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Editorial

The De Jure editorial board has the pleasure of presenting the second volume of 2011. This volume joins the first on the journal's open access website which is set to be a true asset to legal research. With its effective search function and well organised layout, the website embodies the essence of the open access environment. This essence is exquisitely described by Jason B Jones who states that "because ideas complete, rather than compete with, one another, creativity and innovation ferment most noticeably when ideas are allowed to circulate openly and freely."

The editorial board extends its congratulations to Prof Frans Viljoen, who earlier this year delivered his inaugural address as the Director of the Centre for Human Rights. De Jure is also pleased to feature an article taken from Prof Viljoen's thought provoking address on international human rights law and the role of human rights education.

It is a disappointment that throughout 2011, cases of misconduct amongst legal professionals have regularly gained attention in the media. Following an investigation by the bar's ethics committee ... six advocates were struck from the roll and seven more were suspended for double briefing and overreaching. Millions owing to the Road Accident Fund and the sheer number of lawyers involved have lead to the image of the legal profession being severely undermined. Questions of professional regulation and ethics have been raised in the minds of legal practitioners and everyday citizens alike. But it seems that unethical behaviour in the legal profession is, unfortunately, not a new phenomenon. Liezel Wildenboer provides an historical look at these questions in her extensively researched article on the history of the legal profession in the *Zuid-Afrikaansche Republiek*, a history which includes incidents of misconduct and overcharging.

The submissions contained in this volume cover a variety of subjects, but have in common that they are all highly relevant in today's legal arena. Amongst others, the submissions address a wide variety of issues on commercial law matters in the form of both articles and case notes. Readers also have the benefit of two case notes providing two distinct perspectives on the Constitutional Court's ruling regarding the infamous case of *The Citizen v Mc Bride*.

De Jure has the pleasure of welcoming Prof André Boraine as Dean of the Faculty of Law at the University of Pretoria and congratulating him on his appointment. Prof Boraine joined the the Department of Mercantile Law at the University of Pretoria in 1985 and served as Head of the Department of Procedural Law between 1999 and 2010. He has contributed extensively to legal research in the fields of insolvency law and civil procedure, amongst others. Prof Boraine has also contributed to this volume and we trust that the pressures of the job will not prevent him from contributing in future. We wish him all the best in his important new position.

Clare-Alice Smith
ASSISTANT EDITOR

Contemporary challenges to international human rights law and the role of human rights education*

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OPSOMMING

Hedendaagse uitdagings vir internasionale menseregte en die rol van menseregte-opleiding

In hierdie bydrae word vier hedendaagse uitdagings aan internationale menseregte onder die loep geneem. Hierdie uitdagings is: (1) Die internasionale menseregte-sisteem is oormatig ingewikkeld en gefragmenteerd, dog steeds onvolledig in die substantiewe beskerming wat dit bied. (2) Internasionale menseregte het nie voldoen aan die beloftes wat dit voorgehou het nie. (3) Die staats-gesentreerde aard van menseregte gee aanleiding daartoe dat state die paradoksale posisie inneem as beide menseregte-beskermer en menseregte-skender. (4) Internasionale menseregte het nie voldoende aandag geskenk aan die behoeftes van die mees behoeftige lede van samelewings nie. Hierdie artikel maak die argument uit dat elkeen van hierdie uitdagings beter verstaan en benader kan word indien ´n multidissiplinêre, eerder as ´n streng judisiële of regsgebaseerde benadering gevolg word. Die inhoud van menseregte-opleiding moet dus krities heroorweeg word, en toelatingsvereistes vir meseregte-programme behoort aangepas te word om so ´n multidissiplinêre benadering te vergestalt.

1 Introduction

The duty to deliver an inaugural address provides me with the privilege of sharing some thoughts on matters related to the objectives and activities of the Centre for Human Rights, in this, the year in which it celebrates 25 years of existence. In its initial years, after it was founded in 1986, the Centre concentrated on promoting a human rights-based constitutional culture for a democratic South Africa. Over the next quarter century, the Centre gradually extended its focus to human rights in a broader African, and international, frame. In 2006, the Centre was recognised as an academic department within the Faculty of Law.

This address explores the broader idea of human rights, and reflects on contemporary challenges to international human rights law and their

* Reworked version of an inaugural address, delivered as head of department ('Director') of the Centre for Human Rights, Faculty of Law, University of Pretoria, on 11 May 2011. A revised version of this address was also presented on 14 November 2011 at the Second International Conference on Human Rights Education, held from 14 to 16 November 2011, in Durban.

relevance for human rights education.[1] Under the term "international human rights law", I understand the human rights treaties and other documents and related institutions and processes at both the global level (under the auspices of the United Nations) and at the regional level (under the African Union).

During the last century, in particular after the fall of the Berlin Wall, human rights were celebrated as the "idea of our time".[2] International human rights had become the new universalised or "worldwide secular religion",[3] and its acceptance by states a prerequisite for "good governance" and international legitimacy.[4] However, with the dawn of this century, critical voices have increasingly questioned whether "human rights can survive"[5] and even postulated the "end of human rights".[6]

2 Contemporary Challenges to International Human Rights Law

International human rights law has been problematised from different vantage points, and for various reasons.[7] A few of the contemporary challenges are the following:

(1) In the post-9/11 era, as human rights became increasingly fused with security concerns in the United States and elsewhere, legislation and executive action purporting to counter terrorism instead eroded principles as firmly entrenched as the prohibition of torture.

(2) The prominent role of China in international affairs, especially in Africa, is tied to the resurgence of a crude understanding of the principle of non-interference in the domestic affairs of states, allowing states to cloak human rights violations from international scrutiny despite their acceptance of international standards. Prominent infrastructure developments initiated by the Chinese, which may paradoxically assist in realising socio-economic rights, may also increase the strength of their leverage.

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1 The adoption of the UN Declaration on Human Rights Education and Training by the UN Human Rights Council, on 23 March 2011, testifies to the growing importance attached to human rights education globally (UN Doc A/HRC/RES/16/1, 2011-04-08). It is expected that the UN General Assembly will endorse this draft and adopt this as a UN Declaration in 2012.

2 Henkin *The age of rights* (1990) ix sates "Human rights is the idea of our time, the only political-moral idea that has received universal acceptance".

3 Wiesel "A tribute to human rights" in *The Universal Declaration of Human Rights: Fifty years and beyond* Y (eds Danieli, Stamatopoulou & Dias)(1999) 3.

4 See eg Teson *Humanitarian Intervention* (1988) 15 ("a government that engages in substantial violation of human rights betrays the very purpose for which it exists").

5 Gearty *Can human rights survive?* (2006).

6 Douzinas *The end of human rights: Critical legal thought at the turn of the century* (2000).

7 For an earlier critique of human rights more generally, see Kennedy "The international human rights movement: Part of the problem?" 2002 *Harvard Human Rights Journal* 101.

(3) The major forum for human rights in the United Nations, the Human Rights Council, is no less politicised than its predecessor, the UN Commission on Human Rights, and is characterised by block voting often obscuring the merits of the matter at hand. Due to its political prominence, the political process of Universal Periodic Review (UPR) has gained ground at the expense of the independent monitoring activities by UN human rights treaty bodies. Although political pressure is an important element of "mobilising shame", political processes are often not as rigorous and free of manoeuvring as the fora provided by treaty bodies.

Although each of these issues (and many others) merits full discussion, I focus on four other challenges, which may, in brief terms, be formulated as follows:

(1) The international human rights system is a labyrinth of complexity and fragmentation, yet remains substantively under-inclusive.

(2) International human rights law has not delivered on its promise to "make a difference".

(3) Due to its state-centred nature, international human rights law is trapped in the paradox of the state as both primary protector and violator of human rights.

(4) International human rights law has inadequately engaged with the plight of the impoverished.

In dealing with these four aspects, and finally relating the discussion to human rights education, I by necessity adopt the expansive – and eclectic – gaze of the land surveyor rather than the microscopic search of the prospector in his quest for that one elusive bright diamond or golden nugget.

As one sets up the challenges to "international human rights law", one should not expect the impossible. What can we expect from international human rights law? It is a complex question to answer fully, but there should be general agreement about the following: First, it complements and does not substitute national law. Ideally, it serves as a normative force coaxing and urging states on towards an internationally agreed consensus on humanity and dignity. It monitors these standards and takes effective action to ensure their observance.

To what extent is the human rights regime conceptually and practically under threat, and how is it or may it be manoeuvring its escape?

3 The Fragmented Proliferation of International Human Rights Law

A principal rationale of international human rights is to provide a normative beacon of commonly agreed standards of humanity and dignity that all states should respect. To assist states and hold them accountable to these standards, an effective implementation system should also be in place.

The charge is increasingly being made that international human rights law has become unwieldy and fragmented due to its endless proliferation. This allegation of proliferation has a normative and an institutional aspect: Normative proliferation arising from the multiple texts elaborated at UN, AU and even sub-regional level (in Africa);[8] and institutional proliferation due to the creation of a multitude of treaty bodies and other institutional mechanisms and processes.

As far as normative proliferation is concerned, it is correct that a great wealth of general and group-specific human rights treaties and other instruments have been put in place. Since the adoption of the Universal Declaration of Human Rights in 1948, the UN and regional organisations such as the OAU/AU adopted a wide array of human rights treaties and other documents, covering the rights of – to name but a few – children, refugees, women, detainees, persons with disabilities, those forcibly disappeared. Soon after the Universal Declaration of Human Rights had been adopted in 1948, the UN Commission on Human Rights started the process of converting the Declaration into a single binding treaty. The eventual adoption of two Covenants testifies to the failure to adopt a single treaty, and marks the start of further norm proliferation. The UN human rights system now comprises nine core treaties.[9] This global network is woven into a similarly complex normative and institutional network at the regional and – increasingly in Africa – at the sub-regional level. Are these overlapping networks mutually reinforcing and complementary, or are they in competition with one another and do they constitute needless duplication?

On the one hand, for victims of human rights violations, the normative variety presents a veritable post-modern hypermarket full of forum-shopping possibilities. For states, on the other hand, the normative landscape may present an intricate puzzle from which they have to devise a yardstick against which to measure their own laws and practices.

Paradoxically, perhaps, the very expansiveness of the network of human rights treaties at the global and regional levels makes normative

8 See eg the 2003 Southern African Development Community (SADC) Social Charter and 2008 Protocol on Gender and Development; and the 2006 Protocol on the Protection and Assistance to Internally Displaced Persons to the Pact on Security, Stability and Development in the Great Lakes Region (of the International Conference on the Great lakes Region).

9 Convention on the Elimination of All Forms of Racial Discrimination (CERD); International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); Convention on the Protection of the Rights of All Migrant Workers and the Members of their Families (CMW); Convention on the Rights of Persons with Disabilities (CRPD); Convention for the Protection of All Persons from Enforced Disappearance (CED).

omissions all the more noticeable. Two of the most prominent issues in the last two decades or so have been the rights of persons with HIV and those affected by the epidemic and at risk of infection, and discrimination against persons on the basis of sexual orientation and gender identity. Although influential "soft law" standards have been elaborated – in the form of the 1998 International Guidelines on HIV-AIDS and Human Rights and the 2007 Yogyakarta Principles on the Application of Human Rights in relation to Sexual Orientation and Gender Identity – these norms have not been converted into binding state obligations in the form of treaties. In this respect, then, international human rights law mirrors the discomfort of many societies and political elites to talk openly about sex, and reinforces publicly expressed or implied prejudice and homophobia. While it is correct that the 2003 African Women's Rights Protocol refers to HIV, it does so by applying the optic of coercive measures of partner notification and not by focusing on the structural and personal factors that predispose women to vulnerability.[10] While existing treaties have been interpreted to cover some issues of concern[11] and a number of UN and African Commission special mechanisms have contributed towards state accountability for violations on the mentioned grounds,[12] this was done on an *ad hoc* and inconsistent basis.

These aspects relate to the broader category of "sexuality rights". It has been argued that we are witnessing the emergence of women's rights specifically, and "sexuality rights" more broadly, as a "fourth generation" of rights, on the basis that the effective protection of these rights necessitates the rejection of the public/private divide.[13] There are also other candidates for an emerging fourth category, such as "information rights". Given that the "three generations" distinction has largely been replaced by a categorisation of rights linked to governments' obligations to respect, protect and fulfil, I do not advocate a "fourth generation" of sexuality rights. In my view, the proposed obligations on states fit into the existing understanding of human rights. At the same time, HIV, sexual orientation and gender identity raise particular concerns that are not adequately addressed by existing treaty law. These issues may be conceptually linked as "sexual or sexuality rights", a categorisation allowing for the intersections between sexual orientation and HIV

10 See arts 14(1)(d) and 14(1)(e) Protocol to the African Charter on the Rights of Women in Africa.

11 See eg the decision of the UN Human Rights Committee, Communication 488/1992, *Toonen v Australia*, UN Doc CCPR/C/50/D/488/1992 (1994-04-04).

12 See also the establishment by the African Commission of the Committee on on the Protection of the Rights of People Living With HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV, in 2010 (ACHPR/Res163(XLVII)2010).

13 Coomaraswamy "Reinventing International Law: Women's Rights as Human Rights in the International Community" Edward A Smith Lecture, Harvard Human Rights Program, 1997 available at http://library.columbia.edu/urlmirror/11/ReinventingInternationaLaw.htm (accessed 2011-04-30).

discrimination and all other forms of restrictions of sexual expression not conforming to hetero-normative reproductive models, including sex work.[14]

As far as the institutional aspect of proliferation is concerned, it is true that the normative network of standards gave birth to a myriad of nine UN treaty bodies,[15] as well as treaty bodies (the African Commission and African Children's Rights Committee) and further processes at the regional level. Each of these treaty bodies examines periodic states reports; and most of them allow complaints against state parties.

States' contentions that their reporting obligations under nine different UN treaties and further regional treaties are overly burdensome are supported by the daunting reporting cycles in place: Consider that the African Charter on Human and Peoples' Rights obliges states to report every two years,[16] the African Charter on the Rights and Welfare of the Child, every three years,[17] and that the interval for periodic reports under the relevant UN treaties averages around four years. To this should be added the review processes involving state-peers, at the UN level, the Universal Periodic Review (once every four years), and in Africa, the African Peer Review Mechanism (APRM)(on an ad hoc basis), and the AU Solemn Declaration on Gender Equality in Africa (annually).

Attempts to improve institutional and functional co-ordination are on-going. The creation of the UN Office of the High Commissioner for Human Rights in 1993 was a first step. The consolidation of the UN human rights treaty bodies, or at least parts of their mandate, is proceeding slowly.[18] Unfortunately, the interests of role players already deeply invested in the existing system have proven to be a significant obstacle. In the meantime, important adjustments have been made to the state reporting process, calling for shorter reports dealing with specific issues. Some more recent treaties contain explicit measures for collaboration.[19]

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14 See Saiz "Bracketing Sexuality: Human Rights and Sexual Orientation – A Decade of Development and Denial at the UN" 2004 *Health and Human Rights* 49 65.

15 Although there are numerous other human rights treaties under the UN, the eight mentioned above are the only treaties establishing human rights treaty bodies.

16 Art 62 African Charter on Human and Peoples' Rights.

17 Initial reports have to be submitted within two years of entry into force for a particular state (art 43(1)(a) African Children's Charter).

18 See Report of the UN Secretary General *In larger freedom* (2005) par 147: "Harmonized guidelines on reporting to all treaty bodies should be finalized and implemented so that these bodies can function as a unified system."

19 See eg art 28(2) CED: "As it discharges its mandate, the Committee shall consult other treaty bodies instituted by relevant international human rights instruments, in particular the Human Rights Committee instituted by the International Covenant on Civil and Political Rights, with a view to ensuring the consistency of their respective observations and recommendations."

