly income must not exceed R8000.00 per month after tax.[37] If the applicant does not own immovable property, their movable assets should not exceed R128 000.00; if the applicant is a member of a household that owns immovable property then the value of their movable and immovable assets may not exceed R640 000.00. The particularly low threshold excludes the middle class from the benefits of legal aid. As Brickhill notes, the means test prevents "the working poor, the lower middle class and parts of the rural population" from adequate representation.[38] This group of citizens is referred to as the "missing middle" who are effectively precluded from accessing the legal system.[39]

Severe budgetary constraints are however impacting the delivery of legal aid services. A budget cut over the next three years of R503 million is likely to further undermine the provision of legal services to the indigent.[40] In the LASA Annual Report for 2016/17, the Chief Executive Officer (CEO) reported that the organisation whose main source of

32 Legal Aid South Africa "Integrated Annual Report 2016-2017".
33 Legal Aid South Africa "Integrated Annual Report 2016-2017".
34 Legal Aid South Africa Act 39 of 2014.
35 1998 4 SA 626 (C).
36 Klaaren "Towards affordable legal services: Legal costs in South Africa and a comparison with other professional sectors" delivered at SALRC conference on Access to Justice in Durban in October 2018.
37 These amounts were increased from 1 April 2019. See Legal Aid South Africa "How it works" https://legal-aid.co.za/how-it-works/ (accessed 2020-04-10).
38 Brickhill 2005 *SAJHR* 294.
39 Brickhill 2005 *SAJHR* 294.
40 Cape Argus "High cost of legal fees impedes access to justice" http://www.pressreader.com/south-africa/cape-argus/20181102/281779925129269 (accessed 2020-04-10).

revenue is a government grant from the National Revenue Fund received R1,577 billion in the 2016-2017 financial year, which is 3.6% more than the 2015-2016 allocation.[41] The increase was minimal due to the budget cut of R92 million effected for 2016-2017.[42] LASA CEO Vedalankar stated that in moving forward, "the biggest organisational challenge for LASA relates to fiscal constraints and the poor economic climate".[43] This framework is in place to provide access to justice through state-funded representation for the indigent. The following provisions apply to the delivery of free legal services to the poor by private attorneys.

4 *Pro bono*

Whilst the provision of legal services to the indigent is primarily effected by LASA, Kruuse observes that state-funded legal aid and *pro bono* services by the legal profession should be seen as complementary means to provide access to legal representation for the indigent.[44] The huge unmet demand for legal representation for indigent people cannot be met by LASA alone: a commitment by legal professionals to contribute to improving access to justice for the poor should be a moral as well as a legal imperative.[45]

Prior to the promulgation of the Chapter 2 provisions of the LPA in November 2018, compulsory *pro bono* services by lawyers in private practice was mandated, with some slight variations across provinces, in the Rules for the Attorney's Profession promulgated on 1 March 2016. Under these rules, attorneys were required to complete 24 hours of compulsory unremunerated work each year. Rule 25 states: "*pro bono* services shall include, but not be limited to, services …relating to, the delivery, through recognised structures, of advice, opinion or assistance in matters falling within the professional competence of a member, to facilitate access to justice for those who cannot afford to pay for such services".[46] Persons who cannot pay are those who fall below the threshold set in the LASA means test. Recognised structures include, but are not limited to: the office of the registrars of the high court when issuing in *forma pauperis* instructions, small claims courts, community (non-commercial) advice offices, university law clinics, non-government organisations, the office of the Inspectorate of Prisons and other specialist committees of the society.[47]

41 Legal Aid South Africa "Integrated Annual Report 2016-2017" 17.
42 Legal Aid South Africa "Integrated Annual Report 2016-2017" 19.
43 Legal Aid South Africa "Integrated Annual Report 2016-2017" 21.
44 Kruuse "Vuk'uzenzele ('Arise and act'): Lawyers and Access to Justice in South Africa" in H Whalen-Bridge (ed) *Lawyers and Access to Justice: Challenging Pro Bono* (forthcoming).
45 Kruuse 3.
46 Government Gazette 39740 of 2016-02-26 "Rules for the Attorneys' Profession" Rule 25.1.
47 Government Gazette *supra*.

A certificate of completion of 24 hours of *pro bono* work by practising attorneys had to be submitted annually to their respective law societies for recording and monitoring. It appears that punitive sanctions for non-compliance have not been imposed.[48] At best, a complaint of failing to give attention to the affairs of a client could be made.[49] In informal conversations with the author, several Cape Town attorneys of many years' experience mentioned that they never completed the 24 hours of mandatory *pro bono* service because referrals from the law society are rare and the requirement of working through a 'recognised structure' is a long-protracted process. None of the attorneys was aware of any consequences that might arise should they not complete the 24 mandatory hours of *pro bono* work.

Advocates are required by the General Council of the Bar to complete 20 hours of *pro bono* work each year.[50] Records of the completed hours are retained by the Bar Council, but again, the imposition of punitive sanctions for non-compliance seems unlikely.

No clarity exists as to who shall be responsible for the monitoring of *pro bono* hours now that the Legal Practice Council (LPC), a unifying body with disciplinary powers over attorneys and advocates, has been established in terms of the Legal Practice Act promulgated on 29 October 2018.[51] A recognition of the lacuna that exists at present was implicit in a communique issued by the Director of the LPC on 12 March, 2019. In this document, the director acknowledges that:

> "the LPC has taken a policy decision that free legal services (what is referred to as pro bono services) provided to indigent members of the public by the legal profession will be regulated….Therefore practitioners are encouraged to continue to attend to free legal services to provide and promote access to justice to the indigent members of the public who cannot afford the same… The Council is currently in the process of formalising the regulation of pro bono services to give effect to the above."[52]

The LPA has also created some confusion about whether *pro bono* service is now to be regulated through the Act. The term "*pro bono*" is not used in the LPA, nor is mention made of services to indigent persons to provide increased access to justice, one of the stated aims of the LPA.

48 Kruuse 2
49 Kruuse 3.
50 The Cape Bar "*Pro Bono* Rules" https://capebar.co.za/wp-content/uploads/2015/04/Pro-Bono-rules-after-amendment-in-September-2016.pdf (accessed 2020-04-10) Rule 1.
51 Government Gazette 42003 of 2018-10-29 "Commencement of Certain Sections of the Legal Practice Act, 2014" brings chapter 2 of the Legal Practice Act 28 of 2014 into effect.
52 https://lpc.org.za/important-notice-to-members-pro-bono/ (accessed 2020-04-11).

5 Community service in the LPA

The term "community service" has been used in the Legal Practice Act to refer to certain types of legal practice activities that will be regulated by the Minister, in consultation with the Legal Practice Council, to apply to candidate attorneys and to practitioners.[53] Although a proclamation has brought Chapter 2 of the Act into effect, the regulations for community service have not yet been drafted.

Section 29 of the LPA states that –

> "(1) The Minister must, after consultation with the Council, prescribe the requirements for community service from a date to be determined by the Minister, and such requirements may include –
> (a) community service as a component of practical vocational training by candidate legal practitioners; or
> (b) a minimum period of recurring community service by practicing legal practitioners upon which continued enrolment as a legal practitioner is dependent."[54]

The section further states that community service may include, but is not limited, to service in the State, at the South African Human Rights Commission (SAHRC), academic institutions or non-governmental organisations (NGOs), or other service approved by the Minister, in consultation with the Council.[55] It is notable that the types of services described do not include the provision of legal representation to the poor.

It is unclear whether the requirement of community service is applicable to candidate attorneys, or alternately to legal practitioners, or to both. The use of the word "or" renders the import of the section ambiguous. The confusion that exists between the meaning of community service and *pro bono* also gives rise to speculation about what is intended by this wording.[56]

The question of whether "community service" as contained in the LPA is to be remunerated and whether the term is intended to carry the same meaning as "*pro bono*" legal services also arises.[57] In section 29(1)(c), there is an express reference to work as a Small Claims Court Commissioner being unremunerated.[58] The lack of clarity and possibly a missed opportunity to unequivocally impose compulsory, unremunerated *pro bono* requirements on all practitioners and candidate attorneys seems to be unfortunate.

53 S 29 of the Legal Practice Act 28 of 2014.
54 S 29(1) of the Legal Practice Act 28 of 2014.
55 S 29(2) of the Legal Practice Act 28 of 2014.
56 Emdon "More clarity on *pro bono* under the Legal Practice Act" 2017 *De Rebus* 26; Kruuse *supra* 22.
57 Emdon *De Rebus* 27.
58 Emdon *De Rebus* 27.

The above provisions describe the framework, the formal structures and rules in place regarding the delivery of legal services to the indigent. Although it appears that provision is made to deliver legal services in a variety of complementary ways to indigent people, the gaps that exist and the harsh realities of accessing the justice system are highlighted in the reports of the novice law students. Their observations and comments from interviews with litigants and officials at the lower courts reveal a lived reality that is substantively at variance from what is promised by the formal provisions.

6 In *forma pauperis*

Another way in which practitioners are able to expand their services to the poor is through participation in the under-utilised in *forma pauperis* proceedings.[59] Applications are made to the registrar in high courts and to the clerk in magistrates' courts, for leave to prosecute or defend an action in court on behalf of an indigent person. The means test applied in such cases takes into consideration the following: "a party shall be deemed to be indigent if he or she can satisfy the registrar (or clerk) that, except for household goods, wearing apparel and tools of trade, he or she is not possessed of property to the amount of R10 000 and will not be able within a reasonable time to provide such sum from his or her earnings or obtain legal aid."[60] Referrals where a prospective litigant satisfies the criteria are made by the clerk or registrar of the court to an attorney, who then engages the services of an advocate when necessary.[61] Both practitioners are required to agree to provide *pro bono* services. According to Dugard, judges seldom use this process because of its complexity and the time delays incurred.[62] Large *pro bono* divisions in law firms report receiving one or two referrals of in *forma pauperis* cases per annum, when this process could effectively result in widened access to legal representation in civil matters for indigent persons.[63]

7 Analysis of student observations

Several themes were evident in the students' court visit reports. These were: (i) socio-economic inequalities impacting the provision of adequate legal representation for the poor; (ii) systemic inefficiency in the

59 Department of Justice and Constitutional Development "Rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa" (as amended) Rule 40; Department of Justice and Constitutional Development "Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa" (as amended) Rule 53.

60 Department of Justice "Rules concerning the SCA" Rule 15(2); Rule 40(2) a of Uniform Rules of Court.

61 *Potgieter v ABSA Bank Limited* (2344/2013) [2017] ZAECPEHC 29 (11 May 2017).

62 Dugard 2008 *SAJHR* 225.

63 Dugard 2008 *SAJHR* 225.

administration and functioning of the courts, which leads to an inordinate number of postponements of cases; (iii) the high demand for legal aid services which remain unmet by the current resource provision.

7 1 Socio-economic inequalities

Participant 5 began with the following quote: "it is better to be rich and guilty than poor and innocent".[64] The glaring disparities and concomitant unevenness in the quality of legal services provided to rich and poor was echoed in many of the student observations throughout the reports. Access to justice inevitably reflects the harsh realities of poverty and class distinction in a society that is possibly one of the most unequal in the world.[65] Accessing justice is often a function of the ability to afford effective legal representation and an understanding of legal rights and remedies. In an evocative observation Participant 16 captured the experience.

> "Walking into the Wynberg magistrates' courts the feeling of inequality surrounds you. From the petty criminal charged with stealing toiletries to a wealthy businessman being involved in a civil suit, one gets the sense that justice will be served to those who can pay and not to those who are innocent. The legal representatives mimic this same feeling of inequality, the rich lawyers dressed in tailored suits, ready to ensure their clients get the best possible sentence compared to the legal aid attorneys who look like they have had one too many energy drinks to stay awake."

Even where legal representation is provided by legal aid attorneys, it was immediately evident to an observer that the quality of the services provided was inferior to those provided by private attorneys. Participant 6 noted that some litigants stated that they did not trust the services of a lawyer who was "funded by the State" to represent them in a criminal case instituted by the State. Litigants also described to students how it was apparent that the legal aid attorneys were inexperienced, less capable than private attorneys and over-burdened with cases.

The role that financial means plays in the legal system was described in several other contexts. Students reported that another disadvantage of poor-quality legal representation to indigent people is that they are prejudiced by the unaffordable costs incurred in having expert witnesses such as psychologists, accountants and medical professionals. Following on an interview with a litigant, Participant 29 stated: "the families of detained persons bear the most amount of stress as in some instances loans have to be taken out in order to afford a private lawyer. Private lawyers are highly esteemed and viewed as being more competent than lawyers provided by the State. The financial pressures double as there is a need to raise bail money and to cover money for lawyer's fees."

64 United Nations Office on Drugs and Crime "Global Study on Legal Aid: Country Profiles at 4" http://www.unodc.org (accessed 2018-10-04).
65 Brickhill 2005 *SAJHR*; Kruuse 5.

Many observations related to people at the courts being ignorant of their legal rights and remedies, failing to understand the nature of court proceedings and not being aware of the availability of legal aid representation.[66] Levels of illiteracy, language barriers and the experience of alienation in the court surroundings also contributed to a heightened sense of socio-economic and class disparities that affect access to the courts and the legal system.

7 2 Systemic inefficiency in the courts

The day to day practices at the lower courts were of concern for many students. Comments such as: "Upon arriving at the magistrates' court at 8.00, I noticed that queues of people had already started to form and it was getting more and more crowded as the time passed by. An hour had passed and neither I nor the people waiting were seen to yet. All that we were met with was a locked door and an occasional 'wait outside' if anyone tried to knock on the door. This was alarming to me… vulnerable members of society will not feel comfortable to reach out for help at a legal institution if they are treated in this way. I noticed that they appeared to be intimidated by the employees, attorneys and magistrates … being treated disrespectfully in the process."[67] At the Cape Town magistrates' courts Participant 17 observed: "there were lines of people waiting outside court with one lawyer representing a large number of clients", while another student noted that "overcrowded courts are the greatest barrier to accessing justice" – there are consequent knock-on effects such as delays and increased fees. This type of inefficiency and poor quality service to citizens is not formally documented anywhere, but impacts significantly on the ability of the vulnerable to access justice.

A recurrent theme in many of the student reports was the poor administrative systems, lost files and delays leading to litigants not having adequate representation on the date of their case. At the Knysna district court a student reported: "Court A was saturated with nothing but postponements. Whether it was due to outstanding dockets, acquiring representation or further investigation, the look of frustration on the defendants' faces were evident."[68]

Students reported that most criminal cases were postponed: "One trial was postponed due to a lost docket…the state prosecutor pointed out the problems of an inefficient docket system for cases, which resulted in postponements and innocent individuals spending more time behind bars."[69] At the Wynberg magistrates' court,[70] the following were observed: "court started late"; "postponements on the basis that there

66 Nyenti 2013 *De Jure* 914; Mubangizi "Human rights education in South Africa: Whose responsibility is it anyway?" 2015 *African Human Rights Law Journal* 496.
67 Participant 33.
68 Participant 17.
69 Participant 4 interview with a prosecutor.
70 Participants 9 and 13.

was insufficient evidence on the day such as witnesses not showing up". Participant 24 stated: "it (court) started very late reflecting inefficiency with regard to time. Hours later, postponements took place in the court and it was revealed that there is inadequate administration as many cases were overlooked because the demand of cases far outweighed the supply of court officials available to deal with them. During my court visit many cases were postponed due to the maladministration on behalf of the court."[71] "Clerical errors made by the court, such as lost case files were common. On the upper floors (of the Wynberg courts) piles of cases littered the corridors. Poor management and the excessive volume of cases contributed to the disorder". "The administration in the lower courts is slack and often leads to events such as misfiling, numerous documentation errors were discovered."[72] Participant 36 commented: "the administration in the courts is very inefficient and because the judicial services still need to catch up in terms of technology, everything was written down and this is prone to human error." The sense of chaos, poor management and under-resourcing of personnel at the lower courts creates an alienating and inaccessible system for those attempting to have their disputes resolved there.

Another category of inefficiencies raised issues of the facilities at the courts: microphones in the Durban courts were not working; and in Knysna, faulty microphones and open doors prevented the magistrate from hearing the witness testimony, causing delays and repetitive questioning during the proceedings.[73] Poor signage resulted in litigants and witnesses being confused about which courts to attend. Language and communication barriers were also noted by many students. These day to day realities to which litigants are exposed impede the functioning of the courts and engender mistrust of the system.

7 3 High unmet demand for legal aid and quality legal representation for the poor

Many comments in the student reports noted the scarcity of legal aid resources and the heavy burden placed on the limited number of state-funded attorneys. In an interview one such legal aid attorney stated that they deal with 35 cases on an average day and that they have to explain the nature of proceedings repeatedly to many clients each day.[74] Other student comments included: "the legal aid attorneys seemed inundated with work and most of the matters were postponed, so much so that I and some of the other students who were there on the day named it 'postponement court."[75]

71 Participant 6.
72 Participant 31.
73 Participants 7 and 16.
74 Participant 14.
75 Participant 36.

The low threshold of the means test excludes all but the impoverished from receiving legal aid. The plight of the "missing middle",[76] was described poignantly by a student: "the criminal case I attended … was a charge of assault and the reason for appearance was to set a trial date. The accused did not have a lawyer and did not qualify under the means test because he earns R7000 and the threshold (at the time) was R5500. The accused assumed that he could present his own suggestion as to when his case should be heard. The magistrate was upset by the accused's behaviour; the accused noted that he did not know what his options are, and without receiving any advice he was given another date to appear with his own lawyer."[77]

In an interview with a prosecutor, the potential for *pro bono* work by private attorneys to assist with the demand for legal representation for the poor, the following was stated: "*pro bono* work is not a system that can work effectively in the long run because the lack of access to justice is a much bigger issue that is linked to economic status and the cycle of poverty. Ultimately, money will always be needed to attain a decent level of legal representation, thereby rendering *pro bono* work an ineffective, oversimplified solution to a much greater issue."[78] None of the students reported the presence of a university law clinic attorney at any of the courts visited. This casts some doubt on the limits of the law clinics' reach in terms of enhancing access to justice for the poor. The limited use of *pro bono* representation that was evident to many students suggests that this source of legal services for the poor is under-utilised and does not make any significant contribution to access for justice for the poor and vulnerable. The apparent lack of monitoring and compliance with the requirements for completing mandatory *pro bono* hours though the law societies, and now through the LPC, resonates with these views.

8 Evaluation of student recommendations and further proposals

8 1 Socio-economic inequalities

Many students identified the need to provide legal literacy education for those who are not aware of their legal rights and remedies, as well as for those who do not understand the nature of the legal proceedings in which they are attempting to participate. Recommendations were made that 60 hours of community service be required of all law students to facilitate an educative initiative, especially for people living outside of metropolitan areas.[79] Workshops, and classes for adults and school learners could be presented and pamphlets designed for distribution, with a view to enhancing legal literacy in the population at large. Work in legal aid offices, police stations and at the courts for the purposes of

76 Brickhill 2005 *SAJHR* 296.
77 Participant 19.
78 Participant 22.

translation, explaining of legal rights, as well as administrative functions could be undertaken by law students. Training for this work could be presented in a six-week module at all Law faculties. A national curriculum to ensure that the content covered is appropriate could be developed by, or may already exist, from initiatives such as Street Law and Constitutional Literacy and Service Initiative (CLASI). As part of the 60 hours, students completing a clinical law course, could provide supervised advice to clients through university law clinics. Increased publicity to communities regarding the availability of legal assistance from university law clinics through social media, posters, pamphlets, radio and television could serve to expand the work done in clinics. Students at all universities could be required to complete a clinical law course as a pre-requisite for graduation.[80]

In 1985 a set of student practice rules were drafted with the purpose of enabling final year law clinic students to appear in criminal cases for indigent accused persons in district courts.[81] These rules were based on the American Bar Association rules for student practice.[82] However, the initiative, despite having the approval of the profession and the law schools, was blocked by officials in the Department of Justice.[83] In current times when there is a huge unmet demand for legal services, it is possible that this proposal could be revisited.

The above student proposals seem feasible and could be undertaken without too much disruption to the current LLB curricula. Requiring students to study a language other than their mother tongue, to be used in educating and advising citizens on basic legal matters could also serve to improve access to justice. Student recommendations about the use of mobile technology, websites, television, radio, You-tube videos and Facebook pages to reach more members of the public for educative purposes and for publicising the availability of legal advice and representation are realistic and practicable.[84] Sponsorship, possibly by advertisers such as large law firms and public companies, could help to defray the costs of such projects. On May 10, 2018 in his budget speech to parliament the justice minister advised that LASA has launched a social

79 At the University of Cape Town Law Faculty, all students are required to complete 30 hours of compulsory community service as part of their degree. Students who complete the Legal Practice course are considered to have completed this component.

80 At present, a compulsory clinical law course is included in the LLB curriculum at many universities.

81 McQuoid-Mason, "Lessons from South Africa for the delivery of legal aid in small and developing commonwealth countries" 2005 *Obiter* 229.

82 McQuoid-Mason 2005 *Obiter* 229.

83 McQuoid-Mason 2005 *Obiter* 229.

84 Cabral, Chavan and Clarke, et al "Using technology to enhance access to justice" 2012 *Harvard Journal of Law and Technology* 248. Lessons from the United States, where technology has for many years served to enhance access to justice, may be usefully adapted to address critical challenges in South Africa.

media presence on Facebook, Twitter and Instagram.[85] A 'please call me' hotline service, permitting indigent persons to speak to a LASA legal advisor has also been introduced.[86]

To extend the students' recommendations, I would propose a requirement of compulsory community service of six to twelve months' duration for all candidate attorneys and pupil advocates after the completion of their articles or pupil training. The provision of legal services to the poor and "missing middle" could be considered a pre-requisite for admission by these groups of aspiring practitioners. They would be adequately prepared to appear on behalf of indigent clients or provide legal advice in community law centres, NGOs and university clinics. The financial, and administrative burden of implementing such community service would likely fall on the Department of Justice and Constitutional Development and would require the allocation of budgetary resources by central government.

Another measure directed at socio-economic inequalities and the impact these have on legal services has been the enactment of section 35(4) of the LPA.[87] This provision aims to regulate the fees charged by legal professionals with the objective of improving access to justice. The South African Law Reform Commission has been tasked with developing recommendations regarding professional fees over the next two years.[88]

8 2 Systemic inefficiency in the courts

Student recommendations focussed on the introduction of more sophisticated technology in the courts and improved capacitation and training of court personnel. Once again, the fiscal implications are not insignificant. A student suggested the introduction of night courts to extend the hours of operation to deal with backlogs, whilst a few other students urged that the jurisdiction of the Small Claims' court be increased to take some of the pressure off the courts.[89] An increase in jurisdiction to R2000 has been implemented from 1 April, 2019.

I would further propose that quality assurance mechanisms be put in place to monitor the efficiency of the courts regarding hours of operation,

85 Minister Michael Masutha "Justice and Constitutional Development Dept Budget Vote 2018/19" https://www.gov.za/speeches/minister-michael-masutha-justice-and-constitutional-development-dept-budget-vote-201819-10 (accessed 2020-04-10).

86 Masutha *supra*.

87 Act 28 of 2014 s 35 (4).

88 South African Law Reform Commission "Investigation into Legal Fees: Project 142 Issue Paper 36" 16 March 2019.

89 Smith, Lurigio and Davis et al "Burning the Midnight Oil: An Examination of Cook County's Night Drug Court" 1994 *Justice System Journal* 42. This article describes the operation of night courts in the United States. However, in a legal system where backlogs abound, the South African court system could take note of this innovation; McQuoid-Mason "Access to Justice in SA: Are there enough lawyers?" 2013 *Onati Socio-Legal Series* 561.

treatment of litigants, and the adequacy and quality of service provided by court personnel.

8 3 High unmet demand for legal aid and quality legal representation for the poor

It is clear that resource constraints hamper the provision of legal aid and have an impact on the threshold for the means test. Almost all students recommended that the LASA budget and the means test threshold be increased, but in light of current trends such measures seem unlikely.[90] The impending reduction of budget for LASA is likely to aggravate this current state of affairs. Justice Minister Masutha recently stated: "these successes (the number of cases taken on by LASA) were recorded notwithstanding a budget deficit of R45.3million, which is projected to rise to R92.8 million during this financial year (2017)."[91]

In my view, given the polycentric nature of decision-making regarding national treasury allocations, it is possible that LASA may have to engage in fund-raising from public corporations, international funders and other *ad hoc* sources to address its budgetary deficit.

The use of students, pupil advocates and candidate attorneys could address some of the unmet demand for legal services. Whether supplementing the work of the legal aid attorneys in an administrative capacity, at a grassroots advisory level, or as legal representatives of indigent clients, these cohorts could extend the reach of LASA to more citizens. This suggestion was made by many students in a variety of formulations as it could be an immediate and practical way to improve the services of LASA. Participant 27 suggested the use of more mobile legal aid clinics, sponsored by large corporations, to make legal advice more accessible to rural citizens.[92] Community service obligations could supply staff such as senior students or candidate attorneys and pupil advocates.

The interpretation of the term 'community service' as applicable to practitioners in terms of the Legal Practice Act is contested.[93] It remains to be seen how this will be interpreted once the regulations in terms of the LPA come into effect. However, it seems, that whether or not it is intended to refer to *pro bono* work in section 29, access to justice could be enhanced by imposing a 48-hour requirement of legal work from lawyers in firms with more than 10 partners. In small firms (one to nine

90 These amounts were increased from 1 April 2019. See Legal Aid South Africa "How it works" https://legal-aid.co.za/how-it-works/ (accessed 2020-04-10).

91 Masutha *supra*.

92 Wizner & Aiken "Teaching and doing: The Role of law school clinics in enhancing access to justice" 2004 *Fordham Law Revue* 997. Although the article describes initiatives by university law clinics in the United States, the suggestions about mobile legal aid clinics is particularly apposite in South Africa where many rural areas are not serviced by legal aid offices.

93 Emdon 2017 *De Rebus*.

partners) the current 24-hour requirement could remain in place. Similarly, for advocates, a requirement of 24 hours community service seems reasonable. In practice, many large law firms have established *pro bono* divisions for the purposes of carrying out the community service obligations of all their partners. Although defeating the purpose of individual lawyers giving back to their communities, the desired outcome of hours of legal services delivered by experienced professionals is attained. While the demand for a focus on a number of other socio-economic rights such as the right to education, health care and housing exists, the right of access to justice is fundamental to the gradual realisation of these second generation rights through the legal system.[94] Much impact litigation, directed at addressing inherent inequalities and a lack of provision related to socio-economic rights, is most often undertaken by public interest law organisations, NGOs, university law clinics and the *pro bono* divisions of large law firms.[95]

Regarding in *forma pauperis* proceedings, it is feasible that if policy directives from the Department of Justice were to be issued to magistrates and judges, alerting them to this process, more cases would be referred for *pro bono* representation by practising lawyers.[96]

9 Conclusion

Despite the existence of a framework of provision for enhancing access to justice for those who cannot afford private legal services, the realities in the lower courts of South Africa, as observed by novice law students, are such, that substantive access to justice remains outside of the purview of poorest citizens. Barriers to accessing the legal system, both socio-economic and physical, can be addressed in the form of increased funding from Treasury for legal aid provision. Although the threshold for the means test for legal aid provision has recently been increased, the amount still excludes all but the truly indigent from receiving legal advice and representation.

Compliance by all legal practitioners with a mandatory number of *pro bono* hours could assist in addressing the unmet demand for free legal services for vulnerable and indigent persons. The implementation of a system of community service by candidate attorneys, pupil advocates, law students and graduates could support the increased provision of legal advice and representation for the poor and "missing middle" who cannot afford the fees charged by lawyers. However, these measures too would have financial implications for government. The conclusion must be

94 Nyenti 2013 *De Jure* 901.
95 Democracy, Governance and Service Delivery Research Programme of the Human Sciences Research Council "Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society Final Report" http://www.justice.gov.za/reportfiles/2017-CJPreport-Nov2015.pdf (accessed 2020-04-10).
96 Dugard 2008 *SAJHR* 219.

drawn that at present, access to legal services and thus access to justice remain an unfulfilled expectation rather than a reality for most citizens, other than an affluent minority, who can afford the exorbitant costs of legal representation charged by private practitioners.

Competition law and corporate social responsibility: a review of the special responsibility of dominant firms in competition law

Phumudzo S. Munyai
LLB LLM LLD
Associate Professor, Department of Private Law, University of Pretoria

SUMMARY

"*with great power, comes great responsibility*"[1]

Few concepts aptly captures competition law's expectations on firms with substantial market share or market power than '*with great power, comes great responsibility',* made popular in American movie *Spider Man*.[2] Although *Spider Man* helped made the concept popular, its true origin may be religious teachings and ancient cultural wisdoms. The Bible, *King James Version,* warns that "*For unto whomsoever much is given, of him shall be much required".*[3] In African culture, the value or principle of *Ubuntu,* with its emphasis on common humanity and good, counsels that one person should not thrive at the expense, or to the exclusion, of others.

The relevance and application of these principles or values to commercial relationships and rules of trade regulation, in particular competition law, is the object of this paper. In some competition law jurisdictions, abuse of dominance rules recognise, explicitly or impliedly, that firms with substantial market share or market power have a special 'duty' or 'responsibility' to the market.[4] The purpose of this paper is to investigate the link between certain elements of this special duty or responsibility and Corporate Social Responsibility ("CSR").[5] It is the argument of this paper that the principle of special responsibility, as applied in competition and abuse of dominance law, has elements of CSR.

1 Lee & Ditko *Amazing Fantasy No. 15: Spider Man* (1962) *13.*
2 Adapted from Lee & Ditko 13.
3 *The Holy Bible*, Luke 12:48.
4 *Michelin v Commission* Case No. C-322/81. Wood "EU Competition Law and the Internet: Present and Past Cases" 2011 *Competition Law International* 44; Szyszczak "Controlling Dominance in European Markets" 2010 *Fordham International Law Journal* 1755.
5 It is the assumption of this paper that the reader has some basic knowledge of what CSR entails as CSR is already a popular concept in business and legal culture. However, for the sake of completeness, a brief explanation of CSR will be provided in discussion that will follow. Because it is not the main object of this paper to provide a full exposition of what CSR entails, it is recommended that appropriate sources on what CSR entails be consulted, see Agudelo, Jóhannsdóttir & Davídsdóttir "A literature review of the history and evolution of corporate social responsibility" 2019 *International Journal of Corporate Social Responsibility* 1.

How to cite: Munyai 'Competition law and corporate social responsibility: a review of the special responsibility of dominant firms in competition law' 2020 *De Jure Law Journal* 267-285
http://dx.doi.org/10.17159/2225-7160/2020/v53a18

1 Introduction

It is generally accepted that the main or primary goal of competition law is to promote competition.[6] Competition entails the existence of commercial rivalry among different sellers of the same or similar services or products striving to win custom. Competition, and the pursuit thereof, is the ultimate antithesis of monopoly.[7] One of the likely outcomes of competition is that one seller may gain more custom than others, while others may have to make do with little or no custom. In worst case scenario, those with little or no custom may be forced to exit the market.

In this context, the difficult question for competition law, and indeed its main paradox, is what must the law do to ensure that competition in the market is maintained? Put differently, when one seller emerges victorious from the competitive struggle, what is the role of competition law and its enforcement agencies in the market and towards the emergent dominant firm specifically? To maintain a healthy competitive balance in the market, can competition law and its enforcement agencies require or expect the successful and thus dominant firm, once victorious, to start "pulling its competitive punches"[8] in order to "leave a certain amount of money on the table"[9] for other competitors in the market so as to avoid destroying competition?

Competition policy and law makers recognise that while the free market system is still a reliable mechanism for the allocation of resources, they also accept that in appropriate circumstances there may be justification for intervention in markets, particularly where such markets have failed or where they do not allocate resources more efficiently. Markets characterised by monopoly or firms with substantial market share are a good example of markets with poor and undesirable resource allocation. Competition law provides a mechanism to control the actions of monopolies and firms with substantial market share. The

6 Brassey *et al Competition Law* (2002) 2.

7 This is consistent with the view that the origin and development of competition law had its roots in the widespread hostility that existed towards monopoly. *Standard Oil Co of New Jersey v United States* 221 US 1 1911 77-82; *United States v Aluminium Company of America* 148 F2d 416 2d Cir 1945 427-429; *United States v Columbia Steel Co* 334 US 495 1948 536. Orbach "How Antitrust Lost its Goal" 2013 *Fordham Law Review* 2254; Bradley, Jr. "On the Origins of the Sherman Act" 1990 *Cato Journal* 737-738; Fox "Monopolization and Dominance in the United States and the European Community: Efficiency Opportunity and Fairness" 1986 *Notre Dame Law Review* 983; Letwin *Law and Economic Policy in America* (1967)15, 54 and 59; Thorelli *The Federal Antitrust Policy: Origination of an American Tradition* (1954) 1–5.

8 *Goldwasser v Ameritech Corp* 222 F.3d 390 7th Cir. 2000 397-398. US Department of Justice *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act* (2008) 8.

9 *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another* Case No 13/CR/FEB04 para 131.

law against the abuse or misuse of dominance or market power are a case in point.

However, abuse of dominance law is strange. Unlike criminal law, for example, which proscribe defined criminal conduct and penalises it regardless of who the offender is, abuse of dominance law, by contrast, is selective.[10] Under the law of abuse of dominance, certain conduct is prohibited only if performed by firms meeting the legal definition of dominance. When the same conduct is performed by a firm that does not meet the legal definition of dominance, it is treated as lawful and therefore not actionable.[11] While the logical defensibility of the law of abuse of dominance is not the subject of this paper, it is sufficient to be observed here that monopolies and firms with substantial market power are treated differently in competition law. This beg the questions, are there special rules for dominant firms and do dominant firms have any special duty or responsibility under the law?

As Bakan observes, some corporations, particularly those with substantial market share, "are dangerous possessors of great power which they wield over people and societies".[12] It may be appropriate, therefore, that the manner in which firms with substantial market power exercise their power is regulated. In some jurisdictions, especially in European Competition law, abuse of dominance rules include the principle that dominant firms have a "special responsibility" to the market.[13] Although the exact meaning of this concept is not the subject of broad consensus, its operation – as this paper will show – may have the effect of fostering a kind of Corporate Social Responsibility ("CSR") on firms with substantial market share.

Although a thorough investigation of the meaning and scope of the concept of CSR is not within the remit of this paper, it may be helpful to provide an explanation of what CSR entails and how it may be relevant for competition law. It is appropriate to note from the onset that the definition of CSR is context dependant and may as a result differ from one industry or country to another.[14] However, there is no doubt as to what its core principle is: businesses have a responsibility towards the industries and communities in which they operate.[15] This means that corporate strategies, decisions and day to day practices cannot be driven

10 Munyai *A Critical Review of the Treatment of Dominant Firms In Competition Law: A South African Perspective* (2016) ch 5.
11 Munyai ch 5.
12 Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (2005) 1 – 2.
13 *Michelin v Commission supra*. Wood 2011 *Competition Law International* 44; Szyszczak 2010 *Fordham International Law Journal*1755.
14 Blowfield & Frynas "Setting new agendas: critical perspectives on Corporate Social Responsibility in the developing world" 2005 *International Affairs* 502.
15 Kloppers "Driving corporate social responsibility through Black economic empowerment Law, Democracy and Development" 2014 *Law, Democracy and Development* 63.

by profit and profit alone.[16] Profit maximisation should be balanced with other goals. As the United Nations Industrial Development Organisation observes, other key issues which companies must consider include, responsible sourcing, employee and community interest, social equity, gender balance, human rights, good governance and anti-corruption measures.[17] CSR principles requires corporations to have a much broader view of their goals and an awareness of the impact of their operations on a broader set of stakeholders. Indeed business must have a social conscience.[18]

From a South African perspective, CSR acquires an additional meaning. A number of government policies and legislation promoting socio-economic transformation, notably those relating to BEE,[19] have been described as espousing a CSR element.[20] South African competition policy, while based fundamentally on traditional competition policy principles, also embraces a host of equity and distribution goals.[21] Among its stated goals, the Competition Act[22] provides that the purpose of the Act is to promote employment; ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and promote greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.[23] The substantive provisions of the Act,[24] strengthened by recent amendments,[25] ensures that equity and distributive goals are an important part of merger review as well as determinations as to whether a prohibited practice, such as an abuse of dominance, has occurred.[26] This means that when designing their policies and strategies and when embarking on their day to day practices, South African firms must judge the impact of their actions on a broader set of interests and stakeholders, which includes employees and small businesses, particularly those owned by historically disadvantaged persons. In this context, the actions

16 As Esser observes, corporate actions purely focused on short gain and profit maximisation tend to have a negative impact, even on the relevant firm's own long term profit, Esser "Corporate Social Responsibility: A Company Law Perspective" 2011 *SA Merc LJ* 317 – 18.

17 United Nations Industrial Development Organisation "What is CSR" available at https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr (accessed 2020-03-032).

18 Esser 2011 *SA Merc LJ* 317 – 19.

19 Broad-Based Black Economic Empowerment Act 53 of 2003.

20 Kloppers 2014 *Law, Democracy and Development* 60.

21 OECD *Competition Law and Policy in South Africa, An OECD Peer Review* 2003 17 – 20.

22 89 of 1998.

23 See preamble & s 2 of the Act.

24 Contained in chs 2 & 3 of the Act.

25 Competition Amendment Act 18 of 2018.

26 Ss 12A(1)(b) & 12A(3) of the Act, as amended by s 9 of the 2018 Amendment Act; s 9(1)(a)(ii) of the Act, as amended by s 6 of the 2018 Amendment Act.

of South African firms are to be judged, not only from a purely legal and economic standard, but also a social one.

Corporate social responsibility, it is submitted, is particularly relevant in the context of firms with substantial market share, as they may easily be able to abuse their market power.[27] So, by prohibiting the abuse of market power by dominant firms, it is argued, competition law seeks to foster not only legal but also socially responsible corporate conduct.[28] The idea that firms with substantial market share have social responsibilities beyond the maximisation of shareholder value is premised on the view that dominant firms have too much political, social and economic power and for that reason they have social responsibilities to a broader range of stakeholders.[29]

As the gap between the wealthy and the poor widens, there is recognition in most societies that inequality will become a greater socio-economic problem. Societies are finding ways to respond to the challenge of inequality, especially in the economic sphere. In competition law, dominant firms are being required to think about the impact of their actions on the livelihoods of their rivals, especially small and medium sized enterprises. For example, the South African Competition Act provides that certain actions or practices by dominant firms, such as price discrimination, will be unlawful, particularly if they are likely to impede small and medium sized enterprises, or firms owned or controlled by historically disadvantaged persons, from participating effectively in the relevant market.[30]

For purposes of this paper, the jurisdictions that have been selected for purposes of illustrating the application of the principle of special responsibility in competition law are the European Economic Community and South Africa. In different ways, these jurisdictions have developed rules that, expressly or implicitly, recognise or suggest that dominant firms have a "special responsibility" to the market or society in general, based on the need to protect competition and the public interest.

In the discussion that follows, i start with a discussion of the European Economic Community, as the jurisdiction in which the special responsibility of dominant firms is most central to their abuse of dominance law enforcement. I then provide a discussion of the special responsibility of dominant firms under South African competition law. This will then be followed by a broad analysis of the special responsibility of dominant firms from a legal and CSR perspective. In the end I provide a summary of my observations and conclusions.

27 Quo "The role of competition law in promoting corporate social responsibility: an Australian perspective" 2010 *Company Lawyer* 1.
28 Quo 2010 *Company Lawyer* 1.
29 Quo 2010 *Company Lawyer* 9.
30 S 9(1)(a)(ii) of the Act, as amended by s 6 of the 2018 Amendment Act.

2 European competition law

The cornerstone of European competition law is Article 102 of the Treaty on the Functioning of the European Union.[31] Article 102 provides that: "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."[32] It is important to note that Article 102 does not make any explicit reference to "special responsibility" or "CSR". Article 102 does not even define the meaning of 'dominant position', an important concept in the application and enforcement of the provision. However, the practice established by case law is that a firm is considered dominant when it enjoys a position of economic strength in a market enabling it "to act anticompetitively to an appreciable extent independent of its competitors, customers and consumers".[33] A firm with a market share of at least 50 per cent is, in the absence of exceptional circumstances pointing to the contrary, presumed to be in such position of economic strength and therefore dominant.[34] Connected to the concept of dominance is the idea that some dominant firms can be "super-dominant".[35] This refers to a state where a dominant firm's market share and level of dominance in the market is substantially higher than the average it normally takes to be considered dominant.

One of the most important principles that have emerged in the application and enforcement of Article 102 is that a dominant undertaking has a special responsibility to the market.[36] And when a firm's level of dominance is substantially higher than the average

31 Official Journal of the European Union, C 202, 7 June 2016. See also Vickers "Abuse of Market Power" 2005 *Economic Journal* F245.

32 Such abuse may, the Article provides further, consist in: directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; limiting production, markets or technical development to the prejudice of consumers; applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

33 *United Brands Company and United Brands Continentaal BV v Commission* Case No. 27/76 para 65; *Hoffmann-La Roche & Co AG v Commission* Case No. 85/76 para 39.

34 *AKZO Chemie BV v Commission* Case No. 62/86 para 60; *Solvay SA v Commission* Case No. T-57/01 para 279; *France Télécom SA v Commission* Case No. T-340/03 para 100; *AstraZeneca AB v Commission* Case No. T-321/05 para 243.

35 Amato *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (1997) 70-71; Schweitzer "The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC" (2007) paper deliver at the 12th Annual Competition Law and Policy Workshop, Florence; Szyszczak 2010 *Fordham International Law Journal* 1756.

36 Wood 2011 *Competition Law International* 44; Szyszczak 2010 *Fordham International Law Journal* 1755.

required for dominance, more special responsibilities are imposed on it, in recognition of its status as a super-dominant firm. To illustrate how the special responsibility of dominant firms work, in *Europemballage Corporation and Continental Can Company Inc v Commission*[37] the Court observed that a dominant firm may be found to have abused its position in the market by 'strengthening its position in the market to such an extent that the degree of dominance achieved makes it impossible for other firms in the market to survive without relying on, or cooperating with, it'.[38] Because Article 102 does not provide a closed list of practices or conduct that may fall foul of the provision (on the contrary the provision is open ended), the implication therefore is that nearly every action or practice by a firm considered to be dominant which strengthens its position or market share will fall foul of the provision. The maintenance and improvement of market share lies at the heart of the competitive process. It is the goal and ambition of every business to improve their market share. However, firms which are subject to the special responsibility, as dominant firms are, may find themselves denied or restricted from exercising this basic economic right.

Dominant firms may as a result find that their ability to compete freely and effectively in the market is limited. This may be in spite of the fact that same conduct would be unobjectionable when adopted by other firms that are not dominant.[39] It would seem that in European competition law, dominant firms, once they achieve a certain degree of commercial success, are expected to "pull their competitive punches so as to avoid the degree of marketplace success that gives them monopoly power" or "lie down and play dead and watch the quality of their products deteriorate and their customers base eroded".[40] This they must do to avoid the unwanted attention of competition authorities. As Marvel observes, in European competition law large firms are expected to "hunker down to avoid attracting the attention of competition authorities by building on their successes".[41]

A salient feature of the operation of the principle of special responsibility, particularly having regard to the restrictions imposed by it on dominant firms, is consideration for other market players. Dominant firms are required to act in a socially responsible way, by leaving the market open for entry and or growth by others, instead of monopolising it. In this context, it can be said that the special responsibility of

37 Case No. C-6/72.
38 *Europemballage Corporation and Continental Can Company Inc v Commission* supra para 26. This view was also endorsed in *Atlantic Container Line AB and Others v Commission* Joined Cases No. T-191/98, T-212/98 to T-214/98 para 1262.
39 Ahlborn, Evans & Padilla "Competition Policy in the New Economy: Is European Competition Law up to the Challenge?" 2001 *European Competition Law Review* 162.
40 *Goldwasser v Ameritech Corp supra*; US Department of Justice (2008) 8.
41 Marvel "The New (Or Is It Old?) Approach to Antitrust Regulation" 2009 *Global Competition Policy* 2.

dominant firms, as applied in European competition law, has elements of CSR. While the special responsibility of dominant firms and its accompanying CSR elements may be seen by some as unnecessary, there are some who are of the firm view that the principle plays an important role of ensuring that markets are accessible.[42]

Following to the introductory discussion of European competition law and CSR provided above, I will now provide a brief discussion of the development of the principle of special responsibility with a view to highlight its CSR elements.