Due to its initial failure of conceiving of state reporting as a continuous dialogue based on previous concluding observations, the African Commission on Human and Peoples' Rights lags behind in this respect, but is now also giving greater prominence to the outcomes of examining state reports as a way of restricting the scope of subsequent state reports.[20] Linked to these efforts is the idea of a UN human rights court, to replace, or supplement, the adjudicatory functions of the different UN treaty bodies.[21] Such an international court of human rights would provide access to a judicial remedy to all. Its decisions would bind states under international law, and not be merely recommendatory or persuasive as the findings of the treaty bodies (formally) are. It would also symbolise a "new era" and may galvanise energies towards ensuring accountability.[22]

In Africa, particularly, the treaty bodies and the more political organs lack institutional cohesion. Few functioning linkages exist between the African Commission, on the one hand, and the APRM and AU organs with a human rights aspect to their mandates, such as the Peace and Security Council, the Pan-African Parliament (PAP), and the Economic, Social and Cultural Council (EcoSoCC), on the other. The drafting and recent adoption of the much vaunted AU Human Rights Strategy is an important but flawed attempt to map the route towards improved institutional collaboration and co-ordination. While the Strategy identified one of the four main challenges to an effective continental human rights system as "inadequate coordination and collaboration among AU and RECs organs and institutions", it does little to enhance the links that are already formally provided for or implied, but not realised in practice. Examples are: The African Commission should carry out on-site investigations on massive scale human rights violations and report to the PSC.[23] The African Commission should be involved in the APRM, and the Commission should take APRM reports into account when examining the human rights record of states.[24] The PAP should discuss the African

20 Guidelines for state reporting under the Protocol to the African Charter on the Rights of Women in Africa (http://www.achpr.org/english/Special%20Mechanisms/Women/Guideline/Guidelines_State%20Reporting_Women_eng.pdf) (accessed 2011-04-30).

21 See eg Oberleitner "Towards an International Court of Human Rights?" in *International human rights law: Six decades after the UDHR and beyond* (eds Baderin & Ssenyonjo)(2010) at 359.

22 Oberleitner *op cit* 370.

23 Art 19 Protocol relating to the Establishment of the Peace and Security Council of the African Union provides that the PSC should seek "close collaboration" with the African Commission on Human and Peoples' Rights. The Commission should adjust its competence under art 58 of the African Charter, which provides for the Commission to draw situations of serious or massive violations to the attention of the AU Assembly, to rather refer such cases to the attention of the AU PSC.

24 Although there is no formal link between the African Commission or African charter, on the one hand, and the New Partnership for Africa's Development (NEPAD) and its African Peer Review Mechanism (APRM), on the other, there

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Commission's activity reports and should scrutinise candidates for the Court and Commission and make recommendations to the Assembly.[25] These kinds of issues do not feature in the Strategy. It does however emphasise that the relevant AU institutions should be viewed as together constituting the "African Governance Architecture" (AGA), and that there should be greater coordination between the AGA and the APSA – the African Peace and Security Architecture. Unfortunately, the opportunity has been lost to entrench or at least advocate for the position of an AU Commissioner for Human Rights, to ensure consistency in co-ordination and cement the AU's political commitment to human rights.

In conclusion: Normative human rights expansion is an inevitability, especially towards the new frontiers of sexuality rights. However, the need for expansion should find its fit within an institutional landscape of greater consolidation and conscious and carefully-coordinated collaboration. What is required, in brief, is innovative norm-enlargement combined with relentless and drastic institutional simplification and streamlining.

4 International Human Rights Law Lacks Effective Enforcement

The second challenge to international human rights law is that it has not lived up to its own rhetorical promises. Under human rights treaties, a ratifying state's overarching obligation is to "give effect to" the rights provided for in each of the treaties. What is required, is domestication or incorporation (making international law part of national law); institutionalisation and operationalisation (establishing national institutions and processes to provide for specific channels of responsibility); and internalisation (changed conduct based on the acceptance of international norms).

A discussion of this challenge is contextualised by the two-phased evolution of international human rights from "legislation" to "implementation".[26] The first phase in this process emphasised standard setting and institution creation. Focusing on the many norms,

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is no reason why the African Commission should not make reference to APRM reports in its examination of state reports submitted under art 62 of the African Charter. Similarly, the APRM process should rely on the previous examinations of state reports (and concluding observations adopted by the African Commission and African Children's Committee) in respect of states undergoing the APRM process.

25 The PAP's competence includes the examination and discussion of "matters pertaining to respect for human rights" (art 11(1) Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament). This provision could be the basis for more extensive engagement with human rights.

26 For this wording, see Report of the UN Secretary General *In larger freedom* (2005) par 132: "We must move from an era of legislation to an era of implementation."

institutions, mechanisms and procedures in place can easily detract from their real purpose, which is to achieve respect for and observance of human rights.[27] Over the last decade or so, the second phase has consequently seen much more concern for norm enforcement, implementation and state compliance, as international law scholars and political scientists started posing questions about the effect and impact of international human rights at the domestic level.

"Making rights real", "the improvement of conditions on the ground", and "realisation of human rights" became the filter of analysis, and lines of inquiry have shifted to answer whether treaties actually make a difference, and what the conditions are under which treaties are more likely to have such effects, and what factors induce or inhibit state compliance. Employing quantitative measurement, empirical techniques and statistical analyses, political scientists in particular, have attempted to answer these questions through studies at the macro level, analysing or comparing a wide array of human rights violations in states across the globe.[28] Debates about fact finding, data gathering and data coding entered the discourse, and questions about methodology seemed to take centre stage.

In a seminal study, Hathaway concluded that there is no positive correlation between treaty ratification and the effect of treaties "on the ground" – in fact, she finds, the inverse is true: treaty ratification is associated with worsening of the human rights situation, because international actors "relieve pressure for real change in performance" of ratifying states.[29] Note that this is not the conclusion of a despondent observer who looks at the world and with a sigh remarks that human rights violations "occur everywhere". No, this is a much more measured and substantiated critique.

Hathaway's analysis and conclusions are open to criticism. By comparing reported human rights violations pre and post ratification, her analysis overstates the importance of the treaty ratification moment.[30] Her analytical frame does not account for the fact that formal treaty acceptance is part of a gradual process, often preceded by signature; and sometimes preceded by and in other instances followed by a domestic compatibility study and the adoption of implementing legislation. Also, by using recorded and reported violations as a proxy for actual human rights practices, she opens her analysis to the critique that the post-ratification period may result in a more open and caring society allowing human rights violations to be revealed and reported to an extent

27 Preamble Universal Declaration of Human Rights.

28 See eg Keith & Ogundele "Legal Systems and Constitutionalism in Sub-Sahara Africa: An Empirical Examination of Colonial Influences on Human Rights" 2007 *Human Rights Quarterly* 1065.

29 Hathaway "Do Human Rights Treaties Make a Difference?" 2002 *Yale LJ* 1935 2007.

30 See Goodman & Jinks "Measuring the Effects of Human Rights Treaties" 2003 *European J of Int L* 171 173.

previously unheard of.[31] In other words, what she observed is an increase in reported – and not actual – human rights violations. Lastly, as a macro analysis covering numerous treaties, Hathaway's study does not distinguish between the effects of different treaties, which are, as Simmons observed, distinctly different in their "governing consequences for a ruling regime".[32] Simmons pointed out that politically sensitive treaties may have the most far-reaching influence in politically unstable or fluid political orders, where there is the best overlap between the need for social mobilisation and the available political space to do so. In stable democracies, the need for mobilisation may be limited; and in stable autocracies the political space may be definitively closed. Due to the lack of a treaty-based and state-specific assessment in Hathaway's and other similar studies, their conclusions are not sufficiently nuanced to acquit them of the burden of persuasion.

All these studies, including that of Simmons, postulate some causal link between treaty ratification and its effects. An attendant methodological complexity is the difficulty of isolating treaty ratification from a multitude of other factors that may have a role in the human rights situation observed on the ground. Treaty ratification may very well mark an on-going process of greater openness and may formally mark an already-growing acceptance that domestic practices need to change. Treaty ratification should then not be viewed as constitutive of positive developments, but as confirming the continuing nature of these effects. For this reason, empiricism based on the before/after dichotomy should at the very least be supplemented by micro analyses of the use of treaties in cases, arguments and policies.

International human rights law and lawyers have to engage with these analyses. One approach is to scrutinise the relevant findings for methodological flaws and to question the logic supporting conclusions. In a prominent example of the contested nature of even the most basic building block of quantitative analyses, data gathering and coding, the *Human Rights Quarterly* devoted a significant part of a recent issue to the measurement of "physical integrity rights" according to two instruments, the Political Terror Scale (PTS) and the Cingranelli and Richards Human Rights Data Project (CIRI).[33] A striking example of the divergence in measurement results is provided by the following: In 1991, the PTS assessed the UK as a "1", while the CIRI gave it a "4"; and in 2000 Morocco scored "3" on the PTS scale and "7" on the CIRI scale, where

31 See Goodman & Jinks *op cit* 175; Bollen "Political Rights and Political Liberties in nations: An Evaluation of Human Rights Measures, 1950 to 1984" in *Human rights and statistics: Getting the Record Straight* (eds Jabine & Claude)(2002) 200.

32 Simmons *Mobilising for Human Right: International law in domestic politics* (2009) 15.

33 See Wood & Gibney "The Political Terror Scale (PTS): A Re-introduction and a Comparison to CIRI" 2010 *Human Rights Quarterly* 367 367-400; Cinganelli & Richards "The Cingranelli and Richards (CIRI) Human Rights Data Project" 2010 *Human Rights Quarterly* 401-424.

"8" represents the worst possible score, and "0" the absence of the types of abuses under consideration.[34]

Another, more constructive, approach is to participate in this discourse itself, as many have done, by shifting the enforcement/ implementation discourse to the micro level, to focus on in-depth case studies of particular countries,[35] by using qualitative rather than quantitative methods and by underlining the indirect and constitutive influence (or "impact") of international law on legal cultures and as impetus for social mobilisation.

My conclusion to the discussion on the second challenge: Dismissing uncomfortable analyses ("inconvenient truths") out of hand is not a tenable option. International human rights lawyers have to work with relevant experts or acquire the skills required to engage with the real effects of human rights (whether provided for at the international or domestic level) in the lives of real people. The effect of these insights on norm creators and operators may, in turn, be both sobering and inspiring.

5 International Human Rights Law is Trapped in the Paradox of the Janus-Headed State

The third challenge to international human rights law relates to its paradoxical dependence on the government as primary guarantor of human rights despite the reality that the same government often is the primary violator of the rights of its own people. Too often, the notion of state sovereignty is used to trump any form of inspection – or, in circumscribed circumstances, intervention – on the basis of international standards. Although this paradox plays itself out frequently, it presents itself most strikingly in a context of massive-scale violations of the rights of violations of nationals by their own state, as has been the case in Libya in early 2011. Indeed, the Janus-headed state has come to prominence in the context of the continuing popular revolutions all over the Arab world. At the recent session of the African Commission, for example, the Libyan state representative deplored the UN-sanctioned intervention as an unjustifiable inroad into state sovereignty.

The question as to the basis on which nationals may, in these situations, be protected under international law, brings the international peace and security apparatus into play. In this regard, it should be recalled that the basis of the international community, the UN's very reason for being is the non-use of force by states. An ancillary principle is the non-interference by one state in the domestic affairs of another. Only the UN Security Council, acting under Chapter VII of the UN Charter,

34 Wood & Gibney *op cit* 381.

35 See eg the studies in Heyns & Viljoen *The impact of the United Nations human rights treaties on the domestic level* (2002); Simmonds 284–304, focusing on Chile and Israel in her analysis of torture and the impact of CAT.

may intervene with military force in any UN member state in order to maintain or restore international peace and security.[36] Despite this possibility, the UN Security Council failed to authorise intervention in cases of grave and serious violations committed to the people of, for example, Rwanda (in 1994) and Kosovo (in 1998-1999).

The failure of the UN to act in respect of Kosovo, in the late 1990s, and NATO's willingness to do so, sparked a debate about the legality of NATO's intervention. A consensus emerged that NATO's actions were "illegal, but legitimate".[37] Clearly, this formulation not only raised issues of constructive ambiguity, but also put the appropriateness of the existing legal regime into question. On the basis of state sovereignty reconceived as state responsibility towards nationals, the notion of each state's individual and the international community's collective "responsibility to protect" subsequently gained acceptance.[38] The responsibility to protect entails that the international community has a duty to protect populations, even against their own states, from extreme and conscious-shocking human rights violations, at the very least, genocide, war crimes and crimes against humanity. Based on the acceptance that it is derived from the needs of people, and not the rights of states, state sovereignty has thus been humanised in the notion of the "responsibility to protect". Although the Security Council allowed intervention in Libya, arguably on this basis,[39] questions about the "operationalisation" of this doctrine remain, in the light of the Security Council's exclusive Chapter VII powers, and the possibility of a veto by any of the five permanent members.

Two main solutions present themselves to eliminate selectivity and to provide for a more principled application of the "responsibility to protect" by the Security Council. One option is the radical restructuring of the Security Council, including its enlargement, the abolition of veto powers, and the devolution of some of its powers to the General Assembly.[40] However, these on-going discussions are not likely to bear fruit in the foreseeable future.

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36 Art 39 UN Charter.

37 The Independent International Commission on Kosovo *The Kosovo Report. Conflict, International Response, Lessons Learned* (2000) 186.

38 International Commission on Intervention and State Sovereignty (ICISS) "The Responsibility to Protect" (2001) http://www.iciss.ca/pdf/Commission-Report.pdf (accessed on 2011-04-30).

39 Security Council Resolution S/RES/1973 (2011) (2011-03-17), as well as Security Council Resolution S/RES/1970 (2011) (26 February 2011), preamble: "Recalling the Libyan authorities' responsibility to protect its population".

40 See eg African Union, The Common African Position on the Proposed Reform of the United Nations (the "Ezulwini Consensus"), AU Doc Ext/EX.CL/2 (VII), advocating eg for "full representation of Africa in the Security Council", meaning "not less than two permanent seats with all the prerogatives and privileges of permanent membership including the right of veto" and "five non-permanent seats".

The other option is to bring the Security Council's veto power in line with the responsibility to protect. Arguably, interpreted against this background, the use of the veto would be "illegal" if it impedes the use of force in a situation where a state is in flagrant violation of its responsibility to protect.[41] Still, many questions remain, including how a dispute about the conflicting appreciation of the circumstances and the need for intervention by Security Council members would be resolved.

While these uncertainties remain within the UN Security Council, the African Union has broken new normative ground through the enactment of its 2000 Constitutive Act, and the African Commission on Human and Peoples' Rights, with the adoption of its amended Rules of Procedure in 2010.

Both the immediate memory of OAU inaction in the 1994 Rwandan genocide and the emerging conceptual articulation of the responsibility to protect, informed the inclusion of article 4(h) of the AU Constitutive Act, which in essence constitutes a statutory embodiment of this concept. The omission of the requirement for Security Council authorisation, as stipulated by the UN Charter, should also be understood as a way of leaving a statutory framework in place if UN intervention is not forthcoming and a request by the AU to intervene is denied.[42] However, thus far the AU has not invoked this provision, either of its own volition, or by way of a request for authorisation to act to the Security Council, in any of the situations of massive violations involving incumbent governments such as in Darfur or Libya.

Recent developments in Africa demonstrate that international human rights systems may have a role in these cases of serious and massive violations. The referral by the African Commission on Human and Peoples' Rights to the African Human Rights Court, in March 2011, of a case in respect of Libya speaks, substantively, to the serious threat to the lives and physical integrity of persons on a widespread scale. In its subsequent interim order, the Court ordered Libya to cease all actions endangering the lives of civilians.

Although it was not done explicitly in this case, the Commission's Rules of Procedure effectively allows for a referral of a case concerning serious or massive violations directly to the Court. The Court's decision mentions that the case has been submitted under article 5(1) of the Protocol, and founds its jurisdiction in part on this provision. However, in so far as this case constitutes a direct referral of serious or massive

41 Peters "Humanity as the A and **Ω** of Sovereignty" 2009 *European Journal of Int L* 513 540.

42 See however the AU's own position, which is more restrictive (Ezulwini Consensus): "The African Union agrees with the Panel that the intervention of Regional Organisations should be with the approval of the Security Council; although in certain situations, such approval could be granted 'after the fact' in circumstances requiring urgent action. In such cases, the UN should assume responsibility for financing such operations."

violations of human rights, it seems to be explicitly mandated under Rule 118(3) of the Commission's 2010 Rules of Procedure.[43] This Rule is an exception to the position that cases against state parties to the Protocol that have not made the optional declaration under article 34(6) should be dealt with by the Commission before they may be referred to the Court.[44] Rule 118(3) allows the Commission to submit situations considered by the Commission to constitute serious or massive violations, directly to the Court. This provision, with its emphasis on the extensive scale and far-reaching nature of violations, is yet another substantive expression of the responsibility to protect. Given its clear relevance in the particular circumstances, it is unclear why the Commission did not base its referral on the Libyan case squarely on this Rule.

The state has long been losing its centrality in the international community at the expense of non-state actors such as multinationals and civil society organisations, and to regional economic communities. Regional integration has eroded state sovereignty as first the European Union, and now, albeit tentatively, the African Union,[45] are moving to replace intergovernmental with supranational arrangements, thus shedding significantly more competences to supra-national institutions.

The evidence is too sparse to make the case that the international community, or international human rights regime, has turned the corner in its preparedness to protect nationals against even the most excessive misuses of state power against them. Time will tell where these nascent developments will lead, but it seems that as sovereignty-as-responsibility becomes more firmly entrenched, it may well see the re-direction of the Janus-headed state towards its role as protector rather than violator.

6 International Human Rights Law has Neglected the Poor

At the dawn of the last century, WEB Du Bois identified "the problem of the twentieth century" as "the problem of the color-line" (race and

43 Rule 118(3): "The Commission may, pursuant to Rule 84(2) submit a case before the Court against a State party if a situation that, in its view, constitutes one of serious or massive violations of human rights as provided for under article 58 of the African Charter, has come to its attention."

44 See Rule 118(1), which refers to the "decisions" taken by the Commission in respect of inter-state communications (under arts 48 and 49 Charter) and individual communications (under art 55 Charter).

45 Through the transformation of the AU Commission into an AU Authority, which aims to "broaden the mandate" of the Commission. Although the decision has been taken by the AU Assembly, the details are still in the process of being formulated. The real possibility remains that the "transformation" would be largely symbolic, with an emphasis on changed nomenclature (the title "President" and "Vice-President" of the Authority will be used) combined with little fundamental transfer of competences to the new AU Authority.

racism).[46] The defining issue of this century, the most serious form of human rights violation, is no doubt extreme poverty. Just as humanity now disowns racialised concepts and conduct that were pervasive in a different age, it will still in this century, I venture to predict, look back in great shame at the ease of its tacit and meek acceptance of radical inequality and extreme poverty.

Accepting for the moment the contention that rights and their adjudication may have a socially transformative role,[47] it is argued that international human rights law has not been effective in transforming the situation of those most deprived of the basic necessities of life. There is for example no general acceptance that poverty, as such, is a violation of human rights.[48] Under international law, two main normative routes have been explored to address the plight of the impoverished: "socio-economic" rights and the right to development. In both respects, international law developments have been dismally inappropriate.

When socio-economic rights were provided for as part of international human rights law, under the International Covenant on Economic, Social and Cultural Rights (ICESCR), they were treated differently from other (civil and political) rights in that individuals could not complain about the violation of these rights. Despite the General Assembly's request in 1948 to the Commission on Human Rights to prepare a single covenant comprising both "civil and political" and "socio-economic" rights, it soon became clear that socio-economic rights would be contained in a separate document. When it was eventually adopted in 1966, the Covenant on Economic, Social and Cultural Rights provided for non-enforceable and non-justiciable rights, subject to progressive realisation. As individual complaints were not allowed, monitoring of the treaty was by way of state reports. Instead of establishing a treaty monitoring body of independent experts, monitoring of state reports was left to ECOSOC, a political body made up of 54 UN member states. An independent treaty body was only established in 1985. A similar dichotomy was put in place in the two major regional human rights systems in Europe and the Americas.

Although the African Charter included some justiciable socio-economic rights alongside civil and political rights, making them equally enforceable, the list of guarantees omitted rights crucial to the poorest, such as the right to shelter or housing, food, water, basic sanitation and

46 Du Bois "Of the dawn of freedom" in *The souls of black folk* (1905).

47 See eg essays in *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (eds Gargarella, Domingo & Roux)(2006).

48 See eg Pogge "Severe poverty as a human rights violation" in *Freedom from poverty as a human right: Who owes what to the very poor?* (ed Pogge)(2007) 11 13; Campbell "Poverty as a violation of human rights: Inhumanity or injustice?" in *Freedom from poverty as a human right: Who owes what to the very poor?* (ed Pogge)(2007) 55 56. See also the three conceptual frameworks privided in Doz Costa "Poverty and human rights: From rhetoric to legal obligations: A critical account of conceptual frameworks" 2008 *SUR International Journal on Human Rights* 81.

social security. According to the founding fathers, as they were, the minimal obligation was a conscious decision to 'spare our young states too many but important obligations'.[49] Note the juxtaposition of the actual omission of basic rights with the rhetorical acknowledgement of their importance.

An amendment to the UN Covenant, by way of the 2003 Optional Protocol to the ICESCR, is not likely to make much difference. The Protocol has been hailed as a major advance, because for the first time at UN level it creates the possibility of individual complaints related to socio-economic rights. While this treaty addition represents an important acceptance that socio-economic rights are justiciable, our expectations – and that of the poor – should be tempered. So far, only three states have accepted this Protocol as binding, far short of the modest target of 10 ratifications to ensure its entry into force. One of the main reasons for the hesitancy by states is related to the requirement that local remedies have to be exhausted before a case may be submitted to the Committee on Economic, Social and Cultural Rights. It would be fair to state that most socio-economic rights are not justiciable in the domestic legal systems of most states. For these states, accepting justiciability at the international level would be at odds with national law, and therefore perceived as a significant inroad into national sovereignty. Ratification of the Optional Protocol is thus most likely to happen in the small number of states that already provide for justiciability of socio-economic rights at the domestic level.

Even if the Optional Protocol were to gain more widespread support and enter into force, the standard of review to be applied is that of reasonableness, allowing considerable deference to state parties, and not whether the core content of a right had been violated.[50] This rather deferential approach flows from the long-standing contention that, according to the separations of powers, the realisation of socio-economic rights falls within the domain of the elected legislature and politically-accountable executive, and not in the hands of unelected judges. While these arguments about institutional legitimacy have been raised primarily in respect of national adjudication, their traction is increased in respect of an international treaty body, of which the members are elected by a group of states, for fixed terms, and the membership of

49 Rapporteur's Report on the Draft African Charter on Human and Peoples' Rights, OAU DOC CAB/LEG/67/Draft Rapt.Rpt. (II) Rev.4, para. 13, reprinted in *Human Rights Law in Africa 1999* (ed Heyns)(2002) 94.

50 Art 8(4) Optional Protocol to the ICESCR: "When examining communications under the present Protocol, the Committee shall consider the *reasonableness of the steps taken* by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a *range of possible policy measures* for the implementation of the rights set forth in the Covenant" (emphasis added).

which may not include even a single national from the state against which a finding is made.[51]

A further reason not to burden the Protocol with overstated expectations born from frustration is the likelihood of complaints being brought. If the experience of South Africa, a model of domestic justiciability, is anything to go by, the number of cases directed at issues related to basic necessities would be minimal. The reasons for the relative dearth of cases are complex, but some of them relate to a lack of permeation of a legal culture allowing people not to conceive of their life problems as legal issues, and the largely urban focus of legal access even to public interest litigation leaving the rural poor and their difficulties as peripheral concerns. The picture is equally bleak if the number of complaints under existing treaties is considered as a better yardstick than a national jurisdiction. With the exception of complaints to the Human Rights Committee, the numbers of successful complaints are very small, ranging from 6 under CEDAW and 12 under CERD, to 439 cases under CAT and 562 cases under the ICCPR-OPI.[52] But even that figure means that an average of some 12.5 cases have been submitted annually. Very few cases have been submitted against African states. In addition, very few cases dealing with socio-economic rights were ever submitted to the African Commission, and only one case decided under the African Charter brought the obligation of a state to fulfil socio-economic rights fully into contention.[53]

Let me be clear: I do not argue that the Optional Protocol is devoid of potential, or that the celebration and intense scrutiny of occasional examples of domestic adjudication of socio-economic rights are not warranted. I am stressing that the evolution of international human rights law has not kept the poor sufficiently in its sights, nor is it likely to do so in the near future.

The second route is the one towards a justiciable right to development. Since the African scholar Kéba M'Baye proposed this as a new normative principle,[54] the justiciability of the right to development has been shrouded in controversy.[55] This right is not accepted as binding at the global level; instead, it remains contained in a non-binding instrument, the Declaration on the Right to Development. At the regional level, Africa

51 See generally Dennis & Stewart "Justiciability of economic, social and cultural right: Should there be an international complaints mechanism to adjudicate the right to food, water, housing and health?" 2004 *American Journal of Int L* 462.

52 These numbers are based on the lists of cases completed by all UN human rights treaty bodies displayed on www.bayefsky.org (accessed 2011-04-30). The "successful complaints" are cases conclusively decided on the merits in which a violation by the state has been found.

53 *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

54 M'Baye *Les droits de l'homme en Afrique* (1992) 184-209.

55 See eg Donnelly "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development" 1984 *California West Int LJ* 485.

again provides a notable exception as far as the normative framework is concerned. Not only does the African Charter explicitly provide for this right,[56] the African Commission has made a finding that a state (Kenya) has violated that right by excluding an indigenous community in that country (the Endorois) from the benefits of development, and by failing to effectively and inclusively consult with the community.[57]

Similarly, little attention has been devoted to a derivative element from the right to development, linked to the duty to provide international cooperation towards the "full realisation" of Covenant rights,[58] namely the right to development assistance. Although many developed nations provide development assistance (aid) to developing countries, on the basis of a 40 year-old pledge to provide at least 0.7% of GDP in development assistance, development assistance has not been seen as a binding obligation.[59] It may be argued that many of the conceptual problems attendant upon the right to development, such as questions about who would benefit from the right, and what the right exactly entails, do not arise when it comes to the right to development assistance. In addition, there is sufficient state practice and growing indications of a willingness to accept this as an obligation on the part of developed states to justify the inference of an emerging rule of customary international law.[60] Even if the details of the rule, such as the extent of development assistance, may still be contested, it could serve as the basis for the elaboration of a UN treaty on development assistance.

In conclusion: These two avenues will not be fundamental to a rearrangement of social hierarchies. Evidently, they should be

56 Art 22 African Charter.

57 Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Group Rights International (on behalf of Endorois Welfare Council) v Kenya*, 27th Activity Report of the African Commission on Human and Peoples' Rights, 2009.

58 Art 2(1) ICESCR.

59 UN General Assembly Doc A/RES/75/2626 (XXV). International Development Strategy for the Second United Nations Development Decade, 24 October 1970, par 43: "In recognition of the special importance of the role which can be fulfilled only by official development assistance, a major part of financial resource transfers to the developing countries should be provided in the form of official development assistance. Each economically advanced country will progressively increase its official development assistance to the developing countries and will exert its best efforts to reach a minimum net amount of 0.7 per cent of its gross national product at market prices by the middle of the Decade."

60 Government of the Republic of Ireland in its White Paper on Irish Aid (2006): "First and foremost, we give aid because it is right that we help those in greatest need. We are bound together by more than globalisation. We are bound together by a shared humanity. The fate of others is a matter of concern to us. From this shared humanity comes a responsibility to those in great need beyond the borders of our own state. For some, political and strategic motives may influence decisions on the allocation of development assistance. This is not the case for Ireland. For Ireland the provision of assistance and our cooperation with developing countries is a reflection of our responsibility to others and of our vision of a fair global society."

understood as modest complements to a multitude of other attempts to improve the fate and fortune of the poor, such as their effective inclusion in matters affecting them, access to information regimes allowing for critical engagement in budgetary processes, negotiations for a fair trade regime, and the realisation of the Millennium Development Goals.[61]

7 The Role of Human Rights Education

Accepting that the debate about these issues will no doubt persist, and that international human rights law remains in flux, I turn to some aspects pertaining to the role of, and approach to, human rights education. From the earlier discussion, it transpires that a multidisciplinary perspective or interdisciplinary approach provides a better appreciation of the resolution of these challenges. Such an approach entails a conversation between law and other disciplines, allowing the channelling and challenging of insights, the sharing and shedding of methodologies and the development of common understandings.

The growth and overgrowth of international human rights norms and institutions, identified thus far as the "first challenge", is best appreciated not by comparing legal provisions in complementary treaties, but as an aspect of the geopolitical, embedded in the understandings of international relations theory. Issues such as the cost and benefits of normative development, institutional competition, and resource sharing by regimes with overlapping membership are likely to garner important insights to the international lawyer seriously concerned about norm-explosion and institutional overload.

By its very nature, our second challenge – the enforcement of international law by states – speaks to the political. It is inescapable that, in assessing the effectiveness and meaning to real people of international norms and institutions, the human rights discourse should be enriched by the critical questions and techniques of political scientists. To call a human rights violation a human rights violation does not further our understanding of this stated fact and leads us into a discursive and epistemological dead-end. Important voices to listen to are those of anthropologists, who may relate personhood to principle, and those of sociologists, who may explain the absence or presence and potential of social mobilisation around human rights treaties and decisions in different societies. International relations provide a further frame to explain state conduct, which is largely dependent on an understanding of states' perceived self-interest in their relationships with other states.

One way of minimising the role of the Janus-headed state is to re-conceive state sovereignty in the light of regional integration. In the

61 None of these steps also absolve states in Africa and elsewhere to adjust their priorities in allocating available resources and to eradicate corruption and the systematic enrichment of isolated elites.

African context, one should in this regard take into account the often fragile bonds imposed by the post-colonial nation state, and the possibilities of a radical reconfiguration of states in Africa. Thus far, the faltering OAU/African Union project has largely been in the hands of African leaders, supra-national bureaucrats and consultants. The importance of supporting participatory politics at the nation-state level has been neglected, as has the voice of African academia. The African integrationist project is doomed to failure if its advances depend on dictates from Addis Ababa. Law schools should take the initiative in contextualising national legal developments, including human rights, within the bigger picture of regional integration, and in re-framing regional integration as a practical way of advancing human rights in all its disciplinary dimensions. A core question in this regard is: What are the shared values – the common human rights understandings – of AU member states? How are differences to be negotiated within a unified structure? If human rights educators do not stimulate the pondering of these questions, they may very well be left unasked – and remain unanswered.

Our brief discussion on international human rights law and poverty concluded that socio-economic realities and domestic inequalities cannot be divorced from the greater forces of globalisation constantly reconfiguring our world. The study of international human rights should therefore also factor in an understanding of both the political economy of a particular state and the impact of the international economic order. Let me add another discipline: In so far as poverty – and any other aspect – engages our moral responsibility, students of human rights law should also, through ethics, confront their own personal responsibilities.

Simply put, ethics concerns itself with the question what it means to live a good and moral life. Do students of international human rights sufficiently ponder the following questions: In a world increasingly stratified between the affluent and the poor, how do we, as individuals, ethically respond to our position in this divide? Using the example of a person passing by a pond in which a small child is drowning, the ethicist Peter Singer argues that the person has a moral duty to save the child. His argument is based on the principle that when it is in our power to prevent something bad from happening (the child dying a preventable death), without thereby sacrificing anything of comparable moral importance (getting our clothes wet or missing an important appointment), we ought morally to do it.[62] If this is accepted, he continues, there is a corresponding moral imperative to save a child, or an adult, in another country where a famine is raging. The remoteness, and the fact that others may be in a position similar to ours, do not detract from our own moral responsibility. Could we extrapolate this obligation to someone starving in the same town or city or country, and

62 Singer "Famine, affluence and morality" 1972 *Philosophy and Public Affairs* 229.

to the deprivation of material benefits that, while falling short of famine, constitutes serious impediments to material life-sustaining conditions, such as preventable illness? Whatever our responses to these questions, the most important – from an educational perspective – is that we question the nature and extent of our altruism. How do we understand our own best interests in a world of affluence and poverty? At the very least, the conception of our own best interest should not be determined primarily by our need to sustain a consumerist lifestyle.[63]

Despite the obviousness of these links between the legal and extra-legal, teaching of international human rights and the concomitant academic discourse are still predominantly legal.[64] Our conception of law as a separate intellectual endeavour and as a sub-discipline of the social sciences, and the phenomenon of law schools or faculties, is not historically or logically inevitable. The increased international and national codification and constitutionalisation of human rights is also a distinctly mid- to late-20th century phenomenon.[65] The associated emergence of international human rights law as a distinct discipline resulted in a largely textual-analytical approach, focusing on the scope and meaning of treaties, constitutions and other legal texts.[66] Human rights law aims to ask this (ostensibly) valid question: Was a human right violated? With reference mainly to legal texts and jurisprudence, the question is answered in respect of a particular set of circumstances. A strictly legal analysis leaves little room for questions about the causes and histories informing these circumstances.