2 1 The principle of special responsibility

As stated earlier, Article 102 does not refer to or mention the issue of 'special responsibility' that may attach to dominant undertakings. The principle was developed by case law. One of the earliest moments in which the principle of special responsibility of dominant firms was recognised in European competition law was in the case of *Michelin v Commission*.[43] In this case, the Court found that "a dominant undertaking has a 'special responsibility' not to allow its conduct to impair genuine undistorted competition on the market".[44] The *Michelin* decision has been followed by numerous other subsequent decisions, to such an extent that it can confidently be said that the special responsibility of dominant firms has become an important principle of European abuse of dominance law.[45]

42 The special responsibility of dominant firms, Vatiero observes, can be justified in terms of its role in preventing a distortion of competition in the market, see Vatiero https://www.academia.edu/3038173/Power_in_the_Market_on_the_Dominant_Position (accessed 2020-03-02). Bavasso also argues that the notion of a dominant undertaking having a special responsibility is not inconsistent with the principle that efficient behavior ought to be promoted and only prevented when it gives rise to exclusion of a competitor which is likely to produce consumer harm, see Bavasso "The Role of Intent Under Article 82 EC: From "Flushing the Turkeys" to "Spotting Lionesses" in Regent's Park" 2005 *European Competition Law Review* 620.

43 *Michelin v Commission supra*.

44 *Michelin v Commission supra* para 57.

45 *BPB Industries Plc and British Gypsum Ltd v Commission* Case No. T-65/89 para 67; *Compagnie Maritime Belge Transports SA and Others v Commission* Joined Cases No. T-24/93, T-25/93, T-26/93 & T-28/93 paras 19 & 106; *Tetra Pak International SA v Commission* Case No. C-333/94 P para 24; *Compagnie Maritime Belge Transports SA & Dafra-Lines A/S v Commission* Joined Cases No. C-395/96 P & C-396/96 P paras 37 & 85; *Irish Sugar plc v. European Commission* Case No. T-228/97 paras 5 & 112 ; *Duetsche Telekom AG v Commission* Case No. C-280/08 P para 176 ; *Konkurrensverket v TeliaSonera Sverige* Case No. C-52/09 para 24.

Judging by the decision in *Continental Can,*[46] there can be little doubt that this principle may make it difficult for dominant firms to engage in a wide range of ordinary business conduct which other firms that are not dominant may freely engage in.[47] The principle effectively means that dominant firms may not be allowed to act in the same manner as other firms that are not dominant. This seems to suggest that there is effectively one law for dominant firms and another for firms that are not dominant.[48] Some observers argue that there is no rational explanation for this unequal treatment of firms, where sound commercial practices that are common in the marketplace may become illegal only when adopted by dominant firms.[49] But in societies where inequality is growing, and with no signs of it abating, it may be understandable why some competition authorities may look for ways to prevent the capitalisation of markets by one or a few entities in order to preserve opportunities for others. After all competition, the main object of the law, may not exist if there are no competitors.

2 2 The concept of super-dominance: with more dominance, comes more responsibilities

Article 102 does not formally distinguish between the behaviors of ordinarily dominant and super-dominant undertakings. The provision does not even refer to degrees of dominance or different responsibilities for different dominant undertakings.[50] In European community competition law, the concept of super-dominance was first entertained in the written opinion of the Advocate General in *Compagnie Maritime Belge Transports SA v Commission*. [51] It is important to note, however, that in this case the Court did not itself use the term. In *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading,*[52] the UK Competition Appeal Tribunal referred with approval to the concept of super-dominance as proposed in the Advocate General's opinion in *Compagnie Maritime Belge,* when it found that "super-dominant firms may have particularly more onerous responsibilities than

46 That an action by a dominant firm to strengthen its dominant position in the market to such an extent that the degree of dominance achieved makes it impossible for other firms in the market to survive without relying on, or cooperating with, Case No. C-6/72 para 26. This view was also endorsed in *Atlantic Container Line AB and Others v Commission* Joined Cases No. T-191/98, T-212/98 to T-214/98 para 1262.

47 Marsden & Lovdahl "Guidance on abuse in Europe: The Continued Concern for Rivalry and a Competitive Structure" 2010 *The Antitrust Bulletin* 892; Bloch *et al* "A Comparative Analysis of Article 82 and Section 2 the Sherman Act" 2006 *Business Law International* 142.

48 Vickers 2005 *Economic Journal* F246.

49 Lianos https://papers.ssrn.com/sol3/papers.cfm?abstract_id = 2235875 (accessed 2020-03-03).

50 Szyszczak 2010 *Fordham International Law Journal* 1758.

51 Opinion of Advocate General Fennelly, *Compagnie Maritime Belge Transports SA and Dafra-Lines A/S v Commission* Joined Cases No. C-395/96 P & C-396/96 P para 137; Szyszczak 2010 *Fordham International Law Journal* 1757.

52 Case No 1001/1/1/01 2002 CAT 1.

other dominant undertakings".[53] In *Konkurrensverket v TeliaSonera Sverige,*[54] the European Court of Justice acknowledged that the concept of super-dominance has become part of European abuse of dominance law, adding that "an undertaking's degree of dominance in the market is relevant to the assessment of the lawfulness of its conduct".[55]

The concept of super-dominance clearly suggests that there may be varying degrees of dominance, and possibly different legal obligations accompanying different levels or categories of dominance. Whish and Bailey allude to this potential distinction in legal responsibilities and obligations between super-dominant and ordinarily dominant firms when they observe that "if an ordinarily dominant undertaking has a special responsibility, a super-dominant firm should have an even greater responsibility".[56] The rationale behind super-dominance is that if a firm with a 50 per cent market share is dominant, as is standard practice in European competition law,[57] then a firm with a 90 per cent market share is likely to be even more dominant.[58] More responsibilities and constraints on market conduct will accordingly follow a firm considered to be super-dominant.

2 3 Summary of observations

Constraints on the market conduct of firms with substantial market share occasioned by the principle of special responsibility are in line with the European view that the presence in markets of firms with substantial market shares is inimical to the ideal of free and effective competition. The existence or presence of such firms in markets is seen as an indication that "the degree of competition in that market has been weakened".[59] As Niels and Jenkins observe, "the notion that the mere existence of dominant firms is dangerous for competition is still deeply embedded in European competition law".[60]

Successful firms, the ones whose dominant status is achieved on the merit of their performance and innovation, may thus find their success

53 *Napp Pharmaceutical Holdings supra* para 219.
54 Case No. C-52/09.
55 *Konkurrensverket v TeliaSonera Sverige supra* para 81.
56 Whish & Bailey *Competition Law* (2012) 189; Skilbeck "Carter Holt Harvey Building Products Group Ltd v Commerce Commission [2004] UKPC 37; [2005] 2 LRC 320" 2005 *Commonwealth Law Bulletin* 191.
57 *AKZO Chemie BV v Commission supra*; *Solvay SA v Commission supra*; *France Télécom SA v Commission supra*; *AstraZeneca AB v Commission supra*.
58 Geradin http://ssrn.com/abstract = 770144 (accessed 2020-03-02).
59 *Hoffmann-La Roche & Co AG v Commission supra* para 91; *Michelin v Commission supra* para 70; *General Electric v Commission* Case No. T- 210/01 para 549; *British Airways v Commission* Case No. C-95/04P para 66; *Tomra Systems ASA and Others v Commission* Case No. T-155/06 paras 38 & 206. See also Sinclair "Abuse of Dominance at a Crossroads - Potential Effect, Object and Appreciability Under Article 82 EC" 2004 *European Competition Law Review* 493.
60 Niels & Jenkins "Reform of Article 82: Where the Link Between Dominance and Effects Breaks Down" 2005 *European Competition Law Review* 605.

unenjoyable,[61] especially if they find the CSR elements embodied in the special responsibility principle to be of no relevance to their organisations. As Arowolo observes, "there are serious disincentives to the acquisition and maintenance of dominance", in view of the manner in which Article 102 has been applied by European competition authorities.[62] European courts have made a number of decisions the effect of which has been to prevent dominant firms from pursuing commercial practices that are perfectly standard in the market.[63] For example, some dominant firms have even been precluded from aligning their prices to meet competition from their rivals.[64] As Gal contends, because the rights of dominant firms to protect their commercial interests when threatened are not properly recognised, dominant firms have to compete "with their hands tied to their back".[65]

There are different perspectives from which observers can view the principle of special responsibility as applied in European competition law. In this paper, the application of the principle of special responsibility in European competition law is seen as fostering a kind of corporate social responsibility on dominant firms. With dominant firms not allowed or being restricted from doing what other non-dominant firms may do freely, dominant firms are effectively being required to think not only about the maximisation of their profits and market share. They are also being forced to consider the impact of their actions on the sustainability of competition in the market and the welfare of their rivals, particularly small and medium sized enterprises. It is important to note that business is not just business. By and large it is the livelihoods of individuals and their families. Depending on one's level of moral and social awareness, there may be a case for the preservation of the livelihoods of others when under threat by aggressive profit and market share maximisation driven practices, which have no regard for the sustainability of the livelihoods of others. Responsible corporations may caution themselves against this form of corporate aggression, even when exercising it is not strictly unlawful. Irresponsible ones may need a nudge

61 Subiotto "The Special Responsibility of Dominant Undertakings Not to Impair Genuine Undistorted Competition" 1994 *World Competition* 6.

62 Arowolo "Application of the Concept of Barriers to Entry Under Article 82 of the EC Treaty: Is There a Case for Review?" 2005 *European Competition Law Review* 251.

63 See *Atlantic Container Line AB and Others v Commission supra* paras 1105-1127. Other standard market practices that may be prohibited if adopted by a dominant firm include loyalty discounts and rebates, see generally *Hoffmann-La Roche & Co AG v Commission supra*; *Michelin v Commission supra*; *BPB Industries Plc and British Gypsum Ltd v Commission supra*.

64 *AKZO Chemie BV v Commission supra* paras 70-71 & 133–134; *France Télécom SA v Commission supra* paras 171, 179, 182 and 187; *Tetra Pak International SA v Commission supra* para 41. See also European Commission DG Competition http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf (accessed 2020-03-03).

65 Gal "Below-cost Price Alignment: Meeting or Beating Competition? The France Télécom Case" 2007 *European Competition Law Review* 382-383.

in that direction. In different ways, the principle of special responsibility does that.

3 South African competition law

It is important to note that section 8 of the Competition Act,[66] which prohibits dominant firms from engaging in various practices deemed to constitute an abuse of dominance,[67] does not mention any special responsibility that may attach to a dominant firm. As far as the question of dominance is concerned, the Competition Act outlines various instances in which dominance may be deemed to exist in a market.[68] However, the Competition Act does not say anything about the concept of super-dominance. Section 7 of the Competition Act provides that a firm is dominant in the market if "it has at least 45% market share".[69] It states further that a firm can also be dominant if "it has between 35% – 45% market share, unless the firm concerned can show that it does not have market power".[70] Lastly, section 7 provides that a firm can be deemed to be dominant if "it has less than 35% market share, but has market power".[71] Market power is defined in section 1 of the Act as the power of a *firm* to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.[72] It can be seen that the definition of market power under the South African Competition Act is similar to or echoes the definition of dominance followed in European competition law.[73] Therefore market power can be taken to mean the same thing as dominance.[74]

Despite the absence of any reference to the concepts of special responsibility and super-dominance in the Competition Act, South African competition authorities have invoked them. By so doing, they followed the lead of European competition law. It is perhaps relevant to note here that of all foreign competition jurisdictions, European competition law has had the most pervasive influence in the development of South African competition law. Indeed South African competition case law is replete with generous quotations of principles and rules from European competition law. As our Competition Appeal

66 89 of 1998.
67 Such practices include excessive pricing; refusal to give a competitor access to an essential facility when doing so is feasible; engaging in various exclusionary acts that includes requiring or inducing a supplier or customer not to deal with a competitor; refusing to supply a competitor with scarce goods or resources when doing so is feasible; bundling/tying; predatory pricing; buying-up scare goods or resources required by a competitor.
68 S 7 of the Competition Act.
69 S 7(a) of the Competition Act.
70 S 7(b) of the Competition Act.
71 S 7(c) of the Competition Act.
72 S 1 of the Competition Act.
73 *United Brands Company and United Brands Continentaal BV v Commission supra* para 65; *Hoffmann-La Roche & Co AG v Commission* supra para 39.
74 Munyai 244.

Court also found in *Senwes Limited v Competition Commission,*[75] the theoretical foundations of European competition law "are more congruent with those of our own Competition Act".[76] This also makes European competition law a suitable jurisdiction to study for purposes of understanding the development of the principle of the special responsibility of dominant firms in South African law.

3 1 The principle of special responsibility

It is appropriate to note that the principle of special responsibility has not been recognised explicitly in the majority of decisions by South African competition authorities. But this is neither surprising nor unusual, given that competition authorities in South Africa have thus far had a limited number of abuse of dominance cases to deal with.[77] The first South African competition law decision to explicitly refer to the special responsibility of dominant firms is that of the Competition Tribunal in *Competition Commission v South African Airways (Pty) Ltd*.[78]

In *South African Airways* the Tribunal cited with approval a passage from the European decision in *Michelin*,[79] in which it was found that "a dominant firm had a special responsibility not to allow its conduct to impair genuine undistorted competition in the market".[80] Following *Michelin*, the Tribunal found that South African Airways bore this 'special responsibility' towards the market.[81] It is interesting to note that in this particular case, South African Airways, as the Tribunal observed,[82] lacked an appreciation of what this 'special responsibility' it was found

75 Case No 87/CAC/Feb09.

76 *Senwes Limited v Competition Commission supra* para 54. See Munyai "The Interface Between Competition and Constitutional Law: Intergrating Constitutional Norms in South African Competition Law Proceedings" 2013 *South African Mercantile Law Journal* 326-327.

77 For example, at the time of the preparation of this paper the list of complaints involving prohibited practices under ch 2 of the Competition Act decided by the Competition Tribunal (as the primary adjudicative body in competition law) is fewer than 40. And of these decided complaints, many of them did not concern the abuse of dominance but restrictive horizontal and vertical practices, see Competition Tribunal of South Africa date unknown http://www.comptrib.co.za/cases/complaint/?start = 0 (accessed 2020-03-02).

78 *Competition Commission v South African Airways (Pty) Ltd* Case No 18/CR/Mar01.

79 *Michelin v Commission supra*.

80 *Michelin v Commission supra* para 57; *Competition Commission v South African Airways supra* para 302.

81 *Competition Commission v South African Airways supra* para 303. Hawthorne "Has the Conduct-based Approach to Competition Law in South Africa Led to Consistent Interpretations of Harm to Competition?" 2008 *South African Journal of Economic Management and Science* 292.

82 *Competition Commission v South African Airways supra* para 303. Part of this confusion had to do with the approach the Competition Commission adopted in defining the relevant market which South African Airways disputed, see *Competition Commission v South African Airways supra* paras 50; 51 & 57.

to have entailed.[83] However, the Tribunal insisted that South African Airways ought nevertheless to have been alert to any possible dangers to the market inherent in its conduct as a dominant firm having this special responsibility.[84]

Another South African competition decision, and perhaps the most prominent, which has explicitly recognised the special responsibility of dominant undertakings towards the market is *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another*.[85] In this case the Tribunal observed that the principle of special responsibility, which applies to the 'privileged status' of dominance, is well recognised in scholarly work and in the decisions of foreign competition adjudicators.[86]

There is limited academic commentary in South Africa on the usefulness or otherwise of the principle of special responsibility of dominant firms. What does exist appears overwhelmingly sympathetic to its use in our law.[87] As one commentator remarked, 'the imposition of a special responsibility on dominant firms in South African competition law is justified, as it is consistent with the idea that in the presence of dominant firms competition in the market is already weakened and that any interference by the dominant firm with the market structure may eliminate all competition'.[88]

Kampel has gone so far as to suggest that "the South African Competition Act may need to be amended in order to ensure that it explicitly imposes a special responsibility on dominant firms to maintain genuine undistorted competition in the market".[89] The special responsibility of dominant firms, Kampel further submits, will be particularly necessary in South African competition law when regard is had to the historical economic context and prevailing concentrated market structures that are not conducive to free and effective participation in the economy by small and medium-sized enterprises.[90]

3 2 The concept of super-dominance

Most South African abuse of dominance cases in which substantial market shares have been involved have generally adopted the concept of

83 *Competition Commission v South African Airways supra* para 303.
84 *Competition Commission v South African Airways supra* para 303.
85 Case No 13/CR/FEB04.
86 *Harmony Gold Mining v Mittal Steel supra* para 96.
87 Hawthorne 2008 *South African Journal of Economic Management and Science* 303.
88 Njoroge *Regulation of dominant firms in South Africa* (2011) 3.
89 Kampel https://ideas.repec.org/p/ags/idpmcr/30655.html (accessed 2019-08-15).
90 Kampel https://ideas.repec.org/p/ags/idpmcr/30655.html (accessed 2019-08-15).

"overwhelming dominance",[91] which may have the same connotation as super-dominance. The concept of 'super-dominance' entered the annals of South African competition law jurisprudence through the decision of the Competition Tribunal in *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another*.[92] The Tribunal found Mittal Steel South Africa to be not only dominant, but also 'super-dominant'.[93] In this case, the Tribunal cited with approval the UK competition decision in *Napp Pharmaceutical Holdings Limited*,[94] which emphasised the principle that "the more dominant the firm the more onerous responsibilities it attracts".[95] Referring to the obligation imposed on Mittal Steel South Africa, as a super-dominant firm, not to charge excessive prices to its customers, the Tribunal found that when devising its pricing policies, Mittal Steel South Africa was expected to "leave a certain amount of money on the table".[96] This means that dominant firms are required by law to refrain from taking the utmost advantage of their positions in the market, even when doing so may not completely be illegal.

To demonstrate the extent to which the Tribunal embraced the concept of super-dominance, it used the term more than 40 times in this decision.[97] When this is taken into account, it is clear that the use of the concept of super-dominance in this case was not some casual remarks of the Tribunal made in passing. It was based on a genuine belief on the part of the Tribunal that the concept is of fundamental relevance and importance to South African abuse of dominance law enforcement. Unhappy with the decision of the Tribunal, Mittal Steel South Africa appealed to the Competition Appeal Court.

On appeal, in *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another*,[98] the Competition Appeal Court observed that section 8 of the Competition Act makes no reference to the term "super-dominance".[99] However, the Court was clearly sympathetic to why the Tribunal had used the term. The Competition Appeal Court found that "in holding that a firm is 'super-dominant', the Tribunal was indicating that the firm concerned was able to exercise its

91 *Harmony Gold Mining v Mittal Steel supra* paras 96 & 109; *Competition Commission and Another v British American Tobacco South Africa (Pty) Ltd* Case No 05/CR/Feb05 paras 4 & 38; *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* Case No 70/CAC/Apr07 para 77; *Competition Commission v South African Breweries Limited and Others* 2015 (3) SA 329 (CAC) paras 1, 52 & 53.
92 *Harmony Gold Mining v Mittal Steel supra*.
93 *Harmony Gold Mining v Mittal Steel supra* paras 121 & 164.
94 *Napp Pharmaceutical Holdings supra*.
95 *Napp Pharmaceutical Holdings supra* para 219.
96 *Harmony Gold Mining v Mittal Steel supra* para 131.
97 *Harmony Gold Mining v Mittal Steel supra* paras 37; 47; 61; 84; 106; 108; 112; 117; 121; 126; 129; 131; 132; 133; 143; 152; 154; 163; 164; 175; 189; 194; 195 & 196.
98 *Mittal Steel South Africa v Harmony Gold Mining Company supra*.
99 *Mittal Steel South Africa v Harmony Gold Mining Company supra* para 30.

market power as if it were a monopolist".[100] For its part, the Competition Appeal Court also found that Mittal Steel South Africa had done little to show that it was not "super-dominant" or "overwhelmingly dominant".[101]

Crucially, the central point on which the Competition Appeal Court eventually overturned the Tribunal's *Mittal* decision was not the use of the concept of 'super-dominance' by the Tribunal, but the Tribunal's own failure to evaluate Mittal Steel South Africa's pricing in order to determine whether there had been excessive pricing.[102] Having regard to the above, it can be said that the concept of 'super-dominance' has not been expunged from South African competition law. This argument is also fortified by the fact that the concept of super-dominance does not stand alone but is an extension of, and gives effect to, the principle of 'special responsibility', which has never been questioned and enjoys respectable support in our competition law.

3 3 Summary of observations

What this means is that firms with substantial market shares in South Africa must, as their European counterparts, be more cautious of the impact of their actions on the accessibility of markets and the survival of rivals. Considering that inequality remains high in South Africa and that many markets in the economy remain highly concentrated and dominated by a few large firms, it can hardly be surprising that dominant firms, as responsible corporate citizens, are expected *to leave a certain amount of money on the table*, to borrow from the language of the Tribunal in *Mittal*. This will be in line, not only with their legal obligations, but also their corporate social responsibilities.

4 An analysis of the special responsibility of dominant firms form a legal and CSR perspective

It is appropriate to acknowledge that the principle of special responsibility may play an important role of ensuring that markets are accessible and competitive. However, it is also clear that the principle may also raise significant legal concerns. One of the key issues that emerges in the evaluation of the principle of special responsibility is that once a firm is found to enjoy substantial maker share, it may find its market conduct constrained by virtue of its status as a dominant firm. And these constrains will apply regardless of whether the firm acquired its market share lawfully or fairly. The overall effect may be that the ability of such a firm to compete freely and effectively in the market may

100 *Mittal Steel South Africa v Harmony Gold Mining Company supra* para 19.
101 *Mittal Steel South Africa v Harmony Gold Mining Company supra* para 77.
102 *Mittal Steel South Africa v Harmony Gold Mining Company supra* para 28 & 75.

be limited.[103] As a commentator remarked, dominant firms may have to compete "with their hands tied to their back".[104] In some instances a dominant firm may even find itself restricted from engaging in market conduct that is common among other firms that may not be dominant in the market. Although it may be a stretch to argue on this basis alone that the principle of special responsibility would violate some legal principle, the fact that the operation of the principle may impact unfavourably on the ability of dominant firms to compete freely is beyond doubt.

From a South African constitutional point of view, dominant firms, like all other enterprises, are entitled to certain rights in the Bill of Rights.[105] Indeed, the Bill of Rights applies to all laws, including competition law.[106] In *Woodlands Dairy (Pty) Ltd and Another v Competition Commission*[107] the Supreme Court of Appeal emphasised that the Competition Act must be applied in a manner that least impinges on the fundamental rights of affected firms.[108] The fundamental rights relevant to the field of competition law may include, but are not limited to, the right to fairness, freedom of trade, equality and non-discrimination.[109] In *AK Entertainment CC v Minister of Safety and Security*[110] the Court held that "it is difficult to appreciate why a corporation should not be entitled to enforce the Bill of Rights, in particular the equality clause, where an executive or administrative functionary blatantly treats it unequally from all other persons".[111]

However, a counter argument can also be made to the effect that, when historic and prevailing economic inequalities are taken into consideration, restrictions on the market conduct of dominant firms occasioned by the operation of the principle of special responsibility are a justifiable and necessary limitation of rights designed to achieve the transformative objectives of the Constitution. From a South African CSR perspective, this argument may have some persuasive force.

Some, in fact many, private corporate behemoths currently dominating the economy in South Africa traces their history back to the times of apartheid. There is no doubt that they may have been enabled, directly or indirectly, in their monopolisation of the economy by favorable state policies. Other entities were also designed as state

103 Arowolo 2005 *European Competition Law Review* 251.
104 Gal 2007 *European Competition Law Review* 382-383.
105 S 8(4) of the Constitution. *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 57.
106 S 8(1) of the Constitution.
107 2010 6 SA 108 (SCA).
108 *Woodlands Dairy v Competition Commission supra* para 10.
109 Neethling & Rutherford "The Law of Competition and the Bill of Rights" in JA Faris (ed) *Law of South Africa*, Annual Cumulative Supplement, 2nd vol 2(2) (Lexis Nexis Online) para 233; Van Heerden and Neethling *Unlawful Competition* 2nd ed (2008)12-13.
110 1994 4 BCLR 31 (E); 1995 1 SA 783 (E).
111 AK Entertainment CC v Minister of Safety and Security supra 38; 39

monopolies operating in various strategic sectors of the economy and continues to operate to this day with substantial degrees of market power and control over their respective sectors. In this context, it would seem reasonable for competition authorities to insist that firms in this privileged position must, in line with their special responsibilities to the market, act more carefully when taking advantage of their positions in the market, even when doing so may not be illegal. It may be fair and reasonable to expect firms in this privileged position to be sympathetic to the plight and challenges of small and medium sized enterprises, particularly those owned by historically disadvantaged individuals.

5 Conclusion

From the perspective of the principle of the special responsibility of dominant firms, the purpose of this contribution was to assess the relevance of corporate social responsibility in competition and abuse of dominance law enforcement in Europe and South Africa. The contribution observes that competition and abuse of dominance rules in the two jurisdictions place significant pressure on firms with substantial market shares to consider and be sensitive to the impact of their actions on competition in the market and the sustainability of rivals, especially small and medium sized enterprises. In South Africa, evidence of this can be seen in the 2018 Competition Amendment Act, which makes certain practices, like price discrimination by a dominant firm, particularly unlawful when they have an adverse effect on small and medium sized enterprises and firms owned or controlled by historically disadvantaged persons.[112] Although this policy falls within the broader competition policy objective of ensuring the promotion and maintenance of competition, as competition can only exists when there are competitors, it also fosters responsible corporate conduct among dominant firms.

Indeed, the enforcement of the special responsibility doctrine may in some instances seem unfairly to inhibit the ability of firms with substantial market share to engage in trade freely and unhindered. However, when regard is had to economic history and existing market structures in a country like South Africa, such interference with the right of dominant firms to trade freely may be seen as a justifiable and necessary limitation of rights necessary to achieve fairness and equity in commerce and society. Although the free market system remains a preferred means of doing business in most societies, few societies are content with remaining silent or passive in the face of market failures, monopolies, poverty and inequality. In different ways, societies have always found ways, taxation being a fine example, to ensure that those more fortunate must shoulder some responsibility of contributing to the welfare of those less fortunate.

112 S 9(1)(a)(ii) of the Act as amended by s 6 of the 2018 Amendment Act.

The special responsibility imposed on dominant firms ensures that dominant firms are sensitive, as the American Supreme Court found,[113] to the plight of many small dealers and other worthy men who could face extinction from the market as a result of fierce competition waged against them by their well-established rivals.[114] The Court, per Justice Peckham, remarked that it would be unfortunate for society and the economy to lose the services of a large number of small and independent dealers who had spent their lifetimes developing their own businesses, becoming experts in their trade and supported themselves and their families from the small profits realised from their business.[115]

113 *United States v Trans-Missouri Freight Association* 166 US 290 (1897).
114 323. See also Hazlett "The Legislative History of the Sherman Act Re-Examined" (1992) *Economic Inquiry* 264.
115 *United States v Trans-Missouri Freight Association supra* 324.

Gender-based violence ignites the re-emergence of public opinion on the exercise of judicial authority

Nomthandazo Ntlama
B. Juris, LLB (UFH), LLM (US) LLD (UNISA)
Acting Head of Department: UNESCO "Oliver Tambo" Chair of Human Rights/ Nelson R Mandela School of Law, Faculty of Law University of Fort Hare

SUMMARY

South Africa is highly celebrated for its commitment to the promotion of human rights. This has also fostered "rights consciousness" among the citizenry which has become of essence for the advancement of the rights of women who had long been in the "legal cold". However, the significance of the "rights concepts" is marred by the extreme levels of gender-based violence against women. The effect of crimes suffered by women raises questions about South Africa's post-apartheid system of governance and the promotion of the rule of law, which is founded on human rights. With South Africa's history, it is assumed that law has the potential to transform societies in ensuring the fulfilment of rights as envisaged in many national, regional and international instruments.

Against this background, this paper focuses on the recent shocking wave of the extreme levels of gender-based violence against women experienced in South Africa with the resultant consequence of the agitation of the public on the independence of the judiciary. Whilst it acknowledges the limitations of the law and the challenges faced by women, it argues against public opinion that seem to wither the democratic character of the state relating to the functioning of the judiciary. It also argues that public opinion waters down the assumption about the capacity of the law in generating social change. In addition, the confidence in the judiciary cannot be replaced by invidious philosophies that appear to compromise the independence of the judiciary as envisaged in the doctrine of separation of powers. The argument advanced herein is limited to the rationality of the calls by further raising a question whether safeguarding independence and impartiality of the judiciary should be outweighed by public outrage on gender-based violence. It also does not profess to provide an expert analysis of the interrelationship between law and social change because of the complexities that exists between these areas. Overall, the paper acknowledges and shares the concerns by the public on the elimination of gender-based violence; however, it refuses the indirect consequence of public opinion on the trampling of judicial authority.

How to cite: Ntlama 'Gender-based violence ignites the re-emergence of public opinion on the exercise of judicial authority' 2020 *De Jure Law Journal* 286-306
http://dx.doi.org/10.17159/2225-7160/2020/v53a19

1 Introduction

Two decades have passed since South Africa's democratisation in 1994. This period has been characterised by the quest to ensure the full realisation of human rights that are envisaged in the Constitution 1996.[1] It also entailed the development of norms, ethos and standards that have to ensure compliance with the prescripts of the new dawn of democracy. This period is of further significance for the promotion of the rights of women as the most vulnerable group who also had always been out of the "legal comfort'.[2] Thus, the continued manifestations of gender inequalities, especially violent crimes that affect all aspects of women's lives have dominated both public and private spaces. The rising tide of inequalities is characterised by protracted violence, domestic and otherwise, exclusion and discrimination, sexual assault, rape, bullying, and murder, emotional and physical abuse including women's limitations in enforcing their rights.[3] The effect of crimes suffered by women raises questions about South Africa's post-apartheid system of governance and the promotion of the rule of law, which is founded on human rights.[4] The system has fostered a strong "rights consciousness' throughout society and the good that is related to their enforcement.[5] The evolution of the "rights concept' is indicative of the state's commitment to develop effective ways that will harness the "rights system' as an operational way of bringing about social change in the promotion of the right to gender equality.

Considering South Africa's history,[6] it cannot be denied that law has the potential to transform societies wherein rights will not only be respected, promoted and protected but also fulfilled.[7] The significance of the law in the construction of societies is derived from many of the international, regional and national legal instruments.[8] In the South African context, the Constitution 1996 is foundational to such construction as it "seeks to establish a society based on democratic values, social justice and fundamental human rights".[9] It is without doubt that the legal paradigm has over decades demonstrated its vision for the social construction of societies.[10]

However, the spate of gender-based violence against women and children that has reached alarming proportions in South Africa has challenged

1 See Chapter 2 of the Constitution of the Republic of South Africa 1996.
2 See Ngcukaitobi "Let the world know that women were once not 'persons' in the eyes of the law" *Mail and Guardian* 9 August 2018. Available from https://mg.co.za/article/2018-08-09-let-the-world-know-that-women-were-once-not-persons-in-the-eyes-of-the-law/ accessed 29 March 2020.
3 See Beal "Trickle-down or rising tide? Lessons from mainstreaming gender policy from Colombia and South Africa" 1998 *Social Policy Administration: An International Journal of Policy and Research* 513.
4 See S 1 of the Constitution of the Republic of South Africa 1996.
5 See Hohmann "Visions for social transformation and the invocation of human rights in Mumbai: The struggle for the right to housing" 2010 *Yale Human Rights and Development Journal* 135.

the very same assumptions made about the impact of the oriented rights laws in the construction of societies. Questions are raised and debates ensuing on the strength and significance of the law in contributing to social change. The centrality of the law has become a subject of debate and concern over its efficacy in eliminating the challenges faced by women. Gender based violence undermines many of the fundamental rights of women and the foundations of South Africa's democratic character, which is founded on human dignity, the achievement of equality and advancement of human rights on freedom, non-racialism and non-sexism among others.[11] The country's highly celebrated international standing on human rights protection has been deeply tainted.

---

6 See Mahomed DP in *Azanian Peoples Organisation v President of the Republic of South Africa* 1996 (8) BCLR 1015 para 1 as he expressed and acknowledged that:

> "for decades, South African history has been dominated by a deep conflict between a minority, which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination. Fundamental human rights became a major casualty of this conflict as the resistance of those punished by their denial was met by laws designed to counter the effectiveness of such resistance. The conflict deepened with the increased sophistication of the economy, the rapid acceleration of knowledge and education and the ever increasing hostility of an international community steadily outraged by the inconsistency which had become manifest between its own articulated ideals after the Second World War and the official practices which had become institutionalised in South Africa through laws enacted to give them sanction and teeth by a Parliament elected only by a privileged minority. The result was a debilitating war of internal political dissension and confrontation, massive expressions of labour militancy, perennial student unrest, punishing international economic isolation, widespread dislocation in crucial areas of national endeavour, accelerated levels of armed conflict and a dangerous combination of anxiety, frustration and anger among expanding proportions of the populace. The legitimacy of law itself was deeply wounded as the country haemorrhaged dangerously in the face of this tragic conflict, which had begun to traumatise the entire nation." See also Banda "Women, law and human rights in Southern Africa" 2006 *Women and the Politics of Gender in Southern Africa* 13.

7 See S 7(2) of the Constitution of the Republic of South Africa 1996.

8 See Booysen "Twenty years of South African democracy: citizen views of human rights, governance and the political system" 2014 *Freedom House* 1-78. Available from https://freedomhouse.org/sites/default/files/Twenty%20Years%20of%20South%20African%20Democracy.pdf (accessed 2020-03-22). See also the instruments such as but not limited to the Universal Declaration of Human Rights 1948, Convention of the Elimination of Racial Discrimination 1965, International Covenant on Civil and Political Rights 1966, International Covenant on Economic, Social and Cultural Rights 1966, Convention on the Elimination of Discrimination Against Women 1979, African Charter on Human and Peoples Rights 1981, Southern African Development Community Protocol on Gender and Development 2008, Promotion of Equality and Prevention of Unfair Discrimination Act 2 of 2000.

9 See preamble of the Constitution of the Republic of South Africa 1996.

10 See Winston "Human Rights as Moral Rebellion and Social Construction" 2007 *Journal of Human Rights* 279.

11 See Rafudeen "A South African reflection on the nature of human rights" 2016 *African Human Rights Law Journal* 225.

Consequently, there are calls from the general public and highly placed individuals for the reinstatement of the death penalty, refusal to grant bail to those accused of such crimes, the imposition of stiffer sentences and denial of parole to those sentenced of these horrendous crimes. The President, on many occasions has also weighed in to an extent, one time he had to withdraw from attending the meeting of the United Nations General Assembly in order to address this unfortunate situation, which resulted in South Africa being classified as a country of "shame".[12]

The calls are also not made in abstract because women are the most vulnerable and their living in both public and private spheres free from fear of violence in the enjoyment of all their fundamental rights is essential for the assumption made in determining the capacity of the law in effecting social change. The post-apartheid South Africa has put in place laws and policies which seek to promote respect for the rights and safety of women and guarantees for their implementation.[13] It then became a model of good governance and human rights protection not only on the African continent but globally. The relentless calls by the South African public for neither the release of the accused persons on bail nor handing down what appears in the eyes of the public as "lighter sentences" for those sentenced of horrendous crimes, is indicative of a country in "distress" over the extreme levels of gender based violence which undermine the equal rights of women.

On the other hand, the calls seem to show resentment against the judiciary. The calls perpetuate the unjustified influence of public opinion on the exercise of judicial authority. The judiciary is vested with judicial authority to apply and interpret the law without fear or favour.[14] The judiciary is endowed with "independence" to ensure certainty in the application of the law. The principle of independence is a basic tenet of a functioning democracy. It seeks to give effect to a just and fair application

12 Kieswetter "I write with a sense of shame: Kieswtter's letter to SARS staff about gender-based violence" 13 September 2019. Available from https://www.fin24.com/Opinion/i-write-with-a-sense-of-shame-kieswetters-letter-to-sars-staff-about-gender-based-violence-20190913-2 (accessed 2020-03-21).

13 See but not limited to the Maintenance Act 99 of 1998, Domestic Violence Act 116 of 1998, Recognition of Customary Marriages Act 120 of 1998, Promotion of Equality and Prevention of Unfair Discrimination Act 2 of 2000.

14 See S 165(1) of the Constitution, which reads as follows.
(1)The judicial authority of the Republic is vested in the courts.
(2)The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3)No person or organ of state may interfere with the functioning of the courts.
(4)Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
(5)An order or decision issued by a court binds all persons to whom and organs of state to which it applies.
(6)The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

of the law to all people on an equal footing. It is also meant to eliminate any form of arbitrariness that is "camouflaged" as law. The authority that is vested in the courts is marred by public calls that seem to suggest for the courts to succumb to public opinion. The judiciary is accused of favouring those alleged to have committed the crimes instead of their victims. Plethora of issues are raised such as the provision of legal aid if the perpetrators cannot afford the legal representation whilst the victim woman is "left out to dry in the legal cold" without representation considering the challenges on the enforcement of the rights by many of them. The dragging of the investigative process, which is not within the realm of the judiciary, is also put at its doorstep as the one that drags the finalisation of the matters before it.[15]

Against this background, this paper focuses on the recent shocking wave of the extreme levels of gender-based violence against women experienced in South Africa with the resultant consequence of the agitation of the public on the independence of the judiciary. Whilst it acknowledges the limitations of the law and the challenges faced by women, it argues against public opinion that seem to wither the democratic character of the state relating to the functioning of the judiciary. It also argues that public opinion waters down the assumption about the capacity of the law in generating social change. In addition, the confidence in the judiciary cannot be replaced by invidious philosophies that appear to compromise the independence of the judiciary as envisaged in the doctrine of separation of powers. The argument advanced herein is limited to the rationality of the calls by further raising a question whether safeguarding independence and impartiality of the judiciary should be outweighed by public outrage on gender-based violence. It also does not profess to provide an expert analysis of the interrelationship between law and social change because of the complexities that exists between these areas. Overall, the paper acknowledges and shares the concerns by the public on the elimination of gender-based violence; however, it refuses the indirect consequence of public opinion on the trampling of judicial authority.[16]

15 See Dugard "Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice" 2008 *South African Journal on Human Rights* 214-238. The author points out that in the past the judiciary failed to confront a racially divided South Africa. It was the apartheid judiciary that was able to rationalise a generalised failure to construct socially just rulings by claiming that law was distinct from morality. Today, the judiciary as an institution is found to have to advance transformative justice in critical systemic ways such as but not limited to:

improve access to legal representation for the poor.
promotion of public interest litigation; and
especially, of the record of the Constitutional Court that has further diminished the capacity of the judiciary as an institutional voice for the poor.

16 Ntlama "The deference of judicial authority to the state" 2012 *Obiter Journal* 135.

2 Gender based violence ignites fury over the judiciary

2 1 South Africa: a country in "distress" over gender-based violence against women

This part provides examples, not exhaustive, of a list of horrendous crimes as reported in various media houses that were committed against women. It is also not an analysis of the cases that have gone and finalised by the courts but highlights them as having caused a stir from the public and directed an unwelcomed focus on the judiciary.

Sachs J in *S v Baloyi*[17] acknowledged the:

> "harsh realities of the effects of crime on society and in particular, of the gender-based character of domestic violence because of its 'hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It *cuts across class, race, culture and geography,* and is all the more pernicious because it is so often concealed and so frequently goes unpunished",[18] (Author's emphasis).

The non-national or non-ethnic status of gender-based violence was evidenced by the adoption of the United Nations Declaration on the Elimination of Violence Against Women[19] as it defined violence against women as a:

> "manifestation of historically unequal power relations between women and men which have led to the domination over and the discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one crucial mechanisms by which women are forced into a subordinate position compared with men."[20]

Further to the above, article 2 of the Declaration affirms that violence against women should be understood to encompass, but not be limited to:

a physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
b physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and

17 *S v Baloy*i 2000 (1) BCLR 86.
18 *S v Baloyi supra* para 11.
19 Proclaimed by UN General Assembly Resolution 48/104 of 20 December 1993. Available from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.21_declaration%20elimination%20vaw.pdf (accessed 2020-03-22).
20 UN General Assembly, Declaration on the Elimination of Violence against women, 20 December 1993, A/RES/48/104. Available at https://www.refworld.org/docid/3b00f25d2c.html (accessed 2020-03-17).

intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

c physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.[21]

In the South African context, the spate of gender based violence, which seem to be spiraling out of control, especially, around the highly celebrated month of the bravery of the Women of 1956[22] has taken toll on all structures, societies, spheres and branches of governance. Women are subject to inhumanness, which the law itself cannot describe.[23] The ruthlessness that is experienced by women does not find comfort even within the rights-oriented laws.[24] Sexual assault coupled with rape, murder including mutilation and the burning of women's bodies and burial in shallow graves questions the centrality of the language of rights laws in upholding the rule of law in the promotion of women's rights in South Africa.[25]

South Africa subscribes to many of the international instruments, which are designed to promote equality and non-discrimination. The elimination of gender-based violence is one of the primary goals of ensuring adherence to the prescripts of the community of nations. Going back to 1948 on the adoption of the Universal Declaration of Human Rights, though South Africa at the time did not sign the instrument and abstained because of the apartheid system, the rights framework was consolidated to bring international peace at national level. The international community adopted the universality of rights, which is characterised by their interdependence and indivisibility as they uniformly apply to everyone on an equal footing throughout the world.[26] This also entailed the localisation of the international prescripts of rights

21 See also Art 18(3) of the African Charter on Human and Peoples' Rights, adopted in Nairobi June 27, 1981 and entered into Force October 21, 1986. South Africa signed the Charter in 1995 and ratified it in 1996. The said article obligates the state to "ensure the elimination of every discrimination against women and also censure the protection of the rights of the woman and the child as stipulated in international declarations and conventions".

22 The Women of South Africa had on 9 August 1956 marched to the Union Buildings in Pretoria to claim their independence and freedom against the discriminatory laws of the apartheid government.

23 Mofokeng "Violence against women is blocking development" 21 February 2020. Available from https://www.project-syndicate.org/commentary/violence-against-women-blocking-development-by-tlaleng-mofokeng-2020-02 accessed 23 March 2020.

24 See Van der Westhuisen J in *Omar v Government of the Republic of South Africa* 2006 (2) BCLR 253 (CC). The judge expressed with discomfort that gender based violence is a "brutality to many of the fundamental rights in the Constitution", para 17.

25 Abrahams, Jewkes, Marins, Matthews, Vetten and Lombard "Mortality of women from intimate partner violence in South Africa: a national epidemiological study" 2009 *Violence and Victims* 546.

26 Mubangizi and Sewpersadh "A human rights based approach to combating public procurement corruption in Africa" 2017 *African Journal of Legal Studies* 66.

into the domestic spheres, which becomes essential in the construction of rights oriented societies.