Developed in isolation from other disciplines, an overly legalistic, de-historicised and a-contextual discourse on human rights (and law more generally) has taken root in laws schools, especially in many parts of post-colonial Africa. The dominance of legal perspectives on human rights also influenced the forms of engagement of social scientists in this field.

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63 See further Singer *The life you can save: Acting now to save world poverty* (2009).

64 For a general introduction to the relationship between human rights and the social sciences, see Freeman *Human Rights: An Inter-disciplinary approach* (2011).

65 On the transformation of moral rights into legal rights, see eg Meckled-Garcia and Çali "Lost in translation" in *The Legalization of Human Rights. Multidisciplinary Perspectives on Human Rights and Human Rights Law* (eds Meckled-Garcia & Çali)(2006) 11.

66 See eg Forsythe "Human Rights Studies: On the Dangers of Legalistic Assumptions" in *Methods of Human Rights Research* (eds Coomans, Grünfeld & Kamminga)(2009) 59 62: "The crux of this view [that human rights studies are often legalistic] is that many lawyers are often too uncritical about international human rights law, too focused on treaty language and court cases, and not appreciative enough about soft law and extra-legal factors that affect policy and behaviour related to human rights."

Increasingly, over the last two decades, these approaches have come under criticism and multidisciplinary human rights programmes and interdisciplinary research gained ground.

In the last decade, the Centre has also gradually moved towards a more multidisciplinary approach in its activities and programmes. This trend is reflected in the establishment of the AIDS and Human Rights Research Unit, a collaboration with the Centre for the Study of AIDS, aimed at combining the exploration of the social and legal dimensions of HIV, and a project using qualitative research techniques to better appreciate xenophobic violence in our society.

In 2000, the academic flagship programme of the Centre, the LLM (Human Rights and Democratisation in Africa), was introduced. As its name indicates, this programme lodged the political ("democratisation") as an integral part of a human rights programme principally directed at law and lawyers. An LLM programme in trade and investment law in Africa, presented by the Centre in alternate years, and a Unit for International Development Law in Africa, established in the Centre, seek to explore the synergies between human rights and economic development. In 2008, the Centre introduced a fully-fledged Master's programme in Multidisciplinary Human Rights. This programme is open not only to lawyers who upon successful completion obtain the degree LLM, but is also open to non-lawyers, who obtain an MPhil.

In my view, the time is now ripe to open-up all Centre academic programmes – the LLM (Human Rights and Democratisation in Africa) and the LLM (International Trade and Investment Law in Africa) – to non-lawyers. The challenge is to retain the main benefits of programmes directed at law students, while adding the benefits of a multidisciplinary student body and a deeper engagement with disciplines such as anthropology, sociology, political economy, political science and international relations. A similar model as with the existing LLM/MPhil (Multidisciplinary Human Rights) should be followed, with law students finishing with an LLM and non-lawyers with an MPhil. Although the core content for all students would be the same, students with a law background will focus on a full understanding of and would acquire competence in legal techniques to ensure government accountability. In this way, the main benefits that a law-specific education brings would not be lost, but would rather be enhanced by a more contextual and nuanced understanding of the relevant issues.

The resolution of contemporary challenges calls for critically-reflective education, questioning premises and destabilising common knowledge. At the same time, one cannot lose sight of the fact that human rights education does not take place in isolation, but is framed by the realities, particularly in Africa, of repression, denial of human rights, poverty, deprivation, and deficits in democratic governance. Human rights education is therefore, in my view, not a normatively neutral endeavour, but is an inevitable response to the context from which it grows. It should

therefore aim as much at developing the competence and knowledge of students as appealing to their affective sensibilities.

The challenge is to adopt a teleological approach to human rights education without reifying the object of study into something sacrosanct, against which criticism is viewed as an act of betrayal or collusion. Perhaps the best posture to adopt is that of the critical insider, akin to the forthright and honest criticism often only possible in a close family circle or community of close friends.

Still, the goal, the end of human rights education cannot be disentangled from the utopian and transformative essence of both human rights and education. If our human rights teaching and training does not open the possibilities of a better world, and does not aim to transform institutions and societies and individual students, where should it lead us, and where does it leave us, instead? One way of achieving this end is to *humanise* human rights education. Gradually, human rights brought about the greater humanisation of international law.[67] Most notably, by allowing individuals to submit complaints against states, international human rights law made individuals into participating subjects of – and not only entities subjected to – international law. By breaking down the authority of single disciplines, the multi-disciplinary approach allows the focus to shift away from preoccupations with the dictates of the discipline, to the core of concern: the human condition. At least as far as the law is concerned, the introduction of other disciplines is likely to shift the focus away from a preoccupation with texts, institutions and procedures, towards affected persons. As its very tag testifies, the so-called "law and literature" approach is itself a combination of disciplines, allowing the rigidity of legal regulation to be supplemented or replaced by insights derived from the fluidity of narratives and other representations of a human existence. As Bianchi demonstrates, students of international humanitarian law should not only be taught the relevant rules, but should also, through the reading of "war literature", be exposed to the reality that armed conflict is also about "death, wounds, blood, maiming, bereaved persons, hatred, madness, terror, fury, fear, angst, vomit, urine, stench, disease, annihilation, death again".[68]

While Bianchi uses the insights of the law *in* literature-approach, the law *as* literature-approach may infuse into human rights education more awareness of the narrative elements in decided cases, in particular. Despite the manifold opportunities for judicial storytelling presented when teaching human rights cases, case-law is often presented in an overly technical way, lacking any narrative thread. Adding a narrative dimension may contribute to humanise such a discussion. Take for example, the decision of the Southern African Development Community

67 Meron, *The humanization of international law* (2006).
68 Bianchi "Terrorism and armed conflict: insights from a law and literature perspective" 2011 *Leiden Journal of Int L* 1 18.

(SADC) Tribunal in *Tembani v Zimbabwe*.[69] Here is one way of summarising the case: Tembani failed to repay a loan to the Agricultural Bank of Zimbabwe; his farm was sold at a price allegedly below market value; he was deprived of access to the domestic courts in Zimbabwe to contest the amount; he approached the SADC Tribunal; the government's challenges to the jurisdiction of the SADC Tribunal were rejected; the SADC Tribunal found that the relevant legislation violated the SADC Treaty; the government failed to give effect to the judgment. From this perspective, Tembani is a litigant, a successful applicant, a judgment creditor. However, Luke Tembani is also a farmer, a father, a family man, a Zimbabwean failed by both his domestic and the SADC legal system. Here is the humanised version based on the same facts:[70] Luke Tembani is one of Zimbabwe's first black commercial farmers. Having started working as a gardener, in 1954, he subsequently underwent an apprenticeship, enrolled in an Agricultural College, and became a farm manager – a position that he held for 18 years, during the colonial period. In 1983, three years after independence, he acquired his own farm, with a loan provided by the Agricultural Bank of Zimbabwe. Tembani built up a very profitable farm, with up to 100 hectares of tobacco and some 600 animals. In 1986, he built a school for the children of farm workers in the area. In the late 1990s, due to successive droughts and weakened by his expenses on the school, Tembani defaulted on his loan. His farm was sold at a price far below its actual value. In the context of land reform programmes, he and his family were later evicted from the farm. His children dropped out of school – the new owner agreed that the children could return to the school on condition that Tembani cedes total ownership of the farm to him. At age 74, Luke Tembani was reduced to selling small bags of sugar to scrape together the most basic means for survival.

At the same time, this post-modern age has taught us that solid-seeming truths are built on shifting sands, and better worlds may all too soon reveal the roots of their ruin. Add, therefore, to the curriculum of humanity and optimism, I suggest, a few lecture outcomes in humility and realism about where our efforts are likely to lead.

In conclusion, I let Rumi, the thirteenth century Persian poet-philosopher-teacher, describe to you a field.[71]

> Out beyond ideas of wrongdoing
> and rightdoing there is a field.
> I'll meet you there.
> This is not a field for combat, a place to celebrate triumphs, or for final resolution. In my narrative, it is a meeting place of the fallable, a meeting place of those who have, in some imperfect way, contributed to international

69 *Tembani v Zimbabwe*, case no SADC 7/2008, 2009-06-05.

70 This summary is based on facts as contained in the Tribunal's judgment, as well as information obtained from http://www.sokwanele.com/thisiszimbabwe/archives/6685 (accessed on 2011-04-30).

71 Barks & Moyne *The Essential Rumi* (1995).

human rights law and human rights education, of those who imagined and persevered despite the likelihood of failure and the acute awareness of the transitory nature of their efforts. May we all meet there.

Bespoke justice? On financial ombudsmen, rules and principles

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OPSOMMING

Geregtigheid na maat? Oor finansiële ombudsmanne, reëls en beginsels

Alternatiewe geskilbeslegtingsprosedures bestaan om diegene by te staan wat nie hulle regte in die howe kan of wil afdwing nie. Die spesifieke voordeel van ombudsmanne is dat hulle prosesse toeganklik, goedkoop, informeel en vinnig is. Hierdie artikel neem twee skemas onder die loep, naamlik die *FAIS* ombud in Suid Afrika en die *Financial Ombudsman Service (FOS)* in Engeland. Daar word gekyk na die wyse waarop die twee instansies reëls sowel as beginsels toepas, wat die jurisdiksie en prosedure van elk behels en hoe daar te werk gegaan word om geskille op te los. Die belangrikste verskil tussen die twee organisasies is dat die FAIS ombud se beslissings in elke wesenlike opsig dieselfde uitwerking as hofbeslissings het en dat dit volledig gerapporteer word, terwyl beslissings deur die *FOS* nie ten volle gerapporteer word nie en ook nie presedente daarstel nie. Die *FOS* streef uiteraard daarna om geregtigheid te laat geskied tussen individuele partye, weliswaar binne die bestaande regsraamwerk, maar met die veronderstelling dat billikheid die belangrikste oorweging moet wees. Hierdie werkswyse kan geregverdig word omdat individuele oplossings nie op ander sake van toepassing gemaak word nie. Die *FOS* of ´n verweerder word deur wetgewing gemagtig om sake na ´n hof te verwys waar daar sprake is van ´n belangrike of nuwe regsvraag. Die beslissing in so ´n saak stel dan ´n presedent daar. Die Suid-Afrikaanse *FAIS* ombud bereg ook sake binne die bestaande regsraamwerk en moet soos die *FOS* seker maak dat alle beslissings billik is. Die gevaar is egter dat die FAIS ombud nie verplig is om sake na ´n hooggeregshof te verwys nie, met die gevolg dat ´n beslissing wat in der waarheid oorwegend billik is vir die spesifieke partye tot die geding, presedentele waarde het. Hierdie tekortkoming in die *FAIS* Wet gee aanleiding daartoe dat die *FAIS* ombud soos ´n tweede reguleerder word en die gevaar is dat verkeerde interpretasies van die wetgewing tot onbillike resultate vir ander partye tot ´n dispuut kan lei. Hierdie aspek behoort deur die wetgewer aangespreek te word.

1 Introduction

Alternative dispute resolution systems exist in order to provide remedies to those who cannot approach the courts in order to enforce their rights. Ombudsman schemes in particular have the advantage of being accessible, inexpensive, informal and quick.[1] The origins of the word

1 Melville "Has Ombudsmania Reached South Africa? The Burgeoning Role of Ombudsmen in Commercial Dispute Resolution" 2010 *SA Merc LJ* 50 54; McVea and Cumper "The Financial Ombudsman Service and Disputes Involving 'Wider Implications' Issues" 2007 *Lloyd's Maritime and Commercial Law Quarterly* 246 247.

"ombudsman" can be traced back to Scandinavia.[2] Melville explains that the Old Norse word "umbodhsmadhr" referred to an individual who recovered compensation from the family of a wrongdoer on behalf of the family of the victim.[3] Present-day institutions still use the term "ombudsman",[4] but the actual functions of these depend on whether they were created by statute or whether they operate as voluntary associations.[5] It is therefore imperative to understand the mandate of an ombudsman before one can evaluate their rulings as based on rules of principles. Also, the matter of an ombudsman exceeding his mandate is one that needs to be assessed by looking at the stature and powers of that particular ombudsman.

This article examines the Finanacial Adivisory and Intermediary Services Act[6] (FAIS Act) ombudsman scheme in South Africa and the Financial Ombudsman Service in England as examples of ombudsman schemes who are tasked with adjudicating matters between financial services providers and clients. In discussing these two schemes, the article starts by first explaining the circumstances that lead to the establishment of each of these institutions and the legislative framework within which they function. What follows is an explanation of procedural aspects as well as matters pertaining to jurisdiction and the types of orders that can be made. In an attempt to establish whether these schemes rely on principles of fairness or on specific rules or both in reaching their decisions, this contribution will scrutinise enabling legislation, literature as well as determinations by both these institutions. Ultimately, the question to be answered is whether these alternative dispute resolution mechanisms lead to forum shopping and arbitrary rulings which do not ultimately satisfy one's sense of justice or whether they provide a better alternative to the court system.

2 Rules or Principles: What is the Difference and What Does It Matter?

Perhaps one of the fastest-changing legal rules worldwide is found in the area of financial law. In South Africa alone, a bewildering number of statutes regulate the financial landscape and these are steadily supplemented.[7] The raging debate on over-regulation versus self-

2 Melville 50.
3 *Ibid*.
4 *Idem* 51.
5 *Idem* 53, 55.
6 37 of 2002.
7 These include *inter alia* the Banks Act 94 of 1990, the Collective Investment Schemes Control act 45 of 2002, the Consumer Affairs (Unfair Business Practices) Act 71 of 1998, the Financial Advisory and Intermediary Services Act 37 of 2002, the Financial Institutions (Investment of Funds) Act 39 of 1984, the Financial Institutions (Protection of Funds) Act 28 of 2001, the Financial Intelligence Centre Act 38 of 2001, the Financial Services Ombud Schemes Act 37 of 2004, the Insider Trading Act 135 of 1998, the Long-term

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regulation is an issue in itself[8] but regardless of one's sentiments, the fact remains that financial law is complicated and despite the best attempts of the legislator, all these rules still leave role players in the financial sphere discontented. In an attempt to explain this outlook, Athanassiou[9] observes that financial law is the prime example of man-made, positive law. In addition, it is a body of rules that draw from contract, administrative law, property, delict and criminal law "that mankind has, until fairly recently, managed to do without".[10] So, why then are the rules that constitute financial law indispensable in a modern economy?

Part of the answer lies in the financial sector's evolution from a support structure for productive and other activities into an independent industry with a variety of participants.[11] Furthermore, financial law is abuse-prone and difficult to police.[12] Therefore, if a body of financial rules that are contained in various acts and subordinate legislation do not have a common goal or at least some core principles upon which it rests, compliance and enforcement can be difficult.

Generally, one can say that rules prescribe relatively specific actions whereas principles prescribe highly unspecific actions.[13] For instance, "treating customers fairly"[14] amounts to a principle, whereas an obligation to take reasonable steps to gather information about a client's financial situation when rendering advice amounts to a rule.[15] Of course, by rendering advice without knowledge of the client's financial situation, an advisor does not act with the necessary care and skill and the carelessness and lack of skill may lead to unfair results for the client and here the rule supports the principle. Importantly, it is not so much the

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Insurance Act 52 of 1998, the Medical Schemes Act 131 of 1998, the National Credit Act 34 of 2005, the Participation Bonds Act 55 of 1981, the Pension Funds Act 24 of 1956, the Security Services Act 36 of 2004, the Short-term Insurance Act 53 of 1998, the South African Reserve Bank Act 90 of 1989 and the Stock Exchanges Control Act 1 of 1985. Then there are various acts dealing with tax, labour law and business entities.

8 For a general discussion on financial regulation, see Chiu "Enhancing Responsibility in Financial Regulation – Critically Examining the Future of Public-private Governance: Part II" 2010 *Law & Financial Markets Review* 286 287, 292-303.

9 "Financial Rules: Why they Differ, Where We Got them Wrong and how to Fix Them" 2010 *Law & Financial Markets Review* 279 280.

10 Athanassiou 280. The writer argues that financial law is crucial because "the welfare of millions of people and the stability of entire economies depend on getting its rules right and on administering them properly and vigilantly."

11 Athanassiou 280.

12 *Ibid.* See also Moolman *et al Financial Advisory & Intermediary Services Guide* (2010) 1-5.

13 Raz "Legal Principles and the Limits of Law" 1981 *Yale Law Yournal* 823 838; Dworkin *Taking Rights Seriously* (1977) 24-28.