A synopsis of cases as reported in the media that have caused agitation from the public are highlighted herein. These cases have fueled perceptions about the protection accorded to women and the adequacy of the enforcement mechanisms in the fulfilment of their rights. The cases are but not limited to the case of:

- Ms Ntombizodwa Charlotte Dlamini, a 42-year-old nurse who was shot and killed at her home in Richmond Crest, Durban, after an argument with her husband who then fled the scene and later found with a bullet wound in the chin;
- Ms Nompumelelo Mthembu, a 20-year-old, who died from burn wounds after the father of her two children, Mr Siyabonga Buthelezi, 32 years of age, placed a tyre around her neck and doused her with petrol. On 23 April 2019, the Umthunzini High Court in KwaZulu-Natal sentenced Mr Buthelezi to life imprisonment for the murder;[27]
- Ms Meisie Maisha, an 18-year-old matric pupil, who was found dead with her eyes gouged out at the Soul City informal settlement on the West Rand. Her murder remains unsolved after three men initially arrested were set free;[28]
- The brutal murder of a 19-year-old former University of Cape Town student: Ms Uyinene Mrwetyana left the country bruised and reeling in disbelieve over the manner in which the student was murdered. She was not only raped and murdered but her charred body was found in a shallow grave in Khayelitsha, Cape Town. Her alleged killer, Mr Luyanda Botha, a 42 year old man working at the Claremont Post Office after confessing and detailing the manner in which he killed the student was sentenced to three life sentences and extra five years which are to run concurrently by the Western Cape High Court;
- Ms Leighandre "Baby Lee" Jengels, a former boxer of 25 years of age who was shot dead by her ex-boyfriend who happened to be a police officer;
- Ms Lynnette Volschenk of 32 years, whose body parts were found in refuse bags in an apartment block. A suspect was arrested for her murder;
- Ms Meghan Cremer, a showjumper of 30 years of age who was found dead in a shallow grave, reportedly with a rope around her neck. Three people were charged for her murder;[29] and

27 Somdyala "KZN man gets life in prison for burning his girlfriend to death" *News24.com* 26 April 2019. Available from https://www.news24.com/SouthAfrica/News/kzn-man-gets-life-in-prison-for-burning-his-girlfriend-to-death-20190426 (accessed 2020-03-24).

28 Sobuwa "Countries femicide list keeps growing" *Sowetan Newspaper* 4 September 2019. Available from https://www.sowetanlive.co.za/news/south-africa/2019-09-04-countrys-femicide-list-keeps-growing/ (accessed 2020-03-17).

29 Report "South Africa: violence against women like a war – Ramaphosa" 18 September 2019. Available from https://www.bbc.com/news/world-africa-49739977 (accessed 2020-03-17).

- The murder of a 11-year-old girl, Tiyiselani Rikhotso from Limpopo who was recently found in a nearby-dam with her mutilated body after being reported missing.[30]

The shocking wave of violence has also infiltrated even the institutions of higher learning.[31] These institutions are the breeding ground and the generation of a new crop of rights-oriented, ethically and morally responsible citizens in the upholding of the prescripts of the new dispensation. These institutions are required to produce socially oriented knowledge in addressing the ills experienced by societies.[32] The production of rights-oriented knowledge has become more prudent in giving content to the ideals of the new democracy. The cases, not limited to the following, which were committed at institutions of higher learning, are a great cause of concern:

- Ms Zolile Khumalo, a student at Mangosutu University of Technology of 21 years of age who was shot dead by her ex-boyfriend, Mr Thabani Mzolo in 2018 by using the illegal fire-arm and has also been found guilty and sentenced to life imprisonment on 5 March 2020 at the Durban High Court, and
- Ms Jabulile Nhlapo, a 21-year-old UNISA student who was shot dead at a student residence in Vanderbijlpark, south of Johannesburg, by her ex-lover Lebohang Mofokeng who is 30 years of age. Mr Mofokeng was sentenced to life imprisonment for the murder. He was also sentenced to five years' imprisonment for theft, four years for possession of a firearm and 18 months for possession of illegal ammunition.

What is striking about the murders is what appears to be the same *modus operandi* where the victim is not only raped and murdered but is also buried in a shallow grave with a burnt or mutilated body. The discomfort experienced by the country in all levels and spheres of society led to the President making an undertaking at the launch of the International Day of No Violence against Women, for the review of the existing laws on criminality and sentencing.[33]

The cases mentioned here are just a tip of the iceberg and have unsettled many people in South Africa. There are also a myriad of factors, which are not the subject of this paper and not a justification for the

30 Maringa "Ritual killing suspected to be behind 11 year-old's brutal murder in Limpopo" 18 March 2020. Available from https://www.sabcnews.com/sabcnews/ritual-killing-suspected-after-11-year-olds-brutal-murder/ (accessed 2020-03-20).

31 SaferSpaces "Gender based violence at higher education institutions in South Africa". Available from https://www.saferspaces.org.za/understand/entry/gender-based-violence-at-higher-education-institutions-in-south-africa1 (accessed 2020-03-20).

32 See Gilchrist "Higher Education as a Human Right" 2018 *Global Studies Law Review* 1.

33 Ramaphosa "Enough is enough: Ramaphosa's speech for 16 Days of Activism for No Violence against Women and Children" 25 November 2019. Available from https://www.iol.co.za/news/politics/enough-is-enough-ramaphosas-speech-for-16-days-of-activism-for-no-violence-against-women-and-children-37939845 (accessed 2020-03-17).

suffering of women, that could have in one way or another contributed to the subjection of women to the extreme levels of violence from their male counter-parts. What is evident and could be safely said is that women because of their vulnerability, suffered violence for no reason than being women. The contention is informed by the gruesome murder of one woman wherein one would follow suite whilst the country is still reeling in disbelief about how the first woman died at the hands of a man. As expressed by Bosielo JA in *S v Makatu,*[34] the judge concretised the general outcry regarding the effect of the crime on societies, particularly women and held:

> "for some time now this country has witnessed an ever-increasing wave in crimes of violence, notably murder and sexual offences. Undoubtedly, these crimes seriously threaten the very social and moral fabric of our society. As a result, our society is seriously fractured. *The majority of our people, particularly the vulnerable and the defenceless which include women, children, the elderly and infirm live under constant fear. It is no exaggeration to say that every living woman or girl in this country is a potential victim of either murder or rape. This is sad because these heinous crimes happen against the backdrop of our new and fledgling constitutional democracy, which promises a better life for all. These crimes have spread across the length and the breadth of our beautiful country like a malignant cancer. They are a serious threat to our nascent democracy. They have to be exterminated with their roots"*,[35] (Author's emphasis).

Moegoeng CJ in *F v Minister of Safety and Security*[36] shared the same sentiments and held that:

> *"[gender based violence] is said to go to the very core of the subordination of women in society. It entrenches patriarchy as it imperils the freedom and self-determination of women. It is deeply sad and unacceptable that few of our women or girls dare to venture into public spaces alone, especially when it is dark and deserted. If official crime statistics are anything to go by, incidents of sexual violence against women occur with alarming regularity. This is so despite the fact that our Constitution, national legislation, formations of civil society and communities across our country have all set their faces firmly against this horrendous invasion and indignity imposed on our women and girl-children"*,[37] (Author's emphasis),

With South Africa's rights consciousness of the citizenry, it remains a mystery that almost everyday day; there are widespread news about a woman that was brutally murdered. Courts are also placed in an

34 *S v Makatu* 2014 (2) SACR 539 quoted in *S v Kusele and Others* Case No: CCS31/2016 (unreported).

35 *S v Makatu supra* para 30. See also Sachs J in *S v Baloyi supra* as he expressed that "domestic violence compels constitutional concern in yet another important respect. To the extent that it is systemic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form", para 12.

36 *F v Minister of Safety and Security* 2012 (3) BCLR 244 (CC).

37 *F v Minister of Safety and Security supra* para 56.

untenable situation with the impatient public over the judicial processes in dealing with horrendous crimes against women.[38]

3 Gender based violence fuels the re-emergency of public opinion on the functioning of the judiciary

3 1 Public opinion implanting doubts on the significance of the independence of the judiciary

Following the abolishment of the death penalty in *S v Makwanyane*[39] with the huge outcry for its retention for serious crimes from the public, the case of *S v Pistorius*[40] saw the re-ignition of public opinion on the functioning of the judiciary. Mr Pistorius shot and killed his girlfriend in the early hours of the morning at his home. Without a detailed analysis of the case, his conviction and a six-year sentence by the Gauteng High Court, which was overturned by the Supreme Court of Appeal to 13 years,[41] caused an uproar and agitation from the public. Mr Pistorius happened to be an international athlete and competed in international events such as the Olympics. His sentencing was reduced to the distinction between the rich and the poor where, as alleged, those who can afford legal representation can "easily buy justice".[42] Public opinion seemed to have subsided until the recent wave of horrendous crimes against women, which left many reeling in disbelief about the gruesome crimes against women.

38 Bosielo JA in *S v Makatu supra* para 31 quoted in *S v Shangase* Case No CCD: 33/16 [2017] ZAKZDHC 27 shared the frustration of the court over the increasing levels of gender based violence when the judge held that:

> "there is a huge and countrywide outcry by citizens, civic organisations, NGO's, politicians, religious leaders and people across the racial, class and cultural divide about these crimes which have become a scourge. There is hardly a day that passes without a report of any of these crimes in the media, it be print or electronic. The Legislature responded to the public outcry with, amongst others the Criminal Law Amendment Act 105 of 1997, which singled out these crimes that are a threat to our wellbeing and welfare, for very severe sentences, the main objective being to punish offenders effectively and in appropriate cases, to remove those who are a danger to society from our midst, circumstances permitting either for life or long term imprisonment. In addition, the national Government declared the period from 15 November to 10 December, popularly known as 16 days of activism to be a nationwide campaign to promote a culture and ethos of no violence against women and children. I regret to state that everyday media reports and statistics from the South African Police Services (SAPS) and the National Prosecuting Authority 12 (NPA) seem to suggest that, despite all these gallant efforts by Government, we are not winning the battle against these crimes".

39 *S v Makwanyane* 1995 (6) BCLR 665 (CC).

40 *S v Pistorius* (CC113/2013) [2014] ZAGPPHC 793.

41 See *Director of Public Prosecutions, Gauteng v Pistorius* [2018] 1 All SA 336 (SCA).

42 Campbell-Gilliers "Can money buy justice in SA?" 12 September 2014. Available from https://ewn.co.za/2014/09/15/Can-money-buy-justice-in-SA (accessed 2020-03-24).

On many occasions, with the foundations laid in the *Makwanyane* judgment, the judiciary has made pronouncements regarding the influence of the public on its functioning.[43] The newly established Constitutional Court made it explicit that the public has a limited influence on the performance of the functions of the courts. At the time, the democracy was still in its infancy and there was an existing need to interpret and develop the jurisprudence of the courts within the context of the rights framework. The intense calls for the imposition of stiffer sentence diverts the primary purpose of constitutional adjudication, which is founded on the Constitution.

The recent judgment of the Ugandan Constitutional Court in *Uganda Law Society vs Attorney General*[44] is of direct relevance to the argument herein that the judicial authority is derived from the Constitution to the exclusion of the public. The court contextualised the significance of the Constitution and held that:

- the Constitution is the supreme law of the land and forms the standard upon which all other laws are judged. Any law inconsistent with it is invalid to the extent of its inconsistencies.
- the entire Constitution must be read together as an integral whole with no particular provision destroying the other but each sustaining the other. This is the rule of Harmony, rule of completeness and exhaustiveness and rule of paramountcy of the written constitution.
- in determining the constitutionality of the legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining the constitutionality of either the effect animated by or the object the legislation intends to achieve.
- all provisions bearing a particular issue should be considered together to give effect to the purpose of the instrument.
- where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary meaning.
- where the language of the constitution or a statute ought to be interpreted is imprecise or ambiguous a liberal, general or purposeful interpretation should be given to it.
- the words of the written Constitution prevail over all unwritten conventions, precedents and practices.
- the history of the country and legislative authority of the Constitution is also relevant and useful guide to Constitutional interpretation.[45]

It is in this vein that South African Constitutional Court in the *Omar*[46] judgment grounded the enforcement of the fundamental rights of women against violent crimes and "extended the responsibility to the courts in the performance of their function in ensuring the elimination of

43 *S v Makatu supra* para 32.
44 *Uganda Law Society vs Attorney General* Constitutional Court Petition 52 of 2017 [2020] UGCC 4 (10 March 2020).
45 See *Uganda Law Society vs Attorney General supra* paras 5-20.
46 *Omar v Government of the Republic of South Africa supra*.

gender based violence or threat thereof".[47] The court further cited with approval Moegoeng CJ in *F v Minister of Safety and Security* that:

> "it follows without more that the state, through its foremost agency against crime, the police service, bears the primary responsibility to protect women and children against this prevalent plague of violent crimes. *Courts, too, are bound by the Bill of Rights. When they perform their functions, it is their duty to ensure that the fundamental rights of women and girl-children in particular are not made hollow by actual or threatened sexual violence. They must acknowledge the policy-drenched nature of the common law rules of vicarious liability, that it is the courts that have in the past fashioned and favoured them, and that now the rules must be applied through the prism of constitutional norms",*[48] (Author's emphasis).

It is evident from *F* that courts are vested with judicial review because of the "limitation of the public in determining what it would believe to be an appropriate punishment for the imposition of sentence for extreme crimes [such as gender based violence]".[49] The Court in *Makwanyane* further held that:

> "if public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the [Constitution]. [Similarly], the issue of [constitutional adjudication] cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected".[50]

Hence, Abebe[51] rejects the influence of public opinion as an "illegibly heir" in constitutional adjudication by highlighting a myriad of factors such as but not limited to the following:

- courts should not attach determinative value to public opinion.
- the democratic justification for considering public opinion should be rejected based on the very reasons that created judicial review:

47 *Omar v Government of the Republic of South Africa supra* in *F v Minister of Safety and Security supra* para 34.
48 *F v Minister of Safety and Security supra* para 57.
49 *S v Makwanyane supra* para 87.
50 *S v Makwanyane supra* para 88.
51 Abebe "Abdication of Responsibility or Justifiable Fear of Illegitimacy? The Death Penalty, Gay Rights, and the Role of Public Opinion in Judicial Determinations in Africa" 2012 *The American Journal of Comparative Law* 603.

- to restrict the outcomes of the majoritarian process whether exercised through representatives or directly by the people.

- the consequentialist justification for considering public opinion should be abandoned as well, for the simple reason that there is no guarantee that public opinion is well-informed and that it is fickle.
- besides, judges are unlikely to have good information about the content or grounds of public views.
- furthermore, judicial reliance on public opinion may contradict the principles of legal certainty and predictability, which are the essential tenets of the rule of law.
- lack of information as to public opinion, personal bias, potential consequences, and the possibility of breeding strategic public behavior to influence judicial decisions, all militate against judicial reliance on public opinion.
- the potential impact of the strategic behavior is significant given the influence of organized interest groups, which may easily mobilise support for their views and capture the democratic process to advance their own interests at the expense of the common good.
- reliance on public opinion rather than the constitution would substitute the supremacy of the constitution with the majoritarian supremacy, which contradicts the very purpose of human rights protecting vulnerable individuals and groups, whether of majority or minority from abuse by an individual, government or public at large.
- public opinion should be ignored when constitutions are adopted with an explicit transformative and ambitious ethos to ensure a decisive break with certain social and government traditions and practices as in the case of the South African Constitution.[52]

Ntlama AJ in *S v Shangase*[53] acknowledged that public "interests" and not "opinion" had always been considered by the judiciary on sentencing of the alleged accused convicted of a crime. The judge noted the already existing jurisprudence, which developed principles that considered public opinion. For example, the application and interpretation of the law is not taken in abstract, as the courts must first individualise the crime and the sentence to fit the crime. Secondly, to take the interests of the offender into account and lastly interests of the society.[54] The three-tier factors captures the rights framework as they consider the interests of all in the judicial law-making process.[55] Public opinion falls within this domain and it becomes of concern that the public would dictate to the courts on the sentence to be imposed in the exercise of the judicial function.

52 Abebe 2012 *The American Journal of Comparative Law* 611.
53 *S v Shangase supra*.
54 See for example, *S v Selebi* [2010] ZAGPHJHC 58 para 25 in *S v Kus*ele *supra*.
55 See Du Plessis "Between apology and utopia: the Constitutional Court and public opinion" 2002 *South African Journal on Human Rights* 18. See also Satchwell J in *S v Muller* (2SH98/2005) [2006] ZAGPHC 51 para 12 as the

The judicial approach undertaken in post-apartheid South Africa is one characterised by the rights framework, which was not the case in the past.[56] Of particular importance is the limitation of the authority of the judiciary not to do what is referred as "overreach". The laws to be interpreted are prescribed by the legislature, which is carrying the law-making function of the Republic. It is not for the courts to go beyond what is prescribed by law. The judiciary must exercise its discretion within the context of prescribed laws. The judge can deviate from the prescribed minimum sentence if "substantial and compelling circumstances" exist.[57] The deviation must be clearly put on record and delivered in a public court. In *S v Abrahams,*[58] the court emphasised that the judiciary should:

> "not merely pay lip service to the intention of the legislature that prescribed periods of imprisonment which have to be taken to ordinarily appropriate when crimes of the specified kind are committed as the provisions of the Act create a legislative standard that weighs upon the exercise of the sentencing court's discretion."[59]

From *Abrahams*, it is evident that the courts are required to give content to the constitutional structure of the Republic, which is designed along the doctrine of separation of powers. The doctrine is the central feature of the new dawn of democracy. It is characterised by the institutional, personal and functional divisions of government authority into legislative, executive and judicial branches of the state. Ngcobo J in *Doctors for Life*[60] judgment contextualised the essence of the doctrine and held that:

> "the constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle

judge acknowledged the parliamentary debates on the introduction of the Bill on the Sentencing Act 105 of 1997 that:

> firstly, there is a public demand for more stringent punishment for convicted offenders.
> secondly, the introduction of the minimum sentences will help to restore confidence in the ability of the criminal justice system to protect the public against crime.
> thirdly, the introduction of a minimum sentence confirms the government's policy - and I hope this is the view of the parliament – which aims to curb the increasing crime rate and to protect the community against criminals. ……
> fifthly, and most importantly, these provisions relating minimum sentences are designed to ensure that our courts are able to deal effectively in terms of sentencing, with the kinds of serious crimes which we have witnessed in our country and which our people unfortunately will experience.

56 The past was designed to humiliate and the enforcement of punitive measures, especially for black South Africans.

57 See *Tafeni v S* 2016 (2) SACR 720 (WCC).

58 *S v Abrahams* 2002 (1) SACR 116 (SCA)

59 S v *Abrahams supra* at para 25 quoted in *S v Muller supra*.

60 *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC).

> 'has important consequences for the way in which and the institutions by which power can be exercised'. *Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution"*,[61] (Author's emphasis).

The doctrine developed in the *Uganda Law Society* judgment is of direct relevance to the argument made herein and the approach by Ngcobo J in *Doctors for Life* that it should not be flouted and clouded, which in our instance, by public opinion. Although there is no rigid separation of powers in both countries (South Africa and Uganda) as endorsed in their respective Constitutions,[62] separation is embedded in the independence of the judiciary.[63] The independence of the courts was simplified as the "capacity to perform their constitutional function free from actual or apparent interference by and to the extent that it is constitutionally possible free from actual or apparent dependence upon any person or institutions, including in particular the executive arm of government over which they do not exercise control".[64] This means that it is only the courts that "are bestowed with capacity to maintain the rule of law and to serve as being custodians of justice and not the public. Secondly, independence is not an end in itself but is intended to protect the rights and freedoms of the individuals to be determined by an independent and impartial judge and founded on the principles of the doctrine of the rule of law".[65] The courts are therefore not "only axiomatic, [but] the genius of [the] government that they must be independent, unfettered and free from directives, influences, or interference from extraneous source".[66]

---

61 *Doctors for Life International v Speaker of the National Assembly supra* para 37.

62 See Art 128 of the Uganda Constitution 1995 which provides that:
(1) in the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.
(2) no person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions.
(3) all organs and agencies of the State shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts.
(4) a person exercising judicial power shall not be liable to any action or suit for any act or omission by that person in the exercise of judicial power.
(5) the administrative expenses of the judiciary, including all salaries, allowances, gratuities and pensions payable to or in respect of persons serving in the judiciary, shall be charged on the Consolidated Fund.
(6) the judiciary shall be self-accounting and may deal directly with the Ministry responsible for finance in relation to its finances.
(7) the salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial power shall not be varied to his or her disadvantage.
(8) the office of the Chief Justice, Deputy Chief Justice, Principal Judge, a justice of the Supreme Court, a justice of Appeal or a judge of the High Court shall not be abolished when there is a substantive holder of that office.
and S 165 of the South African Constitution.

63 *Uganda Law Society v Attorney General supra*, 21.

64 *Uganda Law Society v Attorney General supra* 26.

65 *Uganda Law Society v Attorney General supra* 26.

66 *Uganda Law Society v Attorney General supra* 31.

Hence, it is worth to reiterate that public opinion "could not compel the courts to depend upon the vagaries of invidious philosophies in the performance of their duties".[67] As similarly expressed by the court in *S v Makatu* that:

> "our courts which are an important partner in the fight against crime cannot be seen to be supine and unmoved by such crimes. Our courts must accept their enormous responsibility of protecting society by imposing appropriate sentences for such crimes. It is through imposing appropriate sentences that the courts can, *without pandering to the whims of the public* send a clear and unequivocal message that there is no room for criminals in our society. This in turn will have the salutary effect of engendering and enhancing the confidence of the public in the judicial system. Inevitably, this will serve to bolster respect for the rule of law in the country",[68] (Author's emphasis).

With the independence of the judiciary, the frustration and anger towards the courts over gender-based violence is misdirected. The judiciary is the last line of defence in the protection of fundamental rights for all. Both the legislative and executive arms should withstand the worst of public agitation because the former designs laws whilst the latter ensures effective measures are in place for their enforcement. The calls from the public tilt the scales against the principle of independence and have the great potential to trample the authority that is vested in the courts. Any undue influence on the manner in which the judiciary exercises its authority is not in line with the ideals of the new dispensation. Both the executive and the legislature are required to ensure the independence of the judiciary. Equally, the President should not succumb to public pressure and compromise the independence of the judiciary. "Independence" captures transparency in the functioning of the judiciary by requiring judgments, including the reasons upon which they are based, to be made in public. This context renders public opinion on the functioning of the judiciary unwarranted.

Public opinion does not only compromise the principle of independence and doctrine of separation of powers but the development of the core content of a "right" which the court may frame within a particular approach. For example, the courts are required to develop a set of values and principles, which in the context of the argument in this paper, is the assumption about the role of the rights-oriented law in effecting social change. The rights-oriented law is a cornerstone of good governance and democracy, which entrenches accountability from all in addressing the scourge of gender-based violence against women. The essence of the law in effecting social change is not about the adoption and existence of the laws but their effective implementation in order to determine their impact.[69] It is of further concern that law seem to be

67 *Uganda Law Society v Attorney General supra* 31.
68 *S v Makatu supra* para 32.
69 Kaarhus, Tor, Hellum and Ikdahl "Women's land rights in Tanzania and South Africa: a human rights based perspective on formalization" 2011 *Forum for Development Studies* 456.

clouded by public opinion, which limits the determination of its effects in constructing social change in the elimination of gender-based violence. Does this, therefore, mean law has a limited role in regulating human behaviour?[70]

4 Public opinion distracts the envisaged purpose on law and social change

As noted above, this is not an expert analysis of the intersection of law and social change. However, it highlights the importance of the law in effecting social change.

In the past, the system of apartheid had dire consequences for the integration of the law in effecting social change as Madala[71] expresses it as follows:

> "the practice of the law and fundamental human rights were on one side of the system. A decline in the moral fibre of society and a collapse of social values were on the other side. The system of apartheid created a society in which the majority came to regard the courts, judges, and the administration of justice with suspicion and anger. In the eyes of the oppressed, the system came to represent an enforcement of injustice and a denial of protection. Society reached a stage where it was ready to defy and disobey the law and, in fact, did so. The judiciary, in general, was unable to resolve the impasse. It did not have the option to review and reverse unjust laws; rather, the courts and all the other institutions had to implement and administer such laws. In the nature of things, because that power had not been consented to or mandated by the great majority of the people over which it was exercised, rule had to be by force; thus, draconian laws and measures were unleashed on the people."[72]

This history is significant in determining the imperatives of the new dawn of democracy. The quest for the determination of the law in effecting social change is unique for South Africa because the post-apartheid period has seen the required reforms in both law and ethos of the society. These changes were informed by South Africa's past, which saw the law that lagged behind socio-political, legal and cultural changes running the risk of losing legitimacy in the evolution of human rights for all. On the other hand, the law-making process was also informed by the alertness of the lawmakers in seeing the pressing need for societal changes. The changes, whether through law or societal reforms were shaped and founded by the Constitution, which, for the first time in South Africa's history were inclusive of everyone, including the women who

70 See Mwambene and Kruuse "The thin edge of the wedge: *ukuthwala*, alienation and consent" 2017 *South African Journal on Human Rights* 25.

71 Madala "Rule under apartheid and the fledgling democracy in post-apartheid South Africa" 2000 *North Carolina Journal of International Law and Commercial Regulation* 743.

72 Madala 2000 *North Carolina Journal of International Law and Commercial Regulation* 748.

had long been in the "legal cold". The Constitutional Court in *Makwanyane* endorsed the contention and held that:

> "in all societies there are laws which regulate the behaviour of people and which authorise the imposition of civil or criminal sanctions on those who act unlawfully. This is necessary for the preservation and protection of society. *Without law, society cannot exist. Without law, individuals in society have no rights.* The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the Constitution. The high level of violent crime is a matter of common knowledge and … the power of the State to impose sanctions on those who break the law cannot be doubted. It is of fundamental importance to the future of our country that respect for the law should be restored, and that dangerous criminals should be apprehended and dealt with firmly… However, the question is not whether criminals should go free and be allowed to escape the consequences of their anti-social behaviour. Clearly, they should not; and equally clearly, those who engage in violent crime should be met with the full rigour of the law. The question is whether [public opinion] for [the commission of horrendous crimes against women] can legitimately be made part of that law",[73] (Author's emphasis).

Drawing from *Makwanyane*, under the new dispensation, "law" became an overarching framework to protect the rights for all. It is also reinforced by principles of constitutionalism, the rule of law, democracy, separation of powers, accountability and, but not limited to, judicial independence.[74] It also reinforces the interrelationship that exists between law and individuals in the regulation of human behaviour. In turn, the regulation envisages the construction of a system where law has an impact and serves as a determinant for the development of socially oriented rights laws in eliminating the scourge of gender-based violence against women. Considering the effect of violent crimes against women, the new form of agitation is for the state to adhere to the prescripts of the new dawn of democracy in ensuring the construction of a truly democratic dispensation. The capacity of the law to effect the needed reforms in securing the equal treatment and benefit for all[75] in order to

73 *S v Makwanyane supra* para 118.
74 Currie and De Waal, *Bill of Rights Handbook* (2013).
75 See S 9 of the Constitution which reads as follows:
(1) everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed Chapter 2: Bill of Rights 6 to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

address the indirect consequence of insensitive laws and the weak mechanisms in their enforcement has caused outrage from the public.[76]

Gender-based violence weakens the assumption made about the centrality of the law in ensuring the evolution of the equal status of women to live in crime-free societies. On the other hand, for the courts to exercise their authority without being subject to unnecessary pressure by the public. With an effective system of law, endorses the assumption made herein that law will be central and a determinant of the construction of societies in effecting social change. Women would also be empowered and occupy their rightful place and contribute to the advancement of the right to gender equality. The courts would also be better placed as agents of developing jurisprudence that will intersect the interpretation of the law for socio-legal objectives. Madala expresses the same sentiments and points out that "in a credible democracy it became important that a body be vested with the power to blow the whistle when parameters of a constitutional covenant were transgressed … and t*hat could only be the judiciary. The judiciary alone would have the final power to decide whether the impugned enactment or provision had transgressed the constitutional guarantee".*[77]

It is worth to reiterate that the argument herein is "not blind" to the challenges faced by women as evidenced by the irritation of the public. Generally, law is limited in its capacity because it appears to "swing like a pendulum" over people's heads in order for them to fear the "mighty of the law" instead of the "self-consciousness" in viewing it as a measure that is designed to effect social change. Criticism is laid against the law, that it is designed to reflect and reinforce the privilege and interests of the powerful as evidenced by public opinion, traceable to Mr Pistorius case.

South Africa is highly acclaimed as a beacon of hope in the area of legal frameworks that are designed to advance the protection of human rights. The acclamation takes into account that combating gender-based violence that has an indirect consequence for the functioning of the judiciary requires the non-interference in the exercise of such authority. Further, the public confidence on the exercise of judicial authority should not be built on public opinion on the sentences to be imposed against the commission of horrendous crimes. It is not for the public to build confidence but for the judiciary in upholding both its personal and institutional independence in the exercise of its authority. In addition, notwithstanding the celebrated status, South Africa need to draw comparative lessons from other jurisdictions on measures adopted on the eradication of gender-based violence. As noted above, violence

76 Francke "South Africa in a crisis of violence against women, says President" *The Guardian,* 6 September 2019. Available from https://www.theguardian.com/world/2019/sep/06/south-africa-faces-national-crisis-of-violence-against-women-says-president (accessed 2020-03-10).

77 Madala 2000 *North Carolina Journal of International Law and Commercial Regulation* 756 (Author's emphasis).

against women knows no boundaries and it is for the state to build capacity of its institutions in the formulation and the enforcement of the rights-laws that are designed to promote gender equality in minimising the risk of "public barking" on the judiciary. In addition, to develop a comprehensive plan for human rights education for the general public relating to the functioning of the different branches of government. Further, to strengthen good governance and build capacity in all structures, spheres and branches in the consolidation of the hard-fought democracy. Long before the attainment of democracy, civil society had been at the forefront in advocating for women's liberation from the bondages of oppression as evidenced by the Women of 1956. Hence, it is still prudent that civil society has to, through campaigns, activism, education; training and networking play a key role in the fight against gender-based violence.[78]

5 Conclusion

The cases highlighted herein are indicative of the brutality that has been meted against women and in turn caused an uproar from the members of the public who then directed their frustration on the judiciary. The incessant calls for the reinstatement of the death penalty are misguided and will not solve this problem. The death penalty is a symptom of a culture of violence not a solution to it, and there is no credible evidence that it has a greater deterrent effect on crime than a prison term.[79] The government would do better to channel its resources to ensure the effective administration of justice through proper investigations into incidences of gender-based violence and fair trials for those accused of the crimes.[80] Hence, the assumption of the law as the language of effecting social change because gender based violence affect many of the fundamental rights of women. It also waters down the argument about the assumption of the law as an effective measure for social change. It also creates a "hype" from the public, which intrudes into the domain of the judiciary, and undermine the very foundations of the structural principles of the new dawn of democracy.

78 Mubangizi and Sewpersadh 2017 *African Journal of Legal Studies* 67.

79 Zlotnick "The Death Penalty and Public Opinion" Seminar 4, Paper presented at the Centre for the Study of Violence and Reconciliation. Available from https://www.csvr.org.za/publications/1382-the-death-penalty-and-public-opinion (accessed 2020-03-24).

80 See commentary by Hobden "The death penalty is not a solution to violence against women" 3 September 2019 The Daily Vox Team. Available from https://www.thedailyvox.co.za/the-death-penalty-is-not-the-solution-to-violence-against-women/ (accessed 2020-03-29).

Evaluating the jurisprudence of the African Commission on evidence obtained through human rights violations

Robert Doya Nanima
LLB DipLP LLM LLD
Postdoctoral Research Fellow, Dullah Omar Institute, University of the Western Cape

SUMMARY

The normative framework of the African Commission, which regulates the admission of evidence obtained through human rights violations, is largely based on a number of instruments. These include the Tunisian Resolution, the Dakar Declaration, the Robben Island Guidelines and the Principles and Guidelines on the Right to a Fair Trial and Legal Representation in Africa. It is argued that the emerging jurisprudence on evidence obtained through human rights violations has a limited developmental framework, owing to the normative framework. This contribution discusses the normative framework, and qualifies the limited jurisprudence. The final step engages the jurisprudence of the Commission followed by a conclusion and recommendations.

1 Introduction

The success of any human rights system is based on its institutional, normative and jurisprudential framework. The institutional framework of human rights protection in Africa is the African Union.[1] In its Constitutive Act of 2001, the African Union engages heads of States Parties to promote and protect human and peoples' rights as provided for in the African Charter on Human and Peoples Rights (The African Charter).[2] The African Commission on Human and Peoples' Rights (African Commission) was established by the African Charter,[3] with a mandate to promote and protect human rights.[4] It must be noted, that in the exercise of this mandate, the African Commission may formulate and lay down principles and rules aimed at solving human rights issues, on which States Parties may base their legislation.[5] The African Charter is silent on the mode of dealing with evidence obtained through human rights

1 Heyns "African Regional Human Rights System" 2003-04 *Pennsylvania State Law Review* 681.
2 Constitutive Act of the African Union (CAAU), adopted by the OAU in Sirte, Libya, on 2000-07-11 and entered into force 2001-05-26, para 9 of the Preamble and arts 3(h) and 4(m).
3 African Charter on Human and Peoples' Rights (ACHPR) adopted by the OAU in Nairobi, Kenya, on 1981-06-27 and entered into force on 1986-12-21, art 30.
4 ACHPR, art 30.
5 ACHPR, art 45(1)(b) Udombana "The African Commission and Fair Trial Norms" 2006 *AHRLJ* 305.

How to cite: Nanima 'Evaluating the jurisprudence of the African Commission on evidence obtained through human rights violations' 2020 *De Jure Law Journal* 307-331
http://dx.doi.org/10.17159/2225-7160/2020/v53a20

violations. However, its institutional ability to formulate principles aimed at solving legal problems deal with this silence.

Another institutional structure of the African human rights system is the African Court of Human Rights.[6] Several reasons inform the author's decision to use the African Commission other than the African Court in this study. This Court complements the protective mandate of the African Commission.[7] In its interpretation and application of the African Charter, it uses decisions of the African Commission and other relevant human rights instruments that will fall within its jurisdiction.[8] In addition, the African Commission has handed down approximately 358 decisions,[9] unlike the African Court's 88 decisions.[10] The African Commission has also been actively involved in the development of the normative framework on evidence obtained through human rights violations, between the period of 1992 and 2003. The African Court started operating in 2004 and the African Commission as the focal point of the study is instructive in evaluating its normative framework and the emerging jurisprudence.

For purposes of this contribution, the normative framework refers to the development of soft law by the African Commission that guides it in adjudicating complaints or communications which arise concerning human rights violations. This stage has foreseen four normative developments between 1992 and 2003. These include resolutions, declarations, guidelines and principles. As shall be discussed in the subsequent section, a great part of this soft law was adopted through resolutions in a bid to improve the right to a fair trial. This right is a direct reflection of the subtle issues that form the basis of this contribution about evidence obtained through human rights violations.[11] An overview of the normative framework will aid the analysis of the emerging jurisprudence.

2 Normative framework of the African Commission

The normative developments of the African Commission on evidence obtained through human rights violations took place between the year

6 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (Protocol) adopted by the OAU in Ouagadougou, Burkina Faso on 1998-06-09 and entered into force on 2004-01-25, art 1.

7 Protocol, art 2.

8 ACHPR, art 3(1). Stefiszyn "The African Union; challenges and opportunities for women" 2005 *AHRLJ* 382.

9 Institute of Human Rights Defenders in Africa (2018-06-30) African Human Rights Case Law Analyser, https://bit.ly/2EdkHqc (last accessed 2020-08-17).

10 African Court (2018-06-30) Statistics from the African Court's website, https://bit.ly/3iKJm4c (last accessed 2020-08-17).

11 See the discussion on the normative framework below.

1992 and 2003. This can be ascribed to the drastic developments concerning the right to a fair trial experienced during this period. The chronological developments foresaw the adoption of the Resolution on the Right to Recourse and a Fair Trial (Tunis Resolution)[12] and the Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa (Dakar Declaration).[13] The other developments were the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines)[14] and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (The Principles).[15] This section gives an overview of these developments.

2 1 Resolution on the Right and Recourse to a Fair Trial

In 1992, at its 11th Ordinary Session in Tunis, the African Commission indicated that the right to a fair trial was not adequately provided for in the African Charter.[16] It did not provide for the right to an effective remedy[17] or require that an individual be promptly informed of the charges against him or her,[18] or that an individual is promptly brought before the court.[19] The African Commission adopted the Tunis Resolution to address these issues and required that the State Parties ensured that person in their jurisdiction had effective remedies and a procedure that addressed violations of the right to a fair trial.[20] Although the resolution dealt with the right to a fair trial, it did not specifically deal with instances of admission of evidence obtained through human rights violations. This shortfall affected its effectiveness in dealing with impugned evidence as a crucial component of the right to a fair trial.[21]

12 The Resolution on the Right to Recourse and a Fair Trial (Tunis Resolution) adopted by the ACHPR at its 11th Ordinary session in Tunis, Tunisia, on 1992-03-09, Res.4(XI)92: 11th session ACHR/Res.4(XI)/1992.

13 The Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa (Dakar Declaration), adopted by the ACHPR at its 26th ordinary session in Dakar, Senegal on 1999-11-15, ACHR /Res.41(XXVI)1999.

14 The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) adopted by the ACHPR in Banjul, Gambia at its 32nd session on 2002-10-29, ACHR/Res.61(XXXII)/2002.

15 The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (The Principles) adopted by the ACHPR in Banjul, Gambia at its 33rd ordinary session on 2003-05-29, DOC/OS(XXX)247/2003. Mashood "Developments in the African Regional Human Rights System" 2005 *HRLR* 118.

16 Ouguergouz *The African Charter on Human and Peoples' Rights. A comprehensive Agenda for Human Dignity and Sustainable Development in Africa* (2006) 141.

17 Tunis Resolution, para 1.

18 Tunis Resolution, para 2(b).

19 Tunis Resolution, para 2(c).

20 Tunis Resolution, paras 2-5.

21 Moravcsik "Taking preferences seriously: A liberal theory of international politics" 1991 *International organization* 517 on the primacy of the domestic society that represent the interests of individuals in a domestic jurisdiction.

2 2 Dakar Declaration on the Right to a Fair Trial

In September 1999, the African Commission adopted the Dakar Declaration on the Right to a Fair Trial in Africa.[22] It established that the right to a fair trial was a fundamental right whose realisation depended on the extinction of certain practices by the States Parties.[23] These included the elimination of state influence in the decisions of the judiciary [24] and acts of impunity like torture.[25] The Declaration required that States Parties respect the rule of law as a way of realising the right to a fair trial.[26] Where the States recognise the right to due process from the institution of preliminary investigations to the handing down of decisions by courts, the instances of admitting evidence obtained through human rights violations would be greatly reduced.

Besides, the African Commission reiterated that the judiciary had to be independent and impartial.[27] While its independence dealt with the appointment, security, and tenure of the members of the judiciary, impartiality resonated with its ability to hand down decisions without the influence of any person or organ.[28] However, the existence of an effervescent legal regime governing the judiciary, without rules on evidence obtained through human rights violations would still fail to solve the problem. [29] The adoption of this Declaration still pointed to the general improvement of the right to a fair trial without dealing with the specifics such as evidence obtained through human rights violations. It referred to the general aspects such as legal representation, practices of impunities by the States Parties, and independence of the judiciary. The concept of legal representation would have been a specific issue if it was engaged with instances of obtaining evidence through human rights violations. It showed that while the African Commission kept its perspective on the improvement of the right to a fair trial, it also indicated a lack of foresight in dealing with the admission of impugned evidence. However, its recognition of various aspects about the judiciary showed that the African Commission would be instructive in forging the foreign policy of States Parties.[30]

22 Dakar Declaration, para 1.
23 Dakar Declaration, para 1.
24 Dakar Declaration, para 2.
25 Dakar Declaration, paras 3 and 6.
26 Dakar Declaration, para 7.
27 Dakar Declaration, para 8.
28 Dakar Declaration, para 8.
29 Arts 126-151 of the Constitution of the Republic of Uganda, 1995 (hereafter Constitution 1995) provides for a robust system on the judiciary. It still lacks a provision on evidence obtained through human rights violations. See Nanima "The legal status of evidence obtained through human rights violations in Uganda" 2016 *PELJ* 1-38. The same was evident in the Constitution of the Republic of Kenya 1963, which had a legal regime concerning the judiciary, but lacked a provision on evidence obtained through human rights violations.
30 Moravcsik 518.

2 3 Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa

The third development culminated in the adoption of the Robben Island Guidelines. This development was informed by the requirement to tackle instances of torture, cruel, inhuman and degrading treatment and punishment.[31] The preamble stated:

> "Recalling the universal condemnation and prohibition of torture, cruel, inhuman and degrading treatment and punishment."[32]

> "Recognising the need to take positive steps to further the implementation of the existing provisions on the prohibition of torture, cruel, inhuman and degrading treatment and punishment."[33]

This was a departure from the Tunis Resolution and the Dakar Declaration that offered a general standard concerning the improvement of the right to a fair trial. The Robben Island Guidelines offered a constricted standard, which adequately dealt with evidence obtained through torture, cruel, inhuman and degrading treatment.[34] However, this position did not embrace evidence that was obtained outside these bounds. This posed another problem, namely, its failure to deal with evidence obtained through other human rights violations that lacked a taint of torture, cruel, inhuman or degrading treatment.[35]

2 4 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

The fourth major development was the passing of a resolution to establish a working group to prepare a draft of general principles and guidelines on the right to a fair trial and legal assistance. This led to the adoption of the Principles, which introduced four key concepts. These included the right to an effective remedy[36] the role of prosecutors,[37] the prohibition of collection of evidence through a violation of a detained suspect's rights,[38] and the rule on how to deal with evidence obtained through force or coercion.[39] These four concepts represented a departure from a general model that sought to develop the right to a fair trial to the specific issues that inform the admission of evidence through human rights violations.

---

31 Robben Island Guidelines, preamble.
32 Robben Island Guidelines, para 1 to the preamble.
33 Robben Island Guidelines, para 4.
34 Robben Island Guidelines, para 7. See the ACHPR, arts. 5, 45.
35 Communication 416/2012, *Jean-Marie Atangana Mebara v Cameroon* paras 81-83.
36 The Principles, principle (C)(a).
37 The Principles, principle F.
38 The Principles, principle M(7)(d)-(f).
39 The Principles, principle N(6)(d)1.

First, the Principles require that everyone has the right to an effective remedy by the domestic courts, which are competent with regard to their composition and the officers who adjudicate cases.[40] The State Parties have an obligation to ensure that victims of human rights abuses have an effective remedy.[41] This requirement extends the scope of an effective remedy from the conservative judicial remedies to those that deal with the admission of evidence. The prosecutors have a key role to play in instances where they have evidence that has been obtained through human right violations. Where they come into possession of evidence that has been obtained through a violation of the suspect's human rights, such evidence should not be admitted unless it is to be used against the perpetrators.[42]

This principle creates a standard, which recognises the need to deal with evidence obtained through human rights violations by the court and the prosecution.[43] Furthermore, it indicates that the prosecutors play a significant role in ensuring that impugned evidence is not tendered for admission. This principle reminds the parties not to engage in practices that violate the rights of persons within its jurisdiction.[44]

The principles protect suspects in the course of collection of evidence by the investigating arms of government. The States Parties are required to ensure that all persons under any form of detention or imprisonment are treated humanely.[45] While it does not define "humane manner', the fact that the African Commission can engage the jurisprudence of other human rights bodies offers a remedy to the situation. The relevant article provides that:

> "The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members."[46]

The State Party should collect evidence as it upholds the dignity of an individual such that the subsequent admission of the evidence is not contested.[47]

---

40 The Principles, principle C(a).
41 The Principles, principle C(c)(1).
42 The Principles, principle F (l).
43 The Principles, principle M(7)(d) and F(l).
44 See the discussion on the Dakar Declaration above.
45 The Principles, principle M(7)(a)-(f).
46 ACHPR, arts 60, 61.
47 For an extensive discussion on The Principles and evidence obtained through human rights violations, see Nanima *The legal status of evidence obtained through human rights violations in Uganda* (LLM thesis UWC 2016) 17-20.