14 Refer to the *Treating Customers Fairly Discussion Paper,* which was released for discussion by the Financial Services Board during May 2010 (http://www.fsb.co.za accessed on 2011-07-01).

15 Clause 8(1)(a) General Code of Conduct (GCC) for Authorised Financial Services Providers and Representatives, published in terms of the FAIS Act under Board Notice 80 of 2003-08-08.

language of the stipulation but more what it requires that makes the difference between rules and principles and a good set of rules should ultimately support a principle.

The significance of rules and principles for adjudication of financial disputes lies in the outcome for the parties to a dispute. An ombudsman must take all the rules into account that have bearing on a particular case.[16] Failure to do so would be unfair. However, an ombudsman may be able to demonstrate that every applicable rule had indeed been considered but the outcome may still be unfair, which is why it may be necessary to rely on fairness in order to do justice between the parties and to look beyond the black letter of the law. Importantly, it is not the function of an ombudsman to create new rules or principles and should a case arise that cannot be properly adjudicated because of a problem with the interpretation of the law, such a matter should ideally be referred to a court.

The following paragraphs examine the FAIS ombudsman in South Africa and the Financial Ombudsman Service in England in an attempt to establish whether these two jurisdictions use rules, principles or both in adjudication and whether there are perhaps shortcomings that need to be addressed.

3 FAIS Ombudsman in South Africa

3 1 Background

South Africa is no stranger to corporate scandals.[17] Financial legislation in South Africa is complex and the trend is definitely towards more regulation.[18] Behind a multitude of financial legislation aimed at consumer protection sits the Financial Services Board (FSB), a creature of statute with its main objective the supervision of financial institutions.[19]

16 Nobles "Rules, Principles and Ombudsmen: *Norwich and Peterborough Building Society v The Financial Ombudsman Service*" (2003) *The Modern LR*781 787.

17 Moolman *et al* 12-13 mention the Masterbond scandal that saw the Masterbond Group defraud investors of a billion Rand. The autors also refer to Chinza Holdings (Pty) Ltd which operated a forex trading scheme and robbed investors of R30 million.

18 Moolman *et al* 6 state: "What really distinguishes financial products from other products is the self-serving exclusive design, the complex rules and the ever-changing characteristics of the products designed by the industry to ensure that it remains as a preserve and a repository of a small minority whilst it needs the life and blood of the ignorant majority to keep it alive. Because of the ignorance of consumers, the complexities associated with financial products, the incorporeal nature, the medium through which they are sold and the fact that a client is at the mercy of an intermediary, there is a tendency for unscrupulous intermediaries to exploit unsuspecting members of the public."

19 Van Zyl *Financial Advisory and Intermediary Services Manual* (2004) 1-8. The FSB was established by the provisions of the Financial Services Board

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The statutory registrar of a variety of financial institutions,[20] the FSB drafted the FAIS Act with the aim of creating a regulatory structure for intermediary and advisory services in respect of financial products.[21] In terms of section 21 of the FAIS Act, the FSB is empowered to appoint a person with a legal qualification and who possesses adequate knowledge of the FAIS Act to deal with complaints relating to financial services rendered on or after 30 September 2004.[22]

The FAIS ombud is an example of a statutory ombudsman and as such, it derives its mandate from the FAIS Act and its subordinate legislation.[23] Although the aim of the FAIS Act was to provide the widest possible protection to consumers, the Act is only applicable to certain situations and knowledge of statutory definitions is essential in order to ensure that the FAIS ombud is in fact the correct forum to adjudicate a particular matter.[24]

3 2 Jurisdiction and Conceptual Framework

The complaint resolution mechanism in the FAIS Act aims at providing speedy and effective measures as an alternative to litigation in a civil court.[25] A complainant who wants to approach the ombud should allege that the errant services provider or representative engaged in one or more of the following activities, namely: A contravention of the FAIS Act or failure to comply with a provision of the Act which has lead to the complainant suffering financial prejudice or damage or where he had not already suffered financial prejudice or damage, he is likely to do so in future;[26] the wilful or negligent rendering of a financial service to the

Act 97 of 1990. See also Wille *et al* Principles of Financial Law (2007) 149-150.

20 Hattingh & Millard *The FAIS Act Explained* 3 state that that the FSB is currently in control of the Collective Investment Schemes Control Act 45 of 2002 (CISCA), the Financial Services Board Act 97 of 1990 (FSB Act), Financial Institutions (Protection of Funds) Act 28 of 2001 (FI Act), Financial Supervision of the Road Accident Fund Act 8 of 1993 (FSRAF Act), Friendly Societies Act 25 of 1956 (FS Act), Inspection of Financial Institutions Act 80 of 1998 (IFI Act), Long-term Insurance Act 52 of 1998 (LTIA), Pension Funds Act 24 of 1956 (PFA), Short-term Insurance Act 53 of 1998 (STIA), Supervision of the Financial Institutions Rationalisation Act 32 of 1996 (SFIR Act), the Securities Services Act 36 of 2004 (SSA) and the Financial Advisory and Intermediary Services Act (FAIS Act). See also Wille *et al Principles of Financial Law* (2011) 151-152.

21 Hattingh & Millard 5.

22 Date of commencement of the FAIS Act. Before the enactment of the FAIS Act various statutes existed which had dealt with a variety of financial products such as insurance and pensions but the FAIS Act specifically deals with the way in which *intermediary and advisory services* in respect of certain financial products are rendered.

23 Hattingh & Millard 163. It is submitted that it is more correct to use the term "ombudsman" However, the legislator had opted to use the term "Ombud" in the FAIS Act and therefore "ombud" will be used throughout where the South African system is discussed.

24 Moolman *et al* 196.

25 Van Zyl 1-24; s 20(3) FAIS Act.

26 S 1(1)(*a*) FAIS Act, *sv* "complaint". See also Hattingh & Millard 159-160.

complainant which has caused prejudice or damage to the complainant or which will cause prejudice or damage in future;[27] and treating the complainant unfairly.[28]

These three points require some further explanation, hence some background: Before the introduction of the FAIS Act, common law placed certain duties on agents and mandataries who provided intermediary services or furnished advice to clients.[29] This was later supplemented by the Policyholder Protection Rules issued in terms of the Long-term Insurance Act[30] and the Short-term Insurance Act.[31] Thus, intermediaries and advisors were obliged to act with reasonable care and skill and to act in good faith, where reasonable care and skill were interpreted to be the "general level of skill and diligence possessed and exercised at the same time by members of the branch of the profession to which the mandatary belongs".[32] Good faith entailed three duties, namely to act in the best interest of the client, to be open and honest in all his dealings and not to make a secret profit out of the mandate.[33] The FAIS Act did not alter common law, with a result that the wilful or negligent failure to act with reasonable care and skill and in good faith which leads to financial prejudice is still actionable on exactly the same criteria as it had been before the introduction of the Act.

In addition to what common law provides for, the FAIS Act introduced certain *minimum standards* which aim to provide better protection to consumers. The Policyholder Protection Rules ("PPR's") were amended to deal with matters pertaining to sound insurance practice and matters in the PPR's that dealt solely with intermediary and advice issues were incorporated in the FAIS Act by means of the General Code of Conduct for Authorised FSPs and Representatives.[34] Any conduct that falls short of the standards set out by these statutory requirements is actionable by a client who had suffered damage or prejudice. On the function of these statutory requirements, Rossouw states:

> All legislation is in essence about complying with minimum standards and compliance always deals with that which "I *have* to do" – mostly with a primary motivation of wanting to stay out of trouble! In contrast, professionalism has to do with what I *choose* to do – that which I do voluntarily.[35]

27 Hattingh & Millard 160.
28 *Ibid*.
29 Hattingh & Millard74-76. See also Havenga *The Law of Insurance Intermediaries* (2001) 4.
30 Act 52 of 1998.
31 Act 53 of 1998.
32 Havenga 4.
33 *Ibid*. See also Reinecke *et al General Principles of Insurance Law* (2002) at 348.
34 Board Notice 80 of 2003 published in *Government Gazette* 25299 of 8 August 2003, s amended. See Moolman *et al* 3-4.
35 "FAIS and Professionalism: A challenge for the Financial Services Sector" *FSB Bulletin* (2008) 4. Emphasis as per the original text.

Evidently the FAIS ombud is expected to apply rules as well as principles. Section 20(3) of the FAIS Act clearly stipulates that:

> The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is *equitable* in all the circumstances, with due regard to -
>
> (a) the *contractual arrangement* or *other legal relationship* between the complainant and any other party to the complaint; and
>
> (b) the provisions of this Act.[36]

In considering a possible contravention of the FAIS Act, the ombud is expected to judge the behaviour of a defendant by measuring it against a particular stipulation. If such behaviour constitutes a factual contravention of the stipulation (breach of a rule), a claim has merits. The explicit mandate of the ombud in adjudicating a matter is to consider the legal relationship between a complainant and a defendant,[37] the provisions of the FAIS Act[38] and importantly, "what is equitable in all the circumstances."[39] Where the first two amount to applying the letter of the law, the last grants the ombud the power "to grant relief where he may be constrained to do so in circumstances where the strictures of the law of contract may dictate otherwise."[40]

The third point of treating the complainant unfairly definitely involves a principle more than a rule. What is unfair will depend on the circumstances of the case. For instance, where a client had requested reasons from a financial services provider for the cancellation of his policy or for the repudiation of his claim, it is submitted that the mere failure of such services provider to provide adequate reasons within a reasonable time, amounts to unfair treatment.

An important consideration in demarcating the ombud's powers is jurisdiction, which should be further explained with reference to the scope of application of the FAIS Act. In the light of what had already been said, it is sufficient to concentrate the present discussion on the meaning of "advice", "financial product" and "intermediary service".

"Advice" is defined as any recommendation, guidance or proposal of a financial nature furnished by any means or medium, to any client or group of clients.[41] Importantly, the advice must pertain to the purchase

36 Own emphasis.
37 Moolman *et al* 196.
38 Ibid.
39 *Ibid.*
40 Ibid.
41 S 1(1)(*a*) & (*b*) FAIS Act, *sv* "advice". See also Moolman *et al* 197. The writers explain that a recommendation is an idea or suggestion presented to the client which is deemed suitable for a particular purpose. Where guidance is given, the advisor attempts to resolve a client's problem (Moolman *et al* 198) and a proposal is where a client is presented with a plan, suggestion or an idea (Moolman *et al* 198).

of any financial product or the investment in any financial product.[42] Advice also includes any recommendation, guidance or proposal of a financial nature "on the conclusion of any transaction, including a loan or cession, aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product." The Act is also very clear on the fact that all these acts are included in the term "advice", irrespective of whether or not it is provided to a client in the course of financial planning or whether it is incidental to financial planning in connection with the affairs of the client[43] or whether it in fact results in the purchase, investment, transaction, variation, replacement or termination of a financial product.[44]

It is also important to take note of the exclusionary provisions contained in section 1(3) of the Act. Where factual advice is for instance given merely on the procedure for entering into a transaction in respect of any financial product,[45] in relation to the description of any financial product,[46] in answer to routine administrative queries,[47] in the form of objective information about a particular financial product[48] or by the display or distribution of promotional material,[49] this does not constitute advice and it falls outside the scope of the FAIS Act.[50]

It is evident that the FAIS Act aims to regulate the furnishing of advice pertaining to financial products. For the purposes of "advice" and 'intermediary services", "financial products" include the following, namely:

- Securities and instruments, including shares in a company other than a "share block company" as defined by the Share Blocks Control Act,[51]

42 S 1(1)(*a)* & (*b*). See also Hattingh & Millard 5-6.
43 S 1(1)(*d*)(i) *sv* "advice".
44 S 1(1)(*d*)(ii) *sv* "advice".
45 S 1(3)(*a*)(i)(*aa)*. See Moolman *et al* 199.
46 S 1(3)(*a*)(i)(*bb)*. See Moolman *et al* 199.
47 S 1(3)(*a*)(i)(*cc*). See Moolman *et al* 199.
48 S 1(3)(*a*)(i)(*dd*). See Moolman *et al* 199.
49 S 1(3)(*a*)(i)(*ee)*. See Moolman *et al* 199.
50 Hattingh & Millard 7. Other exceptions include the following, namely: An analysis or report on a financial product without any express or implied recommendation, guidance or proposal that any particular transaction in respect of the product is appropriate to the particular investment objectives, financial situation or particular needs of a client (s 1(3)(a)(ii); Advice given by the board of management or any board member of any pension fund organisation or friendly society to members of the organisation or society on benefits enjoyed or to be enjoyed by such members; Advice given by the board of management or any board member of any pension fund organisation or friendly society to members of the organisation or society on benefits enjoyed or to be enjoyed by such members; Advice given by the board or trustees of any medical scheme or any board member to the members of the medical scheme on health care benefits enjoyed or to be enjoyed by such members; or any other advisory activity exempted from the provisions of the FAIS Act by the Registrar, after consultation with the Advisory Committee, by notice in the Gazette.
51 Act 59 of 1980; see s 1(1)(*a*)(i) FAIS Act.

debentures and securitised debt,[52] any money-market instrument,[53] any warrant, certificate and other instrument acknowledging, conferring or creating rights to subscribe to, acquire, dispose of, or convert securities and instruments[54] and any securities as defined in section 1 of the Securities Services Act;[55]

- A participatory interest in one or more collective investment scheme;[56]
- A long-term or a short-term insurance contract or policy;[57]
- A benefit provided by a pension fund organisation as defined by the Pension Funds Act[58] to the members of the organisation by virtue of membership[59] or a benefit provided by a friendly society referred to in the Friendly Societies Act[60] to the members of the society by virtue of membership;[61]
- A foreign currency denominated investment instrument, including a foreign currency deposit as defined in s 1(1) of the Banks Act,[62] and
- A health service benefit provided by a medical scheme as defined in the Medical Schemes Act.[63]

The legislature deemed it necessary to state that any product similar in nature to those mentioned above is included in the definition of financial services and can be declared a financial product by the Registrar upon publication in the *Gazette*.[64] Importantly, any combined product containing one or more of the products mentioned above is regarded as a financial product for purposes of this definition.[65] Finally, any financial product issued by any foreign product supplier and marketed in the Republic and which in nature and character is essentially similar or corresponding to a financial product referred to anywhere in this definition, is included in the term "financial product".[66]

"Intermediary service" denotes any act other than the furnishing of advice that is performed by a person for or on behalf of a client or product supplier that causes the client to enter into or offer to enter into any transaction with a product supplier. An intermediary service would also have been rendered where a client enters into any such transaction in future.[67]

52 S 1(1)(*a*)(ii) FAIS Act.
53 S 1(1)(*a*)(iii) FAIS Act.
54 Act 36 of 2004. See s 1(1)(*a*)(v) FAIS Act.
55 S1(1)(*a*)(v) FAIS Act. See also Van Zyl 1–14.
56 S 1(1)(*b*) FAIS Act.
57 S1(1)(*c*) FAIS Act. Policies and contracts as envisaged here are those policies and contracts provided for by the Long Term Insurance Act 52 of 1998 and the Short Term Insurance Act 53 of 1998.
58 Act 24 of 1956.
59 S 1(1)(*d*)(i).
60 Act 25 of 1956.
61 S 1(1)(*d*)(ii).
62 Act 94 of 1990. See s 1(1)(*f*) FAIS Act.
63 Act 131 of 1998. See s 1(1)(*g*) FAIS Act.
64 S 1(1)(*h*) FAIS Act. See Hattingh & Millard 16.
65 S 1(1)(*i*) FAIS Act.
66 S 1(1)(*i*) FAIS Act. Hattingh & Millard 16. See also Van Zyl at 1–14.
67 Hattingh & Millard 16.

When referring a dispute to the FAIS ombud, clients and their legal representatives should first establish whether their complaint pertains to advice or an intermediary service pertaining to a financial product as contemplated by the FAIS Act. The legislator intended to include as many financial services and instances of intermediary services and advice as possible in order to provide the maximum possible protection to consumers. Let us turn now to the procedural aspects of claims against the FAIS ombud.

3 3 Procedural Aspects

Essential to the success of any claim is the identification of the correct cause of action, the correct defendant(s) and importantly, the correct forum. As a point of departure for deciding whether the FAIS ombud is the correct forum, rule 4 of the Ombud Rules, "type of complaint justiciable by Ombud" stipulates that the complaint must fall within the ambit of the Act and these Rules, the respondent must be subject to the provisions of the act, the rules should have been in force and the respondent must have failed to address the complaint satisfactorily within six weeks of its receipt.[68]

Finally, the FAIS Act determines that a monetary claim (claim for the compensation of financial loss or prejudice) should not exceed R800,000.00, unless the respondent has agreed in writing to this limitation being exceeded, or the complainant has abandoned the amount over and above R800,000.00.[69] This relatively high limit of R800,000.00 serves to encourage complainants to rather use the inexpensive ombud route. A complainant who chooses to institute proceedings in a civil court, must use the high court if a claim exceeds R100,000.00 as it is only possible to institute proceedings in a magistrate's court when the claim amount is R100,000.00 or less.[70]

Other than the determination of jurisdiction, only two more procedural matters will be discussed, namely the complainant's duty to utilise the respondent's internal dispute resolution system and the effect of the FAIS ombud's determination. As far as the internal dispute resolution procedure is concerned, the FAIS ombud will hear a matter if the respondent has failed to address the complaint satisfactorily within six weeks of its receipt. In this initial stage, the respondent has the opportunity to solve a dispute with a client if possible. The FAIS Act prescribes how services providers should solve disputes internally.

68 Rule 4(a). The fourth requirement implies that a complainant should first attempt to resolve the matter with the respondent before approaching the Ombud. The meaning of this will become apparent in the discussion in the next paragraph that deals with claims procedures.

69 Rule 4(b) Ombud rules.

70 S 29 Magistrates' Courts Act 32 of 1944. It is submitted that a regional court would have jurisdiction in matters which may be interpreted a s adispute over "movable or immovable property" where the amount is less that R300 000, according to the Jurisdiction of Regional Courts Amendment Act, 31 of 2008 which took effect on 2010-08-09.

Clause 16(1) of the General Code of Conduct for Authorised Financial Services Providers and Representatives (GCC) describes "internal resolution" as "the process of the resolving of a complaint through and in accordance with the internal complaint resolution system and procedures of the provider."[71] The GCC stipulates that a provider has the following primary obligations, namely to request any client who has a complaint against the provider to lodge the complaint in writing;[72] to maintain a record of complaints for a period of five years;[73] to handle complaints from clients in a timely and fair manner;[74] to take steps to investigate and respond promptly to such complaints;[75] and where a complaint is not resolved to the client's satisfaction, to advise the client of any further steps which may be available to the client in terms of the FAIS Act or any other law.[76]

Apart from these primary obligations, a provider must also ensure that a number of basic principles must be adhered to, namely the maintenance of a comprehensive complaints policy,[77] transparency and visibility,[78] accessibility of facilities[79] and fairness.[80]

It is of primary importance that services providers adhere to the requirements of the GCC pertaining to the internal resolution of complaints. Where a service provider failed to do so, the disgruntled client has no alternative but to approach the ombud or to resort to litigation and there is probably many a niggling matter that may easily be resolved by staff members of service providers who apply their minds to complaints.

As far as the ombud's determination is concerned, it is important to note that the ombud has extensive powers and such determination may include the dismissal of a complaint[81] or the upholding of the

71 Published in Board Notice 80 in *Government Gazette* 25299 of 8 August 2003, as mended.
72 Clause 16(2)(a) GCC; clause 11(2)(a) Short-term Deposit Code ("SDC").
73 Clause 16(2)(b) GCC; clause 11(2)(b) SDC.
74 Clause 16(2)(c) GCC; clause 11(2)(c) SDC.
75 Clause 16(2)(d) GCC; clause 11(2)(d) SDC.
76 Clause 16(2)(e) GCC; clause 11(2)(e) SDC.
77 Clause 17(a) GCC. Hattingh & Millard 161 n 15 explain that this complaints policy should outline the provider's commitment to, and system and procedures for, internal resolution of complaints.
78 Clause 17(b) GCC. Hattingh & Millard 161 n 16 comment that this serves to ensure that clients have full knowledge of the procedures for resolution of their complaints.
79 Clause 17(c) GCC. This entails that the provider should ensure the existence of easy access to internal dispute resolution procedures at any office or branch of the provider. It can also be done through additional postal, fax, telephone or electronic helpdesk support. See Hattingh & Millard 161.
80 Clause 17(d) GCC. According to Hattingh & Millard 161 n 18, "fairness" in this context means that the process should be even-handed to clients and the provider and its staff alike.
81 S 28(1)(*a*) FAIS Act.

complaint.[82] Where a complaint is upheld, the ombud has the option of upholding a complaint either wholly or partially and this simply means that the ombud may award an amount as fair compensation for any financial prejudice or damage suffered.[83] In addition, the ombud may also issue a direction "that the authorised financial services provider, representative or other party concerned take such steps in relation to the complaint as the ombud deems appropriate and just."[84] This gives the ombud far-reaching powers to ensure that a solution is reached which is fair to both parties. Finally, the ombud may make any other order which a court will make.[85] This will for instance include an order forcing a financial services provider to disclose information, to refrain from acting in a specific way or an order declaring a contract or trade practice invalid.

Another matter that sometimes influences a complainant's decision to rather institute an action in a civil court is a cost award. In complex cases a complainant will no doubt utilise the services of a legal professional and the FAIS Act also contains favourable stipulations on this matter.[86]

In conclusion: The ombud's powers in terms of its enabling legislation do not differ materially from those of a civil court.[87] Section 28(3) of the FAIS Act states that the ombud should not make an award which is higher than would have been granted by a civil court.

The discussion on the actual procedures to be followed by the ombud illustrates that the rules are strict and needs to be followed meticulously. However, it is important to understand that these rules serve a number of fundamental principles, namely the objectivity of the ombud,[88] the *audi alteram partem*-rule,[89] the right to an appeal[90] as well as the right to review.[91]

82 See also Hattingh & Millard 171.
83 S 28(1)(*b*)(i). See also Hattingh & Millard 172.
84 S 28(1)(*b*)(ii).
85 S 28(1)(*b*)(iii). See also Hattingh & Millard 172.
86 According to Hattingh & Millard 172: "A final determination may also include a cost order. Normally, a cost order in a civil suit follows the result of the case. In other words, should a matter be decided in favour of a complainant, the Ombud may rule that the respondent is responsible for the payment of the complainant's legal costs. What is also interesting is that the Ombud may also grant a cost order against a complainant in favour of the Ombud or the respondent if the Ombud is of the opinion that the conduct of the complainant was "improper" or "unreasonable" or where "the complainant was responsible for an unreasonable delay in the finalisation of the relevant investigation". See s 28(2)(*b*)(iii)(*aa*) and s 28(2)(*b*)(iii)(*bb*) FAIS Act.
87 Hattingh & Millard 172.
88 Rule 2(a), s 31(*b*)(i) & (ii).
89 As embodied in rule 2(b) Ombud rules.
90 S 39 FAIS Act.
91 Moolman *et al* 225.

3 4 Some Determinations

3 4 1 General

Determinations by the FAIS ombud are reported on the Internet.[92] This article singles out two cases which incidentally dealt with complaints against the same respondent(s) as an illustration of the way in which rules and principles are used in the adjudication process and how this may lead to difficulties.

3 4 2 Malan v Jordaan[93]

In this particular case Malan had used Jordaan's services as financial advisor for 20 years. During October 2006, he had R80,000.00, 00 to invest and was considering investing these in either retail bonds at 8.5 per cent per annum or in a Nedbank two year fixed deposit at 9.57 per cent per annum.[94] Malan was risk averse, a fact well known to Jordaan.[95] Despite thus, Jordaan convinced Malan to invest the amount of R80,000.00 together with an additional R30,000.00 in a bridging finance scheme.[96] When the scheme collapsed a year later, Malan's entire R110,000.00 was lost and he blamed Jordaan or his employer at the time, Sanlam, for his loss.[97]

Central to this particular dispute is the question whether this bridging financing scheme was indeed a financial product as defined by the FAIS Act. Jordaan alleged that it was not and that the ombud therefore had no jurisdiction to hear the matter.

In adjudicating the matter, the ombud observes that consumers who were sold products that do not fall within the "strict definition" of financial products in the FAIS Act often approach the ombud. Relying on the decision of *Nebbe vs Oosthuizen,*[98] the ombud explains that although bridiging finance is not specifically mentioned in the definition of 'financial product", the act also provides for "any other product similar in nature to any financial product referred to in paragraphs (a) to (g), inclusive, declared by the registrar, after consultation with the Advisory Committee, by notice in the Gazette to be a financial product for the purposes of this Act".[99] Therefore, this bridging financing scheme should be considered a financial product. Furthermore, the ombud argues that one needs to bear in mind "what mischief the particular piece of legislation was designed to prevent."[100] The ombud does not elaborate on this aspect but proceeds to explain that:

92 http://www.faisombud.co.za.
93 Case FOC5452/07-08/EC (1).
94 Par 3.
95 Par 4.
96 *Ibid.*
97 Par 5.
98 Case FOC 2243/07-08 (KZN) (1).
99 S 1(1)(*h*) FAIS Act.
100 Par 19.

> If schemes such as bridging finance and so-called investment clubs were to be allowed to be marketed by financial services providers (FSPs) on the basis that they fell outside of the FAIS Act then it would frustrate the very purpose for which the FAIS Act was designed. Unscrupulous financial advisors will continue to ensnare unwary investors who may then have no recourse against the provider concerned.[101]

It was common cause between the parties that Malan would participate in a bridging financing scheme operated by a company called Auctum Capital (Pty) Ltd. The sole director, Hermann Heydenrych, provided Malan with a letter in which he welcomed Malan "as a participant in the Joint Venture with Auctum Capital." Also, he indicated to Malan that his "participation should not be seen as an investment, but rather a contribution to the Joint Venture, thus ensuring profit sharing in the venture."[102] The ombud concludes that the legislative definition is wide enough to also include the product bought by Malan and rules that Jordaan is liable to Malan for payment of R110,000.00.[103]

Interestingly, the ombud had ruled in this particular case that Sanlam was not liable to Malan as Jordaan had acted outside the scope of his employment with Sanlam. On the facts it was evident that Jordaan had previously interested Malan in products that were not marketed by Sanlam.[104]

If one considers that the ombud is bound to have regard to the legal relationship between the parties, the provisions of the FAIS Act as well as what is equitable in the circumstances,[105] it seems that this particular determination was based on equity and not on the letter of the law. It is also clear from the wording of section 1(1)(*g*) that it is the task of the legislator to declare other products as financial products for purposes of the FAIS Act. However, The ombud proceeds to include a scheme such as the one in question in the definition of "financial product" and one may very well ask whether the ombud had not exceeded its powers. Even more important, was the ombud not perhaps influenced by the fact that Heydenrych was the same individual who recruited investments for "the now spectacularly failed Fidentia Group"?[106]

It is submitted that a case such as the present one should ideally have been referred to a civil court. A legal question pertaining to something as fundamental as the FAIS Act's scope of application should not be left open to arbitrary an unconvincing interpretation such as is evident from

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101 *Ibid.*
102 Par 11.
103 Pars 21-22.
104 Par 24. The ombud states: "Jordaan, on the other hand, not only went on a frolic of his own by advising clients to invest in financial products that he was not authorised to market by his employer but went further and advised the complainant to invest in a product that he, as a registered FSP, knew was not a financial product as defined and then raises that very point in his own defence."
105 Moolman *et al* 196.
106 Par 11.

this determination. Above all, a civil court could have granted Malan a remedy based on Jordaan's failure to act honestly and with integrity and above all, failure to act in the best interests of the client. Unfortunately there is nothing in the current FAIS Act or subordinate legislation that compels the ombud to refer a matter to a court in cases such as this one.[107] Another risk is that interpretations such as this one actually amount to "two tier regulation." This aspect is discussed in more detail in paragraph 3.4.1 below.

3 4 3 Elizabeth September v Sanlam Life Limited[108]

Willie Jordaan, the same culprit who was the respondent in *Malan v Jordaan supra*, had in November 2004 invested R254,000.00 on behalf of Elizabeth September.[109] Jordaan, an employee of Sanlam, invested the money in Fidentia Asset Management.[110] Upon hearing that Fidentia had been placed under curatorship, she approached Sanlam, who advised her that they had nothing to do with Fidentia. In investigating September's complaint, the ombud referred it to Sanlam, only to be told that Jordaan did similar investments for other clients and that the complaint should be addressed to Fidentia's curators.[111] The ombud held that it was just and equitable to hold the respondent liable as employer for the acts of its employees.[112]

It is quite evident that September could in fact approach the ombud because the financial product here had clearly been an investment. As far as Sanlam's vicarious liability is concerned, this case also differs from Malan's in that September was under the impression that her money was with Sanlam, whereas Malan was aware of the fact that the money was put into the hands of another entity.[113] This case is in fact cited as an example of how the ombud reached an equitable decision where it would otherwise not have been able to do so because of the "strictures of the law."[114]

3 4 4 Comment

From a consumer point of view, it is easy enough to understand why a dispute resolution mechanism is needed which is based on fairness.

107 The FOS in England operates differently;see Par 3.2 below.
108 Case FOC1291/07-08/EC(1); all further references will be to the discussion of the case by Moolman *et al*.
109 Moolman *et al* 240.
110 *Ibid*.
111 Moolman *et al* 241.
112 *Ibid*.
113 This was also the case for Marna and George Rossouw who gave an amount of R210 000 to the same Willie Jordaan to invest while he was an employee of Sanlam. They were in fact informed that their invesment was in Fidentia and not in Sanlam, which is why Jordaan was held personally liable to the Rossouws for lack of due skill, care and diligence. See *Marna and George Rossouw v Willie Jordaan* Case FOC 816/07-08/EC (1) as discussed by Moolman *et al* 241.
114 Moolman *et al* 196-197.

However, the fact remains that an ombud operates within a particular legal framework. A public office with such an important task should be careful not to exceed its powers and fall into disrepute for reaching arbitrary decisions. Moreover, cases that require individual solutions should be just that and should not have any value as precedents. The next section investigates the Financial Ombudsman Service in England in order to see whether the same difficulties arise as those that have been pointed out in the previous paragraphs.

4 Financial Ombudsman Service in England

4 1 Background

The Financial Services Authority (FSA) came into existence on 1 December 2001 by virtue of the Financial Services and Markets Act, 2000 (FSM Act).[115] The FSA has four general functions, namely to make rules,[116] to prepare and issue codes,[117] to give general guidance[118] and to determine the general policy and principles "by relation to which it performs its particular functions."[119] In addition, the FSA has a duty[120] to act in accordance with the four regulatory objectives, which are market confidence,[121] the public awareness,[122] protection of consumers[123] and the reduction of financial crime.[124] It is then the protection of consumers as an objective that enables the FSA to establish the Financial Ombudsman Service (FOS) as a scheme operator to ensure that certain disputes are resolved.[125] Although the FSA and the FOS are bodies independent of each other, a Memorandum of Understanding effective from 2002-07-11 sets out the terms of their cooperation necessitated by the nature of their statutory duties.[126] The memorandum deals with matters pertaining to information sharing and budgeting.[127]

It is the task of the FOS to appoint a panel of ombudsmen as well as a chief ombud.[128] In addition, the FOS is tasked with making procedural rules governing the compulsory and voluntary jurisdiction of the scheme and with publishing guidance on matters as it deems appropriate.[129]

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115 Morris in Winckler ed *A Practitioner's Guide to the FSA Handbook* (2006) 1.
116 S 2(4)(a) Financial Services and Markets Act (FSM Act) 2000.
117 S 2(4)(b) FSM Act 2000.
118 S 2(4)(c) FSM Act 2000.
119 S 2(4)(d) FSM Act 2000.
120 S 2(1) FSM Act 2000.
121 S 3 FSM Act 2000.
122 S 4 FSM Act 2000.
123 S 5 FSM Act 2000.
124 S 6 FSM Act 2000.
125 In terms of Part XIV and Schedule 17 FSM Act 2000.
126 Melrose "Consumer relations: Complaints and compensation" in *A Practitioner's Guide to the FSA Handbook* (ed Winckler) (2006) 612.
127 *Ibid*.
128 Melrose 611.
129 Rules pertaining to the compulsory jurisdiction of the scheme are made with the consent of the FSA. See also Melrose 612.