3 Qualifying "limited jurisprudence"

3 1 Defining jurisprudence

Jurisprudence is an imprecise term, which cannot be accorded one definition. An engagement of the various definitions depicts a challenge in defining it within the meaning of human rights bodies. It may refer to a body of substantive legal rules or interpretations of a law by a judicial or quasi-judicial body.[48] In this regard, the African Commission uses its substantive rules to hand down decisions.[49] The challenge in their enforcement eludes it of the conventional character of a judicial body.[50] On another hand, jurisprudence is referred to as a scientific or philosophical investigation of law and justice.[51] This points to the notion that jurisprudence refers to the knowledge of the law.[52] This is further expounded in the origins of the term. Jurisprudence is a product of two Latin words, "juris" and "prudentia".[53] The term "juris" means law, and "prudentia" means knowledge.[54] This is an indication that the knowledge of a law needs to have theoretical underpinnings that guide its application. As a result, there should be an inquiry into what the law is, or what it ought to be. This inquiry emphasises the basis other than the components of the law. For instance, if morality forms the basis of a law in a given community, the types of law, from criminal to civil laws, adjectival to procedure laws ought to have elements of morality. Morality is an abstract notion that changes from one society to another, and human rights bodies are hesitant to enforce morals.[55]

The foregoing two definitions fail to offer guidance on the jurisprudence of a human rights body. A look at the perceptions of the various schools of thought will aid our understanding of the concept of jurisprudence. John Austin (1790-1859) defines jurisprudence as the philosophy of positive law.[56] He states that positive law consists of commands set as rules of conduct by a sovereign to a member or members of independent political society or the sovereign.[57] This

48 Suri *Jurisprudence* (2009) 3.
49 Murray "The African Commission on Human and Peoples Rights and international law" 2000 *Leiden Journal of International Law* 684.
50 Olukayode "Enforcement and Implementation Mechanisms of the African Human Rights Charter: A Critical Analysis" 2015 *Journal of Law, Policy and Globalization* 52. Wolfgang "The African Charter and Commission on Human and Peoples' Rights: How to make it more Effective" 1993 *Netherlands Quarterly of Human Rights* 25.
51 Suri 3.
52 Salmond *Jurisprudence* (1924) 1.
53 Salmond 1.
54 Salmond 1.
55 *Handyside v United Kingdom* European Court of Human Rights, Application 24/1976, para 48. *Otto-Preminger Institute* v *Austria*, (1994) 19 EHRR 3, para 56 where the EctHR declined to rule on a single moral code for the State Parties.
56 Austin *Lectures on Jurisprudence* (1875) 10.
57 Austin 10.

definition ousts the position of international law as far as it does not recognise international law as a sovereign entity that issues a set of commands to be followed by the subjects. The point of departure is the definition of Jeremy Bentham (1748-1832), which identifies law as the mandate of the sovereign over the subjects.[58] While Jeremy Bentham advocates for morality as a yardstick for the law, John Austin states that the former does not form part of the law.

The intersection in the two different definitions is the requirement that the law needs a basis to derive its authority. This basis may be in morality or positivism. Concerning this conversation, it still requires the existence of a sovereign entity to hand down the law. This contrasts the nature of human rights bodies which recognises the sovereignty of States Parties.[59]

Thomas Holland (1835-1926) defines jurisprudence as a formal science of positive law.[60] He alludes to the definition by John Austin and adds the concept of "formality" of the law. This definition shows the command of the sovereign as the basis of the law, without concern for its implementation. The implementation of the law is important in society as it leads to redress of criminal and civil wrongs. It shows that the judicial function of the courts is the protection of human rights and fundamental freedoms. In addition to the concept of sovereignty does not aid the enforcement of human rights in a domestic or international community and as such it does not offer adequate guidance to this study.

John Salmond (1862-1924) defines jurisprudence as the science of the first principle of civil law.[61] His concept includes two parts. First, generic law, which refers to the entire body of legal doctrine.[62] Secondly, the specific law, which deals with basic parts of the law such as the analytical, historical or ethical doctrines.[63] According to this definition, jurisprudence deals with both the basis and the implementation of the law. This is an indication that the knowledge of the law is not complete unless its implementation is considered. Arguably, an adequate understanding of a legal system lies in evaluating its content, evolution and the ideals that it stands for. An evaluation of these three concepts engages with the implementation of the law as far as they deal with the substantive law, the reasons that inform its existence and its implementation. Therefore, this definition creates a fusion of the basis of the law and its implementation.

The definitions of jurisprudence by Jeremy Bentham, John Austin, and Holland are inclined to the basis of the law, without dealing with its

58 William "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" 1982 *Wisconsin Law Review* 984.
59 Olukayode 52. Wolfgang 25.
60 Drake "Jurisprudence: A Formal Science" 1914 *Michigan Law Review* 34.
61 Salmond 1.
62 Salmond 2.
63 Salmond 4.

implementation. This position that has little regard to the implementation of the law does not offer guidance to this study. However, Salmond's view aids the understanding of the jurisprudence of international human rights bodies. On this basis, the article sets out to place the jurisprudence of the African Commission into context.

3 2 Defining Jurisprudence of human rights bodies

The jurisprudence of the human rights bodies has no definite definition. It may only be understood in the context it is used. It may refer to human rights recommendations or findings on individual communications that are issued by human rights bodies.[64] It may also refer to the legal interpretation of international human rights law as it develops.[65] There is no uniform model about this jurisprudence of human rights monitoring bodies despite the comparisons of the general principles that govern the universality of human rights across the globe.[66] For instance, the African Commission may have resolutions, declarations, guidelines, decisions and General Comments.[67] The European Court of Human Rights (ECtHR) relies on the decisions it hands down. The question is whether a limitation may exist despite the existence of various forms of jurisprudence.

The Human Rights Committee (HRC) of the United Nations monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR).[68] It uses its decisions, General Comments and recommendations in its Concluding Observations as its jurisprudence. The General Comments offer insight on how various articles of the ICCPR may be interpreted.[69] The Human Rights bodies also use Concluding Observations to enforce the observance of rights by States Parties. In some of its Concluding Observations, the HRC requires that State Parties desist from the use of torture and arbitrary deprivation of liberty in illegal detention areas.[70] It recommends that an accused must appear before a

64 Jurisprudence, 1997 (2018-06-30), http://juris.ohchr.org/Home/About, (last accessed 2020-08-17).

65 Jurisprudence, 1997 (2018-06-30), http://juris.ohchr.org/Home/About, (last accessed 2020-08-17).

66 Cerna "Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts" 1994 *Human Rights Quarterly* 740; Donnelly "The relative universality of human rights" 2007 *Human Rights Quarterly* 281.

67 See discussion above on normative frameworks.

68 International Covenant on Civil and Political Rights (ICCPR) adopted by the General Assembly in New York, USA on 1966-12-19 and entered into force on 1976-03-23, 999 UNTS 171, art 28.

69 CCPR General Comment No 13 Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law Doc HRI/GEN/1/Rev.1 (1984); CCPR General Comment No 20 Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment U.N. Doc. HRI/GEN/1/Rev.1 (1994); CCPR General Comment No 32 Right to equality before courts and tribunals and to fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

70 UN Doc CCPR/CO/80/UGA (30 June 2004) para 17.

judicial officer within a reasonable time.[71] These Concluding Observations may be used to complement the work of other human rights bodies by requiring that States Parties implement these recommendations.[72]

Like the African Commission, the HRC has various forms of jurisprudence. The three bodies all offer principles on human rights as the overriding factor. Salmond's definition depicts the jurisprudence of human rights bodies as the principles that guide their decisions, regardless of the tools that are labelled as "jurisprudence". Besides, this definition aids the implementation of this jurisprudence by the State Parties.

3 2 Qualifying the concept of "limited jurisprudence"

The experiences of other human rights bodies can be used to elaborate on the "limitation" of the jurisprudence of the African Commission. The HRC has many sources like decisions, General Comments and Concluding Observations. This is synonymous with the African Commission that has resolutions, declarations, General Comments, Concluding Observations and decisions on the communications. About this study, the jurisprudence includes the Tunis Resolution, the Dakar Declaration, Robben Island Guidelines and the Principles. The position is different with the ECtHR, which only relies on its decisions as part of its normative framework. The cumulative effect of the application of the normative framework should be the use of this jurisprudence to hand down informed decisions that are based on legal principles in the normative framework. It is on this basis that the concept of "limitation of the jurisprudence" has to be qualified, to justify the subsequent evaluation of the Commission.

The lack of a normative framework that is distinct from the decisions that a human rights body passes should not be used as the yardstick for ruling out the existence of emerging jurisprudence.[73] For instance, in *Saunders v the United Kingdom*, the ECtHR dealt with compulsion and stated that evidence that arose out of a legal compulsion to incriminate an applicant rendered the trial unfair.[74] In the subsequent case of *Jalloh v Germany*, the ECtHR used the concept of severity to qualify the use of legal compulsion to obtain evidence.[75] In *Gafgen v Germany*, the ECtHR balanced compulsion and fairness of a trial. It stated that evidence obtained through cruel, inhuman or degrading treatment may be

71 UN Doc CCPR/CO/83/KEN (28 March 2005) para 17.
72 UN Doc CCPR/C/CHN- HKG/CO/3 (12-13 March 2013) para 8. The HRC recommended that Hong Kong implements the recommendations of the CAT, requiring it to bring its laws to conform with the UNCAT.
73 *Saunders v the United Kingdom* (1996) ECHR Series A No. 6, *Jalloh v Germany* (2007) 44 EHRR 32, *Gafgen v Germany* (2010) 52 EHRR 1.
74 *Saunders v the United Kingdom supra,* paras 75, 76.
75 *Jalloh v Germany supra,* paras 113-120.

admitted in Court if its admission does not render the trial unfair.[76] In this vein, a limitation in developing jurisprudence is not in the number of decisions of a human rights body, but rather the quality of the decision. This quality is evident in the developments on a given principle of law.

At this point, it is clear that the normative framework of the African Commission was developed to improve the standard of the right to a fair trial, with little regard to the mode of dealing with evidence obtained through human rights violations. This is noted in the fact that the Tunis Resolution and the Dakar Declaration do not expressly deal with evidence obtained through human rights violations. This is exacerbated by the fact that the Robben Island Guidelines are limited to evidence obtained through torture, cruel, inhuman and degrading treatment. As a point of departure, the Principles present a streamlined mode of dealing with evidence obtained through human rights violations.

Black's Law Dictionary defines the term "limit" as a boundary of scope, be it authority, power, privilege, or right.[77] The application of this definition to the norms of the African Commission on evidence obtained through human rights violations specifies that the scope of the Tunis Resolution and the Dakar Declaration did not envisage evidence obtained through human rights violations. Therefore, this section evaluates both the normative framework and the jurisprudence of the African Commission.

The human rights bodies resonate with the universality of human rights. The concept of universality is the over-arching principle and not the normative framework.[78] The HRC has the mandate to deal with complaints and communications from 174 States Parties.[79] The ECtHR handles complaints and communications from 47 States Parties, which are litigious societies.[80] This is evident in the fact that it received 280,512 applications from the year 1998 to 2008, and delivered 9,399 decisions in the same period.[81] The Commission has handed down 229 decisions since its inception.[82] A quantitative approach in assessing whether the Commission's jurisprudence is limited would be misleading. Therefore, the limitation concerns the quality of the jurisprudence in as far as it

76 *Gafgen v Germany supra,* para 108.
77 Definition of "Limit" (2018-06-30), http://thelawdictionary.org/limit/ (last accessed 2020-08-17).
78 The European Convention on Human Rights, adopted by the members of the Council of Europe in Strasbourg, France on 1950-11-04 and entered into force 1953-09-03, 213 UNTS 221, preambular paras 2 and 6; ACHPR, preamble, para 4; ICCPR preamble, para 2.
79 Ratification table to the ICCPR (2018-06-30), https://bit.ly/2E5CHTr (last accessed 2020-08-18).
80 47 Member States (2017-06-30), https://bit.ly/326MNvg (last accessed 2020-11-18).
81 Ten years of the "new" European Court of Human Rights 1998- 2008 Situational Outlook, 78-90 (2017-06-30), https://bit.ly/2Q2gZ5h (last accessed 2020-08-17).
82 Statistics from the African Human Rights Case Law Analyser (2018-06-30), https://bit.ly/2EdkHqc (last accessed 2020-08-17).

develops principles that deal with evidence obtained through human rights violations. A study of the jurisprudence of the Commission on evidence obtained through human rights violations will look at the quality of the jurisprudence, whether it is limited, and the factors that inform this limited jurisprudence.

An approach that looks at the number of the decisions passed may not offer adequate guidance to creating a framework for the definition of a limited jurisprudence. An analysis in the interim reveals that the ECtHR offers detailed and well reason judgments, which develop its jurisprudence.[83] With the aid of the definition of a "limit" from Black's law dictionary, an approach that engages the limits in the jurisprudence in the quality of the decisions is preferred. This is because it supersedes the arguments that uplift sources of jurisprudence and the number of decisions passed by a human rights monitoring body, other than the quality of the decisions.

4 Emerging jurisprudence

This section visits the decisions of the Commission from the year 2003 to 2015, from the 32nd to the 54th sessions. Out of the 41 decisions that were handed down, the discussion is narrowed down to four decisions.[84] These decisions have three distinct features. Firstly, they relate to the right to a fair trial. Secondly, they reiterate the principles that ensure the enjoyment of the right to a fair trial. Thirdly, they aid in the understanding of the jurisprudence of evidence obtained through human rights violations. These features inform an engagement that deals with these four concepts. These include bringing the law into conformity with the African Charter, exhaustion of local remedies, the responsibility of state actors, and dealing with evidence obtained through torture. These principles form the key issues in the Commission's deliberations on the merits of the communications.

4 1 Bringing the law into conformity with the African Charter

The general rule regarding international treaties is that a State cannot invoke its national law as a justification for the non-compliance with international law.[85] Concerning the Principles and the Robin Island Guidelines, State Parties are expected as a matter of principle to comply

83 *Saunders v the United Kingdom supra; Jalloh v Germany supra* and *Gafgen v Germany supra* on incriminating evidence.

84 Communications 222/1998 and 229/199, *Law Office of Ghazi Suleman v Sudan* 9; Communication 250/2002, *Liesbeth v Eritrea*; Communication 245/2002, *Zimbabwe Human Rights Non-Government Organisations Forum v Zimbabwe*; Communication 334/2006, *Egyptian Initiative and Interights v Egypt*.

85 Vienna Convention on the Law of Treaties (VCLT) adopted by the General Assembly in Vienna, Austria on 1969-05-23 and entered into force 1980-01-27, 1155 UNTS 331, art 27.

with this soft law.[86] When a State Party ratifies the African Charter, it has an obligation to uphold the fundamental human rights contained therein, even in instances where it does not enact domestic legislation to effect the African Charter's incorporation[87]

The ICCPR requires that each State Party "undertakes to take the necessary steps, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant."[88] This is to ensure that the State Parties uphold their obligations under the international treaties.

Other international instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) require States Parties to:

> "… embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle".[89]

This provision adds a voice to the requirement to uphold the rights enshrined in international and regional treaties, provided the parties are States Parties. While some authors have criticised the Commission's view on the premise that its findings are not binding and consequently a State may disregard them,[90] the findings remain persuasive like the opinions of the United Nations Human Rights Committee.[91]

The African Charter requires that a complainant enjoys the right to a lawyer as a component of the right to a fair trial.[92] The position formed the adoption of the Tunis Resolution as far as the failure to engage the right to a lawyer affected the right to a fair trial.[93] The practice of violating this right with impunity formed the adoption of the Dakar Declaration.[94] This position was tested in *Law Office of Ghazi v Sudan.*[95]

---

86 ACHPR *supra* art 45(1)b; *Purohit v The Gambia* (2003) Africa Human Rights Law Reports 96 para 43.
87 Draft Declaration on Rights and Duties of States adopted by the International Law Commission at its first session and forwarded to the General Assembly as a report on 1949-12-06, GA Res 375/1949. Wachira & Abiola "Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy" 2006 *AHRLJ* 472.
88 ICCPR, art 2(2).
89 Convention for the Elimination of all Forms of Discrimination against Women (CEDAW) adopted by the General Assembly in New York, USA on 1979-12-18 and entered into force on 1981-09-03, 1249 UNTS, art 2(a).
90 Murray 684.
91 Murray 684.
92 ACHPR, art 7.
93 See discussion on Tunis Resolution above.
94 See discussion on Dakar Declaration above.
95 *Ghazi supra,* para 2.

The victims were arrested and detained without charge by the government of Sudan on 1 July 1998.[96] In the course of their detention, the complainants were denied a lawyer and contact with their families.[97] The second complaint decried the trial of civilians by a military court established by a Presidential decree.[98] Although the President later pardoned the victims,[99] this did not solve questions about the violation of the right to counsel and other questions concerning their illegal detention and allegations of torture.

The gist of the matter is that the admission of evidence obtained in the course of the illegal detention would be contested. The complainants alleged a violation of the right to a fair trial under article 7 of the African Charter.[100] This was evident in the State Party's wide publicity that the complainants attempted to overthrow the government. This publicity presumed them guilty before the domestic court could make its findings.[101] This kind of publicity potentially rendered any subsequent trial unfair because of the utterances by the state officials, about the complainants' guilt. While the African Commission did not consider this position, this turn of events substantially affected the position of the complainants about their right to the presumption of innocence.[102] There is persuasive jurisprudence that a process that substantially affects the position of a complainant may lead to a finding of an unfair trial, especially in instances where evidence has been obtained through human rights violations.[103] The African Commission ought to have advised the State Party to ensure that its laws on the right to a counsel and the right to a fair trial conform to the principles of the African Charter.

While the African Commission noted that the State Party's failure to uphold the complainants' right to a lawyer violated their right to a fair trial,[104] it found no proof of violation of the right to a fair trial concerning confessions obtained from the complainants in the course of their detention.[105] The fact that the complainants were denied the right to a lawyer as soon as they were detained, was an indication that any evidence following this violation was tainted with illegality.

The African Commission did not expressly state the section of the domestic law that was required to be brought into conformity with the African Charter.[106] At the same time, the State Party had laws that provided for detention beyond 48 hours. The State Party would use its

96 *Ghazi supra,* para 3.
97 *Ghazi supra,* para3.
98 *Ghazi supra,* paras 5-6.
99 *Ghazi supra,* para 29.
100 *Ghazi supra,* para 8.
101 *Ghazi supra,* para 54.
102 Compare *Shabelnik v Ukraine* [2009] ECHR 302 para 53.
103 *Shabelnik supra,* para 53.
104 *Shabelnik supra,* para 57.
105 *Shabelnik supra,* para 55.
106 *Shabelnik supra,* paras 56, 59.

National Security Act to charge, detain and interrogate an individual for 72 hours.[107] This detention could be renewed for up to one month, without justification.[108] In addition, bail would not be granted to persons who were accused of crimes punishable by death or life imprisonment.[109] This detention beyond 48 hours was illegal, and the subsequent purported interrogations and any evidence that was obtained could not be relied on as admissible evidence. The African Commission did not evaluate the contents of the National Security Act, probably because they were not brought to its attention. However, the final decision requiring that Sudan brings its laws into conformity with the African Charter was specifically directed at this law. At the time of conducting this research, the author noted that provisions of the National Security Act that allowed the renewal of detention have survived all repeals to the Security Acts. Firstly, the National Security Forces Act of 1999, which repealed the National Security Act of 1994, still provides for detention for three days, which could be renewed for 30 days,[110] and a further 30 days.[111] Secondly, the National Security Act 2010, which repealed the National Security Forces Act of 1999, still provides for detention for 30 days, which can be renewed for 30 days,[112] and a further 15 days.[113] At the time of preparing this article, the author was not aware of any communication by the African Commission to Sudan to ensure that these sections conform to the principles of international law.[114]

At the date of communication of this decision, the four norms that form the basis of this study had been enacted.[115] The Commission did not use the Tunis Resolution or the Dakar Declaration, to point to the evidence obtained through human rights violations.[116] However, it emphasised the right to freedom of expression.[117] This was evident in the requirement to States Parties to adhere to the principles that govern the right to a fair trial, without offering guidance on the specific aspects

107 Report to the US Department of Defence on Sudan Human Rights Practices 1994, paras 19-20 (2018-06-30), https://bit.ly/3haek5C, (last accessed 2020-08-17).
108 Report to the US Department of Defence on Sudan Human Rights Practices 1994, paras 19-20 (2018-06-30), https://bit.ly/3haek5C, (last accessed 2020-08-17).
109 Report to the US Department of Defence on Sudan Human Rights Practices 1994, paras 19-20 (2018-06-30), https://bit.ly/3haek5C, (last accessed 2020-08-17) para 20.
110 S 30(d) of the National Security Forces Act 1999 (hereafter NSFA).
111 S 30(e) of the NSFA.
112 S 50(1)(e) of the NSFA.
113 S 50(1)(g) of the NSFA.
114 Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan, paras 31-33, 66-67 provide recommendations on the National Security Act 2010, but do not refer to the codified long periods of detention.
115 The decision refers to The Principles, and the Dakar Declaration in paras 65- 66.
116 *Ghazi supra,* para 65.
117 *Ghazi supra,* paras 54, 66.

that govern the instances of the right to legal representation and the presumption of innocence. The failure by the African Commission to give specific recommendations to States Parties on how to deal with evidence obtained violation of the right to a lawyer and the presumption of innocence indicated a limited development in its jurisprudence with regard to human rights violations.

4 2 Exhaustion of local remedies

The exhaustion of local remedies is a tool used by various regional and international bodies to gauge the complaints and communications that they should address.[118] This rule ensures that the domestic institutions have the opportunity to deal with violations before the human rights bodies.[119] This tool engages the principle of non-intervention and state sovereignty in matters that the latter can rectify, without interference from other states.[120] The local remedies have to be available, effective and sufficient.[121] According to the ECtHR, the exhaustion of remedies is a recognised rule of international law that forms part of the customary international law.[122]

The African Commission uses the exhaustion of local remedies as a tool that deals with instances of evidence obtained through human right violations, by subjecting a complaint to the admissibility test.[123] In *Liesbeth Zegveld and Mussie Ephrem v Eritrea,* the Commission dealt with the rule regarding exhaustion of remedies. The complainant alleged that the illegal arrest of eleven former Eritrean government officials in Asmara, Eritrea, in September 2001 violated Eritrean laws and the African Charter.[124] The African Commission acknowledged that exhaustion of a domestic remedy was a condition precedent to obtaining the right of appearance before it.[125] It also reiterated that the exhaustion of a domestic remedy is dependent on whether it is available, effective and sufficient.[126] The availability of a domestic remedy depends on the petitioner's ability to pursue it without impediment, and its effectiveness depends on its offer of a prospect of success and its sufficiency depends on its capability to redress the complaint.[127]

118 ACHPR, art 56(5); European Convention, art 41(1) (c).
119 Cancado "Origin and Historical Development of the Rule of Exhaustion of local Remedies in International Law" 1976 *Belgium Review of International Law* 521; European Convention, art 22.
120 Cancado 521.
121 *De Jong, Baljiet and Van den Brink* (1984) 8 EHRR 20.
122 Practical Guide on Admissibility Criteria, 2014 Council of Europe, 22 (2018-06-30), https://bit.ly/3kRbcgW (last accessed 2020-08-17).
123 ACHPR, art 56(5). As at 17 June 2018, a total of twenty-six communications had been dismissed on grounds of inadmissibility. These included 19 concerning failure to exhaust remedies and 3 decisions on the right to a fair trial (2018-06-30), https://bit.ly/3axjJBd (last accessed 2020-08-17).
124 *Liesbeth supra,* para 2.
125 *Liesbeth supra,* para 22.
126 *Liesbeth supra,* para 37.

This is closely related to the principle of primacy, which recognises that the ECtHR has a role to play in monitoring the enforcement of the domestic authorities' implementation of the European Convention.[128] This principle requires that an individual has access to a remedy in a domestic court, which effectively implements the provisions of the European Convention.[129] This resonates with the availability of a remedy as laid out in *Liesbeth,* where an individual should be able to pursue it without any impediment. The requirement by the principle of primacy that an individual should have a substantive review of his or her complaint in the domestic court[130] is a point of departure in the two human rights bodies as far as the question of substantiality has not yet been dealt with directly by the African Commission.

The African Commission reiterates that the effectiveness of a remedy lies in its prospect of success.[131] This is synonymous with the principle of primacy, which indicates that an individual should have access to provisional measures in the course of the determination of a matter by a domestic court.[132] Besides, the Tunis Resolution recognised the need for the effectiveness of a remedy to buttress the right to a fair trial.[133] The grey area was evident in its failure to offer guidance on how to deal with evidence obtained through human rights violations. Therefore, if a State Party unduly prolonged the process of accessing a remedy, then the Commission would find that the principle of exhaustion of the remedy would not be applicable.[134] Some scholars suggest that remedies that need to be exhausted should be judicial remedies and not discretionary remedies.[135] That discussion is outside the scope of this contribution. A point of concern is where the domestic laws of a country have a legislative procedure that offers a remedy for evidence obtained through human rights violations. This is an indication that the remedy has to be exhausted through the required procedure for one to have standing before the Commission.

The exhaustion of remedies is a precursor to the admissibility of a communication by the African Commission.[136] A look at the statistics of the communications decided on their merits, and on admissibility is crucial to informing the conversation on the exhaustion of remedies. The

127 *Liesbeth supra,* para 37. The ACHPR relied on Communications 147/95 and 149/96 *Sir Dawda K. Jawara v The Gambia* and *Velasquez Rodríguez* Case (29 July 1988) Series C No. 4.
128 Christoffersen *Fair balance: proportionality, subsidiarity and primarity in the European Convention on Human Rights* (2009) 359.
129 Christoffersen 361.
130 Christoffersen 361.
131 *Liesbeth supra,* para 37.
132 Christoffersen 361.
133 The Tunis Resolution, para 1.
134 Communication 361/2008, *Zitha & Zitha v Mozambique* para 101.
135 Enabulele & Bazuaye "Setting the Law Straight: *Tanganyika Law Society v Tanzania* and Exhaustion of Domestic Remedies before the African Court" 2014 *Mizan Law Review* 237.
136 See notes 121-130 above.

African Human Rights Case Law Analyser indicates that the African Commission has handed down 229 decisions since its inception.[137] The outcomes of these decisions fall into 13 categories. These include amicable settlements, referrals under art 58(1), decisions on merit, dismissed, files closed, outcome inconclusive, and postponed "sine die".[138] Other outcomes include provisional measures, rejection at seizure stage, review on merits, rulings of inadmissibility and the withdrawal of communications.[139] While it is acknowledged that the Commission had reasons for the various outcomes, as at 30 June 2017 only 89 out of the 229 communications have been decided on merits.[140] This accounts for 38% of the communications. Besides, 90 communications have been ruled inadmissible,[141] accounting for 39% of the total number of communications. Subject to substantial research, these figures may be instructive in increasing the number of communications that are decided on merit and increasing the number of decisions that are declared inadmissible.

In the interim, the admissibility of communications that deal with evidence obtained through human rights violations poses a potential loophole, which disregards the cases with merit. The African Charter requires that a communication be considered if it satisfies the admissibility test.[142] The grounds require that the authors disclose their identity although they seek to remain anonymous [143] and that the communications are compatible with the African Charter.[144] The communication should not be written in disparaging or insulting language against the State or the institutions of the African Union,[145] that it is not based exclusively on media reports.[146] The complainant should have exhausted all local remedies,[147] and that the communication is submitted within a reasonable time.[148] The final requirement is that the communication should not be under consideration by any other international or regional treaty body.[149] This contribution visits the ground that requires that all local remedies be exhausted before the

137 IHRDA African Human Rights Case Law Analyser (2018-06-30), https://bit.ly/2EdkHqc (last accessed 2020-08-17).
138 IHRDA African Human Rights Case Law Analyser (2018-06-30), https://bit.ly/2EdkHqc (last accessed 2020-08-17).
139 IHRDA African Human Rights Case Law Analyser (2018-06-30), https://bit.ly/2EdkHqc (last accessed 2020-08-17).
140 IHRDA African Human Rights Case Law Analyser (2018-06-30), https://bit.ly/2EdkHqc (last accessed 2020-08-17).
141 IHRDA African Human Rights Case Law Analyser (2018-06-30), https://bit.ly/2EdkHqc (last accessed 2020-08-17).
142 ACHPR, art 56.
143 ACHPR, art 56, ground 1.
144 ACHPR, art 56, ground 2; Communication 383/2010 *Mohamed Abdullah Saleh Al Asad v Djobouti*.
145 ACHPR, art 56, ground 3.
146 ACHPR, art 56, ground 4.
147 ACHPR, art 56, ground 5.
148 ACHPR, art 56, ground 6. Commission Communication 305/2005 *Article 19 v Zimbabwe*, Communication 306/2005 *Samuel Muzerengwa v Zimbabwe*.
149 ACHPR, art 56, ground 7.

Commission considers a communication. Where the local remedies cannot be exhausted, the complainant has to show that the remedy in issue is unavailable, ineffective or insufficient, other than making generalised statements.[150]

There is a debate as to whether exhaustion of remedies may be a substantive or a procedural issue.[151] This section unpacks the exhaustion of remedies as a procedural issue and places it within the context of the evidence obtained through human rights violations. Some States Parties have laws that require that a person seeking a remedy for evidence obtained through human rights violations files a formal application with a domestic court. This is distinguished from instances where one alleges that evidence was obtained through human rights violations, and the court conducts a trial-within-a-trial to ascertain the voluntariness of obtaining the evidence.[152]

In Zimbabwe, a complainant who seeks the non-admission of evidence obtained through human rights violations has to file a formal application for permanent stay of criminal proceedings before the remedy is granted.[153] On this basis, his or her communication may be technically disregarded by the African Commission for failure to exhaust this procedural domestic remedy. In other countries such as South Africa, a case with similar facts may pass the admissibility test due to lack of a similar procedural requirement. This is because the domestic courts may use a trial-within-a-trial, to establish the voluntariness of obtaining the evidence without formally applying.[154] This requirement to exhaust domestic remedies poses a challenge to equality before the Commission since complainants from jurisdictions that have this procedural requirement have to apply formally for the remedy. Conversely, complainants from jurisdictions that do not provide for a procedure to follow do not have to prove the exhaustion of this remedy to court. Therefore, persons with similar complaints, other than this procedural requirement, may receive different treatment in the course of establishing the admissibility of the complaint before the Commission.

The Commission has not taken any positive steps to provide clarity by way of Concluding Observations or General Comments. The Concluding Observations of the Commission play a vital role in ensuring that evidence obtained through human rights violations is not admitted.[155] Some of the recommendations included advising States Parties to

150 Communication 338/07*Socio-Economic Rights and Accountability Project v The Federal Republic of Nigeria*.
151 Silvia & Kathrin "The rule of prior exhaustion of local remedies in the international law doctrine and its application in the specific context of human rights protection" 2007 *European University Institute* 1-4.
152 S 35(5) of the Constitution of the Republic of South Africa, 1998 (hereafter Constitution).
153 *Jestina Mukoko V Attorney General* Unreported case 36/ 2009 (20 March 2012).
154 S 35(5) of the Constitution.
155 See notes 159-161, below.

provide an independent Police oversight body[156] and criminalisation of torture.[157] Other States Parties have been advised to conform to the definition of torture as provided for in the *United Nations Convention Against Torture* (UNCAT).[158] The African Commission, therefore, in its Concluding Observations to States, has shown the areas of concern and recommendations for dealing with evidence obtained through human rights violations.

4 3 Responsibility for non-state actors

Under international law, three categories of non-state actors are identified. These include armed groups like rebels, paramilitaries, mercenaries and militias;[159] national and transnational corporations;[160] and other non-state actors.[161] The Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, (Declaration)[162] requires that States Parties exercise due diligence to prevent, investigate and punish any violation of the rights enshrined in the Declaration. The African Commission is empowered to use the provisions of this Declaration under the African Charter.[163] The States should prevent the violations of the rights of defenders under their jurisdiction by taking legal, judicial and administrative and all other measures to ensure the full enjoyment by defenders of their rights. These include investigating alleged violations, prosecuting alleged perpetrators and providing defenders with remedies and reparation. The state cannot absolve itself of liability if the perpetrators of human rights violations are non-state actors. The requirement on the state to exercise due diligence is a way of assessing whether the state has acted in fulfilment of its obligations.[164]

156 Concluding Observations on consolidated 2nd to 10th Report of Tanzania of 2008, para 24 (2018-06-30), https://bit.ly/2DQVTVa (last accessed 2020-08-17).

157 Concluding Observations on 3rd Periodic Report of Uganda of 2006 para 27, article V, paras (e) and (f) (2018-06-30), https://bit.ly/2YaFNMR (last accessed 2020-08-17).

158 United Nations Convention against Torture, and other Cruel, inhuman and degrading treatment (UNCAT) adopted by the General Assembly in New York, USA on 1984-02-04 and entered into force on 1987-06-12, 1465 UNTS 85. Concluding Observations on initial periodic report of Botswana, of 2010 (12th to 20th May 2010), https://bit.ly/3atL1s6 (last accessed 2020-08-17).

159 Report of the Special Rapporteur, Margaret Sekagya on the situation of human rights defenders A/65/223 dated 4 August 2010, 3.

160 Report of the Special Rapporteur, Margaret Sekagya on the situation of human rights defenders A/65/223 dated 4 August 2010, 4.

161 Report of the Special Rapporteur, Margaret Sekagya on the situation of human rights defenders A/65/223 dated 4 August 2010, 5.

162 Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, adopted by the General Assembly at its 53rd session on 1999-03-08, GA Res 53/144, UN GAOR, UN Doc A/RES/53/144 annex.

163 ACHPR, arts 60 and 61.

An assessment on whether the African Commission offers clarity on evidence obtained through human rights violations by vigilantes is instructive. This is because some countries have developed jurisprudence that deals with evidence from vigilantes. In South Africa, evidence obtained through human rights violations may still be admitted if it was obtained in a manner that did not violate the rights of an accused person.[165] In *Zimbabwe Human Rights NGO Forum v Zimbabwe,* the African Commission dealt with the issue of the scope of responsibility for state actors in human rights violations. The facts are that the Zimbabwe NGO Forum, brought this claim, alleging that following the Constitutional Referendum in 2000, there was widespread violence targeted at white farmers, black farm workers, teachers, civil servants and people believed to be supporting opposition parties.[166] Because of the violence, 82 people lost their lives.[167] The complainants stated that the police and the army of Zimbabwe failed to intervene in the incident of criminal activity. According to the Commission, the term "state actors" referred to individuals, organisations, institutions, and other bodies that were acting outside State organs.[168]

The Commission stated that the complainants failed to prove, first, that the war veterans were state actors,[169] and secondly that the government of Zimbabwe acquiesced to their acts.[170] The human standards of the African Charter require that the state takes positive steps to prevent private violations of human rights of individuals under its jurisdiction.[171] The prevention of these violations of human rights does not end with the observance of the human rights standards by state organs, but require the state to ensure that third parties, like non-state actors, do not interfere with the enjoyment of rights of individuals under its jurisdiction.[172] The state is expected to exercise due diligence to prevent the violation of the human rights of individuals by non-state actors by organising state organs to apprehend such individuals and ensure that they are brought to justice.[173]

There was no doubt that because the non-state actors were involved in the arrest and detention of individuals, the state prevented the victims

164 See *Velasquez supra*, para 172.
165 *S v Songezo Mini* Unreported Case 141178 of 2015 (30 April 2015), paras 20, 21, 22. *S v Zuko* Unreported ECD Case CA & R159 of 2001. *S v Hena* 2006 2 SACR 33 (SE 40i-41b).
166 *Zimbabwe Human Rights NGO Forum supra,* paras 3-4.
167 *Zimbabwe Human Rights NGO Forum supra,* para 8.
168 *Zimbabwe Human Rights NGO Forum supra,* para 142.
169 *Zimbabwe Human Rights NGO Forum supra,* paras 139-141.
170 *Zimbabwe Human Rights NGO Forum supra,* paras 139-141.
171 *Zimbabwe Human Rights NGO Forum supra,* para 142.
172 *Zimbabwe Human Rights NGO Forum supra,* para 143. Communication 272/2003 *Association of victims of Post Electoral Violence and Interights v Cameroon* para 89.
173 *Zimbabwe Human Rights NGO Forum supra,* para 147. The Commission referred to the ICCPR article 2(3)a, General Comment 20 of the HRC; articles 2,3,8 and 14 of the European Convention.

of the crimes from obtaining relief from the domestic courts.[174] The state had an obligation to exercise due diligence and ensure that it did not acquiesce to the use of evidence obtained through human rights violations by non-state actors like vigilantes. Consequently, bringing such individuals to justice for human rights violations, such as obtaining evidence through torture or cruel, inhuman and degrading treatment ought to have been alluded to by the African Commission under the Principles. These Principles prohibit the collection of evidence through a violation of a detained person's rights[175] and require that States Parties put in place mechanisms for the receipt and investigation of complaints.[176] The African Commission did not address the issue of evidence obtained through human rights violations. However, it pointed to the need to uphold the rights of individuals who were affected by the non-state actors. As such, laws like the Zimbabwe Decree 1 of 2000 which forecloses access to any remedy that may be available to victims to vindicate their rights, had to be amended to ensure that Zimbabwe does not renege on its commitment to the enjoyment of the right to a fair trial by persons in its jurisdiction.[177]

This complaint presented the Commission with a chance to rule on the position of the vigilantes and the evidence they obtain. Its failure to offer clarity on evidence obtained through human rights violations by vigilantes presented a lacuna in its jurisprudence. It was expected that the African Commission addressed the issue of vigilantes and how the evidence they obtain is dealt with. This case offered the African Commission a chance to use the development of domestic law to improve the jurisprudence on evidence obtained by vigilantes.[178]

4 4 Dealing with evidence obtained through torture

Various international and regional instruments impose obligations on States Parties about evidence obtained through torture. There are protective measures to ensure the training of law enforcement officers on what constitutes torture or ill-treatment.[179] The States Parties are supposed to ensure that any statement made because of torture is not used in evidence in any proceedings, except against the perpetrators as evidence that the statement was made.[180]

174 *Zimbabwe Human Rights NGO Forum supra,* para 211.
175 The Principles, principle M(7)(d) - (f).
176 The Principles, principle M(7)(h).
177 *Zimbabwe Human Rights NGO Forum supra,* paras 214, ACHPR, arts 1 and 7.
178 Municipal law has been used before, to develop law at the regional level. Compare the judgment of Sachs J in *S v M* 2008 (3) SA 232 (CC) and the General Comment 1 of 2014 on children and caregivers (2015-11-30), https://bit.ly/3110vke (last accessed 2020-08-17).
179 Declaration on the Protection against Torture (DPT) adopted by the UNGA res 3452 (XXX) 1975-12-9, art 5. United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) A/RES/70/175 para 54.

The States Parties are required to ensure that there are established competent authorities to promptly and impartially investigate reasonable grounds that there has been the commission of torture.[181] It is expected that there is subsequent prosecution of the perpetrators once it is established that an act of torture has been committed.[182] The States Parties are required to streamline their legislation and bring it into conformity with the Convention against Torture (CAT).[183] The CAT requires that the prosecution of perpetrators of torture should not be subjected to discretion.[184] This principle forms the core of the content in the Robben Island Guidelines. However, this is limited to evidence obtained through torture, cruel, inhuman and degrading treatment.

In *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt,* the African Commission addressed the issue of evidence obtained through torture.[185] According to the complainants, agents of the State Security Intelligence (the SSI) subjected the victims to various forms of torture and ill-treatment during their detention to "confess" before the State Security Prosecutor for their involvement in the Taba bombings.[186] The victims were held *incommunicado* for a long period without access to a lawyer.[187] Subsequently, these confessions were used to convict the complainants in the domestic court and sentenced to death.[188] The main issue before the African Commission was whether the complainants' right to a fair trial was violated.

The African Commission relied on the jurisprudence of the ECtHR to state:

> "Where a person is injured while in detention or otherwise under the control of the police, any such injury will give rise to a strong presumption that the person was subjected to ill-treatment. It is incumbent on the State to provide a plausible explanation of how the injuries were caused, failing which a clear issue arises under art 3 of the Convention."[189]

The African Commission held that since the respondent did not attempt to give a satisfactory explanation, it was presumed that it was

180 CAT General Comment No. 2 Implementation of article 2 by States parties, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007), para 4(3). CCPR General Comment No 13 Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law Doc HRI/GEN/1/Rev.1 (1984) para 16 indicates that evidence obtained by way of compulsion of any form is inadmissible.
181 UNCAT, art 12. General Comment 20, para 1.
182 UNCAT, art 7.
183 UN Doc CAT/C/7/Add.1 (23 November 1995) paras 10, 30. See also Concluding Observations on the third periodic report of Australia of 2008, UN Doc CAT/C/AUS/CO/1 (15 May 2008) para 30.
184 UN Doc CAT/C/AUS/CO/1 (6 May 1998) para 11.
185 *Egyptian Initiative supra,* para 7.
186 *Egyptian Initiative supra,* para 7.
187 *Egyptian Initiative supra,* para 7.
188 *Egyptian Initiative supra,* para 8.
189 *Colibaba v Moldova* European Court of Human Rights Application 29089/2006 para. 43

responsible for the injuries. In addition, a confession obtained through torture should not have been admitted in evidence.[190] While this decision marked the dawn of developing specific jurisprudence on evidence obtained through human rights violations, the African Commission did not question the State Prosecutor's reluctance to disallow the admission of the confession that was obtained through human rights violations. This would have established a new line of jurisprudence that required that both the law enforcement officers and the prosecutors play an active role in ensuring that the rights of an individual are upheld in pre-trial detention. This decision resonated with the Principles in ensuring that evidence is not obtained through human rights violations. The decision, however, did not expound on the role of the prosecutor. This role is central to ensuring that in instances of human rights abuses in pre-trial detention, the prosecutor evaluates which evidence should be admitted.

The African Commission referred to a wide range of international jurisprudence from the HRC, the ECtHR, the Robin Island Guidelines and The Principles.[191] It adequately dealt with evidence obtained through human rights violations as long as it amounted to torture, cruel, inhuman and degrading treatment. The decision did not, however, recognise that there are instances that may potentially lead to evidence obtained through human rights violations other than torture. The Commission's engagement with the Robben Island Guidelines affected the quality of the decision as far as the violation of the right against torture formed the violation of the right to a fair trial. This decision presents a limitation in the development of the jurisprudence as far as the African Commission has not adequately dealt with other instances of evidence obtained through human rights violations other than torture.

5 Conclusion

The definition of "jurisprudence" by Salmond, engages the basis, development and the implementation of a law. This enables one to approach the jurisprudence of international human rights bodies from a normative and implementation perspective, based on the principles that they present. Therefore, the limits in the jurisprudence of human rights body are qualified by its ability to offer detailed and well reason judgments other than a high number of decisions. It follows that the quality of the decisions supersedes the sources of jurisprudence that a human rights body uses in its decision.

On this basis, the emerging jurisprudence of the African Commission shows a limited development on evidence obtained through human rights violations. First, the normative developments were not specifically tailored to adequately deal with evidence obtained through human rights

190 *Egyptian Initiative* paras 191, 218. The Principles, principle N(6)(d)(1).
191 ACHPR, art 60.

violations. This position changed with the adoption of the Robben Guidelines and the Principles. Second, the development of the jurisprudence has been generally targeted at enhancing the right to a fair trial rather than specifically dealing with evidence obtained through human rights violations.