4 2 Jurisdiction and Conceptual Framework

A complaint is defined as "any expression of dissatisfaction, whether oral or written and whether justified or not."[130] Interestingly, the FOS distinguishes between compulsory jurisdiction and voluntary jurisdiction.[131] The so-called "DISP Rules"[132] stipulate that the FOS has compulsory jurisdiction in relation to acts or ommissions by a firm[133] carrying on one or more of the following activities,[134] namely regulated activities;[135] payment services;[136] consumer credit activities;[137] lending money secured by a charge on land;[138] lending money (excluding restricted credit where that is not aconsumer credit activity);[139] paying money by a plastic card (excluding a store card where that is not a consumer credit activity);[140] providing ancillary banking services;[141] or any ancillary activities, including advice, carried on by the firm in connection with them.[142]

According to the DISP Rules,[143] the ombudsman can consider a complaint under the voluntary jurisdiction in the following curcumstances, namely:

> (1) it is not covered by the Compulsory Jurisdiction or the Consumer Credit Jurisdiction; and
>
> (2) it relates to an act or omission by a VJ [voluntary jurisdiction] participant in carryingon one or more of the following activities:
>
> (a) an activity carried on after 28 April 1988 which:
>
> (i) was not a regulated activity at the time of the act or omission, but
>
> (ii) was a regulated activity when the VJ participant joined the Voluntary Jurisdiction (or became an authorised person, if later);

130 DISP Rule 1.1.10. See also Virgo & Riley *Compliance Officer's Handbook* (2004) 113.
131 S 226 FSM Act 2000. See also Schlueter *Banks as Financial Advisers: A Comparative Study of English and German Law* (2001) 143.
132 S 138 FSM Act 2000 authorises the FSA to make rules. These rules are published as part of the FSA Handbook in a separate chapter entitled: Dispute Resolution: Complaints. All further references will be to "DISP Rules". The latest version of these rules is available at http://www.fsa.co.uk (accessed on 2011-07-01).
133 According to DISP Rule 2.6.1R, the FOS's Compulsory Jurisdiction covers only complaints about the activities of a firm (including its appointed representatives) or of a payment service provider (including agents of a payment institution) carried on from an establishment in the United Kingdom.
134 DISP 2.3.1R. See also Virgo & Riley 117.
135 DISP 2.3.1R(1).
136 DISP 2.3.1R(1A).
137 DISP 2.3.1R(2).
138 DISP 2.3.1R(3).
139 DISP 2.3.1R(4).
140 DISP 2.3.1R(5).
141 DISP 2.3.1R(6).
142 See Virgo & Riley 117.
143 Rule 2.5.1R.

(b) a financial services activity carried on after commencement by a VJ participant which was covered in respect of that activity by a former scheme immediately before the commencement day;

(c) activities which (at 1 July 2009) were regulated activities or would be regulated activities if they were carried on from an establishment in the United Kingdom (these activities are listed in DISP 2 Annex 1 G);

(d) activities which would be consumer credit activities if they were carried on from an establishment in the United Kingdom;

(e) lending money secured by a charge on land;

(f) lending money (excluding restricted credit where that is not a consumer credit activity);

(g) paying money by a plastic card (excluding a store card where that is not a consumer credit activity);

(h) providing ancillary banking services;

(i) acting as an intermediary for a loan secured by a charge over land;

(j) acting as an intermediary for *general insurance business* or *long-term insurance business*;

(k) National Savings and Investments' business;

(l) activities which (at 1 November 2009) were *payment services* or would be *payment services* if they were carried on from an establishment in the *United Kingdom*; or any ancillary activities, including advice, carried on by the *VJ participant* in connection with them.[144]

In terms of the FOS dispensation, eligible complainants include private individuals,[145] businesses with a group annual turnover of less than £1million,[146] charities with an annual income of less than £1million[147] and trustees of trusts which have a net asset value of less than £1million.[148] In addition, a complaint is defined as "any expression of dissatisfaction, whether oral or written and whether justified or not."[149]

It is quite evident that the FOS has wide ranging powers. Having consolidated a number of functions that were previously performed by other institutions under the FOS, this institution had wide ranging powers and as with the FAIS ombud in South Africa, the idea is to make the statutory ombudsman accessible to as many complainants as possible. Let us now turn to the procedural aspects.

4 2 Procedural Matters

It is evident from the DISP rules in general that fairness is firmly embedded in the prescribed procedures for dealing with complaints. Similar to the process followed by the FAIS ombud in South Africa,

144 Emphasis in the original.
145 Virgo & Riley 112.
146 *Ibid.*
147 *Ibid.*
148 *Ibid.*
149 Virgo & Riley 113. See also Melrose 613.

complaints handling starts with a compulsory internal dispute resolution mechanism.[150] Such internal procedure must provide for receiving, responding to and investigation of complaints as well as notification to complainants of their right to refer an unresolved complaint to the FOS.[151] In fact, Part 1 of the DISP Rules is entitled: "Treating Complainants Fairly", which already alludes to the core value that drives the dispute resolution process. It is not the black letter of the law but rather an equitable outcome that is at the core of the dispute resolution procedure. An essential requirement for the procedure to be fair is for it to acknowledge a complaint promptly.[152] It is then important to keep the complainant informed of the progress that is being made.[153] The respondent is obliged to provide the complainant with a final response by the end of eight weeks after receipt of the complaint.[154] Where the respondent is not in a position to supply the complainant with a written response, the complainant should be informed of reasons for the delay and of his right to refer the matter to the FOS.[155]

Although perceived as red tape by many, an internal procedure such as the one described here serves an important purpose in that it provides a respondent with an opportunity to forward his reasons for having acted in a particular way. Respondents too are treated fairly if afforder the opportunity to state their case. The FOS cannot consider a complaint if it is referred less than eight weeks after receipt by the respondent.[156] Similarly, the ombudsman cannot consider a complaint if the complainant refers it "more than six months after the date on which the respondent sent the complainant its final response."[157] A further disqualification applies to complaints referred more than six years after the event complained of[158] or if the complaint is received even later, more than three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for

150 See par 2.3 above.

151 Virgo & Riley 111-112. DISP Rule 1.4.1 states as follows: "Once a *complaint* has been received by a *respondent*, it must: (1) investigate the *complaint* competently, diligently and impartially; (2) assess fairly, consistently and promptly: (a) the subject matter of the *complaint*; (b) whether the *complaint* should be upheld; (c) what remedial action or redress (or both) may be appropriate; (d) if appropriate, whether it has reasonable grounds to be satisfied that another *respondent* may be solely or jointly responsible for the matter alleged in the *complaint*; taking into account all relevant factors; (3) offer redress or remedial action when it decides this is appropriate; (4) explain to the complainant promptly and, in a way that is fair, clear and not misleading, its assessment of the *complaint*, its decision on it, and any offer of remedial action or redress; and (5) comply promptly with any offer of remedial action or redress accepted by the complainant." Emphasis in the original.

152 DISP Rule 1.6.1(1).

153 DISP Rule 1.6.1R(2).

154 DISP Rule 1.6.2R(1).

155 DISP Rule 1.6.2R(2). See also Virgo & Riley 113.

156 *Virgo & Riley 119*.

157 *Ibid*; DISP Rule 2.8.2R(1).

158 Virgo & Riley 119; See DISP Rule 2.8.2R(2)(a).

complaint".[159] Importantly, these time limits do not apply where the time limit is missed because of exceptional circumstances or where the complainant had in fact referred the claim within the six- or three year periods and has in fact a written acknowledgement or some other record of the complaint having been received.[160]

Upon receipt of a complaint, the FOS deals with the matter in accordance with chapter 3 of the DISP Rules. A matter may be dismissed on merits[161] or it may be dismissed without reference to the merits so

159 Virgo & Riley 119; See DISP Rule 2.8.2R(2)(b).

160 Virgo & Riley 119; DISP Rule 2.8.2R.

161 In accordance with DISP Rule 3.3.4R, The *Ombudsman* may dismiss a *complaint* without considering its merits if he considers that: "(1) the complainant has not suffered (or is unlikely to suffer) financial loss, material distress or material inconvenience; or (2) the *complaint* is frivolous or vexatious; or (3) the *complaint* clearly does not have any reasonable prospect of success; or (4) the *respondent* has already made an offer of compensation (or a goodwill payment) which is: (a) fair and reasonable in relation to the circumstances alleged by the complainant; and (b) still open for acceptance; or (5) the *respondent* has reviewed the subject matter of the *complaint* in accordance with: (a) the regulatory standards for the review of such transactions prevailing at the time of the review; or (b) the terms of a scheme order under section 404 of the *Act* (Schemes for reviewing past business); or (c) any formal regulatory requirement, standard or guidance published by the *FSA* or other regulator in respect of that type of *complaint*; (including, if appropriate, making an offer of redress to the complainant), unless he considers that they did not address the particular circumstances of the case; or (6) the subject matter of the *complaint* has previously been considered or excluded under the *Financial Ombudsman Service*, or a *former scheme* (unless material new evidence which the *Ombudsman* considers likely to affect the outcome has subsequently become available to the complainant); or (7) the subject matter of the *complaint* has been dealt with, or is being dealt with, by a comparable independent complaints scheme or dispute-resolution process; or (8) the subject matter of the *complaint* has been the subject of court proceedings where there has been a decision on the merits; or (9) the subject matter of the *complaint* is the subject of current court proceedings, unless proceedings are stayed or sisted (by agreement of all parties, or order of the court) in order that the matter may be considered under the *Financial Ombudsman Service*; or (10) it would be more suitable for the subject matter of the *complaint* to be dealt with by a court, arbitration or another complaints scheme; or (11) it is a *complaint* about the legitimate exercise of a *respondent's* commercial judgment; or (12) it is a *complaint* about employment matters from an employee or employees of a *respondent*; or (13) it is a *complaint* about investment performance; or (14) it is a *complaint* about a *respondent's* decision when exercising a discretion under a will or private trust; or (15) it is a *complaint* about a *respondent's* failure to consult beneficiaries before exercising a discretion under a will or private trust, where there is no legal obligation to consult; or (16) it is a *complaint* which: (a) involves (or might involve) more than one *eligible complainant*; and (b) has been referred without the consent of the other complainant or complainants; and the *Ombudsman* considers that it would be inappropriate to deal with the *complaint* without that consent; or (16A) it is a *complaint* about a pure landlord and tenant issue arising out of a *regulated sale and rent back agreement*; or (17) there are other compelling reasons why it is inappropriate for the *complaint* to be dealt with under the *Financial*

continued on next page

that the courts may consider it a test case.[162]

Where the ombudsman elects to make an award, it is done with reference to what is "fair and reasonable in all the circumstances of the case."[163] The DISP Rules unpack this further, stating that when considering what is fair and reasonable, the ombudsman will take into account relevant law and regulations,[164] regulators' rules, guidance and standards,[165] codes of practice,[166] and what he considers to have been good industry practice at the relevant time, where appropriate.[167] This is similar to the position in South Africa.[168]

Section 229 of the Financial Services and Markets Act empowers the ombudsman to make a monetary award of up to £100,000.00,[169] which amount excludes any interests awarded on the amount, cost awards or interest on cost awards.[170] Interestingly, if the ombudsman considers an amount in excess of £100,000.00 to be a fair amount, he may recommend that the respondent pays the balance to the complainant.[171]

What probably makes the ombudsman as a forum more attractive than a civil court, is the ombudsman's powers to direct a firm to "take such steps in relation to the complainant as the ombudsman considers just and appropriate."[172] What is also important to note is that the monetary awards by the ombudsman can be for financial loss (which includes consequential and prospective loss) and also for pain and suffering, damage to reputation or distress or inconvenience.[173] Where a third party had been misinformed about the customer's circumstances, such as where a cheque had been dishonoured or where private information had been disclosed in an improper way, these will fall under damage to reputation.[174] In turn, "distress" includes "embarrassment, anxiety, disappointment and loss of expectation".[175] Pain and suffering are regarded as more extreme forms of distress and inconvenience.[176] South African legislation does not provide for compensation for pain and suffering, damge to the reputation or distress or inconvenience.[177]

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161 *Ombudsman Service*." Emphasis in the original.
162 DISP Rule 3.3.5R. See par 3.4.2 below.
163 Winckler 629, DISP Rule 3.6.1R.
DISP Rule 3.6.4R(1)(a).
165 DISP Rule 3.6.4R(1)(b).
166 DISP Rule 3.6.4R(1)(c).
167 DISP Rule 3.6.4R(2).
168 See par 2.2 above and more specifically, s 20(3) FAIS Act.
169 DISP Rule 3.7.4R.
170 DISP Rule 3.7.5G.
171 DISP Rule 3.7.6G.
172 S 229 FSM Act.
173 Winckler 631.
174 Winckler 631-632.
175 Winckler 632.
176 *Ibid*.
177 This particular feature of the FSM Act is very interesting and forms the subject of an independent discussion. The South African position is quite

continued on next page

It is clear from the discussion so far that the FOS has wide ranging powers and that the golden thread that runs through the legislation is fairness to consumers. It is also clear from the very detailed DISP Rules that the rules are supposed to enhance the principles of fairness. The discussion that follows takes a look at FOS determonations and how these compare to FAIS determinations.

4 3 Determinations

4 3 1 Reporting of Determinations

As was seen in paragraph 2 4 1 above, ombudsman determinations in South Africa are published on the Internet, reflecting the full details of the parties involved as they would in the record of a court case. The situation is quite different in England. In fact, the general reporting of the FOS on their determinations have been one of the subjects under investigation by Lord Hunt.[178] The arguments against detailed reporting are that the volumes of cases would be too large to manage,[179] that there is a danger of seeing these decisions as precedent-setting[180] and that publication can "create false and undesirable misapprehensions."[181] Arguments in favour of such publication include guiding practitioners about developing FOS "thinking and practice" and "to facilitate debate on the evolution of practice over time."[182] Reporting also serves a purpose in the handling of so-called "lead cases".[183] The latter refer to "the occasional practice of identifying a group of very similar cases ... and holding back the investigation of all of them until a decision is made on a specific lead case."[184] Lord Hunt comments that the FOS proceeds to resolve the other (similar) cases in the same way, unless there are "specific circumstances" which necessitate a different outcome.[185] Furthermore, the so-called lead cases are not regarded as precedents, they feel similar to firms and probably also to consumers.[186] There are also those who

different. Where an individual alleges inconvenience, distress or damage to his reputation, the FAIS Ombud is not the correct forum. Where the services provider's conduct is such that it constitutes a cause of action, that case should be adjucicated by a civil court.

178 Lord Hunt *Opening up, reaching out and aiming high: An Agenda for Accessibility and Excellence in the Financial Ombudsman Service* 2008.

179 *Idem* 50.

180 *Ibid.*

181 *Ibid.*

182 *Ibid.*

183 *Ibid.*

184 *Ibid.*

185 *Ibid.* Lord Hunt 4 states: "I do not, however, want the FOS ever again to be accused of 'making it up as it goes along', to quote a phrase used by one of the more thoughtful and respected respondents to this Review. There must be more transparency on both cases and practices, which will help set realistic expectations for consumers and their advisers, spread best practice within the industry in order to prevent complaints coming to the FOS in the first place, and also achieve greater consistency in decision-making without compromising the current jurisdiction."

186 *Ibid.*

believe that Lord Hunt's proposed "FOSBOOK" in which cases would be reported will amount to "second tier regulation".[187]

It is evident that the practice of only reporting on findings in general and also anonymous is very different from the South African practice of making full judgments available to members of the public.[188] It is much easier to analyse, compare and criticise the FAIS ombud's decisions. Also, the latter are precedents and similar to judgments of civil courts for all intents and purpises, whereas FOS determinations are not precedents. This is problematic: If a FOS case does provide an individual solution based on fairness, it may be justified because it solves a problem between the parties to a dispute. However, if it is to be a precedent, any other presiding officer should be careful in exporting that particular solution to other (similar) cases. The question that arises is whether it is not sometimes necessary to create a precedent and to ensure that important cases with wider implications do form precedents worth following. The next two paragraphs deal with this issue.