The African Commission has not adequately utilised its normative principles to develop its jurisprudence concerning bringing the law into conformity with the foregoing principles. It should make a deliberate effort that engages evidence obtained through human rights violations. This would be a departure from the general development of the right to a fair trial that does not question the admission of evidence obtained through human rights violations. Subject to further research rules on admissibility should be revisited to ensure that the African Commission deals with the merits of a communication with due regard to the procedural technicalities involved. This is due to the existence of procedural processes in various domestic jurisdictions on evidence obtained through human rights violations. This failure stems from the various levels of national developments on evidence obtained through human rights violations.

Where the African Commission requires that a State Party bring its law into conformity with the African Charter, it should specify the impugned parts of the law. Although the States Parties may choose to implement the decisions of the Commission, it is instructive that the decisions handed down due to evidence obtained through human rights violations have specific requirements.[192] This will aid the development of the jurisprudence through its normative principles. Its reference to the Dakar Declaration was hinged generally on the right to a fair trial and not on evidence obtained through human rights violations. The decisions did not offer guidance to issues of evidence obtained through human rights violations because the norms did not do so. Some facts pointed to obtaining evidence through human rights violations. The Commission's failure to engage the norms with these facts affected the quality of the decision. This became a limitation in the development of its jurisprudence as far as the Commission did not deal with issues of evidence obtained through human rights violations.

The recommendations of the African Commission in its Concluding Observations on State Party Reports play a vital role in ensuring the non-admission of evidence obtained through human rights violations. It should use the same tools to advise States Parties on how to deal with this kind of evidence. The admissibility of communications forms an integral part of the complaint's mechanism. The requirement to subject all communications to the admissibility test of exhaustion of local remedies is well-intentioned. The merits of each communication may have to be known so that a value decision on admissibility is made. This addresses the inequality because of domestic procedural requirements.

192 Communication 368/2009 *Abdel Hadi, Ali Radi v Republic of Sudan*, para 93.

Conceptualising the home in law and gender

Gadiël Robbertze
LLB LLM (UP)
Candidate Attorney Adams & Adams

Gustav Muller
LLB LLD (Stell) Diploma (Abo Akademi)
Senior Lecturer, Department of Private Law, University of Pretoria

SUMMARY

The "home" forms a central part of life and it finds relevance in various other legal spheres. However, for such a central point of reference in law and everyday life, it still remains a somewhat vague notion without any discernible meaning in law. Due to the centrality of the home in law and everyday life, it seems necessary to have a coherent understanding of it. Various legal writers and judgments have acknowledged the underdeveloped nature of home in law and have broadly attempted to give home a space in law. Unfortunately, these interpretations of the home fall short and do not encompass all the positive values of home. This article, therefore, considers how gender factors affect the understanding of home and how the law holds some power to structure and restructure gendered relations which stand in the way of achieving a positive interpretation of the home.

1 Introduction

The "home" forms a central part of life and it finds relevance in various other legal spheres including, but not limited to human rights, laws pertaining to domestic violence, housing and even, to some extent, property law.[1] However, for such a central concept in law and everyday life, it is nevertheless a vague concept without any discernible meaning in law. The South African legal system does not have a legal definition for home, nor does it describe what home entails. Although case law and legislation refer to home, no structured definition is in place.[2] Due to the centrality of the home in law and everyday life, it seems necessary to

* LLB, LLM (UP). Candidate attorney at Adams & Adams.
** LLB, LLD (Stell), Diploma (Åbo Akademi). Senior Lecturer, Department of Private Law, University of Pretoria. ORCID: 0000-0003-1254-6601.

1 L Fox *Conceptualising home – Theories, laws and policies* (2007) 3.

2 S 14(a) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") deals with the right to privacy and reads as follows: "Everyone has the right to privacy, which includes the right not to have – their person or home searched". S 26(3) of the Constitution reads as follows: "No one may be evicted from their home, or have their home

How to cite: Robbertze & Muller 'Conceptualising the home in law and gender' 2020 *De Jure Law Journal* 332-352
http://dx.doi.org/10.17159/2225-7160/2020/v53a21

have a coherent understanding of it. Currie and de Waal recognise this gap in the law and propose that home should qualify as a place where there is an intention to "occupy a dwelling for residential purposes permanently or for a considerable period of time".[3] Moreover, courts also recognise this gap in the law and broadly define home in a number of instances. In *Port Elizabeth Municipality v Various Occupiers*[4] ("PE Municipality") the court recognised that home is "more than just a shelter" and that it is a place of "personal intimacy" and "family security" which becomes a "familiar habitat". The court recognised the home as the "only relatively secure space of privacy and tranquillity in a turbulent and hostile world."[5] Unfortunately, these interpretations of the home fall short and do not encompass all the positive values of home. We cannot protect home as a legal right if we do not have a mindful understanding thereof. Our interpretation of the home starts by taking into consideration all the relevant factors that establish and affect the interpretation thereof with a specific focus on relationships within the home. Thereafter, we focus on the gendered aspects of the home in greater detail, specifically on how conventional conceptions of male and female roles within society affect our understanding of their roles within the home space. We confront these conventional roles and analyse both the positive and negative attributes of how gender impacts our understanding of the home.

In confronting these conventional roles and the hierarchies that exist between them, we specifically draw our attention to how they came about and how they persist. We reflect on certain gendered stereotypes and the dangers of such stereotypes. We argue that these stereotypes are kept in place because they are protected from state interference as a result of the public/private divide. We proceed to argue that the boundaries between the public and private sphere insulate the private sphere from state regulation and leads to the continued subordination of women, who are ordinarily associated with the private sphere in conjunction with the home. The division of the two spheres insulates

2 demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions". S 3(5)(b) and 17(1) of the Housing Act 107 of 1997 ("Housing Act") speaks of "home ownership" and not "house ownership". The preamble of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act") reads as follows: "AND WHEREAS no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances". Case law also refers to the home and has attempted defining it in some instances. For example, in the case of *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 CC para 17, the court considers home as a concept in relation to adequate housing. The case provides that the Constitution recognises that "home is more than just a shelter". It considers the importance of the house as a home, and the home as a place of "personal intimacy" and "family security" which becomes a "familiar habitat".

3 I Currie and J de Waal *The Bill of Rights Handbook* 6th edition (2013) 587.

4 2005 1 SA 217 CC.

5 *PE Municipality* para 17.

dominance and control, and the protection of rights within this private sphere are thus at stake. Finally, we consider how rights conceived as boundaries are detrimental to the protection of rights. Our argument is that rights should rather be conceived in terms of the relations that it intends to regulate and in terms of the relations that inform these rights.

2 Home defined

Broadly, home is a physical location and an emotional construct. Home as a physical location is often defined as a place of safety, peace and security.[6] This safety being the safety from the harsh pressures of the public sphere. Therefore, the internalised insecurities, inequality and dangerous relations existing within the home are often overlooked. In this sense the meaning of home extends past its physical locality and becomes an emotional construct which consists of security/safety and threat alike. In order to protect people from the dangers initiated within this space of apparent safety and security, one must take a deeper look into what home actually stands for. Furthermore, one must also take a look into what home means to some people and what it should mean to most people. However, without an organised and structured concept of home, there cannot be a legal framework within which to protect the home or the relevant aspects emanating from it.[7]

The difficulty with defining home in law is that it is not a readily quantifiable concept – it is subjective and complex which often causes confusion in its contradictory ideology.[8] It is, furthermore, not a concept that one can easily dilute to simply mean "housing". Although we demonstrate that housing, to some extent, contributes to the definition of home, it simply does not encapsulate all the elements of what the home is. It is, nevertheless, necessary to consider concepts such as housing in order to further one's understanding and interpretation of the home. Although we argue that housing and home are separate, they are nonetheless interrelated concepts. The Housing Act, provides that housing, in the form of adequate shelter, is a "basic human need" and that it forms a vital part of the "socio-economic well-being of the nation".[9] In this regard, we therefore use housing as a baseline for the interpretation of the home.

However, home holds a deeper and more meaningful value that housing simply cannot capture. Unlike housing, home does not merely consist of tangible meanings. In other words, it is not merely a financial asset or a physical structure. What makes home significant and unique is that it has additional intangible meanings. It is a place of identity which

6 *PE Municipality* para 17.
7 See Fox 3 and 132.
8 S Bowlby *et al* "Doing home: Patriarchy, caring and space" (1997) 20 *Women's Studies International Forum* 343-350 343.
9 The preamble of the Housing Act.

makes it form part of a larger socio-cultural unit.[10] In *Government of the Republic of South Africa and Others v Grootboom and Others*[11] ("Grootboom") the court dealt with the definition of adequate housing. The court held that housing consists of more than just "bricks and mortar",[12] and further that the right to housing includes human dignity,[13] equality and other human rights and freedoms.[14] In this matter, the court reasoned that when dealing with matters pertaining to evictions and alternative accommodation, everyone must be treated with care, concern and human dignity.[15] Further, in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*[16] *(*"Residents of Joe Slovo"*),* the court states that dignity is arguably one of the most significant rights, especially in the context of housing.[17] It is evident that there is a link between housing and home, and that housing can be used as a baseline for defining the home since it introduces the other values, such as human dignity, which could easily be used to develop further values of the home. It is, nevertheless, difficult to define home because it is a subjective concept.

However, the difficulty in comprehending a proper understanding of home leads to the justification in the lack of thereof. Efforts should be made to create a meaningful, all-encompassing definition in order to protect the values and rights so closely connected to the meaning thereof. Home is meant to be the foundation of autonomy and identity. Although many of the comforts and tranquillities of home have historically come at the expense of women,[18] home should not be rejected altogether. There should rather be an extension of these positive

10 See Fox 139.
11 2001 1 SA 46 CC.
12 *Grootboom* para 35.
13 The link between housing and dignity has been affirmed on multiple occasions in *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 CC para 29; PE Municipality paras 12, 15, 18 and 41–42; Occupiers of 51 Olivia Road, Berea Township and 197 *Main Street, Johannesburg v City of Johannesburg and Others* 2008 3 SA 208 CC para 16; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 CC paras 75, 119, 173, 218, 231, 329 and 406; *Machele v Mailula* 2010 2 SA 257 CC para 29 and Daniels v Scribante 2017 4 SA 341 CC. See also Chaskalson A "Human dignity as a foundational value of our constitutional order" (2000) 16 *SAJHR* 193–205; Sachs A "The judicial enforcement of socio-economic rights" (2003) 56 *Current Legal Problems* 579–601 and Liebenberg S "The value of human dignity in interpreting socio-economic rights" (2005) 21 *SAJHR* 1–31.
14 *Grootboom* para 1.
15 *PE Municipality* para 29.
16 2010 3 SA 454 CC.
17 *Residents of Joe Slovo* para 75.
18 Here we are referring to the plethora of cultures that have historically secluded women from access to the public sphere due to their "womanly/wifely duties" being home-based and the expectation that women should be of service to the men and children in the home. In this context, it is clear to see why many women reject home as an ideal since it is synonymous with the confinement of women for the purpose of advancing male projects while obstructing any growth for women.

values of the home to everyone, in particular to all women who have historically been oppressed and continue to be oppressed. This may require us to delicately restructure the boundaries preventing accessibility of the positive values of home to everyone.[19]

Keeping the private sphere insulated is detrimental when it is a place of hostility and fear. This is to say that relationships enabling the public/private divide are detrimental to the realisation of home. Other relationships that were previously shadowed away, will therefore, need to be brought to light in a way to preserve the positive values of home. These relations consist of internal relationships established within the home-space, as well as those between public and private spaces.[20]

Heidegger's philosophy of dwelling presents a good point of departure when defining home. He refers to the relationship between people and the places they live and argues that *being* is having some connection to a particular place.[21] He attaches some form of personhood to the property.[22] To dwell means to be at peace and to be kept safe from harm and danger.[23] By investing your time and energy, a house slowly becomes a home where relationships are established, and values such as safety and security are established.[24] Similarly, Currie and de Waal also refer to the importance of dwelling in their definition of the home. They define home as being a place where one has the intention to dwell for a substantial amount of time.[25] By dwelling, home becomes a projection of identity of the individual and the relationships which form him/her. In furthering the argument that home as a concept is determined by boundary-creating "property speak", home is also seen as a bounded and clearly demarcated space for safe-keeping of the family unit,[26] and the reluctance of the law to intervene in this sphere, results in certain rights being at risk. It maintains any abuse that takes place within this space and upholds patriarchal practices which means that the home is no longer a place of safety and security, but rather a place of toxic relations which the public sphere is complicit to.

The problem with the boundary-creating/maintaining interpretation of the home reveals itself in Heidegger's theory that humans attain dwelling only through building (boundaries). Heidegger abandons the importance of preservation within these boundaries. He contends that "to build is to make" and that by building, man establishes himself and his identity. On the whole, women do not build but rather preserve. Based on Heidegger's argument, women therefore do not establish themselves or

19 Positive values, such as safety, privacy and autonomy, will be the foundation of our proposed definition to home.
20 Bowlby 347.
21 See Fox 135.
22 Fox 169.
23 Fox 135.
24 Fox 168.
25 Currie and De Waal 587.
26 Bowlby 343.

their identities.[27] Gender is, therefore, an important consideration in defining the home. Without the additional gender consideration, home has the dangerous potential of being exclusive. Although Heidegger's philosophy of dwelling can be used as a starting point when defining home (in the sense that he recognises the relationships between people and places) his contentions that building is to make and that preserving is to make nothing, is problematic and gendered in nature.

3 Gender and the home

Heidegger suggests that the material resources available (usually provided by men) to those who construct the home and those who occupy, nurture and preserve it has considerable influence to the gendered hierarchy of power within the home.[28] This is certainly a gendered issue which raises some concern. The work done by men to the home, historically and in the current context, generally entails physically building, which is a readily quantifiable concept.[29] Whereas women's labour in relation to the home generally entails the preservation thereof. This activity is by its very nature not easily quantifiable. Heidegger contends that the act of preservation is not as valuable to the home as building, and further, that it is merely an activity keeping the structure of the home in its current and constant state. If we prioritise the home as a physical entity, we undermine the value of preservation that is ordinarily an activity exercised by women as the traditional home-makers (in the

27 IM Young *On female body experience "throwing like a girl" and other essays* (2004) 126 provides a discussion on how building and construction as a whole remains a male-dominated domain, and even where women do partake in construction projects, it is a rare sight. There are some traditional societies where women physically erect structures such as mud-houses. However, due to the changes in the world, many of these people have been forced to migrate to cities. It has become nearly impossible to "live off the land", meaning that these societies where women – to some extent – erect the physical structure of a house, has become a rare sight in itself. Therefore, men seem to dominate the construction world. Based on Heidegger's theory that building equates to making, it results in women not making anything, and thus not establishing themselves in the world in Heidegger's theory.

28 L Chenwi and K McLean "'A woman's home is her castle?' – Poor women and housing inadequacy in South Africa" (2009) 25 *SAJHR* 517-545 518. See also Bowlby 346.

29 The physicality and material nature of building makes it readily quantifiable. Purchasing material and physical things to build a structure which can be seen and touched makes it easier to quantify. This can be likened to men who work and who are the breadwinners of a certain household. They bring in a certain amount of income which is readily quantifiable. Women, who earn substantially less than men generally, or who often do not make an income at all working from home or being home-makers are in a position where what they do is not as readily quantifiable and, on that basis, is of lesser value simply because it cannot easily be compared to what men do and contribute. See E Bonthuys and C Albertyn (eds) *Gender, law and justice* (2007) 9 which discusses the earning potential of women compared to men.

sense of preservation) especially if one considers that this role was originally assigned to them by men. Moreover, the benefits of home-making and preservation are acquired for men at the women's expense.[30] Man builds for the very purpose to make himself a home, while women's role is to "be the home by being at home."[31] She is an object within his home – an object of his self-reflection.[32] Women are expected to serve and nurture the family unit for the unit's growth and development but her contributions are not valued.[33] The activities of cooking, cleaning and home-making in the home (which is closely associated with the private sphere), are ordinarily activities that have been assigned to women. When this work is compared to that of the man, who financially supports the family and provides the material resources, that Heidegger speaks of, within the home (thus being able to control these resources) the "women's work" is regarded as inferior.[34] Our observation is thus that, these familial ideals often result in the invisibility of women, not only within the public sphere but in the private home sphere as well. In this sense, the private sphere merely becomes the support system which enables the public sphere to function optimally.[35] The activities generally performed by women in the private sphere are seen as inferior in contrast to the more important, and stressful task of providing for the family, which is often performed by men, thus confirming the superior status of men.

Young demonstrates how disadvantaged women are by Heidegger's approach:

> "If building establishes a world, if building is the means by which a person emerges as a subject who dwells in that world, then not to build is a deprivation. Those who build dwell in the world in a different way from those who occupy the structures already built, and from those who preserve what is constructed. If building establishes a world, then it is still very much a man's world.[36]"

Despite Heidegger's contentions that to preserve and nurture is to make nothing, and further, that identity is only established through building, the activities of homemaking and preservation, which are largely executed by women, hold more value than given credit for.

30 Fox 369.
31 Young 129.
32 Young 128-30.
33 Fox 369.
34 Bonthuys and Albertyn 19. See also 201-202 7.3.2 *The sexual division of labour* which provides that the differences in the work performed by men and women in the family and in the wider economy can be referred to as the sexual division in labour. It is further stated that: "Women are frequently paid less than men in the workplace and are employed in low-paid areas like the service sector, caring professions and cleaning work. This reflects the repetitive and undervalued work like childcare, cleaning and cooking which women do in the home. Men's work, both in the household and in the marketplace, tends to carry more status."
35 Bonthuys and Albertyn 203.
36 Fox 369.

Homemaking and preservation means to arrange the material resources in such a way that it comes to display an extension of the self.[37] In other words, it is a way in which to present and establish your identity. Therefore, we argue that although building is a means of establishing one's identity, it is not the only means to do so. Preservation and homemaking are also methods one can use to establish their identity. The difference between the terms – building and preservation – is that "building" breaks the continuity of history whereas "preservation" allows for that history to recur. History is undeniably a part of an individual's identity. Therefore, preservation and homemaking support the emergence and continuous existence of one's identity through taking considerate care of an individual's history. Moreover, the activities of preservation are largely gender-specific: just as men tend to dominate the building world, women tend to dominate the world of preservation and homemaking,[38] albeit roles that have historically been assigned to them. Equally as the acts of building are world-making, so is preservation and homemaking. In fact, preservation is not only world-making, but it provides value and meaning to the world that is being made.[39]

Bringing our argument back to the importance of establishing an understanding of home in law, we argue that home holds that unique quality necessary to establish relationships between person and place which gives personhood to property – it has the so-called "x-factor". Home considers other aspects, such as gender, which housing and property often neglect.[40] For instance, as mentioned, the concept of home largely revolves around the family unit and an expected image of what a family is. To put it differently, gender roles and familial relations are central to home as a concept.[41] Home is often associated as a place suitable for families,[42] which is further associated as a place of safety, security, privacy and comfort.[43] Family is considered as the embodiment of the private sphere,[44] the private sphere is additionally closely associated with the home and therefore, the home and family are consequently closely connected. There is an underlying assumption that

37 Young 142 provides a discussion on how homemaking consists of arranging material objects in a certain way that allows for the life activities of the individuals within that space to take place. Preservation results in keeping these physical objects intact and prolonging their history, which also serves as an extension of the individual.
38 Young 144.
39 Young 145.
40 Fox 24.
41 Bowlby 344.
42 This is very much dependent on how one would go about defining family and how one sees a family unit. If home is associated with the heteronormative ideals of a family, then a home absent of such cannot be considered a home. It is, therefore, important to be gender and context sensitive when defining the home and one needs to consider the various ways in which families are formed which includes female headed households.
43 Fox 177.
44 Bonthuys and Albertyn 170 and 203.

families are spaces of emotional intimacy and high moral standards.[45] This assumption presents some potential dangers, which we have highlighted above, and often leads to the justification of non-interference. Furthermore, there are expected images of family units, which usually follow heteronormative ideals.[46] If one interprets home in this light, it is a site for the creation and maintenance of patriarchal practices in what appears to be natural and ordinary.[47]

In these heteronormative ideals of family units, women are confined to the private sphere to care for and to maintain the household. This role is their deemed "natural role" in a heteronormative and patriarchal society. The private sphere is further, an expected place of unselfish and caring behaviour – behaviour which benefits the unit as a whole. However, we argue that this is not the case. Women, who form part of this unit, do not necessarily benefit to the extent of the other members. There is often an expectation that women should place their families' interests and needs before their own.[48] Women become invisible within their home and their actions which benefit the entire family unit are undermined and under-appreciated. The division of labour which is assumed within the home, for example that the man is the head of the household and that the women must cook, clean and take on maternal roles, is particularly burdensome on women who additionally work for a living.[49] This, once again, supports the argument that the private sphere is merely a support system that enables the public sphere to function optimally.[50] When women serve men within the private sphere, men can function optimally within the public sphere. Whereas women are confined to the private sphere, men are contrastingly commonly associated with the more "uncaring" public sphere.[51] The public sphere is ordinarily associated with freedom and individualism and often celebrates looking out for your own interests and needs above others, which is not the case in the private sphere.

Men build in order to establish their identity and to project a reflection of their identity outwards into the public,[52] allowing men to have external relationships in the public sphere. External relationships,

45 Bonthuys and Albertyn 170 and 204.
46 Bowlby 344.
47 Bowlby 345.
48 Bonthuys and Albertyn 170 and 203.
49 Bonthuys and Albertyn 170 and 202 further refers to Cock et al *Child Care and the Working Mother: A Sociological Investigation of a Sample of Urban African Women* (1984) 3-8 and provides that in South Africa, full-time motherhood is not possible for most urban African women who have to support themselves and their dependants or supplement their husband's income. Family law rules which assume that women remain at home to care for their children disadvantage working mothers, who can never match up to the idealised standards of care, while rules which assume that men provide all of the household income are also unrealistic.
50 Bonthuys and Albertyn 170 and 203.
51 Bowlby 345.
52 Young 128.

therefore, have an impact on the interpretation of a home. The boundaries between the public and private sphere affect the understanding of a home and often maintain oppressive gender norms in both the public and private spheres.[53] The public sphere is ordinarily associated with "male" values such as rationality and objectivity, whereas the private sphere is ordinarily associated with "female" values such as irrationality and subjectivity.[54] The "male" values in the public sphere have been assigned a higher value than that of the "female" values within the private sphere. Furthermore, the fact that these two notions, which are accompanied by further oppositional pairs (i.e. rationality/irrationality and objectivity/subjectivity) are placed on opposite sides of the spectrum, does not allow for any reconciliation between them, thus maintaining the hierarchy and maintaining the patriarchy. The dichotomies between these oppositional pairs and the threats that they pose to each other are illusory and misleading. There does not need to be a choice of one above the other and one can in fact reconcile the two to be mutually beneficial.[55] In a space where man builds to make himself a home and to project a reflection of himself outwards and creating a space where women's role is to "be the home by being at home", her only comfort is to draw fulfilment from being *in* the home. She tries to give herself a place *within* his space. In the end, she is left with no place of her own. She is in fact, left homeless.[56]

If the public sphere is thought of as the male's domain (which is inherently considered to be more significant than the private sphere) and men project a reflection of their identities outwards through the means of building, giving them a dominant space within the public sphere, male dominance in the public sphere supports patriarchy in the private sphere. This patriarchy gives men the power to prevail over women in the private sphere, especially since these men are potentially oppressed themselves within the public sphere, such as in the working environment and with the burdensome heteronormative expectation of them to solely support their entire family unit.[57] This creates a need to release any pent-up anger, generated in the public sphere, within the private sphere. It is an attempt to "balance the scales" in order to feel more empowered within their own private domain – within their space. Therefore, in order to address the power relations between men and women within the private sphere, there would need to be a change of power relations within the public sphere.[58]

53 Bowlby 347.
54 Bonthuys and Albertyn 202.
55 See in general J Nedelsky "Reconceiving autonomy: Sources, thoughts and possibilities" (1989) 1*Yale Journal of Law and Feminism* 7–36.
56 Young 130.
57 Fox 361.
58 Bonthuys and Albertyn 21.

Feminists have argued that private power is the principal threat to women's equality and autonomy.[59] Women have suffered from this oppression within the home long before the boundaries were somewhat disintegrated allowing women into the public sphere and affording them the same protection as men.[60] If the boundaries between the public and private spheres persist, patriarchal gender roles within the home will persist.[61] It is for this reason that many feminists wholly reject the idea of home. If house and home equate to the confinement of women only to liberate the ventures of men, house and home should, rightfully so, be rejected.

However, we argue that since home holds such core positive values, it would be misguided to reject these values entirely.[62] Home "expresses uniquely human values" and provides us with a fixed identity.[63] Home carries positive and meaningful values such as preservation, safety, individuation and privacy.[64] We argue that it is possible to conceptualise an idea of home as supporting individual subjectivity of the person, where the subject is understood as partial, fluid and shifting, in relations of reciprocal support.[65] If men and women alike took part in acts of preservation, for instance, women would no longer be seen as the material subjectivities of men. A relationship of support, equality and dignity would exist.[66] In these circumstances, it is worthwhile to consider the various relationships that exist both within the public and the private sphere and how they affect one another. A deeper understanding of these relations will contribute to a more comprehensive understanding of the home and how these relations ultimately shape a realisation of the home.

---

59 TE Higgins "Why feminists can't (or shouldn't) be liberals" (2004) 72 *Fordham Law Review* 1629-1641 1631.

60 *Ibid* 1631. Also see Bonthuys and Albertyn 83-90 which firstly deals with "equality as sameness" i.e. to treat women and men in an identical manner. Equality as sameness was initially beneficial to women when claiming access to the public sphere of politics. This is a form of formal equality. Unfortunately, this is not necessarily as beneficial to women as originally thought because it simply compares women to men without considering any deeper inequalities that exist socially, culturally or religiously. In order for women to benefit to the same extent as men, various contexts and perspectives should be kept in mind. If equality as difference is considered, we move away from a form of formal equality to a form of substantive equality. Formal equality sees differences as a form of discrimination whereas, substantive equality embraces these differences and changes the law so that it benefits persons equally. The application of formal equality may seem neutral but, in truth it embodies the interests and experiences of the socially and economically privileged and it exacerbates inequality of those who are not socially and economically privileged.

61 Bowlby 345.

62 Young 123.

63 Young 124.

64 Young 125.

65 Young 130.

66 Young 145.

4 The public/private dichotomy

In our observations above we reflect on how the home embodies gender. There are certain conventional associations of the feminine and the private sphere on the one hand, and the masculine and the public sphere, on the other hand. Despite these typical associations, men are nonetheless regarded as the household heads.[67] This is particularly highlighted when the public sphere places expectations on the man to financially support his family. This financial support is valued in a higher regard than any other acts performed by women within the private sphere and therefore, allows a hierarchical power relation to exist and persist. This power relation exists and is based on financial value and results in the commodification of an individual's worth based on their financial and other quantifiable contributions rather than what they can contribute by any other means. In basing a person's value according to their net worth, one ends up objectifying a person and this is especially true for women. Women end up being seen or valued as "objects" that can be controlled because they have less financial power to control. These associations endorse patriarchy in both the public and private spheres and together with norms of masculinity and femininity justify and maintain patriarchy. Patriarchy places women in a subordinate position to men, not only in the public sphere, but specifically within the private sphere. Patriarchal norms and values, therefore, ultimately result in gender-based violence within the home, which should be a place of safety and security.[68] The public/private dichotomy maintains patriarchy by insulating the private sphere from state regulation which leads to the continuous subordination of women within it.[69] When we view the public and private sphere as entirely oppositional, it has a very negative impact on women within the private sphere. We argue that the contrasting elements of the dichotomy are not necessarily inherently opposed and that they can fall on a continuum between the public and the private so that they are mutually beneficial to one another. Maintaining the stark boundary between them obscures their relationship with each other and the relations that exist within each of them. This boundary views public interference as undesirable and unnecessary and prevents legal intrusion into the private sphere, even when it is necessary such as in cases of domestic violence.[70] The boundary prevents any legal regulation of unequal and abusive power relations within the private sphere and is thus complicit to "private" gender oppression. The complicit behaviour of the public sphere not only

67 Bonthuys and Albertyn 203.
68 Bonthuys and Albertyn 20.
69 Higgins 1629. Also see KD Bailey "Criminal law lost in translation: Domestic violence, 'the personal is political,' and the criminal justice system" (2010) 100 *The Journal of Criminal Law & Criminology* 1255–1300 1261. Also see SR Bassadien and T Hochfield "Across the public/private boundary: Contextualising domestic violence in South Africa" (2005) 66 *Agenda: Empowering Women for Gender Equality* 4–15 12.
70 Bonthuys and Albertyn 29–30.

maintains oppression but exacerbates it because the person in power understands that they are free from any regulation and, even if their actions are regulated, it will not necessarily be taken seriously. The public sphere is often unwilling to interrogate the private sphere and the private sphere remains bounded by a concern with conventional ideals of family, sexuality and relationships.[71] The same argument applies to the dichotomy between autonomy and dependency – they are not inherently opposed.

We argue that home is the foundation of autonomy and therefore, the dichotomies of the public/private and dependency/autonomy remove the victim's autonomy, security and safety, and threaten home as a right.[72] The private sphere is often protected because the law aims to protect autonomy which is associated with the private sphere. Protection of autonomy, by insulating the private sphere, often has the opposite effect – endangering autonomy. When the state withholds its willingness to regulate the private sphere, it assumes that society is experiencing over-regulation and that it will be removing all choice and individual autonomy.[73] However, the state has a duty to protect the vulnerable,[74] regardless of whether they find themselves in the public or private spheres. The presumption that these vulnerable persons have free choice and autonomy, thus justifying non-interreference, is incorrect. Men and women do not enter relationships on an equal footing. They enter intimate relationships from different social positions and therefore, hold different measures of bargaining power. Gender inequalities, therefore, result in the lack of freedom of choice and the lack of autonomy and the state's decision not to interfere, only aggravates that. The law's reluctance to intervene allows inequalities to perpetuate by allowing the person in power to remain out of reach of regulation by the law.[75]

If we uphold the boundaries between the elements, it seems as if the elements are inherent qualities rather than aspects of relationships between the elements which we compare. Despite the high value set on

71 We expand on the unwillingness of the public sphere to interrogate the private sphere further on in this article by analysing the decisions in *Volks NO v Robinson* 2005 5 BCLR 446 CC and *S v Baloyi* 2000 2 SA 425 CC.

72 This does not mean that home as a concept should be rejected in its entirety because it is often identified as a source of violence. Instead, it implies that relations within should be restructured in order to satisfactorily reach an ideal of home and that such an ideal should be reclaimed. If home becomes a space of violence it is no longer a *home*. Home carries with it values such as safety, privacy and the ability to exercise autonomy. Once it becomes violent, that sense of safety, privacy and autonomy is taken away. Home is then a space of intrusion – not intrusion from the state, but intrusion by an intimate partner. The home definition therefore no longer applies, and the justification used to support non-interference by the public is invalid since *home* as a concept no longer stands.

73 B Goldblatt "Regulating domestic partnerships – a necessary step in the development of South African family law" (2003) *South African Law Journal* 610–628 615–616.

74 Goldblatt 615–616.

75 Goldblatt 615–616.

the privacy of the home and the centrality attributed to intimate relations, all too often the privacy and intimacy end up providing both the opportunity for violence and the justification for non-interference.[76] Although state regulation may be threatening to some, insulating dominance and control is detrimental to internal relations. The control that men exercise in the private sphere is often accompanied by domestic violence or at least, the threat thereof.[77] In these circumstances specifically, it becomes less threatening if organs of state regulate these relations rather than excluding them in their entirety.[78] In fact, the protection of the private sphere, rather than the person within that sphere, may exacerbate the violence. In other words, the public/private divide facilitates the violation of home[ing] rights. Upholding the barrier between the public and private sphere insulates women within the private sphere and hides them from public scrutiny, which consequently makes them invisible to the laws that are put in place to protect them and making them more vulnerable to abuse.[79]

Bowlby, Gregory and McKie state that:

> "Occupying a fundamental but underappreciated place within societies that affirm patriarchal values both explicitly and subtly, the home is a space within which identities and boundaries are learned, perpetuated, and challenged. It is both safe and dangerous, perpetual and evolving."[80]

Any effort to challenge or question these boundaries usually comes with its own challenges, since it threatens the power imbalances that have been put in place by these very boundaries. Romanticising the home implicitly suggests that the outside world should be feared, whereas often even the home is the source of fear for many women.[81] If women are expected to confine themselves to the private sphere (as associated with the home), it makes sense why many feminists reject the idea of home – it plays into the hands of oppressive patriarchal values. However, home offers certain human values, which are perhaps a privilege to have, but certainly should not be. The values that emerge from home should not be rejected because they are viewed as privileges, instead, these values should be accessible to everyone because they are basic human values.[82] These values broadly consist of safety, individuation, privacy and preservation.[83]

A basic human right, such as safety, seems to be a benefit which is enjoyed only by people beyond the advantages of most. Safety should be a space where one can retreat to from the harsh pressures and violence of the outside world. However, violence for many women, seems to

76 *S v Baloyi* 2000 2 SA 425 CC para 16.
77 Bonthuys and Albertyn 199.
78 Higgins 1631.
79 Fox 367.
80 Bowlby 347.
81 Fox 367.
82 Young 146.
83 Young 151.

originate within the home – within the space, which is meant to be a source of safety and comfort.[84] Furthermore, privacy, another basic human right, is often abused and used as a justification for the public sphere to turn a blind eye to the violence that occurs within the home, this in turn, compromises the safety of many women. The private sphere has often confined and excluded women on the basis that it wishes to protect privacy within the private sphere,[85] but the privacy I refer to rather relates more closely to autonomy.[86] Feminists often reject privacy as a value because it has been used as a tool to justify the non-interference of the private space in which the violence occurs. Instead, we should maintain the idea that privacy is a value which should be extended to all *individuals* – not specifically to the family unit or the private sphere.[87] If privacy is viewed in this manner, it is apparent that women deserve privacy within the private sphere and public sphere, but do not have it in either.[88] Alongside privacy is the value of individuation and autonomy. Therefore, in order to be autonomous, relationships which respect privacy need to exist, and these relationships do not necessarily originate from the private sphere.

The distinct divide between the public and private spheres, and the walls (literally and figuratively) surrounding the private sphere often leave women in a very vulnerable position when seeking assistance from the public sphere. Protection of the personal from the political through boundaries, protects privilege.[89] One should rather incorporate the two spheres with one another to introduce a different form of state involvement, which deals with the issues of vulnerability and abuse of women hidden in the private sphere. There should be a concept of home which does not oppose the personal and the political, but one which makes the political possible. Bell expresses that the home can, in fact, be a site of resistance where the personal becomes political.[90] Home is a place where identity is established; it is a space where one can exercise resistance from exploitative social structures such as patriarchy. Home is a space where autonomy is established.[91] Home is a space which anchors and secures identity.

5 How the law affects relations

The legal rights that the law provides, have the purpose of protecting and enforcing our basic needs to develop as human beings. The purpose of implementing rights in society, is, therefore, to regulate relationships and to ensure that people do not abuse any power they may have. Legal rights

84 Young 151.
85 This argument is supported in *S v Baloyi*.
86 Young 152.
87 Young 153.
88 Young 153.
89 Young 149.
90 Young 146.
91 Young 149.

which have been implemented reflect social relations with the objective to address any inequalities.[92] Legal rights provide society with a sense of safety and security that if your rights have been violated, action will be taken to restore them. Rights are, therefore, an extension of the value that each human life holds. Although the law plays a vital part in shifting public norms which address inequalities, the "private" sphere often remains unaffected. It is challenging, even for legal rights, to remove any social, cultural or religious perceptions. Because of these challenges, legal rights are often poorly implemented.[93] The law is, therefore, limited in its ability to affect change. We briefly explore how the law has challenged or failed to challenge the *status quo*.

We consider how legal rights are viewed as rights which serve as boundaries and argue that rights should be seen in terms of the relations that form them and which they form. The law should implement legal rights in a manner that addresses social relations.[94] Stated differently, we need to reconceptualise rights in terms of relations, because the manner in which rights are implemented, shape people's relations.[95] If legal rights are viewed in this light, one can start to restructure any harmful relations. A relational approach to rights investigates how defining rights in one way, rather than another, results in structuring relations differently.[96]

Fundamentally, rights which are viewed in terms of boundaries prevent interference from the collective.[97] Boundaries limit state involvement with the idea to protect values such as privacy and autonomy.[98] A bounded interpretation of rights is illustrated in the matter of *Volks NO v Robins*[99]("Robinson"). This matter dealt with a claim for spousal maintenance in terms of the Maintenance of Surviving Spouses Act 27 of 1990 ("Spouses Act"). However, the respondent was not married to the deceased, she was, however, in a permanent life

92 Bonthuys and Albertyn 5.
93 Bonthuys and Albertyn 6.
94 Bonthuys and Albertyn 5.
95 J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 307-308. This includes all relations, not just interpersonal relations but also institutionally – rights can shape intimate relations, relations between strangers and even the relations between the state and the private sphere at large.
96 Nedelsky 315. The relational approach does not hold the belief that "the rights one has are contingent on one's relationships." It means that people should see rights as a means of structuring relationships. I argue that the entire purpose of rights is to structure relationships and that rights have done so in the past and will continue to do so in the future. The purpose of the relational approach is, therefore, to look into the structure of these relations and how rights have contributed to forming them; thereafter to take a step back and to restructure abusive relationships that may exist through the use and power of rights.
97 J Nedelsky "Law, boundaries and the bounded self" (1990) 30 *University of California Press* 162-189 163.
98 Nedelsky 162.
99 2005 5 BCLR 446 CC.

partnership with the deceased. They were in a monogamous permanent life relationship for over 16 years and shared family responsibilities like that of a married couple. The respondent sought an order declaring that she was entitled to spousal maintenance in terms of section 2(1) of the Spouses Act. Alternatively, she sought an order that section 1 of the Spouses Act was unconstitutional and invalid on the basis that it violated section 9 (the right to equality) and 10 (the right to human dignity) of the Constitution of the Republic of South Africa, 1996.[100]

Section 1 of the Spouses Act defines "survivor" as "the surviving spouse in a marriage dissolved by death"[101] and consequently excludes people in permanent life partnerships. In this specific matter, the two majority judgments, by Skweyiya J and Ncgobo J, held that the Act was not unconstitutional on the basis that the distinction between married and unmarried people needs to be considered in the larger context of rights and obligations of marriage. Skweyiya J held that whilst there is a legal "reciprocal duty of support" between married couples, this duty does not legally arise for cohabitants.[102] The court was unwilling to interfere with the private affairs of the parties, although one could argue that it was necessary and in fact invited. The court was bound by conventional ideals of family and marital relations.

Sachs J, in his minority judgment, exposed the notion that not all people who cohabit necessarily have the choice to get married and, therefore, to have the legal consequences of marriage attached to their relationship. He further reflected on the inferior role that women ordinarily hold in society and how that affects their ability to make choices in a relationship, and held that often, women bear the legal consequences of their male partner's choice not to get married.[103] Sachs J further held that the context of a relationship must be considered rather than simply referring to the status of the relationship based on a piece of paper – being a marriage certificate. In many instances, cohabitation relationships reflect the nature and reciprocal duty of support of a marriage whereas marriages sometimes are merely an empty shell of a relationship. He refers to Goldblatt[104] who asserts that one should consider families in terms of the functions that they perform, rather than defining the relationship based on a marriage certificate.[105] If one considers the relationship from this perspective, it becomes clear that it would be unfair to make the distinction between unmarried and married women. The surviving spouse who is in an "empty shell marriage" will have a claim, whereas the survivor of a legitimate, caring and committed life partnership would be left destitute.[106] Although, in some instances it may be challenging to prove that such relationships reflect the nature of

100 *Robinson* para 3-11.
101 S 1 of the Spouses Act 27 of 1990.
102 *Robinson* paras 56, 70 and 97.
103 *Robinson* paras 154–162.
104 Goldblatt 617.
105 *Robinson* para 171.
106 *Robinson* para 162.

marriage, we are not unable to overcome these issues. Such difficulties do not justify the continuation of unfair treatment or the lack of development in the law.[107] In the main judgment, Skweyiya J acknowledges the vulnerable position of women and that they often do not have a choice in many relationships. Nevertheless, the majority held that this did not relate to the issue in question and that the vulnerability of women as survivors in cohabitation relationships, is due to the lack of regulation to protect these women.[108] The majority judgment further recognises that there are many ways to regulate and protect these rights, but maintains that it is up to the legislature to make provision for this – the court passes the buck to the legislature. I argue that this is as a result of formal judicial reasoning and the insufficient application of the court's equality jurisprudence.[109]

The majority judgment is problematic in that it does not appreciate the extent of the complicity of the law in upholding boundaries and thus, upholding harmful power structures and relations. Sachs J believes that this compartmentalised and decontextualised line of thought, which has been demonstrated in the majority judgment, prevents realisation and implementation of substantive equality.[110] Courts should fully utilise their ability to consider and analyse the context and impact that its implementation and development of the law (or lack thereof) has on persons when making judgments. In this matter, the court was able to identify the contextual disadvantages that women in cohabitation relationships find themselves in but was unable to alter this position. This complicity reinforces gender inequalities that the law aims to dismantle.[111]

We reflect on the High Court (Cape Provincial Division) decision which also refers to Goldblatt's article mentioned above, in which she observes the following:

> "Courts may say, in response to heterosexual cohabitants, that they choose not to marry and cannot ask for assistance from the courts once they exercise this choice. One response to this is that a "choice" must be understood contextually. In South Africa, gender inequality, disempowerment of women, poverty and ignorance of the law all contribute towards removing real choice from many people, especially poor women."[112]

107 *Robinson* paras 230–232. We make a similar argument in relation to the home. The difficulties in defining and finding a space for law in home, does not justify the exclusion thereof, especially since it carries so many valuable aspects that should be extended to everyone. The difficulties that exist should be considered when preparing and developing the law, in order to make the law pertaining thereto, more accessible to everyone, especially to the vulnerable.
108 *Robinson* paras 164–165.
109 Bonthuys and Albertyn 112.
110 *Robinson* paras 162 and 163.
111 *Robinson* para 163.
112 *Robinson v Volks* 2004 6 SA 288 C 297.

Unfortunately, the Constitutional Court judgment was unwilling to interrogate the private sphere to determine the issue and therefore, deferred the matter to the legislature.[113] The court left private matters within the private sphere with the aim of protecting privacy and "freedom of choice" and justified its non-interference on this basis, leaving the victim in a very vulnerable position. The court was bounded by a concern with conventional ideas of family, sexuality and relationships. This boundary language creates a sphere in which one can act unconstrained by the prohibitions regularly found in the public sphere. The boundary perception of rights perpetuates the structural nature of patriarchy which can only be challenged by public interventions in the private sphere.[114]

The boundary theory of rights evidently creates binary notions of the public/private spheres which counter free and private on the one hand, collective and coerced on the other. However, these binary notions are misleading, and we argue that they do not sit exactly on oppositional ends of the spectrum. A boundary theory of rights limits the continuum between the two spheres. Furthermore, the boundary theory draws the focus away from constructive relations and suggests that rights are most fully protected when boundaries are in place and the individual is free from any state interference.[115] The relational approach to rights, on the other hand, places its focus on relations which foster the values that emanate from the home. The Constitution itself adopts a relational approach to rights in that it provides a balancing act of the rights in question. Every right stands in relation to another right. Additionally, that right is held by someone else. Therefore, every right that one person has, is in relation to another person. Accordingly, the protection of one right must always be considered within its context. The protection of a right depends on how important it is to uphold that established right for an individual holder, and limiting and regulating that right in as far as it is in the interest of the public.[116] This approach challenges the boundary approach because it views rights in relation with one another and it considers how the respective rights held by the respective people, affect the relations between the right holders. It challenges the "all-or-nothing" approach to rights and "assumes a more nuanced, contextual character."[117] The relational approach invites a constant and consistent analysis of the values in question and requires engagement with relations

113 *Robinson* para 67.
114 Bonthuys and Albertyn 21.
115 Nedelsky 168–169.
116 AJ van der Walt *Property and Constitution* (2012) 5.
117 Van der Walt 5. The boundary approach to rights is similar to an "all-or-nothing" approach that Van der Walt refers to. The constitutional approach that Van der Walt refers to is more in line with that of the relational approach, which assumes a more nuanced and contextual character. Looking at the rights in relation to one another and recognising that rights are not absolute but subject to their relations in order for fairness allows for equality and justice to prevail. Also see page 154 which further supports my argument that the constitutional approach is more akin to the relational approach in that the "Constitution requires a shift from the traditional focus

that foster such values. It determines what form of interpretation of rights and what form of legal structures, structure relations in the most beneficial way for the values in question.[118]

Fortunately, other cases have taken on this approach such as *S v Baloyi*[119] ("*Baloyi*"). In this matter, the court understood that when private relations are perverted and harmful to the victim, public interference becomes necessary. The court held that all crime affects society and specifically referred to domestic violence which frequently goes unpunished and challenges society at every level.[120] The court considered the effects and the relations between the public sphere and the private sphere. The court considered how the ineffectiveness of the system intensifies the subordination and helplessness of victims and which sends a message to the whole of society.[121] It does not see this as only affecting the public or the private sphere separately but considers the relatedness of the two spheres and how attitudes and relations in the public sphere are often complicit to the dangers in the private sphere. The public sphere cannot and should not protect abusive relations within the private sphere despite the high value placed on the privacy of the home and the centrality attributed to intimate relations because it provides an opportunity for violations and the justification for non-interference. The involvement of the courts in the private sphere represents an extension of the law into an area where lawlessness has long been sustained by notions of patriarchy and indicates that an organised society will not sit idly by in the face of any relational abuse within this sphere.[122]

6 Conclusion

The lack of a definition for home has created confusion in the legal sphere, especially in instances where the word home has physically been used. Where home has been referred to in case law and legislation,[123] there is uncertainty as to what is being protected. It has been argued that home should be rejected as a concept worthy of protection because it comes at the expense of women. In this regard, defining home is particularly challenging if it is defined in terms of violence and the oppression of women. It is even more challenging to reclaim home if it

117 of individual rights in discrete objects to a relational or contextual focus on the features or qualities of the overall property holding system and the position of `relationships between individual rights holders in that system". Here, Van der Walt endorses the Constitutional approach as a form of the relational approach, specifically because he moves away from viewing rights in terms of their boundaries and individually and promotes a shift towards viewing them in terms of relations.

118 Nedelsky 343.

119 *S v Baloyi* 2000 2 SA 425 CC.

120 *Baloyi* para 12.

121 *Baloyi* para 12.

122 *Baloyi* paras 16–18.

123 See note 2 above.

is defined in these terms. Home should, therefore, be defined outside of its boundedness – in terms of a space which does not equate to the confinement of women, but rather their autonomy.

We have argued that we should not simply reject home. Instead, there needs to be a deep restructuring not only on how we perceive home but also on how we perceive the law that shapes, secures and preserves these relations which gives rise to a harmful understanding of home. If these destructive relations can be transformed, the positive features of the home will come to light. It is then possible to possess an idea of home as "supporting the individual subjectivity of the person where the subject is understood as partial, fluid and shifting in relations of reciprocal support".[124] In order to achieve this, one needs to look beyond the private sphere, into the public sphere. If home is a place of safety and security from the outside world, then what is it when the abuse comes from within the home? Abuse within the home defeats the very meaning thereof. Therefore, we need to restructure not only internal private relationships but also those external relationships affecting private relationships negatively. The public and the private spheres are not inherently opposed. They fall on a continuum between one another and they can be mutually beneficial to each other if applied correctly. The boundary language has been problematic in that it has led to the confinement of women and the protection of patriarchal norms. The public sphere, however, does have and should have the power to deeply restructure these power imbalances, as was illustrated in the matter of *S v Baloyi*. The sphere is, therefore, a useful tool in restructuring relations and promoting real transformation.

124 Young 130.

The impact of the COVID-19 regulations on rent obligations

Sue-Mari Viljoen
BComm (Law), LLB, LLD (University of Stellenbosch)
Associate Professor, Department of Private Law, University of the Western Cape

SUMMARY

The COVID-19 pandemic has led to the introduction of a range of regulatory measures, which has had a detrimental impact on the rights of South Africans, in general, and specifically the ability of commercial lessees to trade. A large number of commercial lessees were forced to close their businesses for lengthy periods of time, which effectively meant that they were deprived of the use and enjoyment of their leased premises. It is unclear whether such lessees, who have been either partly or absolutely deprived of the use of their premises, should continue to make rental payments. The common law is explored to cast light on this issue, taking account of the use of *force majeure* clauses and the operation of the lockdown measures as a form of *vis maior*. The common law position regarding *vis maior* and its impact on rent obligations is further considered with reference to regulatory measures that were specifically introduced to assist parties that were negatively affected due to the lockdown measures in the commercial rental sector.

1 Introduction

The COVID-19 pandemic has led to the introduction of a range of regulatory measures in South Africa. These regulatory measures, which are commonly known referred to as the COVID-19 lockdown measures, have placed severe restrictions on both individuals' rights and the ability of businesses to trade and/or carry on business within the country. In the landlord-tenant context, a significant percentage of lessees have been prohibited from engaging in everyday commerce. This has culminated in numerous lessees closing their businesses for lengthy periods of time. These lessees, under discussion, have been adversely affected by the COVID-19 lockdown measures due to the deprivation of all use and enjoyment of the leased premises which can be attributed to the lockdown measures implemented in the country.

The article sets out to determine the residual position in the case where a lessee is deprived of partial or complete use and enjoyment of a leased premises due to *vis maior*. This determination is undertaken subsequent to defining *vis maior*, with reference to the COVID-19 pandemic and the COVID-19 lockdown measures. The paper also considers the legal position where parties to a commercial lease included a *force majeure* clause, specifically, whether and in what circumstances such a clause can offer protection to either of the parties.

How to cite: SM Viljoen 'The impact of the COVID-19 regulations on rent obligations' 2020 *De Jure Law Journal* 353-368
http://dx.doi.org/10.17159/2225-7160/2020/v53a22

With reference to these common law principles, some newly introduced regulations – in addition to what might be considered "generous initiatives" that are construed to offer rent relief for lessees – are analysed to remark on the suitability thereof. Overall, the article finds that the residual position is geared to protect lessees in the event of *vis maior* by way of rent reductions, whereas a *force majeure* clause in the context of leases might be more inclined to protect lessors against overly burdensome rent restrictions. Regulatory measures that have been introduced to offer "rent relief" amid the lockdown should arguably be interpreted to rather urge ongoing negotiations between contracting parties to provide relief for both parties, instead of suggesting that such measures are necessary to offer relief for lessees. This latter interpretation is arguably misconstrued, because the common law offers wide-scale protection for lessees in the event of *vis maior* and regulatory impositions are generally not required to offer rent relief.

2 COVID-19 regulatory measures

The COVID-19 pandemic[1] has affected many countries globally, including South Africa. On 26 March 2020, all South Africans were compelled into a nation-wide lockdown[2] with the effect that numerous businesses had to close down, albeit temporarily awaiting further guidelines from the government; the majority of the country's workforce were compelled to work from home; whilst a significant percentage of South Africans had to face pay cuts or job losses.[3] The purpose of the lockdown was to ensure that the majority of South Africans would stay at home and refrain from interacting with each other. This is generally referred to as "social distancing" and it was implemented to prevent the uncontrollable spread of the virus. It should be stressed that the mere existence of the novel coronavirus, as well as the inevitable spreading thereof, was not the direct cause of these events, but rather the governmental decision to introduce a lockdown by way of the Disaster Management Act 57 of 2002 and subsequent, fact-specific regulatory measures.[4] The initial lockdown measures limited individuals' rights quite drastically and after which the measures were eased to allow for businesses to re-open in a gradual manner.[5]

1 COVID-19 is defined by the World Health Organization (WHO) as the infectious disease caused by the coronavirus, which emerged in Wuhan, China in December 2019: World Health Organization (https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses (2020-06-09).

2 The lockdown was effectuated with the gazetting of *GG* 11062 of 2020-03-25, in terms of s 27(2) of the Disaster Management Act 57 of 2002.

3 See specifically the *GG* 11062 of 2020-03-25, read with Omarjee "Coronavirus: SA business alliance expects 1 million job losses, economy to contract by 10%" *Fin24* (2020-04-14).

4 For instance, *GG* 11062 of 2020-03-25.

5 See for instance *GG* 43364 of 2020-05-28.

Overall, the closure of businesses and general loss of income for many South Africans has had a detrimental impact on lessees in both the commercial and residential landlord-tenant sectors. Roughly 32 per cent of all residential lessees were unable to pay their full rent in April 2020,[6] whereas some lessees in the commercial sector simply ceased to pay their rents or opted to pay a remitted rent.[7] The legal position for some retail tenants is specifically regulated in terms of the newly introduced COVID-19 Block Exemption for the Property Retail Sector, which was published by the Minister of Trade on 24 March 2020.[8] The purpose of the regulation is to enable the property retail sector to minimise the detrimental impact of the lockdown in relation to their financial obligations.[9] In terms of the regulations, retail tenants[10] and retail landlords are allowed to enter into the following agreements:[11]

i. payment holidays and/or rent discounts for tenants;
ii. limitations on the eviction of tenants; and
iii. the adjustment of lease clauses that restrict retail tenants from undertaking measures that would protect their viability during the lockdown.

Moreover, to actively manage the impact of restrictions of trade, or even the forced closure of some businesses, the Property Industry Group (PI Group), consisting of the South African REIT Association, the South African Property Owners Association and the South African Council of Shopping Centres, on 6 April 2020, announced an industry-wide "relief package" for retail tenants.[12] The "relief package" focuses on small,

6 The impact of the COVID-19 lockdown on the residential landlord-tenant sector will not be explored further, simply because the lockdown does not impair residential lessees' ability to use and enjoy their leased premises. The lockdown does therefore not constitute *vis maior* in the residential sector, at least not on a large enough scale to deliberate the impact thereof. Parties to residential leases should arguably negotiate terms and conditions to mitigate the impact of the lockdown on lessees' ability to pay rent in such a way as to ensure that both parties' financial interests are protected, in the long run. It is likely also prudent for residential lessors to rather keep lease agreements intact since the entire landlord-tenant market is under strain due to economic conditions. It might not be as straightforward for lessors to simply find new lessees as it used to before the impact of COVID-19.

7 See specifically *Business Insider SA* "A third of tenants haven't paid their full rent this month – and May could look much worse" (2020-04-21).

8 *GG* 43134 of 2020-03-24.

9 The regulations will remain intact for as long as the pandemic subsists as a national disaster (and declared as such in terms of the Disaster Management Act 57 of 2002) or until they are withdrawn by the Minister.

10 Designated tenants include (1) clothing, footwear and home textile retailers; (2) personal care services; and (3) restaurants: Annexure A to the regulations.

11 Agreements of this kind would usually be prohibited in terms of the Competition Act 89 of 1998.

12 The full statement is available at https://www.sapoa.org.za/media/5593/property-industry-group-statement.pdf (2020-06-29).

medium and micro enterprises (SMMEs).[13] The PI Group has specifically offered increased and extended rent relief for most of the retail lessees, including Pepkor, Truworths and Woolworths (overall represented by the Clothing Retailer Group).[14] Regardless of ongoing negotiations, these groups have failed to reach an agreement, after which the PI Group called on government to act as a mediator to resolve the impasse regarding retailors' obligations to pay rent during the COVID-19 lockdown.[15]

The purpose of the initiative, as offered by the PI Group, is to provide assistance and relief to SMMEs, as well as other large retailers that are either heavily affected by the trade restrictions or unable to trade during the lockdown. The type of assistance is mainly in the form of rent relief, although the essence of the announcement is to offer guidelines and support to landlords and tenants in order for them to reach amicable solutions that are economically sound. "The proposal allows landlords the flexibility and discretion to make an informed decision on the appropriate '*relief*' offered to tenants, but also gives tenants an indication of what they can expect when entering into discussions with their landlords."[16] In the press release statement from the PI Group, the following is stated in unequivocal terms:

> "The initiative targets preserving jobs – for retailers, their suppliers and service providers. To qualify for the relief benefits, retail tenants will need to undertake not to retrench staff during the relief period. Significantly, the package stipulates that all tenants whose accounts were in good standing at 29 February 2020, can be assured that there will not be any evictions for the next two months … For April and May 2020, retail landlords will offer relief in the form of rental discounts where rental will be waived partially or fully and interest-free rental deferments where the deferred rental will be recovered later over six to nine months from 1 July 2020 onwards. Rental includes rent operating costs and parking rental but excludes all rates and taxes recoveries and utility cost recoveries, as well as insurance, which all tenant will be required to pay in full for April and May 2020."[17]

This "initiative" clearly assumes from the outright that the residual position is in favour of lessors and that lessees are generally expected to continue with their rental payments during the COVID-19 lockdown, regardless of the fact that the majority of commercial lessees, including lessees in the retail sector, were partially or completely deprived of the use and enjoyment of the leased premises as a direct result of the

13 A SMME is generally an entity that has an annual turnover of up to R80 million.

14 See specifically *BusinessTech* "South African landlords announce relief for retail tenants" (2020-04-08).

15 Naidoo "Property industry wants government mediation in retail rent dispute" (2020-04-28) *Moneyweb*. See also Wilson "SA's biggest clothing retailers and landlords don't see eye to eye on paying rent under lockdown" (2020-04-24) *Times Live*.

16 Krige & Rhoodie "Lease agreements and COVID-19" (2020-04-22) *Corporate & commercial and dispute resolution alert CDH* 1-6 6.

17 The full statement is available at https://www.sapoa.org.za/media/5593/property-industry-group-statement.pdf (2020-06-29).

lockdown measures. The ongoing debate between landlord-tenant groups as well as the introduction of various measures, such as the COVID-19 Block Exemption for the Property Retail Sector, call into question such sweeping assumptions as well as the aptness of such measures with reference to basic property and contract law principles.

The point of departure in all contractual agreements is that the parties should first consult the contract to determine whether a specific issue is already dealt with in the contract. Importantly, the impact of COVID-19 on lessees' rent obligations will be regulated by way of a *force majeure*[18] clause as stipulated in the lease or,[19] in the absence thereof, the residual rules of the South African common law will prevail.[20] A *force majeure* clause typically excuses the performance of contractual duties upon the occurrence of unforeseeable events, such as *vis maior*.[21] Such a clause ensures that the failure by a party to abide by the terms of the agreement, due to *vis maior*, will not be regarded as a breach of contract. *Force majeure* is globally used to excuse contractual obligations "where causes beyond a party's control create an inability for a party to perform."[22] A *force majeure* clause usually requires that the other party be notified in order to allow for the suspension of the relevant duty, after which the party will be relieved from having to perform such an obligation.[23] Importantly, a *force majeure* clause will not automatically entitle a lessee to a partial or complete rent remittal; the unforeseeable event must be adequately captured by the specific terms of the clause, which are usually construed strictly.[24] A *force majeure* clause is included in a contract for the parties to know exactly what types of occurrences, also known as acts of God, will amount to an impossibility to perform.[25] It should be stressed that if a *force majeure* clause does not specifically define the

18 *Force majeure* is generally defined as a supervening force: Sniffen "In the wake of the storm: Nonperformance of contract obligations resulting from a natural disaster" 2007 *Nova Law Review* 552.

19 If that is not the case, parties are generally advised to negotiate a settlement, although this is not compulsory: *BusinessTech* "What happens if you can't pay rent during lockdown?" (2020-04-08).

20 See part 3 below.

21 See part 3 below for a discussion of *vis maior*.

22 Sniffen 2007 *Nova Law Review* 554.

23 See *Joint Venture Between Aveng (Africa) Pty Ltd and Strabag International GmbH v South African National Roads Agency Soc Ltd* 2019 3 All SA 186 (GP) par 92 for an example of a typical *force majeure* clause.

24 Katsivela "Contracts: Force majeure concept or force majeure clauses?" 2007 *Uniform Law Review* 112.

25 Sniffen 2007 *Nova Law Review* 555. In US law, which is likely also the legal position in South African law, "when a devastating force majeure event occurs, the language in the contract is important to the parties trying to escape liability because not all delays causing nonperformance will be excused and the clause will inform a party as to whether the performance of obligations under the contract are suspended, delayed, or terminated all together": 558.

unforeseeable event, it will be interpreted narrowly and construed against the drafter.[26]

> "In both civil and common law jurisdictions, contracting parties are free to define the contours of force majeure clauses in their contracts and those contours dictate the application, effect and scope of force majeure. Indeed, if contracting parties have contemplated what constitutes a force majeure event and what its consequences may be, the courts will apply the logic of the parties and will not consider common law or civil law doctrines."[27]

The COVID-19 lockdown consists of the governmental decision to invoke the Disaster Management Act and introduce a range of regulatory measures that are intended to curb the spread of the novel coronavirus. One of the effects of this governmental decision is the restriction of trade, for many businesses, including commercial lessees. In order for a lessee to rely on a *force majeure* clause, to, for instance, argue that rent should be remitted during the period of the lockdown and for so long as she is unable to do business, she will have to prove that the *force majeure* clause was indeed drafted and included in the contract to allow for this form of relief due to the specific unforeseeable occurrence, namely the governmental decision to restrict trade – to temporarily shut down businesses – by way of legislative measures.[28] Where the *force majeure* clause does not specifically cover legislative interferences with the ability to do business, the clause will be interpreted narrowly. It should be stressed that a *force majeure* clause will not necessarily be drafted in such a way as to protect lessees. It is rather typical in landlord-tenant agreements for a *force majeure* clause to exclude the lessee's claim for rent remission against the lessor as a result of an unforeseen event.[29] A clause of this kind may be contrary to public policy and therefore unenforceable if the burden imposed on the lessee is excessive.[30] Nevertheless, the inclination to phrase a *force majeure* clause to benefit lessors upon the occurrence of unforeseeable events calls into question the residual position; is the common law more inclined to protect lessees or rather lessors?

The subsequent section explores the concept of *vis maior* in the context of commercial leases to determine whether the COVID-19 lockdown regulations constitute *vis maior* and, if so, what the legal position of the parties would be if they failed to include a *force majeure* clause or if the clause does not cover the COVID-19 lockdown

26 Sniffen 2007 *Nova Law Review* 559. This is the legal position in US law and likely also South African law.
27 Katsivela 2007 *Uniform Law Review* 110.
28 It is highly unlikely for a force majeure clause, included in a commercial lease, to cover this type of occurrence.
29 Krige & Rhoodie "Lease agreements and COVID-19" (2020-04-22) *Corporate & commercial and dispute resolution alert CDH* 1-6 3.
30 Krige & Rhoodie "Lease agreements and COVID-19" (2020-04-22) *Corporate & commercial and dispute resolution alert CDH* 1-6 3 mention clauses that prohibit deductions from rent, absolutely, as an example.

regulations.[31] Even though the concepts of *vis maior* and *force majeure* are often used interchangeably, the latter is mostly used in the context of contractual agreements.[32]

3 The impact of *vis maior* in landlord-tenant law

3 1 Defining *vis maior*

The subject matter of a lease agreement is the undertaking by a lessor to let the lessee use and enjoy property for an agreed period of time; this undertaking is known to be the subject and substance of a lease.[33] The lessor is also obliged to maintain the leased premises in a proper condition to the extent that it will remain suitable for the purpose for which it was let, throughout the term of the lease.[34] The lessee's *commodus usus*, which can be defined as the "snugness and benefit of his occupation"[35] can be disturbed by the lessor, a third party or the operation of natural forces (also termed *vis maior*, *vis divina* or "Act of God").[36] *Vis maior* occurs in the form of uncontainable natural forces or disasters, for instance "earthquakes, floods, torrential storms, conflagrations or shipwrecks not caused by human intervention and 'to which human infirmity could offer no resistance'".[37] Contrarily, *vis maior* has also been defined as "some force, power or agency which cannot be resisted or controlled by the ordinary individual. The term is now used as including not only the acts of nature, *vis divina*, or 'act of God', but also the acts of man."[38] *Casus fortuitus*, on the other hand, is generally considered a species of *vis maior* and includes direct acts of nature, the violence of which cannot reasonably be foreseen or guarded against.[39]

---

31 "*Force majeure* does not have its closed-enumerative legal definition and usually means unforeseen and unexpected event outside the control of the parties, which makes performance of the contract substantially impossible … consequence of *force majeure* is exclusion of liability of a party for non-performance of the contract": Bortel "Vis maior (basic *ius commune* remarks)" 2004 *Acta Juridica Hungarica* 50. At 51 Bortel includes "governmental or judicial actions, epidemics or other abnormal natural events" as illustrations of *force majeure*.

32 The term *force majeure* can be used to describe an event, an occurrence or a legal concept: Sniffen 2007 *Nova Law Review* 552.

33 *Rebel Discount Liquor Group (Pty) Ltd v La Rochelle Erf 615 Investments CC* 2005 ZAWCHC 88 par 45.

34 *Rebel Discount Liquor Group (Pty) Ltd v La Rochelle Erf 615 Investments CC supra* par 48.

35 *The Treasure Chest v Tambuti Enterprises (Pty) Ltd* 1975 2 SA 738 (A) 748G-749A.

36 *Rebel Discount Liquor Group (Pty) Ltd v La Rochelle Erf 615 Investments CC supra* par 49. Another category is added as fortuitous or accidental circumstances (*casus fortuitus*), which is defined as an "inevitable accident": par 49-50.

37 *Rebel Discount Liquor Group (Pty) Ltd v La Rochelle Erf 615 Investments CC supra* par 51.

38 Du Bois et al *Wille's Principles of South African Law* (2007) 849.

39 *New Heriot Gold Mining Co Ltd v Union Government (Minister of S.A.R. & H)* 1916 AD 415 433.

Casus fortuitus is concerned with an exceptional, extraordinary, unforeseen event, which human foresight could not anticipate.[40]

In the event of *vis maior*, which essentially gives rise to "impossibility of performance", contractual commitments may be dismissed by operation of law.[41] Stated differently, *vis maior* is generally considered to be an example of supervening impossibility, which has the effect of quenching a contract partly or completely.[42] This is however not always the case and it remains necessary to carefully consider the contract, the relationship between the parties and the nature of the impossibility to determine whether performance should be excused.[43]

In *Johannesburg Consolidated Investment Co v Mendelssohn & Bruce Limited*[44] the court held the following in the context of *vis maior* and the impact thereof on leases:

> "The enjoyment of the property may be lost by *vis maior* affecting the tenant personally, or affecting the property itself. The tenant may himself be deprived of possession by being driven away by the incursion of a hostile army or through a well-grounded fear of a hostile invasion; or the use of the property may be hindered by landslip or flood; or the crops on the ground may be destroyed by a passing army, or by extraordinary heat or blight, or the ravages of birds or locusts … I think that the principle to be gathered from the *Digest* is that there must be some cause acting directly either upon the lessee or upon the property itself, which prevents either totally or to a very great extent the enjoyment which the parties contemplated the lessee should have."[45]

Even more importantly, and specifically relevant to the impact of Covid-19 on leases, Wessels J decided the following in *North Western Hotel Ltd v Rolfes, Nebel & Co*:[46]

> "It is perfectly clear by the Roman-Dutch law … that if a lessee has no beneficial occupation of the property leased either because the property has been completely destroyed, or destroyed to such an extent as to be useless for the purposes let, then the lessee can claim remission of rent. The same principle applies where the lessee has been driven out by *incursus hostium*, or by an irresistible power, or, as the law books express it, by *vis major*, *vis divina*, *damnum fatale*, or *casus fortuitus*. Now the expulsion of the lessee by

40 *Mountstephens and Collins v Ohlssohn's Cape Breweries* 1907 TH 56 59.
41 *Rebel Discount Liquor Group (Pty) Ltd v La Rochelle Erf 615 Investments CC supra* par 50.
42 Cooper *Landlord and tenant* (1994) 200. This was confirmed in the recent case of *Wilma Petru Kooij v Middleground Trading 251 CC* 2020 ZASCA 45 par 33.
43 *Transnet Ltd t/a National Ports Authority v Owner of mv Snow Crystal* 2008 3 All SA 255 (SCA).
44 1903 TH 286.
45 *Johannesburg Consolidated Investment Co v Mendelssohn & Bruce Limited supra* 292-293.
46 1902 TS 324.

> any superior power is considered to be *vis major*, and the act of the sovereign power, whether *de jure* or *de facto*, falls under *casus fortuitus*."[47]

In *Bayley v Harwood*[48] the then Appellate Division confirmed that "an act of legislation has the characteristic of *vis major* in that it cannot be resisted".[49] What remains to be considered is the issue of whether the legislation in the given scenario ought to have been foreseen and guarded against by the affected party. Similarly, if a law has the effect of destroying the subject-matter of an agreement, the contract itself will cease to exist.[50] "The difference between supervening impossibility due to, among others, the destruction of the *merx* or failure of the intended source of supply, on the one hand, and supervening illegality, on the other, is one of substance and importance. The latter brings to the fore considerations of public policy."[51] In addition, the case law suggests that state action can in fact constitute *vis maior*, which can lead to an absolute impossibility of performance, resulting in the extinction of both the contract as well as the parties' obligations.[52]

The COVID-19 lockdown, consisting of the governmental decision to invoke the Disaster Management Act and introduce the range of restrictive legislative measures, can undoubtedly be defined as *vis maior*. With reference to the case law, and specifically *Bayley v Harwood*, acts of legislation, which would include supplementary regulatory measures, will amount to *vis maior*. In the context of commercial leases, the lockdown measures are the direct cause of lessees' inability to trade; the measures prohibit trade, which prevents lessees from using and enjoying the leased premises for the purpose for which they were let.[53] It is also highly unlikely that parties to a commercial lease agreement will foresee and somehow guard against such restrictive legislative measures that effectively forbid trade, in most instances, absolutely.

3 2 Rent remission

The duty to pay rent is generally considered to be the lessee's primary obligation,[54] although lessees are often entitled to a remission of rent, provided that such remission is authorised by law. The parties can also agree to restrict the lessee's common law right to remission of rent and

47 *North Western Hotel Ltd v Rolfes, Nebel & Co supra* 331.
48 1954 3 SA 498 (AD).
49 *Bayley v Harwood supra* 510A. In this case, the lessee was effectively deprived of beneficial occupation of the leased premises due to an amendment to legislation governing the use of the property.
50 *Witwatersrand Township, Estate and Finance Corporation Ltd v Rand Water Board* 1907 TS 231 240-241.
51 *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1997 1 All SA 11 (A) 25.
52 *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG supra* 26. See specifically also *King Sabata Dalindyebo Municipality v Landmark Mthatha (Pty) Ltd* 2013 ZASCA 91 (SCA) par 22-23 where the Supreme Court decided that a court order interdicting a development (due to the gazetting of a land claim) amounted to *vis maior*.
53 This is clearly not the case in the residential sector.

such a clause will be interpreted restrictively.[55] If a lessee's use and enjoyment of leased premises is disturbed due to *vis maior*, the general rule is that the lessee is entitled to a *pro rata* remission of rent, regardless of the fact that the lessor was not in breach of the contract.[56] Importantly, Naude points out that if the lessee derives no use and enjoyment from the leased property, he/she is entitled to a complete rent remittal.[57] Bradfield and Lehmann explain as follows:

> "[I]f the lessor's obligation to protect the lessee in the use and enjoyment of the property let becomes wholly or partially impossible to perform, the lessee's reciprocal obligation to pay the rent is also extinguished or reduced. This is in accordance with the principles of the law of contract governing supervening impossibility of performance."[58]

In *Hansen, Schrader & Co v Kopelowitz*[59] the court held that a lessee is entitled to a remission of rent, wholly or in part, if his use and enjoyment of the property was impaired (completely or to a considerable extent) as a result of *vis maior*, provided that the unforeseen incidence was the direct cause of the lessee's diminished use. The lessee must prove that *vis maior* caused such diminished use.[60] The diminished use must also be direct and immediate due to the interference.[61] The remitted rent amount can be set off against the lessor's claim for rent if the amount is ascertainable and the loss is substantial.[62] If the amount is not ascertainable, the full rent amount should be paid after which the lessee can claim the remitted amount.[63] If the rent was paid in advance, the lessee can reclaim the remitted amount by way of the *condictio sine causa*.[64] Rent can generally not be remitted if the loss was caused by the

54 Bradfield & Lehmann *Principles of the law of sale and lease* (2013) 155. This duty is also reflected in s 4(5) of the Rental Housing Act 50 of 1999. The central obligation of the lessor is give the lessee undisturbed beneficial use and enjoyment of the leased property: Naude "The principle of reciprocity in continuous contracts like lease: What is and should be the role of the exceptio non adimpleti contractus (defence of the unfulfilled contract)?" 2016 *Stell LR* 323.

55 Viljoen *The law of landlord and tenant* (2016) 289.

56 Viljoen 189. Naude 2016 *Stell LR* 324 includes *casus fortuitus* as an occurrence that can justify a reduction of rent.

57 Naude 2016 *Stell LR* 324.

58 Bradfield & Lehmann 155.

59 1903 TS 707 718-719.

60 *New Heriot Gold Mining Co Ltd v Union Government (Minister of Railways and Harbours) supra* 438; *Transnet Ltd t/a National Ports Authority v Owner of mv Snow Crystal supra*.

61 *Hansen, Schrader & Co v Kopelowitz supra* 719; *Transnet Ltd t/a National Ports Authority v Owner of mv Snow Crystal supra*.

62 Kerr *The law of sale and lease* (2004) 350; Pothier (transl Mulligan) *Pothier's treatise on the contract of letting and hiring* (1953) par 156.

63 *Lester Investments (Pty) Ltd v Narshi* 1951 2 SA 464 (C) 468-469; *Bhima v Proes Street Properties (Pty) Ltd* 1956 1 SA 458 (T) 460.

64 *Holtshausen v Minnaar* (1905-1910) 10 HCG 50; *Hughes v Levy* 1907 TS 276. See also *Bayley v Harwood supra*.

lessee or if the lessee knowingly took the risk upon herself.[65] Importantly, parties can negotiate matters that concern remission of rent, although complex cases are generally interpreted in favour of the lessee.[66] The court also clarified that mere loss of income or custom due to *vis maior* will generally not entitle the lessee to remission of rent; instead, *vis maior* must be the direct cause of the lessee's deprived use of the leased property. If a lessee decides to vacate the leased property "through fear or prudence so as to escape the accidents of war or plague, he cannot bring an action for remission of rent."[67]

In *Bayley v Harwood*[68] the Court held that, with reference to the specific circumstances, when leasehold conditions change due to *vis maior*, the following three possibilities emerge:

i. if the change is "trifling" the lessee should generally not be allowed to claim remission of rent;
ii. if the change is significant, but it does not justify termination of the lease, the lessee should be able to claim remission of rent proportionate to the diminished use; and
iii. if the lessee is deprived of beneficial use and enjoyment to such an extent that the property cannot be used for the purpose for which it was let, the lessee should be able to withhold the full rent amount.[69]

Where a lessee withholds the full rent amount when she was only entitled to withhold a reduced amount, the lessee will be in breach of contract.[70] However, Naude interprets *Botha v Rich*[71] to imply the following:

> "[I]f the lessee did pay a reduced rent, but erred somewhat on the proper extent of the justified reduction, it may be contrary to good faith for the lessor to exercise his or her right to cancel under a cancellation clause given a *bona fide* dispute on the exact extent of the reduction, which requires an imprecise estimation based on fairness."[72]

A lessor should rather approach a court for a decision in the case where the parties agree that rent should be remitted, whilst they differ on the extent of the remittal. It is not clear whether the *exceptio non adempleti contractus* ("the *exceptio*") would allow the lessee to withhold the full rent amount in the case where she enjoyed partial use of the leased property. In terms of the *exceptio*, such a lessee, who received partial use and enjoyment, would not be in breach of the contract if she withholds the

65 See specifically *Daly v Chisholm & Co Ltd* 1916 CPD 562; *Capital Waste Paper Co (Pty) Ltd v Magnus Metals (Pty) Ltd* 1964 3 SA 286 (N) 289-290; *Morris v Mappin & Webb Ltd* 1903 TS 244.
66 Kerr 356-357.
67 *Hansen, Schrader & Co v Kopelowitz supra* 716, citing Troplong (*Louage* sec 226).
68 *supra*.
69 *Bayley v Harwood supra* 503A-G, 507H-508B.
70 Naude 2016 *Stell LR* 325.
71 2014 4 SA 124 (CC). The case recognised that a cancellation clause should be interpreted in line with principles of fairness and good faith.
72 Naude 2016 *Stell LR* 325.

full rent amount.[73] If the *exceptio* applies in such an instance, the lessor would be forced to approach a court and claim that it should exercise an equitable discretion to award a reduced rent to the lessor.[74] However, recent case law suggests that a lessee would not be permitted to withhold the full rent amount if her use and enjoyment was partially impaired due to the lessor's breach or acts of a third party.[75] Therefore, it seems that the *exceptio* would not be relevant in the case of partial deprivations in the context of lease.[76] Moreover, it seems that the *exceptio* is only available to a lessee as a means of enforcing the lessor's counter performance.[77]

Naude suggests two approaches with reference to the application of the *exceptio* in the context of lease, the first entails that the remitted rent must be proportionate to the diminished use (the full rent amount cannot be withheld in the case where the lessee's use was partially impaired), whereas the second allows "the lessee who received partial use to withhold the full rent until the lessor restores full use and enjoyment."[78] The latter approach captures the essence of the *exceptio*, which is essentially an enforcement mechanism in the context of reciprocal agreements.[79] Furthermore, the operation of the *exceptio* should still be reasonable in the circumstances and reflect concepts of good faith and fairness.[80] It is doubtful whether the *exceptio* should be available to the lessee to withhold the full rent amount where a lessee's use and enjoyment is impaired without any fault of the lessor. Naude argues that it would be contrary to good faith if a lessee raises the *exceptio* in a case where proper performance by the lessor is no longer possible.[81] Arguably, the same argument should hold where the lessor never

73 Naude 2016 *Stell LR* 325. In support of this view, see specifically Sharrock *Business transactions law* (2011) 325-326.

74 Naude 2016 *Stell LR* 326, referring to *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A).

75 *Ethekwini Metropolitan Unicity Municipality (North Operational Entity) v Pilco Investments CC* 2007 ZASCA 62 (SCA) par 22; *Loch Logan Waterfront (Pty) Ltd v Carwash 4U (Pty) Ltd* 2012 ZAFSHC 32 par 18; *Thompson v Scholtz* 1999 1 SA 232 (SCA) 247.

76 Naude 2016 *Stell LR* 331, referring to *Thompson v Scholtz supra*. This was also confirmed in *Dormell Properties 282 BK v Edulyn (Edms) Bpk* 2012 ZAWCHC 244 par 17. In support of this view, see specifically Du Bois et al 916; Knoetze "The lessee's right to use and enjoy the leased premises" 1997 *Obiter* 116; Piek & Kleyn "'n Huurder se aanspraak op vermindering van huurgeld terwyl hy in besit van die huursaak is" 1983 *THRHR* 382; Cooper 105. Contrarily, see Lubbe "A system in search of a lost cause: Reflections on the principle of reciprocity in South African contract law" in Dirix, Stijns, Pintens & Senaeve (eds) *Liber Amicorum Jacque Herbots* (2002) 221.

77 *Ntshiqa v Andreas Supermarket* 1997 3 SA 60 (TkS) 67H-I; *Thompson v Scholtz supra* 244. See also Lubbe 221; Naude 2016 *Stell LR* 335-336.

78 Naude 2016 *Stell LR* 335.

79 Naude 2016 *Stell LR* 344 points out that "the exceptio should only be used as an enforcement mechanism where the aggrieved party seeks to uphold the contract and proper performance remains possible."

80 Naude 2016 *Stell LR* 343.

81 Naude 2016 *Stell LR* 351.

breached the agreement. The *exceptio* should therefore not be available to lessees during the COVID-19 lockdown to withhold the full rent where they had partial use, because the lessees' impaired ability to trade cannot be attributed to any fault of the lessors. The essence of the *exceptio*, which operates as an enforcement mechanism, is consequently unfounded in the case of *vis maior*.

Interestingly, Kerr mentions that it is not entirely clear what the position is when the lessee can physically take occupation of the premises let, although *vis maior* obstructs the use of the premises for the purpose for which they were let.[82] With reference to case law he argues that in such an instance rent should be remitted from the date on which *vis maior* took effect; if the lessee took occupation an amount of rent should be paid, proportionate to the utilisation of the premises.[83] *Vis maior*, which is a form of supervening impossibility of performance, terminates a contract or suspends some or all of the obligations of the parties, by operation of law.[84] However, Ramsden explains that temporary impossibility of performance suspends a party's duty to perform if he is temporarily disabled from carrying it out. In such an instance, the party is neither in default of performance, nor is he guilty of breach of contract.[85] "Temporary impossibility neither terminates an obligation nor gives rise to a right to terminate an obligation. It merely suspends the duty to perform the obligation thus rendered temporarily impossible, while the impossibility continues."[86] Due to the fact that leases are reciprocal agreements, the party deprived of the benefit of performance can withhold counter performance. Upon termination of the interim impossibility of performance, the parties should examine the situation to determine whether the original obligation can still be performed in full or in part.[87] If the original obligation cannot be performed, at all, the previous impossibility will have become absolute.[88]

3 3 Reflection

Overall, it seems that the residual position is more inclined to protect lessees where their use and enjoyment are impaired due to *vis maior* by

82 Kerr "The effects on leases of supervening impossibility of performance" 1977 *SALJ* 391.

83 Kerr 1977 *SALJ* 391, citing *North Western Hotel Ltd v Nebel & Co supra* 333; *Goldberg v Nante* 1903 TH 150. See specifically also *Petersen v Tobiansky and Tobiansky* 1904 TH 73 77 where the court held that the lessees were entitled to a remission of rent from the date that *vis maior* took effect. In this instance the lessees were ordered to serve on the military, a duty that they were forced to abide by. In consequence, this duty was incompatible with them remaining in their store and carrying out their trade.

84 Kerr 1977 *SALJ* 393, citing *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 2 SA 943 (AD) 952A; Ramsden "Temporary supervening impossibility of performance" 1977 *SALJ* 162.

85 Ramsden 1977 *SALJ* 167.

86 Ramsden 1977 *SALJ* 170.

87 In such an instance the creditor is obliged to accept performance: Ramsden 1977 *SALJ* 171.

88 Ramsden 1977 *SALJ* 170-171.

allowing a rent remittal. In terms of the case law, and supporting literature, the point of departure is that a lessee's rent obligation is suspended for the period of *vis maior*. This suspension applies either absolutely or to the extent that the lessee can in fact use and enjoy the leased property. Based on this principle, a commercial lessee who is wholly deprived of the use and enjoyment of the leased premises will be entitled to a complete rent reduction until such time as the COVID-19 lockdown regulations are eased. If they are eased in part, the lessee will subsequently be entitled to a rent remission, proportionate to the extent of her permissible use of the premises. Based on the principle of reciprocity, the alternative rationale is to argue that both parties are excused from complying with their obligations; lessors are prohibited from actually providing lessees with the use and enjoyment of the leased premises, which arguably relieves lessees from having to make rental payments. The *exceptio non adempleti contractus* should arguably not feature in the case of *vis maior*, because it mainly operates as an enforcement mechanism. It will likely amount to undue hardship if a lessee relies on the *exceptio*, and withholds the full rent amount, even though she has partial use and enjoyment of the premises, where the interference results from *vis maior* and not breach of the lessor.

The majority of commercial leases that are affected by the COVID-19 lockdown regulations will suffer from a temporary interference, which means that the parties' duties to perform will be suspended temporarily, until such time as the restrictions are eased. Failure to perform will not amount to a breach of contract, entitling the other party to terminate the lease, nor will the parties' obligations simply terminate.

With reference to the residual position, it is important to reflect on the purpose of some of the newly introduced regulatory measures, such as the COVID-19 Block Exemption for the Property Retail Sector. If the common law is already geared to allow rent remittals in the case of *vis maior*, which would most likely include the COVID-19 lockdown regulations, why would the regulations also offer rent relief? One explanation is simply that the regulations might be directed at offering relief for lessees in the case where a *force majeure* clause excludes rent remission, although a limited number of commercial leases would include such a clause, stipulating statutory restrictions of trade as *vis maior*. Alternatively, the regulations have been passed to override the residual position and offer clear, unequivocal rent relief for lessees in the retail sector. It should however be added that the regulations are not only intended to protect lessees, they also encourage the parties to negotiate terms and conditions that would aid both parties. This suggests that the regulations, and specifically the COVID-19 Block Exemption for the Property Retail Sector, are mainly intended to protect the financial stance of lessors, whilst also protecting lessees that might be prejudiced due to a *force majeure* clause. If a commercial lease is not covered by the newly introduced regulations, the residual position will prevail, and the lessee will be entitled to a rent remittal in accordance with the extent of her use and enjoyment.

Importantly, the COVID-19 Block Exemption for the Property Retail Sector should not be misconstrued (either directly or indirectly) to mean that commercial lessees require protection by way of legislative intervention. Moreover, statements made by powerful property interest groups, such as the PI Group, should be interpreted with caution and full awareness of the common law. Even though the initiative that has been proposed by the PI Group in the retail industry to offer rent relief and other benefits to commercial lessees can be interpreted as deceptive in that it creates the false illusion that lessees are at the mercy of commercial lessors, an interpretation of this kind is not only in contravention of the purpose of the Block Exemption but also counterintuitive, considering the bigger picture in having to meaningfully mitigate a national disaster. Instead, it is perhaps more sensible to agree with the following sentiments as stated by the PI Group:

> "[W]e don't believe that litigation provides either side with timeous solutions needed to get through this unprecedented time. We need to stand together and find workable solutions that will benefit the country, protect jobs, and sustain our businesses through this challenging time."[89]

4 Concluding remarks

The COVID-19 pandemic and the subsequent lockdown measures has had a detrimental impact on South Africans' livelihoods, including numerous lessees' ability to trade and do business. This article finds that the lockdown measures, consisting of the enforcement of the Disaster Management Act and the introduction of wide-scale regulatory measures, are the direct cause of these impositions, more so than the existence and inevitable spreading of the novel coronavirus. Moreover, these measures constitute *vis maior* because commercial lessees are deprived, wholly or in part, of the use and enjoyment of their leased premises as a result of the lockdown measures. If a *force majeure* clause does not specifically include statutory restrictions of trade as *vis maior*, the clause will be interpreted narrowly. However, it seems that clauses of this kind are usually included to restrict lessees' vast rent remittal rights in the event of *vis maior*, which suggests that the residual position is rather geared to protect lessees.

The article confirms that this is indeed true, the common law protects lessees where *vis maior* is the direct cause of interferences with the use and enjoyment of the premises. In such an instance, a lessee will be entitled to a rent reduction, proportionate to her actual diminished use. A complete rent remittal would be justified where the lessee has no use and enjoyment of the leased premises. A number of regulatory measures, in addition to the lockdown laws, have been introduced in the landlord-tenant sector, and specifically the retail industry, to mitigate what might be perceived as a lopsided legal position. These measures

89 The full statement is available at https://www.sapoa.org.za/media/5593/property-industry-group-statement.pdf (2020-06-29).

should arguably be interpreted to urge ongoing negotiations between parties in commercial lease agreements to promote financial viability for both parties. However, it should be noted that the regulations pertaining to the retail industry are mainly intended to assist lessors against overly burdensome rent remittals, regardless of the fact that the regulations are phrased in such a manner as to suggest that lessees are in need of legislative intervention to provide rent relief and other forms of assistance.

Recent case law

Rethinking the regulation of university students' protests in light of *Mlungwana v The State* 2018 ZACC 45

SUMMARY

On 19 November 2018, the Constitutional Court handed down an important judgment in *Mlungwana v The State* 2018 ZACC 45 that declared section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 unconstitutional because it unjustifiably limited the right of everyone to, peacefully and unarmed, assemble, demonstrate, picket and present petitions in section 17 of the Constitution of the Republic of South Africa, 1996. Section 12(1)(a) of the Act was found constitutionally invalid to the extent that it makes the failure to give notice or the giving of inadequate notice by any person who convenes a gathering a criminal offence. In arriving to its decision, the Court held that the limitation imposed by section 12(1)(a) of the Act on the right to freedom of assembly did not meet the requirements in section 36 of the Constitution. The Constitutional Court's judgment in the *Mlungwana* case has caught the interests of legal scholars and has already generated a journal article and a case note. The existing scholarship on this case has focused on analysing the correctness of the Court's reasoning and on what South African municipalities can learn from it. This article departs from this emerging body of scholarship by critically analysing the implications of the Court's jurisprudence in the *Mlungwana* case for the regulation of university students' protests in South Africa. Drawing examples from policies and regulations of some universities outlining the process for students' protests and the consequences for non-compliance with notice and authorisation procedures, this article argues that universities generally have to rethink how they regulate students' protests in order to comply with the Court's jurisprudence emanating from the *Mlungwana* case. It is argued that in their current form, the policy positions of some universities are inconsistent with the rights of students in section 17 of the Constitution and the concomitant duties of universities emanating from the Bill of Rights.

How to cite: Fuo 'Rethinking the regulation of university students' protests in light of *Mlungwana v The State* 2018 ZACC 45' 2020 *De Jure Law Journal* 369-392
http://dx.doi.org/10.17159/2225-7160/2020/v53a23

1 Introduction

The history of the struggle against apartheid and the brutal suppression of peaceful and legitimate protests of the black majority for liberation and equality is well documented.[1] Despite police brutality, protest action remained a defiant hallmark of the struggle for a democratic South Africa because it was the only means through which black people, including students, could express their views in relation to government decisions that affected their lives.[2] Informed by this historic struggle, a core aspect of the new vision of democratic South Africa, as expressed in the Preamble to the Constitution of the Republic of South Africa, 1996 is the commitment to create "the foundations for a democratic and open society in which government is based on the will of the people". While the political rights guaranteed in the Bill of Rights[3] are generally in line with this vision, the right of everyone to assemble, demonstrate and picket in section 17 of the Constitution ensures that "the will of the people is not always mediated by political parties and the elites that run them".[4] Section 17 of the Constitution enables everyone in South Africa, including civil society organisations to directly influence government policy decisions. The #FeesMustFall Movement of 2015-2016 demonstrates how students were able to use this right to influence government's policy position regarding the high cost associated with access to higher education in South Africa for students from poor and middle-income households. The #FeesMustFall Movement was a student-led protest movement that started in October 2015 with the primary objectives of stopping universities from increasing study fees and to force government to increase funding to all universities.[5] The Movement was started and led by the Student Representative Council at the University of Witwatersrand throughout 2015.[6] The protest that started at the Witwatersrand spread to the University of Cape Town and Rhodes University before quickly spreading to other universities across the country. The central message of the Movement across the country was

1 See, Woolman in Woolman and Bishop *Constitutional Law of South Africa* (2014) 43-4 to 43-6; *University of Cape Town v Davids* 2016 3 All SA 333 (WCC) par 60; *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) paras 112.

2 *SATAWU v Garvas* 2012 8 BCLR 840 (CC) par 121; *University of Cape Town v Davids supra* para 40.

3 Political rights guaranteed in Ch 2 of the Constitution (Bill of Rights) include: the right to freedom of expression in section 16; the right to assemble, demonstrate, picket and present petitions in section 17; the right to freedom of association in section 18; and the rights to vote, form and participate in the activities of political parties, regular free and fair elections, and to stand and be elected into public office in section 19.

4 See, Woolman 43-4.

5 See, Langa in Langa *#Hashtag: An analysis of the #FeesMustFall Movement at South African Universities* (unknown) 5. The economic, ideological and political dimensions of the students' protests of 2015-2016 have been analysed in detail by Badat. See Badat "Deciphering the Meanings and Explaining the South African Higher Education Students Protests 2015-2016" 2015 African Journal of Academic Freedom 74-89.

6 For details, see: Malebela in Langa 133-139.

that "the cost of higher education were too high and unaffordable for the majority of poor black students" and that there was therefore need for free university education in South Africa.[7] The protests were initially very peaceful and gained a lot of support from academics and other stakeholders. The protests temporally came to an end in 2015 when the government announced on 23 October that there was not going to be any tuition fee increment for the 2016 academic year. At the start of the 2016 academic year, there were student protests over a diverse range of issues.[8] Although calm was eventually restored, the protest was reignited again in September 2016 when the Minister of Higher Education announced that there would be fee increment for the 2017 academic year capped at 8 percent with universities given the discretion to decide on how much to increase their tuition.

However, towards the end of 2016, the protests lost momentum due to internal divisions. In addition, support from the public dwindled following the intensification of violence by some student protesters. This notwithstanding, on 16 December 2017, President Jacob Zuma took the nation by surprise when he announced that from the 2018 academic year, university education will be free for all deserving students.[9] Although student protests post 1994 was a culture in especially historically black universities and institutions that were merged as part of the restructuring of the higher education landscape after 2000, the 2015-2016 protests were distinctive because, unlike previous protests, the centre of these protests was at historically-white universities. In addition, the mobilisation of students was nation-wide.[10] Although the #FeesMustFall Movement received much attention for their wanton destruction of property, it will also be remembered for putting the torchlight on a very germane issue.[11] It raised tremendous public awareness about the shortage of funding for higher education in South Africa and solicited the type of political response that few anticipated: achieving free higher education for all deserving students in South Africa through increased government funding. As Langa correctly argues,

7 Langa 6 and 8

8 Report of the Commission of Enquiry into Higher Education and Training to the President of the Republic of South Africa (2017) 15-16.

9 This was a surprise because it was contrary to the recommendations of the Commission of Inquiry into Higher Education and Training. For details on the Commission's recommendations, see: Report of the Commission of Enquiry into Higher Education and Training (2017) 540-561.

10 Report of the Commission of Enquiry into Higher Education and Training (2017) 9; Badat 2015 *African Journal of Academic Freedom* 71-72; Langa 7.

11 The student protests of 2015-2016 also received significant academic attention from diverse disciplines. See: Leuscher, Loader and Mugume "#FeesMustFall: An Internet-Aged Student Movement in South Africa and the Case of the University of the Free State" 2016 *Politikon* 231; Badat 2015 African Journal of Academic Freedom 71; Keet, Nel and Sattarzadeh "Retreating Rights: Human Rights, Pre-Theoretical Praxes and Student Activism in South African Universities" 2017 *SAJHE* 79.

"some of these changes would not have happened if the students did not organise(d) protests".[12]

The achievement of the #FeesMustFall Movement demonstrates how ordinary people can use the right to protest to bring about fundamental change that advances the realisation of constitutional ideals such as the right to further education.[13] Generally, the historical and political significance of the right of everyone to assemble, demonstrate, picket and present petitions has been acknowledged by courts in a number of cases.[14] Recently, in *Mlungwana v The State* 2018 ZACC 45, the Constitutional Court was asked to determine the constitutional validity of section 12(1)(a) of the Regulations of Gatherings Act 205 of 1993 which creates criminal liability for a convenor of any gathering who fails to give notice or adequate notice to a local municipality and the police prior to the gathering. The Court declared this provision unconstitutional because it unjustifiably limited the right in section 17 of the Constitution. The Constitutional Court's judgment in the *Mlungwana* case has caught the interests of legal scholars and has already generated a journal article and a case note.[15] The existing scholarship on this case has respectively focused on analysing the correctness of the Court's reasoning[16] and on what South African municipalities can learn from it.[17] This article departs from this emerging body of scholarship by critically analysing the implications of the Court's jurisprudence in the *Mlungwana* case for the regulation of students' protests by universities in South Africa. Drawing examples from policies and regulations of some universities outlining the process for students' protests and the consequences for non-compliance with notice and authorisation procedures, this article argues that universities generally have to rethink how they regulate students' protests in order to comply with the Court's jurisprudence emanating

12 Langa 8.

13 According to section 29(1)(b) of the Constitution, everyone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible.

14 *University of Cape Town v Davids supra* para 60; *Mlungwana v The State* 2018 ZACC 45 pars 64-69; *SATAWU v Garvas supra* paras 61-63.

15 See Barrie GN "Section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 Declared Unconstitutional – Criminal Sanction an Unjustifiable Limitation on the Excercise of the Right to Assemble" 2019 2 *TSAR* 405-418. Stoffels M "The failure to provide notice of an intended gathering: *Mlungwana v The State* (CCT 32/18) 2018 ZACC 45 (CC) 2019 *Obiter* 408-416.

16 See, Barrie 2019 *TSAR* 405-418. Barrie generally agrees with the Court's reasoning but adds that the consideration of the constitutional jurispruce of the Federal Republic of Germany could have enhanced the Court's judgment. For a commentary on the Western Cape High Court ruling that led to the case before the Constitutional Court see: Khumalo K "The constitutionality of criminalising peaceful protests" 2018 *Without Prejudice* (October 2018) 18-19.

17 See, Stoffels M 2019 *Obiter* 408-416. Stoffels accepts the Constitutional Court's clarification of the legal position and argues that "there is a need for municipalities to be educated on the effect of the judgment as well as to revisit the current practices in relation to gatherings". See, Stoffels 2019 *Obiter* 415-416.

from the *Mlungwana* case. It is argued that in their current form, the policy positions of some universities are inconsistent with the rights of students in section 17 of the Constitution and the concomitant human right duties emanating from the Bill of Rights.

In order to achieve the above objective, the discussion that follows is structured into three parts. The first provides a brief historical context and a discussion of the legislation regulating the right to protest in South Africa, with specific attention on the provisions that led to litigation in the *Mlungwana* case. The second part provides a summary of the *Mlungwana* case, focusing on the facts, the decision of the Court, and the reasons advanced for the decision. The third part analyses the relevance of the Court's findings in the *Mlungwana* case for the regulation of university students' protests in South Africa. This part draws examples from three university policies that regulate students' protests in order to support the arguments made and to offer suggestions on the way forward.[18]

2 Legal framework on the right to protest in South Africa

2 1 Background to the Regulation of Gatherings Act

Although protests were vociferously used as a tool for the political liberation of the majority in South Africa, they were hardly sanctioned by law. The government enacted a series of repressive laws from 1920 up to the 1980s that prohibited and criminalised assemblies in order to stifle dissent.[19] The extremely restrictive civil and criminal measures that formed part of these legislation failed to suppress political assemblies and violent protests. In early 1990, most political parties and the government agreed on the need to find solutions to ongoing violence and to reconcile the rights of assemblers with the state's interest in public order. In 1991, former President, FW de Klerk appointed the Goldstone Commission (Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation) to investigate a new approach to regulate assembly and prevent violent protests in the country.[20] The Commission convened a multi-national panel of experts to assist in this task. Although the Commission held the conviction that the right to assemble, demonstrate, protest and petition was fundamental to the functioning of any democratic society committed to universal political participation, it was convinced that the right should be subject to reasonable restrictions. In view of this, the Commission recommended that the police, local authorities and conveners should take part in pre-demonstration negotiations. As Barrie points out, this meant in practical terms that "organisers of demonstrations should be obliged to give notice to local

18 The researcher was able to obtain the relevant policies of only three universities (University of Johannesburg, North-West University and Stellenbosch University) through the internet. They are merely used in this article as examples and do not represent a definitive generalization of the position in all South African universities.

19 For details, see Woolman 43-4 to 45-6; Stoffels 2019 *Obiter* 411.

20 See, Stoffels 2019 *Obiter* 411; Barrie 2019 2 *TSAR* 405-418 at 405.

authorities and police of the nature, size and route of their demonstration".[21] At the end, the Commission and the panel of experts drafted the Regulations of Gatherings Act No 205 of 1993 (RGA) as new legislation to give effect to principles that were laid down in the panel's testimony. Although the Act was meant to repeal a series of repressive legislation and to allow for the meaningful exercise of the right to assemble in the run-up to the 1994 elections, it was only enacted into law in 1996. Commenting on the RGA, Woolman observes that:

> "To Parliament's credit, the legislation retains the most interesting aspect of the panel's report: namely, the notion of 'demonstration as of right'. Demonstration as of right means that the ability to hold a public gathering, assembly or demonstration is not contingent upon approval by the state. Unfortunately, the RGA qualifies this 'right' in a manner that largely vitiates its significance. Several provisions blunt, in a similar fashion, the potentially revolutionary vision of mass action envisaged by the RGA, and reflect the difficulty that present political actors have had in making a complete break with the past."[22]

In line with the above observations, the discussion below shows that despite the transformational aspirations of the RGA, there are practical difficulties posed by the notice requirements for gatherings.[23]

2 2 Legislative framework on the right to protest in South Africa

As indicated above, public gatherings and demonstrations in South Africa are regulated by legislation that predates the Constitution, the RGA. According to the Act, "demonstration" includes any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action.[24] On the other hand, a gathering means any assembly, concourse or procession of more than 15 persons in or on any public road or any other public place or premises wholly or partly open to the air – (a) at which the principles, policy, actions or failure to act of any government, political party or political organisation, whether or not that party or organisation is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or (b) held to form pressure groups, to hand over petitions to any person, or to mobilise or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution.[25] A close look at these definitions suggests that the main difference between a gathering and a demonstration lies in the

21 Barrie 2019 *TSAR* 406.
22 See, Woolman 43-7 to 43-8.
23 For a detailed analysis, see, Woolman 43-8 to 43-16.
24 S 1 of the Regulation of Gatherings Act 205 of 1993.
25 S 1 of the Regulation of Gatherings Act.

number of persons involved. While 15 people or less makeup a demonstration, more than 15 constitutes a public gathering.[26]

In terms of section 2 of the RGA, an organisation intending to hold a gathering must appoint a person to be responsible for the arrangements for the gathering and to represent the organisation for purposes of the Act. Such a person is expected to play an important role in terms of giving notice of the gathering or entering into negotiations on behalf of the organisation as respectively contemplated in sections 3 and 4 of the Act. In terms of section 3 of the RGA, a convener of a gathering shall give notice in writing to the municipality and police within whose area of jurisdiction the intended gathering is supposed to take place, about the intended gathering, not less than 7 days before the date on which the gathering is to be held.[27] Where it is reasonably not possible to give notice seven days before the date of the gathering, the convener is required to give such notice at the earliest opportunity. If the notice is provided less than 48 hours to the commencement of the gathering, the responsible municipal officer may by notice to the convener prohibit the gathering.[28]

According to the RGA, the notice by the convener to the municipality should contain at least the following information: the name, address, telephone number and facsimile numbers, if any, of the convener and his deputy; the name of the organisation or branch on whose behalf the gathering is convened or, if it is not so convened, a statement that it is convened by the convener; the purpose of the gathering; the time, duration and date of the gathering; the place where the gathering is to be held; the anticipated number of participants; the proposed number and where possible, the names of the marshals who will be appointed by the convener, and how the marshals will be distinguished from other participants in the gathering.[29] In the case of a gathering in the form of a procession, the notice by the convener to the municipality should contain: the exact and complete route of the procession; the time when and the place at which participants in the procession are to assemble, and the time when and place from which the procession is to commence; the time when and the place where the procession is to end and the participants are to disperse; the manner in which the participants are to be transported to the place of assembly and from the point of dispersal; and the number and types of vehicles, if any, which are to form part of the procession.[30] In case where notice is given later than seven days before the date on which the gathering is to be held, the reason why it was not given timeously. In addition, if a petition or any other document

26 In the *Mlungwana* case, the court raised questions as to the rational of using the number 15 to distinguish between a gathering and a demonstration. See *Mlungwana* case paras 84 and 93.
27 See, ss 3(1) and (2) of the Regulation of Gatherings Act.
28 See, s 3(2) of the Regulation of Gatherings Act.
29 See, ss 3(3)(a)-(g) of the Regulation of Gatherings Act.
30 See, ss 3(3)(h)(i)-(v) of the Regulation of Gatherings Act.

is to be handed over to any person, the convener should specify the place where and the person to whom it is to be handed over.[31]

The requirements that must be met, and the responsibilities placed on the convener of a gathering in terms of giving adequate notice are onerous and largely reflects the time when the Regulation of Gatherings Act was drafted. Some of the provisions are clearly outdated. For example, section 4(4) which requires the convener to give notice to a district magistrate if a local authority does not exist in the area where the gathering is to be held is not attuned to the current system of wall-to-wall municipalities in South Africa where all geographical space falls within the jurisdiction of a municipality.[32] The system of wall-to-wall municipalities shows that there is no town or village that does not fall within the jurisdiction of a municipality.

The above notwithstanding, the RGA provides that where a municipal officer receives information about a proposed gathering other than through the notice procedure prescribed in section 3(1) and (2) of the Act, he/she shall take such steps as he/she deems necessary, including obtaining assistance from the police, to establish the identity of the convener of such gathering, and may request the convener to comply with the notice requirements of the Act.[33]

Upon receiving notice in terms of section 3(2) of the Act, or through any other means, the responsible municipal officer shall consult with the convener of the gathering or their authorised member regarding the necessity for negotiations on any aspect of the conduct of, or any condition with regard to, the proposed gathering.[34] The processes for negotiations, amendment of notices and the powers of municipal officers to impose conditions for gatherings are outlined in section 4 of the Act. In terms of section 4(4) of the Act, if a meeting between the convener, their authorised member and municipal officer cannot reach agreement on the contents of the notice or the conditions regarding the conduct of the gathering, and where there are reasonable grounds, the responsible municipal officer may on his own accord or on the request of an authorised member impose conditions with regard to the holding of the gathering to ensure: that vehicular or pedestrian traffic is not impeded; or an appropriate distance between participants in the gathering and rival gatherings; or access to property and workplaces; or the prevention of injury to persons or damage to property. In addition, a municipal officer can prohibit a gathering when there is credible information on oath that there is a threat that a proposed gathering will result in serious

31 See, ss 3(3) (i)-(j) of the Regulation of Gatherings Act.
32 See, Fuo "Intrusion into the Autonomy of South African Local Government: Advancing the Minority Judgment in the Merafong Case" 2017 De Jure 325; De Visser *Developmental Local Government: A Case Study* (2005) 87; Du Plessis and Nel in Du Plessis *Environmental Law and Local Government Law in South Africa* (2015) 24-25.
33 See, ss 3(4) and (5) of the Regulation of Gatherings Act.
34 See, s 4(1) of the Regulation of Gatherings Act.

disruption of vehicular or pedestrian traffic, injury to the participants in the gathering or other persons, or extensive damage to property and that the police and traffic officers in question will not be able to contain this threat.[35]

The role of the convener, as well as the conduct of participants, during gatherings and demonstrations are outlined in section 8 of the Act. It is generally expected that the gathering shall proceed and take place at the locality or on the route and in the manner and during the times specified in the notice. No participant at a gathering or demonstration should be in possession of a firearm or any dangerous weapon. In addition, no person present at or participating in a gathering or demonstration shall by way of a banner, placard, speech or singing or in any other manner incite hatred of other persons or any groups of other persons on account of differences in culture, race, sex, language or religion.[36] The Act also prohibits persons present at or participating in any gathering or demonstration from performing any act or uttering any words which are calculated or likely to cause or encourage violence against any person or groups of persons.[37] In addition, participants are prohibited from wearing a disguise or mask or any other apparel or item that obscures their facial features and prevents their identification; and any form of apparel that resembles any of the uniforms won by members of the security forces.[38] The Act prohibits anyone from compelling or attempting to compel another person to attend, join or participate in a gathering or demonstration.[39]

Chapter 4 of the Act deals with liability for damages arising from gatherings and demonstrations as well as offences and penalties.[40] Anyone found guilty and convicted on any one of the following grounds shall be liable to a fine or to imprisonment for a period not exceeding one year or to both such fine and imprisonment: convenes a gathering in respect of which no notice or no adequate notice was given in terms of section 3 of the Act; after giving required notice, fails to attend a negotiation meeting convened in terms of section 4(2)(b) of the Act; contravenes or fails to comply with any of the provision in section 8 regulating conduct during demonstrations and gatherings; knowingly contravenes or fails to comply with the contents of a notice or a condition imposed for the holding of a gathering or demonstration in terms of the Act; convenes a gathering or convenes or attends a gathering or demonstration prohibited in terms of the Act; fails to comply with orders

35 For details, see ss 5(1)-(3) of the Regulation of Gatherings Act.
36 See ss 8(4)-(5) of the Regulation of Gatherings Act. In *Duncanmec (Pty) Ltd v Gaylard* 2018 11 BCLR 1334 (CC), the Court held that the use of racially offensive words in a song by employees during a strike was inappropriate but was not a ground for automatic dismissal. This reasoning also applies to protests generally.
37 See s 8(6) of the Regulation of Gatherings Act.
38 See ss 8(7)-(8) of the Regulation of Gatherings Act.
39 See s 8(10) of the Regulation of Gatherings Act.
40 For details, see ss 11 and 12 of the Regulations of Gatherings Act.

issued by a police officer or interferes with the execution of his functions during a gathering or demonstration; supplies or furnishes false information for purposes of the Act; and anyone who hinders, interferes with or obstructs or resists a member of the police, responsible officer, convener, marshal or any other person in exercising his powers or the performance of his duties under the Act.[41] Anyone carrying a firearm or dangerous weapon during a gathering or demonstration upon conviction shall be liable to a fine or to imprisonment for a period not exceeding three years.[42] However, a person who convenes a gathering without submitting a notice or adequate notice as required by section 3 of the Act can plead as a defence that the gathering concerned took place spontaneously.[43] It should be noted that the powers of the police in gatherings and demonstrations are outlined in detail in section 9 of the Act but not discussed in this article. These powers are not of vital importance in this context.

Even before the recent court rulings that have helped improve understanding of the constitutionality of some provisions of the Regulation of Gatherings Act, Woolman had pointed out several problematic areas that appear to stifle the noble objectives of section 17 of the Constitution.[44] For example, he earlier pointed out the problematic nature of the requirements for notice and approvals before a public gathering could take place;[45] and the fact that the seven-day notice period envisaged in the Act makes it possible for government to suppress dissent since it gives government a grace period that could be used to turn intention into action before the public registers its collective anger.[46] In addition, he indicates that: the requirements of the Act for gatherings scheduled with less than 48 hours' notice are onerous; local authorities often take more than a week to reply to a properly filed notice; and that, requests to demonstrate peacefully are often met with blanket prohibitions.[47]

3 The *Mlungwana* case: facts, decision and reasons for the decision

3 1 Facts

The applicants in this case were members of the Social Justice Coalition (SJC), a lobby group that was established to fast-track the pace of provision of municipal services to disadvantaged communities within the City of Cape Town and its environs. In September 2013, 15 members of

41 See ss 12(1)(i)-(j) and (k)(i) of the Regulation of Gatherings Act.
42 See s 12(1)(k)(ii) of the Regulation of Gatherings Act.
43 See s 12(2) of the Regulation of Gatherings Act.
44 See Woolman 43-7 to 43-16.
45 Woolman 43-7.
46 See Woolman 43-8 to 43-9.
47 See Woolman 43-11 to 43-14.

the SJC travelled from Khayelitsha to the Civic Centre in Cape Town in order to take part in a protest they had decided to organise.[48] The SJC decided to limit the number of participants to 15 in order to avoid rendering the gathering notifiable in terms of the Regulation of Gatherings Act. However, they were aware of the risk of other members of the SJC joining them during the planned protest. Even though they were joined by other people, the gathering was peaceful and members of the public were not denied entry to or exit from the Civic Centre. The protesters refused to obey the police's order for dispersal and were arrested without confrontation.[49] Eventually, 21 of the protesters were charged before the Magistrates' Court for contravening section 12(1)(a) of the Regulation of Gatherings Act and alternatively of attending a prohibited gathering contrary to section 12(1)(e) of the Act.[50] In their defence, the applicants argued that section 12(1)(e) does not make it an offence to attend a gathering merely because no prior written notice was not given. In addition, they challenged the constitutional validity of section 12(1)(a) of the Act. The Magistrates' Court acquitted all accused persons of the alternative count but found the ten conveners of the protest guilty of contravening section 12(1)(a) of the Act. However, taking into consideration the reason for the protest action, the attempts made to engage the City of Cape Town over the issues, the peaceful conduct of the protesters and the fact that no property was damaged, the Magistrate cautioned and discharged the applicants. In addition, the Magistrate granted the applicants leave to appeal to the High Court in order to enable them to pursue their challenge of the constitutionality of section 12(1)(a) of the Act.[51]

In the High Court, the applicants argued that section 12(1)(a) of the Act constitutes an unjustifiable limitation to the right of freedom of assembly in section 17 of the Constitution in that it discourages people from convening gatherings to voice their views and frustrations, mindful of the repercussions that may follow if adequate notice is not given.[52] The respondents, the State and Minister of Police, resisted the constitutional challenge. The respondents argued that section 12(1)(a) of the Act does not constitute a limitation of the right guaranteed in section 17 of the Constitution and that even if it does, this was in line with the general limitation clause in section 36.[53] The respondents further argued that: the requirement to give notice serves a legitimate purpose by ensuring that there is proper planning to facilitate the exercise of the right to assemble; the giving of notice does not impose an onerous duty on the convener of a gathering; section 12(2) of the Act provides the defence of spontaneity against a section 12(1)(a) charge; and that the criminalisation of the failure to give prior written notice or adequate

48 *Mlungwana* case para 29.
49 *Mlungwana* case para 30.
50 *Mlungwana* case para 31.
51 *Mlungwana* case paras 32-33.
52 *Mlungwana* case para 34.
53 *Mlungwana* case para 35.

notice effectively deters the convening of gatherings without notice, which are more likely to be violent.[54] The High Court held that section 12(1)(a) constitutes a limitation on the right in section 17 of the Constitution because of the frightening and deterring effect criminalisation had on the exercise of the right to assembly.[55] The High Court concluded that the limitation could not be justified under section 36 of the Constitution.[56] As required by the Constitution, the Constitutional Court therefore had to confirm the finding of constitutional invalidity of section 12(1)(a) of the Act.[57] This was the heart of the applicant's argument before the Constitutional Court as they refused to plead spontaneity under section 12(2) of the Act.

3 2 Decision and reasons for the decision

The Constitutional Court confirmed the finding of constitutional invalidity of the High Court on the ground that section 12(1)(a) of the Regulations of Gatherings Act constitute a limitation on the right to freedom of assembly and that the limitation could not be justified under section 36 of the Constitution.[58] In order to arrive this decision, the Court had to determine whether the right in section 17 of the Constitution was limited, and if so, whether the limitation was justified. This required an examination of (a) the content and scope of the relevant protected right; and (b) the meaning and effect of the disputed enactment to see whether there is any limitation of (a) by (b).[59]

The Court indicated that although the meaning of the right to assemble peacefully and unarmed under section 17 of the Constitution is clear and unambiguous, the scope and content of the right must be interpreted generously.[60] The Court indicated that the only internal qualifier to the right is that its exercise must be peaceful and unarmed. The Court held that the term "Everyone" contained in section 17 of the Constitution "must be interpreted to include every person or group of persons – young or old, poor or rich, educated or illiterate, powerful or voiceless. Whatever their station in life, everyone is entitled to exercise the right in

54 *Mlungwana* case para 35.
55 *Mlungwana* case para 36.
56 *Mlungwana* case para 36. S 36 of the Constitution provides that: "(1)The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including – (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 relationship between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."
57 This power is conferred on the Constitutional Court by s 167(5) of the Constitution.
58 *Mlungwana* case para 101.
59 *Mlungwana* case para 42.
60 *Mlungwana* case para 43.

section 17 to express their frustrations, aspirations or demands".[61] Based on this interpretation, the Court indicated that anything that would prevent unarmed persons from assembling peacefully would therefore limit the right in section 17 of the Constitution.[62] The Court ruled that although mere regulation of gatherings for the purpose of ensuring the enjoyment of the right to assemble peacefully and unarmed was acceptable, the deterring effect of criminal sanction in section 12(1)(a) of the Act amounted to a limitation of the right in section 17 of the Constitution.[63] The Court reasoned that:

> "The possibility of criminal sanction prevents, discourages and inhibits freedom of assembly, even if only temporarily. In this case, an assembly of 16 like-minded people cannot just be convened in a public space. The convener is obliged to give prior notice to avoid criminal liability. This constitutes a limitation of the right to assemble freely, peacefully, and unarmed. And this limitation not only applies to conveners but also to those wanting to participate in an assembly. If a convener is deterred from organising a gathering, then in the ordinary course (save for the rare spontaneous gathering) a gathering will not occur."[64]

The Court indicated that the above conclusion was consistent with the position adopted by specialised international and regional legal bodies at the level of the United Nations and the European Union which have held that criminalising the failure to give notice of an intended assembly limits the right to freedom of assembly.[65] The Court quoted with approval article 21 of the International Covenant on Civil and Political Rights of 1966 (ICCPR) which asserts that no restrictions may be placed on the exercise of the right of peaceful assembly other than those imposed "in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order… the protection of public health or morals or the protection of the rights and freedoms of others".[66] In view of this provision, the Court emphasised that any requirement for a notice must be in line with one of the purposes in article 21 of the ICCPR otherwise the restriction will be unjustified. Drawing from the work of the United Nations (UN) Human Rights Committee, the Court noted that it is a restriction of the right to freedom of assembly to require conveners to conclude contracts with city services for the maintenance of security and cleaning for gatherings before authorisation is granted or for administrative fines to be imposed for failure to secure authorisation for a gathering.[67] The Court observed that at the international level, the approach adopted for the scope of the right to assemble peacefully is broad, focusing primarily on the justification of the restriction on the right.[68] In this regard, the Court

61 *Mlungwana* case para 43.
62 *Mlungwana* case para 43.
63 *Mlungwana* case paras 46-47.
64 *Mlungwana* case para 47.
65 For details, see *Mlungwana* case paras 48-55.
66 *Mlungwana* case para 48.
67 *Mlungwana* case para 50.
68 *Mlungwana* case para 50.

noted that restrictions include measures taken before, during and after a gathering, such as punitive measures.[69] Despite the broad approach adopted by the Court to the right in section 17 of the Constitution, it observed that: "what has been said on this topic must in no way be understood to imply that the right in section 17 must be exercised otherwise than peacefully and unarmed".[70] The Court emphasised that individuals who convene and participate in a gathering while harbouring intentions of acting violently, forfeit their constitutional protection.[71]

Having set out the scope of the right and the grounds for restriction under international law, the Court proceeded to examine whether the limitation of the constitutional right to freedom of assembly by section 12(1)(a) of the Act was justifiable under section 36 of the Constitution.[72] The Court pointed out that this justification analysis calls for the "weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment".[73] According to the Court, this balancing act must give way to a global judgment on the proportionality of the limitation and that the onus rests on the respondents to demonstrate that the limitation is justified.[74] The Court proceeded to use the following factors outlined in section 36 of the Constitution to determine the proportionality of the restriction imposed by section 12(1)(a) of the Act: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.[75]

In relation to the first factor, the nature of the right, the Court indicated that the right in section 17 of the Constitution was at the heart of South Africa's constitutional democracy for several reasons.[76] Firstly, it gives voice to vulnerable people without economic or political power and creates a mechanism through which they can voice their legitimate concerns and frustrations.[77] Secondly, the right to freedom of assembly enables people to exercise or realise other human rights and freedoms.[78] Based on this link, the Court reasoned that limiting the right to freedom

69 *Mlungwana* case para 51.
70 *Mlungwana* case para 55.
71 *Mlungwana* case para 55.
72 For an outline of s 36 of the Constitution, see fn 38 above.
73 Mlungwana case para 57.
74 Mlungwana case para 57.
75 For details, see *Mlungwana* case paras 58-110.
76 *Mlungwana* case paras 61-73.
77 The Court observed that: "People who lack political and economic power only have protests as a tool to communicate their legitimate concerns. To take away that tool would undermine the promise in the Constitution's preamble that South Africa belongs to *all* who live in it, and not only a powerful elite. It would also frustrate a stanchion of our democracy: public participation. This all the more pertinent given the increasing rates of protests in constitutional South Africa lately." *Mlungwana* case para 69.
78 *Mlungwana* case paras 71-72.

of assembly carries the risk of indirectly limiting other rights.[79] Thirdly, the Court noted that the constitutional right gives civil society organisations the space needed to use their members to collectively hold government to account and to influence political processes and business decisions.[80] In addition, the Court observed that the historical context of the country, viewed through the brutal denial of basic political rights to the majority during apartheid, and the failure of draconian historical legislation to suppress the majority, highlight the importance of the constitutional protection of the right to freedom of assembly.[81] According to the Court, section 17 of the Constitution represents a solemn commitment to citizens and non-citizens alike to move away from South Africa's dark past when peaceful gatherings of blacks were brutally crushed without any regard for the legitimacy of the grievances underlying their protests.[82] Based on these reasons, the Court indicted that just like under international law, South Africa places a very high premium on the right to freedom of assembly as it is a cornerstone to any democratic society.

In relation to the second factor, the importance of the purpose of the limitation, the Court dismissed the argument of the respondents that the requirement for notice allows proper planning for the deployment of police and that this reduces the risk of disruptive protests on four grounds.[83] Firstly, the Court reasoned that the respondents' use of lack of resources by the police to justify the need for section 12(1)(a) of the Act is unacceptable because ordinarily a lack of resources or an increase in cost on its own cannot justify a limitation of a constitutional (civil and political) right. According to the Court, the obligation to respect, promote and fulfil human rights come at a cost and that cost is the price the Constitution commands the state to bear.[84] The Court indicated that the respondents had not presented evidence to show the extent to which policing costs would increase if it were to declare section 12(1)(a) of the Act unconstitutional and that it was also in the dark as to what would happen if the incentive (criminalization and punishment) for giving notice were removed entirely, or if parliament was to adopt other ways of incentivising notice. The Court established that there was lack of information on the "relation between the incentive to give notice, the actual giving of notice, the frequency of the violence at the unnotified protests, and the attendant costs incurred by SAPS should the incentivising mechanism of section 12(1)(a) with its penal condemnation be removed from the Act".[85] According to the Court, this significantly deflated the importance of the purpose behind section 12(1)(a) of the Act.[86] Secondly, the Court reasoned that there was a weak link between

79 *Mlungwana* case paras 71-72.
80 *Mlungwana* case paras 61-63.
81 *Mlungwana* case paras 64-67.
82 *Mlungwana* case para 67.
83 *Mlungwana* case paras 74-81.
84 *Mlungwana* case para 76.
85 *Mlungwana* case para 77.
86 *Mlungwana* case para 77.

the criminalisation and the achievement of section 12(1)(a)'s ultimate purpose of preventing violent protests.[87] Thirdly, the Court was of the view that although the need to reduce crime levels during protests was a legitimate aim, the measure contained in section 12(1)(a) of the Act had the potential of extensively and inappropriately invading the right of individuals to freedom of assembly.[88] The Court remarked that it was not acceptable for the state, in responding to the regrettable phenomenon of violent protests, to employ heavy-handed countermeasures that disproportionately limit the right in section 17 of the Constitution.[89] The Court indicated that the critical question will always be how best to strike a balance between the exercise of the right in section 17 of the Constitution and ensuring a safe and secure environment. [90] Lastly, the Court pointed out that the respondents did not argue that the failure to give notice is hard to defend in a constitutional democracy thereby meriting punishment.[91] According to the Court, crime and punishment were resorted to solely for their deterrent effect.

In relation to the third factor, the nature and extent of the limitation, the Court underscored that the more severe a limitation is, the more powerful the justification for the limitation needs to be. According to the Court, the "severity of a limitation is established by considering the impact the limitation has on the right in question, the social position of those affected by the limitation, and whether the limitation is mitigated at all".[92] Based on these considerations, the Court reasoned that the limitation in this context was too severe for four reasons:

The Court found that the reach of criminal liability under section 12(1)(a) of the Act was exceedingly broad in two ways. Firstly, that the definitions of gatherings and conveners are broad and expand the scope of criminal liability for contravening section 12(1)(a) in two respects: Convening peaceful assemblies of more than 15 people in a public space to discuss "principles, policies, actions or failure to act by any government, political party, or political organisation" without notice is a crime. The Court found that: "This breadth and, by all accounts, legislative overreach, point to how section 12(1)(a) results in criminalisation without regard to the effect of the protest on public order. This exacerbates the severity of the limitation."[93] The Court indicated that the categorical criminalisation of the failure to give notice was contrary to the position in international law which emphasises that every infringement of the right to freedom of assembly must be on the facts to a legitimate purpose. Based on this, the Court indicated that the blanket nature of the restriction in the Act that criminalises gatherings as an end in itself invariably falls short of being legitimate. According to the Court,

87 *Mlungwana* case paras 78 and 93.
88 *Mlungwana* case paras 79-80.
89 *Mlungwana* case para 80.
90 *Mlungwana* case para 80.
91 *Mlungwana* case para 81.
92 *Mlungwana* case para 82.
93 *Mlungwana* case para 84.

this restriction encroached on the right to freedom of assembly without linking the restriction to a legitimate purpose in every instance of encroachment. The Court therefore ruled that section 12(1)(a) of the Act was unconstitutional because its restriction was not context and fact sensitive.[94] Secondly, the Court indicated that where a convener is not appointed in terms of section 2 of the Act, anyone who "has taken any part in planning or organising or making preparations for the gathering" might be criminally liable irrespective of how marginal their role was. This also applies to anyone who by themselves "or through any other person, either verbally or in writing, invited the public or any section of the public to attend that gathering".[95] This broad reach of criminal liability aggravates the extent of the limitation of section 17 of the Constitution.

The second reason the Court advanced for finding the limitation of section 12(1)(a) of the Act to be too severe was that catastrophic effect that criminalisation had on those caught within its wide net.[96] The Court highlighted the fact that the possibility of arrest and its consequences, even without a conviction, was enough to discourage those seeking to exercise their right in section 17 of the Constitution. In addition, if convicted, those involved faced punishment, stigma and a criminal record for a minimum of ten years. These consequences of criminalisation have the potential of severely discouraging people from exercising their right to freedom of assembly.[97] Thirdly, the Court reasoned that the chilling effect of criminalisation went beyond those who convened assemblies without notice. The Court indicated that some people may be deterred from convening a gathering and prospective attendees might be dissuaded from attending because they too may be deemed to have convened the gathering without notice.[98] Lastly, the Court held that because the Act does not distinguish between adult and minor conveners, children who may not have the resources or know the requirements for an adequate notice and they may be indiscriminately held criminally liable if they fail to give notice before convening a gathering. The Court reasoned that exposing children to the criminal justice system is a traumatic experience and that, as section 12(1)(a) of the Act does through criminal liability, this severely exacerbates the extent of the limitation. The Court held that subjecting children to the full rigour of penal sanctions like adults without taking into account their vulnerability and lack of self-restraint cannot be justified on any rational basis.[99]

The Court rejected the argument that the severity of the limitation in section 12(1)(a) of the Act is mitigated by the defence of spontaneity on the basis that its viability is exaggerated. The Court pointed out that the

94 *Mlungwana* case para 85.
95 *Mlungwana* case para 86.
96 *Mlungwana* case para 87.
97 *Mlungwana* case para 87.
98 *Mlungwana* case para 88.
99 *Mlungwana* case para 89.

defence will not be available to most conveners because convening includes an element of planning. The defence can only benefit a limited class of conveners who arranged a demonstration and it turned into a gathering without reasonable foresight on their part. The defence of spontaneity will not be available to people who planned a peaceful, unarmed gathering without prior notice and this severely limits their section 17 constitutional right.[100] In addition, the Court reasoned that, taking into account the requirements of section 3(2) and (3) of the Act, the giving of adequate notice required considerable effort on the part of the convener, first to acquaint himself with the requirements and to satisfy them.[101]

In relation to the fourth factor, the relation between the limitation and the purpose, the Court found that the limiting means employed in section 12(1)(a) of the Act are not rationally related to or reasonably capable of achieving the professed purpose of the limitation.[102] The Court reasoned that there was lack of a "tight fit" in relation to the link between the criminalisation of not giving notice and preventing violent protests through police presence. According to the Court, someone could be criminalised for failing to give notice, and yet police presence to prevent violence at the gathering was not necessary. On the other hand, sometimes notice may not be required but police presence to prevent violence will be required. The Court justified this reasoning on the fact that although the requirement to give notice pivots on there being more than 15 people, a disruptive protest does not depend on the number 15. The Court held that the limitation in terms of criminal liability for failure to give notice is neither sufficient nor necessary for achieving the ultimate purpose of that limitation – peaceful protest through the presence of the police.[103]

In terms of the fifth factor, less restrictive means, the Court held that the respondents failed to prove that the less restrictive incentives identified by the applicants in foreign jurisprudence will not work just as well as criminalisation, without the grave consequences that flow from a conviction in terms of section 12(1)(a) of the Act.[104]

After the above proportionality analysis in terms of section 36 of the Constitution, the Court concluded that:

> "In balancing the above factors, it becomes clear that section 12(1)(a) is not 'appropriately tailored' to facilitate peaceful protest and prevent disruptive assemblies. The right entrenched in section 17 is simply too important to countenance the sort of limitation introduced by section 12(1)(a). Moreover, the nature of the limitation is too severe and the nexus between the means adopted in section 12(1)(a) and any other conceivable legitimate purpose is too tenuous to render section 12(1)(a) constitutional. This is even more so

100 *Mlungwana* case para 90.
101 *Mlungwana* case para 91.
102 *Mlungwana* case paras 92-94.
103 *Mlungwana* case para 93.
104 *Mlungwana* case paras 95-100.

> when regard is had to the existence of a less restrictive means to achieve section 12(1)(a)'s purpose. Consequently, this Court can only conclude that section 12(1)(a) is unconstitutional. In these circumstances, the underlying reasoning in the judgment of the High Court is correct. It therefore follows that the High Court's declaration of constitutional invalidity must be confirmed subject to some sematic and yet consequential variations to be reflected in the order below."[105]

After arriving at the above conclusion, the Court tailored its order to include, *inter alia,* that: the declaration by the High Court regarding the constitutional invalidity of section 12(1)(a) of the Act was confirmed to the extent that it makes the failure to give notice or the giving of inadequate notice by any person who convened a gathering a criminal offence; the declaration of constitutional invalidity should not apply retrospectively and should not affect finalised criminal trials or those trials in relation to which review or appeal proceedings have been concluded; and the appeals of the applicants against their convictions in the Magistrates Court for contravening section 12(1)(a) of the Act are upheld and the resultant convictions and sentences set aside.[106]

It is important to note that, after an in-depth analysis of the jurisprudence of the Constitutional Court on the right to protest in South Africa, Barrie concludes that the decision in the *Mlungwana* case neatly fits into the general approach adopted by the Court in previous cases.[107] Therefore, the decision did not come as a surprise and resonates with the position adopted by Woolman above. Barrie however argues that, the Court could have enriched its jurisprudence by taking into consideration the constitutional jurisprudence of the Federal Republic of Germany.[108]

4 Implications for the regulation of university students' protests and the way forward

4 1 Current regulation of students' protests by South African universities

All universities in South Africa are organs of state discharging the function of national government to provide tertiary education in terms of the Higher Education Act 101 of 1997.[109] Although universities have

105 *Mlungwana* case para 101.
106 *Mlungwana* case para 112.
107 Barrie 2019 *TSAR* 417.
108 Barrie 2019 *TSAR* 416.
109 See, *Nutesa v Central University of Technology, Free State* 2009 30 ILJ 1620 (LC) paras 31-41. Universities in South Africa are public higher education institutions established in terms of ss 20 and 23 of the Higher Education Act 101 of 1997. In addition, universities are organs of state in terms of the definition of an organ of state in s 239 of the Constitution. Schedule 4A of the Constitution makes it clear that national and provincial governments share concurrent legislative competence regarding education at all levels excluding tertiary education. There are many private higher education colleges in South Africa but not universities.

powers to establish structures to make and implement policies and rules for their effective governance in terms of the Higher Education Act,[110] as organs of state, they are obliged to comply with human rights duties emanating from the Constitution.[111]

In light of their constitutional human rights duties, some universities in South Africa have adopted policies, rules and regulations to guide the exercise of the section 17 constitutional right by their students. For example, the "UJ Student Regulations" adopted by the University of Johannesburg in 2007[112] regulates, *inter alia*, organised student activity. The UJ Student Regulations (2007) recognise the right of students to organise demonstrations.[113] However, it provides that if students want to organise a march, demonstration, protests action or similar event, they must apply for such action in writing to the Director: Student Life and Governance at least five working days before the date of the action.[114] According to the Regulations, in considering the application, the Director takes into account whether or not the action might: cause damage or injury to other people, or violate their rights;[115] and whether the action will disrupt or otherwise represent a seriously detrimental interference with the academic work of other students or staff, or the orderly functioning of the University.[116] The Regulations further provides that: "No mass or protest actions in the form of unlawful processions, meetings, boycotts, occupation of venues or any other area will be permitted".[117] In addition, the Regulations provide that "No protest in any form against an individual will be permitted".[118]

On 18 March 2019, the Council of the North-West University (NWU) adopted "Policy and Rules on Gatherings, Demonstrations and Picketing". The NWU Policy recognises the constitutional right of its students to assemble, demonstrate and picket on or in close proximity to any property of the University, "subject to the limitations of the law".[119] The NWU Policy prescribes that: "A convenor must, at least seven days prior to the intended protest, give written notice with intention to seek written permission to the registrar, of the intention to convene a protest

110 See, generally ss 26-32, 35-37 of the Higher Education Act.
111 See, ss 7(2) and 8(1) of the Constitution.
112 University of Johannesburg Student Regulations (14G/14.4, Recommended by Senate on 14 May 2007. Approved by Council on 20 September 2007). Although this Regulation is supposed to be reviewed every five years in terms of pars 21.1 and 21.2, this researcher is not aware of any subsequently revised version.
113 University of Johannesburg Student Regulations (2007) para 6.1.1.
114 University of Johannesburg Student Regulations (2007) para 6.1.1.
115 University of Johannesburg Student Regulations (2007) para 6.1.1.1.
116 University of Johannesburg Student Regulations (2007) para 6.1.1.2.
117 University of Johannesburg Student Regulations (2007) para 6.1.2.
118 University of Johannesburg Student Regulations (2007) para 6.1.3. This provision is problematic because the Regulation of Gatherings Act makes it possible for demonstrations and gatherings to be directed against an individual in terms of their definition in s 1 of the Act.
119 NWU Policy and Rules on Gatherings, Demonstrations and Picketing (2019) para 4.1.

on or in close proximity to any property of the university".[120] Although it may be argued that a notice with intention to seek written permission from the Registrar is not an application to protest, it can be read as such because a protest will be unlawful without approval from the University. In terms of the NWU Policy, the Register must consider an application in consultation with the relevant Deputy Vice Chancellor (DVC) Campus operations, and he/she may grant or refuse such request within a reasonable time.[121] The NWU Policy further provides that an application for a protest may be refused and the protest may be prohibited "for good reason, including where the possibility exists of injury to persons, damage to private or university property, disruption of academic activities, disruption of the discipline or good order within the university or where disruptive involvement of persons or organisations external to the university may be reasonably expected".[122]

When an application is not approved, the Registrar is required to inform the convenor in writing and to provide written reasons for the refusal.[123] On the other hand, where an application is approved, prior to the protest, "a written agreement in the form prescribed by the registrar must be entered into between the convenor and the university".[124] Paragraph 5.2 of the NWU Policy regulates the nature of, and conduct during a protest. According to paragraph 5.2.1, the convenor must in the prior protest agreement contemplated in paragraph 5.1.5, and before the start of the protest: confirm the nature of the intended protest i.e. a gathering, picket, march or demonstration; give notice of the time and place of the commencement; give reasons for the protest; indicate the number of marshals to be appointed; and request access to the facilities of the NWU required for purposes other than but related to the protests such as toilets. In terms of conduct during protest, paragraph 5.2.2 provides that the convenor must: at all times have a copy of the agreement entered into with the university and the list of appointed and present marshals, at hand; ensure that marshals are identified with full particulars; ensure that marshals monitoring the protest are wearing an identifiable uniform; and require marshals to ensure that the rights of others are not infringed by the protest. A convenor or participant in an unauthorised protest can be subjected to disciplinary measures by the University (see paragraph 5.3).[125] Disciplinary processes can also be

120 NWU Policy and Rules on Gatherings, Demonstrations and Picketing (2019) para 5.1.1.
121 NWU Policy and Rules on Gatherings, Demonstrations and Picketing (2019) para 5.1.2.
122 NWU Policy and Rules on Gatherings, Demonstrations and Picketing (2019) para 5.1.3.
123 NWU Policy and Rules on Gatherings, Demonstrations and Picketing (2019) para 5.1.4.
124 NWU Policy and Rules on Gatherings, Demonstrations and Picketing (2019) para 5.1.5.
125 NWU Policy and Rules on Gatherings, Demonstrations and Picketing (2019) para 5.3.

instituted against a convenor or protester that deviates from the pre-protest agreement contemplated in 5.1.5.[126]

In Stellenbosch University, students need to apply for authorisation for student gatherings, petitions and protests marches on campus. In terms of the Disciplinary Code for Students of Stellenbosch University (2017), approved by Council on 26 September 2016, "No student may organize or participate in an event or gathering for which the required permission has not been granted, or which takes place in contravention of any condition or permission having been granted".[127]

4 2 Implications of the *MIungwana* judgment for the regulation of students' protests

A juxtaposition of the university policies and rules above with the jurisprudence of the Constitutional Court in the *Mlungwana* case show that the position adopted by some universities in relation to pre-authorisation for university students' protests is aligned with the provisions of the Regulation of Gatherings Act but inconsistent with the demands of the Constitution. In other words, the position adopted in the policies and rules of the University of Johannesburg, the North-West University and Stellenbosch University, for example, are mostly aligned to the legal position before the *Mlungwana* judgment. The main lesson universities should take home in light of the *Mlungwana* judgment is that, although they have powers to regulate student protests in order to facilitate the enjoyment of the right in section 17 of the Constitution,[128] policies and rules adopted to this effect should not oblige students to obtain approval from university management in order to engage in a peaceful and unarmed protest.[129] As the Court indicated in the *Mlungwana* case, pre-authorisation notice for demonstrations unjustifiably limits the right to assemble in peace and unarmed and that this is not in line with internationally accepted best practice. The need for authorisation and the consequences that may befall students that convene and participate in protests without prior authorisation has a chilling effect on their right guaranteed in section 17 of the Constitution. Many students will avoid violating these policies and rules for fear of being dragged through intimidating disciplinary proceedings. The number of days required for the giving of notice and the powers of university officials to approve or disapprove an application for demonstrations and gatherings can be used to stifle students' protests.

126 NWU Policy and Rules on Gatherings, Demonstrations and Picketing (2019) para 5.3.

127 Disciplinary Code for Students of Stellenbosch University (2017) par 15.1, p 20.

128 The mere regulation of the right in s 17 of the Constitution is not unacceptable. See the *Mlungwana* case paras 45-46.

129 In the context of municipalities, Stoffels concludes that there is the need to educate municipalities about the effect of the *Mlungwana* judgment and the need to revisit their current practices in relaton to gatherings. See Stoffels 2019 *Obiter* 416.

The decision of the Court in the *Mlungwana* case is a positive one and should be embraced for its potential to enhance the enjoyment of the right to protests. The position adopted by the Court is in line with what Woolman had argued several years ago.[130]

While universities cannot impose pre-authorisation notice as a requirement that must be complied with before students' protests or demonstrations, it is submitted that they retain the powers to regulate how the right to protests can be exercised on their campuses. In line with this view, the Constitutional Court held in the *Garvas* case that "the mere legislative regulation of gatherings to facilitate the enjoyment of the right to assemble peacefully and unarmed, demonstrate, picket and petition may not in itself be a limitation" of the right in section 17 of the Constitution.[131] Despite this assertion, the scope of the powers of universities to regulate students protests is uncertain. What their regulatory powers entails in this context is not clear. It is suggested that this could be understood as the power to develop guidelines that will enable students to appropriately enjoy and exercise the right to assemble, demonstrate, picket and present petitions in a peaceful and unarmed manner.[132] This power should not be used to put in place onerous requirements that must be complied with before, during and after students protests. Doing otherwise will effectively limit the right of students to protest in section 17 of the Constitution. Guidelines developed by universities could include: information on appropriate persons to receive petitions during students protests; safety measures and procedures to be followed where a peaceful protests becomes violent; list of words which are likely to cause or encourage violence against any person or groups of persons during protests; discouraging protesting students from forcing others to participate in protests; guidance on how students who are compelled to join protests action can deal with such pressure; and clear explanation of the consequences that will flow from any breach of existing laws, including consequences for destruction of property. This list is not exhaustive.

The generous approach adopted by the Court to the interpretation of the right in section 17 of the Constitution should not leave universities too worried about students abusing the right to protest without authorisation to damage university property. A clear communication of the Court's firm position against violent protests that infringe on the rights of others and often lead to the destruction of property may be

130 Woolman 43-7 to 43-9. See also Barrie 2019 *TSAR* 417.

131 *SATAWU v Garvas supra* para 55.

132 This thinking is borrowed from the Court's jurisprudence on the powers of national and provincial government to regulate municipalities. See *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Councils; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town* 2014 5 BCLR 591 (CC) para 22.

sufficient to dissuade protesting students from violent conduct. In *Hotz v University of Cape Town,*[133] Justice Nkabinde (ACJ) reiterated the position of the Court that the right in section 17 of the Constitution must be exercised peacefully and that where students have no intention of acting peacefully, they lose their constitutional protection.[134] To this effect, in the context of students protests in the University of Cape Town, the Court remarked that:

> "Their right to assemble and to demonstrate ceased when their demonstration or protest become violent, thus violating the rights not only of the University but also of others at the campus.... Self-help, as this Court has pointed out, is inimical to a society in which the rule of law prevails. Destruction of property, particularly in our learning institutions, cannot be tolerated. The High Court is correct that it could not have been within the contemplation of the drafters of the Constitution that section 17 be used to justify hooliganism, vandalism or any other unlawful and illegitimate misconduct. There can be no doubt that the protestors' conduct went beyond the boundary of peaceful and non-violent protest."[135]

In addition to the above strong condemnation of violent students' protests, the Court indicated clearly that universities have the right to punish students who engage in violent protests that lead to the destruction of property. According to the Court, "students responsible for these transgressions must be held accountable through appropriate legal means".[136] Appropriate legal means in this context is broad. It is not limited to internal university disciplinary processes and procedures but includes resorting to courts to seek appropriate relief either under common law or statutory law. The imprisonment of some #FeesMustFall activists for violent conduct and the destruction of property during the 2015-2016 nation-wide university students' protests is significant deterrence to such conduct for other students in future.

Although the "#FeesMustFall" movement has come and gone, it is myopic to believe that this signalled an end to students' protests in universities across South Africa. The higher education environment is dynamic and one can certainly expect students to resort to their rights in section 17 of the Constitution to address grievances whenever they deem this appropriate. Although the regulation of student protests by universities is not new in South Africa, it is necessary to ensure that future regulation is in line with the obligations emanating from the Bill of Rights. The *Mlungwana* case provides valuable guidance in this regard.

OLIVER FUO
LLB LLM LLD
Associate Professor: Faculty of Law, North-West University

133 *Hotz v University of Cape Town* 2017 ZACC 10
134 *Hotz v University of Cape Town supra* paras 30-32 and 39. See *SATAWU v Garvas supra* paras 52-53.
135 *Hotz v University of Cape Town supra* paras 31-32.
136 *Hotz v University of Cape Town supra* para 39.

Recent case law

Dawn of a new era for permanent life partners: from *Volks v Robinson* to *Bwanya v Master of the High Court*

SUMMARY

The laws in South Africa pertaining to marital affairs have for a long time developed from a conservative form to a non-conservative one. This can be denoted from the passing of legislation such as the Recognition of Customary Marriages Act 120 of 1998, affording women in customary marriages the same protection as those in civil marriages as well as the Civil Union Act 17 of 2006, allowing same-sex partners to formalise their union. Since the advent of the Constitution it can therefore be concluded that the courts and legislature have worked relentlessly to ensure the equal enjoyment of rights to all South African people. Regardless of the immense efforts to develop this area of law, certain groups still remain unprotected and often rely on piece-meal protection often derived from court decisions. Such groups include heterosexual parties to a permanent life partnership. Although such permanent life partnerships are acknowledged in South Africa, there is no legislative protection with regards to maintenance or inheritance at the dissolution of the union. This is different to formalised unions such as marriage and civil unions with extensive legislation concerning the aftermath of such unions. A plethora of cases suggests that, this position has been challenged many times to no avail. In 2005, the Constitutional Court in *Volks v Robinson*, held that the distinction between married and unmarried couples could not be held to be unfair as a marriage encompassed legal reciprocal duties which were not present in a non-marital union. Effectively, permanent life partners could not claim maintenance or inheritance from the estate of their deceased partner. In a recent welcomed decision by the High Court, a heterosexual permanent life partner was permitted to inherit from the estate of her deceased partner. This article discusses the Constitutional Court case and the recent High Court case to elicit that South Africa is headed towards positive development with regard to marital unions and those akin to such unions.

1 Introduction

In 2006, it was decided that permanent same-sex life partners where permitted to inherit from the estate of their deceased partner.[1]

1 *Gory v Kolver* 2006 ZACC 20; The court held that the Intestate Succession Act unfairly discriminated against same-sex couples on the grounds of sexual orientation in that it only granted the right to intestate succession to spouses and not also to the former. As a result, section 1 of the Act was found to be invalid because of its violation of section 9 of the Constitution

How to cite: Madzika 'Dawn of a new era for permanent life partners: from *Volks v Robinson* to *Bwanya v Master of the High Court*' 2020 *De Jure Law Journal* 393-406
http://dx.doi.org/10.17159/2225-7160/2020/v53a24

Therefore, this meant that same-sex partners where protected under section 1 of the Intestate Succession Act 81 of 1987 (hereafter referred to as the ISA), however, heterosexual life partners were left out from this decision. Furthermore, when the Civil Union Act 17 of 2006 came into force granting both same-sex and heterosexual couples the right to a union the ISA was not amended to recognise intestate succession for heterosexual life partners.[2] According to Magona AJ, this created an unintended injustice whereby heterosexual life partners were unable to inherit intestate unlike the unmarried same-sex life partners who could.[3] In the previous year, the Constitutional Court had also ruled that heterosexual life partners could not claim for maintenance from the estate of their deceased partner.[4] Heterosexual life partners have for a long period continued to battle with these injustices and until very recently they had been unable to attain a favourable judgment. The purpose of this article is to reveal the new and more positive reasoning being taken by the courts in line with this issue, signifying that the non-recognised status of heterosexual permanent life partners could soon change.

The position of opposite-sex permanent life partners at the dissolution of their union is discussed herein. This shall be with reference to two court cases namely, *Volks v Robinson*,[5] which asserted that heterosexual partners cannot claim for maintenance from the estate of the other at dissolution of the union; and *Bwanya v Master of the High Court*,[6] a recent decision holding that a heterosexual partner may inherit from the estate of their deceased partner. The recent case reveals the Court's willingness to move from a previous position where heterosexual partners where disadvantaged from exercising their rights during and at the end of their partnership, and depicts a clear intention of grant the inalienable Constitutional rights of equality and human dignity to all persons.

The meaning of a permanent life partnership shall primarily be discussed, whereafter, the possible Constitutional rights afforded to such a partnership shall be considered. This shall be followed by a discussion of the legal position concerning heterosexual permanent life partners as well as an analysis of the recent court decision on the matter. After discussing, both, the rights granted and denied to heterosexual partners upon the dissolution of their union, this paper will provide the necessary recommendations and a conclusion will thereafter be drawn.

---

of the Republic of South Africa which grants everyone the right to equality. Words including permanent same-sex partners were read into the section in order to rectify the invalidity.

2 *Bwanya v Master of the High Court, Cape Town* 2020 ZAWCH 111 para 153.

3 *Bwanya v Master of the High Court supra*.

4 *Volks v Robinson* 2005 ZACC 2.

5 2005 ZACC 2.

6 2020 ZAWCH 111.

2 Background

The notion of heterosexual domestic life partners in South Africa not being afforded legal and formal protection is widely associated with the choice not to marry.[7] The so called choice argument, which was formulated through case law has resulted in a growing trend by the courts of negatively entertaining cases relating to the protection of partners in heterosexual partnerships. In *Volks v Robinson,* the court took the approach that there was no unfair differentiation between married couples and permanent life partners in terms of rights as marriage came with rights and obligations which do not exist in a permanent life partnership.[8] In a different judgement, in *Gory v Kolver,* the court held that same-sex partners in a permanent life partnership could inherit from each other but did not deal with those in a heterosexual partnership.[9] In *Butters v Mncora,* the court set out the principles to be proven if partners intended to share assets in terms of a tacit universal partnership, they did not, however, deal with matters such as inheritance or maintenance.[10] Although avoiding the matter, the court in *Laubscher v Duplan* signified an intention to deal with the matter if it ever came up but did not address the matter further as such an issue was not before them.[11] In general, and as appears from case law, the courts appear to be unwilling to grant protection to heterosexual partners, to adequately deal with the matter or to move from their old position of the choice argument. However, the case of *Bwanya v Master of the High Court* brings new reasoning to the issue on the basis of equality.[12]

In an era of rapidly changing societal norms, the paradigm of lack of protection based on the choice of not wanting to marry is no longer sustainable. This is because when assessing development of laws relating to intimacy, there is evidence to show that other forms of intimate relationships have been granted legal protection. These are, among others, same sex partners as shown in the *Laubscher* judgment and Islamic polygamous marriages as shown in *Hassam v Jacobs*.[13] Therefore, research illustrates that only heterosexual domestic partners are not legally recognised. The lack of legal recognition to such a relationship does not align with the growing social trends characterised by the rapidly growing number of South Africans in heterosexual domestic partnerships. The findings of statics show that in 2001, over 2.3 million

7 *Volks v Robinson* para 154.
8 *Volks v Robinson* para 60.
9 *Gory v Kolver* 2006 ZACC 20.
10 *Butters v Mncora* 2011 ZASCA 29.
11 *Laubscher v Duplan* 2017 (2) SA 264 (CC).
12 *Bwanya v Master of the High Court*, Cape Town 2020 ZAWCH 111.
13 *Laubscher v Duplan* supra.

South Africans where involved in domestic partnerships and by 2011 the number had moved to 3 million.[14] Therefore, in view of this rapid growth and lack of legal reform, it appears that the current position regarding domestic partnerships is one which addresses new trends or new problems with old solutions.

There is a growing consensus among scholars that the position of heterosexual partners has reached a point requiring urgent changes. Bonthuys suggests that this area of law must be urgently harmonised with the Bill of Rights and the values of the Constitution such as equality and human dignity.[15] Manthwa calls for a move from seeing domestic partnerships as threats to the institution of marriage but as relationships in need of legal protection.[16] Smith and Robinson identify that the only way to close the gap in law created by the non-recognition of heterosexual partners is to enact legislation in recognition of such partnerships.[17] Therefore, the aim of this article is to reconcile the reasoning of the court with that of various scholars who are proponents for legal recognition of heterosexual domestic partners. The matter has already been elevated by the recent case of *Bwanya v Master of the High Court* which sought to grant rights to a surviving partner.

3 The meaning of a permanent life partnership

3 1 General

A permanent life partnership which is often referred to as a domestic partnership can be defined as an intimate relationship between two people living together without formalising their union through marriage.[18] Part of the origins of domestic partnerships in South Africa can be attributed to the apartheid era.[19] This era was strongly characterised by men migrating to the cities to search for employment

14 *Volks v Robinson* para 119: AED Attorneys "Domestic partnerships and the Intestate Succession Act" https://adattorneys.co.za/domestic-partnerships-and-the-intestate-successionact/#: ~ :text = Domestic % 20partnerships % 20 and % 20the % 20Intestate % 20Succession % 20Act&text = A % 20domestic % 20partnership % 20or % 20cohabitation,increasingly % 20popular % 20in % 20 South % 20Africa (2020-10-11).

15 Bonthuys "A duty of support for all South African unmarried intimate partners part 1: The limits of the cohabitation and marriage-based models" 2018 *PER* 2.

16 Manthwa "Recognition of Domestic Partnerships in South African Law" (LLM dissertation 2015 UNISA) 3.

17 Smith and Robinson "An embarrassment of riches or profusion of confusion? An evaluation of the continued existence of the Civil Union Act 17 of 2006 in the light of prospective Domestic Partnerships Legislation in South Africa 2010 *PER* 30.

18 "According to a more evolving definition, the term 'domestic partnership' connotes an established intimate relationship of a permanent nature between two people of the same or opposite sex who live together without concluding a marriage ceremony" Manthwa 3.

19 Meyersfeld "If You Can See, Look: Domestic Partnerships and the Law" 2010 *Constitutional Law Review* 275.

particularly in mines. One of the outcomes of the migration was that married men, staying for long periods of time in urban centres, would then form non-marital families in the cities.[20] Other reasons for such partnerships include the rejection of the formal nature of a marriage as well as the expenses associated therein[21] and other reasons are simply owing to the choice of not wanting to be committed in a formalised manner. In terms of the 2011 census more than three million, or 8.6 percent of the South African population, were participating in such relationships.[22] However, a domestic partnership, regardless of its duration, is not considered to be a "common-law union" and South Africa has no dedicated domestic partnership legislation despite several proposals and the publication of a draft Domestic Partnerships Bill in 2008. As a result, the laws protecting persons in a marriage do not extend to people who are in a domestic partnership.[23]

3 2 The difference between marriage and a life partnership

The primary difference between a marriage and a permanent life partnership is that couples in a permanent life partnership do not have the rights, duties and obligations that married couples have.[24] This is mainly because marriage is a formalised and legally recognised union in South Africa, whilst a domestic partnership is not legally recognised. Protection such as the right to maintenance at the dissolution of the partnership is non-existent for domestic partners. The non-existence of such protection is according to case law based on the choice not to get married.[25] In the *Volks* case Skweyiya JA formulated the choice argument as follows:

---

20 Meyersfeld 2010 *Constitutional Law Review* 275 *supra*: Furthermore, "Apart from the profound religious significance attached to the institution of marriage, there are important definitional differences. For example, upon the conclusion of a marriage ceremony, the relationship between the two parties has immediate legal significance. In the case of a domestic life partnership, the determination of the nature of the relationship can only take place after a lengthy period of time" Goldblatt [2003 (120) *SALJ* 610- 625.

21 Meyersfeld 2010 *Constitutional Law Review* 275; *Volks v Robinson* para 93.

22 AED Attorneys "Domestic partnerships and the Intestate Succession Act" https://adattorneys.co.za/domestic-partnerships-and-the-intestate-successio nact/#: ~ :text = Domestic % 20partnerships % 20and % 20the % 20Intestate % 20Succession % 20Act&text = A % 20domestic % 20partnership % 20or % 20co habitation,increasingly % 20popular % 20in % 20South % 20Africa (accessed 2020-10-11).

23 Bonthuys 2018 *PER* 2.

24 Maurice Philips Attorneys "Cohabitation and the law in South Africa" https:/ /www.divorcelaws.co.za/the-law-on-cohabitation.html (accessed 2020-10-10).

25 *Volks v Robinson* para 154; Manthwa also states that "The lack of recognition of domestic partnerships has to do with the fact that marriage is accepted as a cornerstone of society, a better environment for raising children and an integral social institution, while domestic partnerships are seen as a threat to the institution of marriage."

> "By opting not to marry, thereby not accepting the legal responsibilities and entitlements that go with marriage, a person cannot complain if she is denied the legal benefits she would have had if she had married. Having chosen cohabitation rather than marriage, she has to bear the consequences. Just as the choice to marry is one of life's defining moments, so, it is contended, the choice not to marry must be a determinative feature of one's life."[26]

It is submitted that, what can be denoted from the choice argument is that the main differences between married couples and those in domestic partnerships are fenced around recognition and non-recognition of the union. Consequently, this creates a situation whereby if one chooses to marry they attain recognised status with rights and duties flowing from it and if one chooses not to marry, they forfeit recognition and the rights that would have accompanied such recognition. The article now turns to the possible Constitutional rights that affect parties to a permanent life partnership.

4 Constitutional rights

The South African Constitution is the Supreme law of the Republic and any law or conduct which is not consistent with it is invalid.[27] In addition, the obligations imposed by the Constitution must be fulfilled.[28] This applies to all branches of law including that of civil unions and marriages. Section 9 of the Constitution states that everyone is equal before the law and it affords the right to equal protection and benefit of the law.[29] Furthermore, section 9(3), forbids discrimination on the grounds of marital status and sexual orientation.[30] However, this provision is not absolute as it may be limited in terms of section 36 of the Constitution, if the limitation is found to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[31] The test used to determine whether discrimination has occurred was derived from *Harksen v Lane,*[32] in which test the courts assess whether there has been differentiation. If there is differentiation, it is then

26 *Volks v Robinson* para 154 *supra*; "Until now, the non-recognition of domestic partnerships has been justified by what is commonly referred to as 'the choice argument'. Simply put, the choice argument dictates that unmarried partners cannot claim spousal benefits because they choose not to 'marry'" Bester and Louw "Domestic partners and The choice argument: *Quo vadis*?" 2015 *PER* 1.

27 S 2 of the Constitution.

28 S 2 of the Constitution *supra*.

29 S 9 of the Constitution.

30 S 9(3) of the Constitution.

31 S 36 of the Constitution.

32 *Harksen v Lane* 1997 11 BCLR 1489 (CC) para 54; (a) Does the provision 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 8(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

considered whether the differentiation amounts to unfair discrimination.[33] When considering fairness, the courts examine whether the differentiation is based on a legitimate government purpose or on justifiable grounds. If no such legitimate purpose exists, it can thereafter be concluded that unfair discrimination will be present.

Section 39(2) of the Constitution obliges courts to develop the law in order to "promote the spirit, purport and objects of the Bill of Rights" in instances where the common or customary law unfairly discriminates.[34] In addition to the right to equality, section 10 of the Constitution, affords everyone the right to inherent dignity, which such dignity should be respected and protected.[35] Discrimination in terms of the rights of opposite-sex life partners upon dissolution of the partnership was first challenged in *Volks v Robinson* where the Constitutional Court held that the discrimination in question was permissible, and that Mrs Robinson's dignity had not been infringed as explained elsewhere in this article.[36]

5 Legal position

5 1 General

The legal position of parties cohabitating without legally formalising their relationship is characterised by Smith and Robinson as complex.[37] An opposite-sex domestic partnership in South Africa falls short of a common law marriage and is subsequently not recognised under any legislation. As a result of this, the consequences of a marriage do not automatically attach to such a relationship.[38] What makes the position even more complex is that same-sex permanent partners are legally recognised and afforded rights and protection whilst opposite-sex

---

33 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) 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 section 8(2). (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 (section 33 of the interim Constitution)."

33 *Harksen v Lane supra.*

34 S 39(2) of the Constitution.

35 S 10 of the Constitution.

36 *Volks v Robinson-* Maintenance para 42.

37 Smith and Robinson "An embarrassment of riches or profusion of confusion? an evaluation of the continued existence of the Civil Union Act 17 of 2006 in the light of prospective Domestic Partnerships Legislation in South Africa" 2010 *PER* 30.

38 Smith and Robinson 2010 *PER* 31.

domestic partnerships are not. Reliance by parties to a heterosexual domestic partnership for protection is often placed on piecemeal legislation and declarations in judicial precedent or through challenging certain practices that appear discriminatory.[39] Of note in this regard are two cases. The first case, *Volks v Robinson* holding that reciprocal duties of support do not exist during the existence of heterosexual partnership and can consequently not start existing after the dissolution of that relationship. The second decision, *Bwanya v Master of the High Court,* in contrast considered the vulnerability of such partners who are often disadvantaged at the dissolution of the relationship and permitted a heterosexual partner to inherit from the estate of her deceased partner. However, it should be noted that although this decision is of immense significance to the development of marital and civil union laws, it is still to be confirmed by the Constitutional Court.[40]

Whilst the number of heterosexual domestic partnerships has dramatically increased, the legal position concerning this matter has for a long period remained stagnant. This is particularly evident in view of the Domestic Partnerships Bill which was published in 2008 with an aim to legally recognise such partnerships yet twelve years later no legislation has been passed towards that end.[41] Smith and Robinson submit that until there is legislation governing the aspect of domestic partnerships,

39 Some examples of the piecemeal legislation and other protection are: The Domestic Violence Act 116 of 1998 which recognises cohabitation. The definition of a dependent in the Medical Schemes Act 131 of 1998 includes a "partner." Cohabitants are also considered as spouses in terms of legislation with the definition of the word spouse including permanent heterosexual or same-sex relationships under the Income Tax 58 of 1962 and the Estate Duty Act 45 of 1955. In terms of life insurance either partner may name the other as a beneficiary however this nomination must be made noticeably clear. With regards to the maintenance of children there is no distinction between married and unmarried persons as decisions concerning the care and contact of children are founded on the best interests of the child. Children are therefore protected if the couple is not married since both biological parents are responsible of taking care of their children. This therefore applies to domestic partnerships as well. A domestic partner may receive pension fund benefits as a nominee if they qualify as a dependant under the Pension Funds Act. However, they will not be entitled to their partner's pension interest when the relationship is terminated. In terms of the Compensation for Occupational Diseases Act, 130 of 1993, a surviving domestic partner can claim for compensation if their partner died because of injuries sustained during the course of work, if at the time of the employee's death date if they were living as "husband and wife." In *Volks Robinson*, Sachs J, held that "The increased legislative recognition being given to cohabitation suggests that cohabitation has a particular status of its own. This status gives it something of a marriage-like character, without equating it for all purposes to marriage" para 179.

40 *Bwanya v Master of the High Court* para 215; The court held that it would be a just and suitable remedy if the operation of the declaration of invalidity became effective from the date the Constitutional Court confirms the order if the applicant succeeded.

41 Domestic Partnerships Bill of 2008.

the legal position remains inconsistent, fragmented, and filled with uncertainty.[42] However, despite this uncertainty, a positive light is shown through the *Bwanya* case with the Court's preparedness to extend protection to heterosexual domestic partners.

5 2 *Volks v Robinson* – Maintenance

In *Volks v Robinson*, Mrs Robinson and Mr Shandling had been in a permanent life partnership from 1985 until 2011, the year in which Mr Shandling died. The two parties had not formalised their union through marriage although there had been no obstacle of a legal nature to stop them from getting married. After the death of Mr Shandling, Mrs Robinson submitted a maintenance claim in terms of the Maintenance of Surviving Spouses Act 27 of 1990 (hereafter referred to as the MSSA) against the estate of Mr Shandling. Mr Volks, who was the executor of the estate denied Mrs Robinson's claim on the basis that she was not a surviving spouse as defined by the MSSA. Mrs Robinson then launched proceedings in the High Court to challenge this decision. She successfully challenged the meaning of the term survivor as defined in the Act.[43] The basis of her litigation success in the High Court as held by the court was that she had been in a "monogamous permanent life partnership," which is akin to a marriage. The High Court found the exclusion of permanent life partners from that Act to be a violation of the Constitutional rights to equality and dignity.[44] They read in words to remedy the exclusion of permanent life partners from the Act. Mr Volks appealed the decision of the High Court whilst Mrs Robinson sought confirmation of the judgment.

The complexity of this matter can easily be denoted from the way the Judges were divided in their ruling with four separate judgments being written on the same issue.

Skweyiya J, writing for the majority held that the distinction between married and unmarried persons was not unfair because there is a mutual duty of support between married persons, and no such duty is imposed on unmarried persons by statute.[45] It was stated that the aim of the MSSA was to provide for the maintenance of the surviving spouse and that the ultimate goal was to extend the invariable effect of marriage, which is that of support, beyond either party's death.[46] He concluded that the distinction did not amount to unfair discrimination and did not violate inherent dignity.[47] The majority considered that marriage is an important social institution and the law requires married and unmarried individuals to be differentiated. For that reason, they held that the MSSA was incapable of an interpretation including permanent life partners in

42 Smith and Robinson 2010 *PER* 31.
43 *Volks v Robinson* paras 3-10.
44 *Volks v Robinson* para 24.
45 *Volks v Robinson* para 55.
46 *Volks v Robinson* para 38.
47 *Volks v Robinson* para 60 *supra*.

the definition of a "spouse."[48] The aim of the legislation was not to include unmarried people. Consequently, where there is no responsibility to maintain a partner on the deceased while he is alive, the court could not mandate the imposition of an obligation on the estate of the deceased person.

Ngcobo J writing for a separate but concurring judgment held that the provisions of the MSSA did deny the surviving partners of permanent life partnerships the protection it affords to surviving spouses, but it could not be said that it fundamentally impaired their rights of dignity or sense of equal worth because there was a legitimate reason for the differentiation.[49] Therefore, he held that the provisions of the MSSA were not inconsistent with sections 9 and 10 of the Constitution.[50] Sachs J in a dissenting judgment found that the crucial question was whether there was a family relationship of such closeness and strength that refusing the right to demand maintenance after death was unjust.[51] In a joint dissent, Mokgoro J and O'Regan J found the provisions to constitute unjust discrimination on the basis of marital status.[52]

The effect of the majority judgment is that without being eligible to certain rights and protection, heterosexual domestic partners continue to be disadvantaged at the termination of their relationships either by death or other circumstances for the sole reason that they made a choice not to formalise their union through marriage. This entails that the choice not to marry is intrinsically bound with a forfeiture of protection and rights similar to those granted in a marriage. This is ironic when considering section 7 of the Constitution stating that the Bill of rights affirms the South African people's freedoms, which begs the question whether making a choice not to marry but to be in a domestic partnership is excluded from the ambit of such stipulated freedoms.[53] It is submitted that the approach by the majority is inconsistent with the developing social trends in intimate relationships in South Africa in light of the rise in the number of domestic partners.

5 3 *Bwanya v Master of the High Court* – Inheritance

The applicant and the deceased met in February 2014 while the applicant was waiting for a taxi to transport her from Camps Bay to Cape Town Bus Station. The deceased escorted her to the Station, and they had their first date on the same day. The two progressively spent more time together in the months following their first meeting. In June 2014 they moved in together on a permanent basis and they lived together since then. Thereafter, the deceased died intestate in April 2016 at the age of 57. The applicant filed a claim against the estate of the deceased – which was

48 *Volks v Robinson* para 68.
49 *Volks v Robinson* para 95.
50 *Volks v Robinson* para 95 *supra*.
51 *Volks v Robinson* para 195.
52 *Volks v Robinson* para 144.
53 S 7 of the Constitution.

denied by the executor of the deceased estate. As a result of this refusal, the applicant launched a claim in the High Court. She averred that certain provisions of the ISA and the MSSA did not recognise her claims for a share of the estate of the deceased and maintenance thereof. On that basis she argued that the provisions should be declared unconstitutional as they discriminated against her on the basis of marital status.[54] She also sought an order reading in the words "partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support and are contemplating marriage" wherever the word spouse was mentioned in the Acts.[55]

The court, held that traditionally it is women who tend to suffer after years of dedication and support to the livelihood of a permanent life partnership as they end up being left with nothing which consequently strips them of their dignity whilst the same-sex life partners in similar situations tend to benefit instead of suffering a similar detriment.[56] It was held that this amounts to an infringement of the right to equality of the heterosexual life partnership. Furthermore, it was found that there was infringement of the Applicant's right to equality and dignity as there was differential treatment to their same-sex life partnership counterparts who do inherit even if they are not married.[57]

This discrimination was held to be on the specified grounds of marital status, sexual orientation, sex, and gender. In addition to this finding, the court held that, although this group in question may not have suffered in the past from patterns of disadvantage such as those suffered by their same-sex counterparts, "the impact of the end of the relationship is severe, affecting the dignity, personhood and identity of heterosexual permanent life partners deeply. It occurs at many levels and in many ways and is often difficult to eradicate."[58] The court concluded that the failure to include the heterosexual partnerships within s 1(1) of the ISA is in contravention of the applicant's rights and the rights of all parties in similar circumstances, particularly, their rights to equality and dignity in terms of sections 9 and 10 of the Constitution.[59] The impact of the impugned provision unfairly discriminates and cannot be justified in the South African Constitutional order.[60] In order to remedy the unconstitutionality of the ISA, the court ordered a reading in of the words or "a partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support."[61]

With regards to the provisions of the MSSA, the court held that they were bound by the *stare decisis* rule and could not depart from the ruling

54 *Bwanya v Master of the High Court* paras 5-26.
55 *Bwanya v Master of the High Court* para 53.
56 *Bwanya v Master of the High Court* para 171.
57 *Bwanya v Master of the High Court* para 181.
58 *Bwanya v Master of the High Court* para 181 *supra*.
59 *Bwanya v Master of the High Court* para 191.
60 *Bwanya v Master of the High Court* para191 *supra*.
61 *Bwanya v Master of the High Court* para 225.

in *Volks*.[62] In that instance, *Volks* continues to apply in full force when it comes to maintenance issues involving heterosexual domestic partners.

6 Analysis

6 1 General

Bonthuys submits that the number of people living in permanent life partnership relationships has universally increased, and South Africa is not an exception.[63] He states that the need to harmonise family law with the provisions of the Bill of Rights and the Constitutional values of equality and dignity has become a necessity.[64] This submission echoes Mokgoro and O'Regan JJ's statement in their dissenting judgment in the *Volks* case whereby they highlighted that it has become apparent that more and more people in South Africa live together without formally being married.[65] Despite the large number of people living this way, there is still no legislation protecting those cohabitating in a marriage like relationship. The analysis herein evaluates the effects and positive impact the *Bwanya* case will potentially have on the dissolution consequences of an opposite sex permanent life partnership as well as the gaps that still remain in the current position.

6 2 Effect and implications of *Bwanya*

The effect of the *Bwanya* decision, if confirmed by the Constitutional Court is that parties to a domestic partnership would have been elevated in terms of rights. Previously they were not entitled to either maintenance or inheritance at the end of a partnership; however, in light of the *Bwanya* decision, they will possibly now claim for inheritance. Although this is only one side of the coin, when considering that prior to this decision nothing was offered on the table at all, the ruling is of significant importance towards the development on laws concerning heterosexual permanent life partners. It is submitted that a decision of this matter has been highly anticipated when considering that parties to a polygamous Islamic marriage as well as same-sex couples have already been granted immense protection related to the same issues.[66] As the court held that women are the most affected group when it comes to dissolution of intimate relationships, it can be concluded that the case

62 *Bwanya v Master of the High Court* para 56.
63 Bonthuys 2018 *PER* 2.
64 Bonthuys 2018 *PER* 2 *supra*.
65 *Volks v Robinson* para 119.
66 *Hassam v Jacobs* 2009 11 BCLR 1148 (CC); The court had to decide if a widow from a polygynous Islamic marriage was entitled to be viewed as an heir of the instate estate of the deceased husband. The court decided that the widow should be entitled to receive maintenance from the estate of the deceased husband: *Laubscher v Duplan* 2017 (2) SA 264 (CC); The court held that same-sex partners would continue to enjoy rights concerning intestate succession under the Intestate Succession Act as had been held in *Gory v Kolver* until the legislature specifically makes an amendment to the Act regarding that issue.

will largely impact on the development and advancement of women's rights, particularly, equality and human dignity in intimate relationships.

6 3 *Lacunae* in current position

In view of the fact that same-sex partners are awarded the same rights and protection which heterosexual domestic partners consistently seek for, it can be stated that the law is inconsistent in this regard, in affording one group protection whilst denying the same protection to a similar group. In his dissenting judgment in the *Volks* case, Sachs J could not find the legitimate basis for this differentiation as he placed more emphasis on the importance of family instead of the importance of marriage.[67] Despite the *Bwanya* case, this gap, although narrowed, still remains in that heterosexual domestic partners still cannot claim for maintenance from the estate of a deceased partner. Therefore, when it comes to maintenance issues, *Bwanya* will have no impact on the matter.

Whilst the High Court can be rightly understood in that they could not touch upon the matter as it is a decision of a higher court, there appears no justifiable excuse on the part of the legislature in taking measures to ensure the recognition of domestic partnerships in South Africa. In further assessing the effects of the *Bwanya* case, another gap created by the two above cases is that it will be difficult to align the *Bwanya* case to *Volks*, because one case allows for protection whilst the other denies protection. This appears to be a situation which can only be remedied by legislative intervention.

7 Recommendations

It is submitted that although the *Bwanya* case is a very welcomed decision by many, the piecemeal recognition and forms of protection afforded to domestic partnerships remain largely insufficient. For this reason, it is suggested that the legislature takes measures to enact legislation that recognises domestic partnerships for heterosexual couples, to achieve the aim of the Constitution to afford the rights to equality and human dignity to all people in South Africa. The continued piecemeal protection only creates a facade that everyone is treated equally before the law when in reality they are deep inequalities embedded in the way some people in the same situation are treated differently to others for no justifiable reason.

In the *Laubscher* case Mbha AJ held that "there has never been a [C]onstitutional challenge for the right of opposite-sex permanent

67 *Volks v Robinson* para 181; He held that "The emphasis shifts from locating conjugal rights and responsibilities exclusively within the tight framework of formalised marriages, towards embracing a wider canvass of rights and responsibilities so as to include all marriage-like, intimate and permanent family relationships." Such an approach would the allow for a wider interpretation with enough room to cater for the social developments in South Africa concerning inequality and protection in intimate relationships.

partners to be included within the ambit of section 1(1) of the ISA. An actual cause of action and a plea of unfair discrimination are thus required before crossing this bridge."[68] It is suggested that as such a case has now presented itself, the courts and legislature may now deal with the matter once and for all to the ends of reaching legal certainty. Furthermore, it is submitted that one position should be adopted when it comes to the rights and benefits of domestic partners when looking at the fact that *Bwanya* favours the protection of rights whilst *Volks* denies maintenance rights, a situation that creates confusion. A position which favours the enhancement of equality and human dignity as in *Bwanya* would consequently be favourable. However, the matter now rests in the hands of the Constitutional Court.

8 Conclusion

Volks v Robinson and *Bwanya v Master of the High Court*, bare striking resemblances as they both deal with the rights of surviving partners in a heterosexual permanent life partnership, however, as *Volks* is a Constitutional Court case it remains precedent on the issue of domestic life partners not being able to claim maintenance from the estate of a deceased partner. When assessing the matter from the viewpoint that previously heterosexual partners were not eligible to claim for both maintenance and inheritance, it can be said that the *Bwanya* decision is a drastic development on the reasoning of the courts towards this issue.

Bearing in mind that Mrs Robinson too, like Ms Bwanya successfully challenged legislative provisions which excluded her from claiming maintenance in the High Court but which decision was later overturned by the Constitutional Court, it is hoped that the Constitutional Court will confirm the decision of the High Court in *Bwanya* as overturning it might result in a hinderance on the development of equality with regards to civil unions and marriage related laws.

Koshesayi Madzika
LLB LLM
Student, Nelson Mandela University

68 *Laubscher v Duplan supra*.