4 3 2 Test Cases

A "test case" raises an important or novel point of law, which has important consequences and would more suitably be dealt with by a civil court.[189] Where a respondent feels that a case brought against him raises an important or novel point in law with significant consequences, he must present the ombudsman with a written motivation[190] together with an undertaking to pay the complainant's reasonable costs and disbursements.[191] Alternatively, where the ombudsman is of the opinion that the complainant "raises an important or novel point of law, which has important consequences,"[192] such case is then dismissed with the understanding that a court is a better suited forum for the particular dispute. This rule effectively prevents the ombudsman from creating instead of applying law and an arrangement such as this one is important: Without detracting from the ombudsman's general powers of assessing matters in a way that is fair, provision is also made for those instances where there is ambiguity and a court of law should interpret the law in order to ensure legal certainty. Courts have different roles than ombudsmen and the inclusion of an explicit statutory arrangement such as this one may safeguard against an ombudsman exceeding its powers.[193] Here, the words of Nobles ring true:

> Ombudsmen are not regulators, a fact doubly obvious when, like this ombudsman, they work alongside bodies that are entrusted with the

187 Blackmore "AIFA fears second tier regulation via FOSBook" (2008) *Moneymarketing* (http://www.moneymarketing.co.uk/analysis/aifa-fears-second-tier-regulation-via-fosbook/165002.article accessed on 2011-07-01).
188 See par 3.4.3 below.
189 DISP Rule 3.3.5R (2). McVea and Cumper 263.
190 DISP Rule 3.3.5R(1)(a); McVea and Cumper 263.
191 DISP Rule 3.3.5R(1)(b); McVea and Cumper 263.
192 DISP Rule 3.3.5(2)(a); McVea and Cumper 263.
193 Nobles 790.

> regulation of the industry. As such, they are not empowered to create the rules that regulate their industry. The existing rules and institutional arrangements provide an essential part of the context for any assessment of fairness.[194]

To return to the point of "bad" precedents: FOS cases are not precedents and may serve the needs of particular parties. Legislation provides for certain cases to be referred to a court. In South Africa, "fairness" cases are precedents and it is submitted that the FAIS Act should be amended to force the FAIS ombud to refer certain matters to the courts.

4 3 3 Case Studies

Despite the recommendations of Lord Hunt, the FOS continues to report determinations as case studies. In *Ombudsman News*,[195] cases are reported under a number, such as "92/1 consumer complains about insurer's proposal for replacing a specially-commissioned item of jewellery",[196] and then proceeds to report how "Mr C was very unhappy with his insurer's response after he made a claim for a diamond ring that his wife had lost".[197] What follows is a summary of the case presented to the ombudsman as well as the services provider's response. The result is then reported, and will typically be "complaint upheld" or "complaint not upheld", followed by reasons for the ombudsman's decision.

Reporting in such fashion is acceptable if one considers that the FOS aims at achieving *individualised justice*. James and Morris comment that the aim of doing justice in an individual case "became something of a hallmark of the second generation ombudsmen in the sense that they were not bound by precedent and most were able to take considerations of substantive fairness into account in their decision-making, usually to the benefit of the complainant."[198]

Eventually, the whole debate on reporting also comes down to the application of rules or principles. On this matter, James and Morris observe:

> There is often a fine balance to be struck, however, between the rational application of rules to ensure consistency, and an over-reliance on rules which leads to a failure to exercise discretion in individual cases. If the FOS because of its size of operation and delegation arrangements were to lean too far towards a strict rules-based approach might it open the way to challenges on the ground of fettering of discretion through the rigid application of a policy of rules?[199]

194 *Idem* 787.
195 February/March 2011. This publication can be accessed at http://www, financial-ombudsman.org.uk (accessed on 2011-07-01)
196 *Ombusdman News* February/March 2011 5.
197 *Ibid*.
198 "The Financial Ombudsman Service: A Brave New World in 'Ombudsmanry'?" 2002 *Public Law* 640 641.
199 James & Morris 645 646.

This then is the point: Reporting FOS decisions in the same fashion as court cases in a publication such as Hunt's suggested FOS Handbook may lead (unintentionally) to a precedent-based system where these reported decisions may very well become more rules-based for fear of creating a perception of treating seemingly like cases in an unlike manner. In a system where fairness outweighs anything else, reporting in this fashion achieves the aim that is seeked, namely to provide the parties to a dispute with a fair solution.

5 Some Observations

The above comparison between the FAIS ombud in South Africa and the English Financial Ombudsman Service highlights a number of issues. First, it is evident that the complexity of financial law is an internationally observable fact. The lack of obvious, universal values in financial law supports this view. Second, financial law is abuse prone and many a consumer had been slaughtered in the battle between services providers for a significant slice of the action. Third, because the odds are seemingly stacked against consumers of financial products, dispute resolution mechanisms which exist independently of civil courts have the potential to assist disgruntled consumers who would otherwise not have had the means to enforce their rights. Four, a system such as an ombudsman needs to function in a specific regulatory framework in order to be legitimate and to enforce the rules of the financial system in which it operates. Finally, over and above the rules, it must be necessary for an ombudsman to look wider than the rules and to consider principles of (individual) fairness in order to resolve disputes quickly and inexpensively.

In evaluating the FAIS ombud and the FOS against these observations, one draws a number of conclusions. Most importantly, the FAIS ombud as well as the FOS have extensive powers and need to consider a substantive portion of financial law in reaching their decisions. In both countries there are examples of consumer abuse, hence the need for an ombudsman. Furthermore, both institutions may be classified as statutory ombudsmen, deriving their power from statutes and its subordinate legislation and functioning independently from the civil courts.

In the final instance, the dilemma faced by both institutions in as far as they apply rules, principles or both, is equally real in both countries but dealt with differently. The FAIS ombud is bound by its strict procedural rules for purposes of administrative fairness, as is the FOS. However, in South Africa the FAIS ombud has the same powers of a civil court for all intents and purposes, determinations are published containing as much detail as a reported court case and these determinations are regarded as precedents for all intents and purposes. A further complication is that the FAIS ombud can refer a case to another ombudsman where the FAIS ombud does not have jurisdiction *but* the FAIS Act does not provide for a referral to a civil court where there is an

important legal issue or matter that requires proper interpretation of the legislation. The difficulty that arises is that the ombud may make a determination in an attempt at individualised, principles-based justice which is well within is mandate but this precedent may not provide a fair solution between other parties. An in-depth study of determinations may very well reveal that a system such as the present one amounts to second tier regulation. This is a serious shortcoming in the FAIS Act and a matter that should be addressed by the FSB.

The English system also has all the detailed rules aimed at procedural fairness and administrative justice but there is the habit of reporting determinations as general case studies with the understanding that these are not precedents. To ensure fairness, provision is made for the adjudication of "lead cases" which may have wider implications, thereby saying that like cases should still be treated alike in order for the FOS not to be perceived as acting in a way that is patently unfair or arbitrary. Furthermore, a case may be referred to a civil court at the insistence of the FOS or a respondent where a case involves an important or novel point of law, thereby stating that although the FOS have jurisdiction, a true precedent is needed to set the way for future interpretation. If applied properly, this is to be preferred to the South African system.

6 Conclusion

What emerges from this article is that the FAIS ombud and the FOS are both new institutions. Their establishment had been prompted by complex financial law aimed at protecting consumers of financial services and products. Financial law in both countries consists mostly of statutes and subordinate legislation. As an alternative dispute resolution mechanism, an ombudsman may be either voluntary or a creature of statute, such as the FAIS ombud or the FOS. In performing this all-important task of protecting consumers, ombudsmen need to adhere to strict rules in order to achieve procedural and administrative fairness and to be accountable to all role players in the industry. However, in order to provide consumers with a solution which is fair in the circumstances, it is also necessary for ombudsmen to look wider than the letter of the law and to ensure that disputes are adjudicated fairly. Even though it is harder to deduce clear principles in the area of financial law, fairness to the client as a principle goes a long way in restoring confidence in financial markets, thereby bringing stability, financial inclusion and a safe environment for investors.

In South Africa, equating FAIS ombud determinations with court cases bring about a number of difficulties. The FAIS ombud may disregard the letter of the law in favour of fairness and this makes the FAIS ombud a more attractive option than a civil court. Discrepant judgments such as those discussed above on matters such as the meaning of "financial product" and vicarious liability should ideally referred to civil courts for purposes of interpretation. Furthermore, the reporting of seemingly discrepant determinations in the same fashion as court cases may very

well lead to "second tier regulation", where interpretations of the law which are not necessarily correct become a source of the law. So, where the FAIS ombud was guided by fairness to do simple justice between parties and in doing so, had craftted an individual judgment to serve that purpose, the ombud would have acted within its mandate. However, by quoting a bespoke judgment as a precedent and basing future decisions thereupon, one runs the risk of misinterpreting the law and doing an injustice.

In England, the advantage of the FOS is that although there are strict, detailed rules, the FOS may similarly revert to fairness in order to offer a solution to a complainant. Despite criticism, determinations are reported as case studies and are not regarded as precedents. Although the treatment of lead cases are aimed at treating like cases alike, each individual case is determined by looking at rules and over and above those, principles such as fairness. By enabling the FOS and respondents to refer cases to civil courts for considering important or novel points of law, the FOS avoids the pitfall of misinterpreting the law and thereby allowing a possible miscarriage of justice.

In conclusion: Ombudsmen are indispensable in guiding consumers through the maze that is financial law. Ideally, they should strive to do justice in individualised cases by balancing rules and principles. This is a tall order indeed! It is submitted that the FAIS ombud would do well to report cases in such a way that it is clear why bespoke justice was indeed required in a particular instance. Finally, the South African legislator will do well to include a provision that will force the FAIS ombud to refer important or novel points of law to a civil court. In the final instance it is submitted that cases such as these, if properly adjudicatedd by the courts, have precedental value and will go a long way in preventing miscarriages of justice, building confidence in the ombud's office and ultimately achieving effective consumer protection.

The legal validity of an advance refusal of medical treatment in South African law (Part 2)

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OPSOMMING

Die regsgeldigheid van 'n gebeurlikheidsweiering van mediese behandeling in die Suid-Afrikaanse reg (Deel 2)

Mediese gebeurlikheidsaanwysings stel persone in staat om mediese behandeling in die toekoms, wanneer hulle nie meer in staat is om wilsbesluite te neem nie, te weier. 'n Mediese gebeurlikheidsaanwysing is 'n lewende testament waarin die outeur weier om mediese behandeling in bepaalde omstandighede in die toekoms te ondergaan. Dit kan ook bestaan uit 'n volmag waarin die outeur 'n ander persoon aanstel om namens hom of haar in die toekoms mediese behandeling te weier. In Suid-Afrika is die regsgeldigheid en afdwingbaarheid van sodanige gebeurlikheidsaanwysing onseker. In die eerste gedeelte van hierdie bydrae wat in 2011 *De Jure* 32 verskyn het, is die regsposisie soos dit tans in Suid-Afrika daar uitsien, bespreek. Die etiese norme wat in die mediese beroep geld is oorweeg en met die huidige regsposisie vergelyk. Voorts is die relevante grondwetlike waardes wat in ons samelewing geld, kontekstueel ontleed en teen bepaalde belange van die gemeenskap opgeweeg. Hierdie ontleding en belange-afweging het tot die gevolgtrekking gelei dat mediese gebeurlikheids-aanwysings in beginsel as regtens afdwingbare wilsbesluite erken behoort te word.

In die tweede gedeelte van hierdie bydrae word aandag geskenk aan die etiese oorwegings wat 'n rol behoort te speel by beantwoording van die vraag of 'n mediese gebeurlikheidsaanwysing in bepaalde omstandighede as regtens afdwingbaar beskou behoort te word. Die ontwikkelinge in buitelandse regstelsels word dan oorweeg en empiriese navorsing wat aldaar onderneem is om die doeltreffendheid van gebeurlikheidsaanwysings in die praktyk te evalueer, word krities ontleed. Die slotsom wat bereik word, is dat die Suid-Afrikaanse parlement oorweging moet skenk aan die destydse voorstelle van die Suid-Afrikaanse Regskommissie in hierdie verband en dat statutêre erkenning aan die regsgeldigheid van mediese gebeurlikheidsaan-wysings verleen moet word. Die ondervinding in buitelandse regstelsels dui egter daarop dat blote statutêre erkenning van die regsgeldigheid van gebeurlikheidsaanwysings nie enige noemenswaardige verandering in die praktyk teweeg bring nie. 'n Verandering in opvattings word slegs teweeggebring deur behoorlike opvoeding en die instelling van opleidingsprogramme en ondersteuningstelsels in gesondheid-sorginstellings soos klinieke en hospitale. Daar dus word aan die hand gedoen dat 'n holistiese benadering gevolg moet word, wat beteken dat die staat self betrokke moet raak by die implementering van doeltreffende strategieë om sodoende groter bewuswording van die reg op selfbeskikking van pasiënte by gesondheidsorg-werkers sowel as die breë publiek te bewerkstellig.

6 The Exercise of Prospective Autonomy in Advance Directives – Some Ethical Concerns

In practice, the enforcement of advance non-treatment directives can be extremely problematic. The concern is that the future cannot be anticipated with certainty. It is difficult enough for a physician to fully inform a patient with decision-making capacity of all the possible consequences of a medical intervention or medical treatment. But while the principle of "informed consent" is perfectly valid in the context of a contemporaneous decision, it may be argued that it cannot apply in *all* cases of prospective non-treatment decisions. The majority opinion in the literature is that an advance directive has the equivalent legal force of a contemporaneous refusal of treatment. But there are those who question the legal validity of advance refusals of medical treatment on ethical grounds.[69] The main concern is that advance directives lack continuous communication between doctor and patient; they lack contemporary information and input from the patient at the critical moment. For a patient to issue an instruction on non-treatment of a hypothetical condition that might arise during some future time of decisional incapacity is questioned, especially if the patient has never suffered from the particular disability or has never anticipated a particular disability. Dresser[70] points out that decisions to hasten death expressed in advance directives are most problematic in cases where people are not permanently unconscious but conscious, incompetent and suffering from progressive and incurable dementia. People often complete advance directives with little understanding of the meaning or implications of their decisions.[71] Before implementing directives to hasten death, it should be required of people to exhibit a reasonable understanding of the choices they are making. Dresser is concerned that people might be mistaken about their future *experiential* interests as incompetent individuals. She argues that to require, as a matter of policy, absolute adherence to advance directives would mean that people who, for instance, suffer from dementia, are denied the freedom other competent people enjoy to change their previous decisions that conflict with their subsequent experiential interests.[72] She argues that interference with choices that originate in insufficient or mistaken information amounts to justified paternalism. Her concern relates also to

69 Rich "Advance directives: The Next Generation" 1998 *Journal of Legal Medicine* 63 67 observes: "When … a healthy person states preferences for treatment or non-treatment of a hypothetical condition that might arise during some possible future period of decisional incapacity, the level of potential uncertainty is greatly increased. The question then arises whether the uncertainty is so great that, as a matter of ethics, law and public policy, it is reasonable to honour such declarations." Buchanan & Brock "Deciding for Others" in Battin, Francis & Landesman (eds) *Death, Dying and the Ending of Life* (2007) 205 248-249 question the ability of a competent person to predict a future situation and express concern about proper procedural safeguards for future decision-making.

70 Dresser "Dworkin on dementia: 'Elegant Theory, Questionable Policy'" in *Bioethics – An Anthology* (eds Kuhse & Singer)(1999) 312 ff.

71 Dresser 315.

72 *Ibid*.

the definition of "person" as considered by Parfit.[73] He claims that in one lifespan, a body may house more than one morally relevant entity. The defining characteristic of a so-called "person" is psychological continuity or connection between past, present and future cognitions. By becoming incompetent as a result of a loss of cognitive abilities, for example, in the case of dementia, the person's continuous self is disrupted. He or she becomes another morally relevant person. Arguably, an advance directive has no moral validity in such cases because it is a decision made by person A in respect of person B.

But Dworkin[74] expresses the view that core values such as autonomy and dignity are "critical interests" of a person which, in the context of dying, should have precedence over the mere "experiential interests" of a person. Therefore, the critical interests of the competent "person A" expressed in an advance directive are valid en enforceable in respect of the incompetent "person B" as well, even if person B still has experiential interests, for example, enjoying food and the company of friends. Dworkin also relies on the principle of beneficence to substantiate his point of view. He argues that it is also in the best interest of a patient to honour his or her choices expressed at a stage when he or she was still competent. In his view, a disregard of a person's critical interests (or core values) as previously expressed, would not only amount to unjustified paternalism but would lack mercy as well.[75] Bernat[76] questions Dworkin's argument on the ground that "it cannot be morally defensible to let a person die whose life seems to be happy and whose former critical interests are no longer of relevance because they are not part of his current personality". MacLean[77] takes a more compromising position by, *inter alia*, drawing an analogy with the parent-child relationship. He argues that recognition of decisional authority residing in the former competent self is justified because the former self can be viewed as the protector of the later incompetent self. He adds the *caveat*, however, that similar to the parent-child relationship the decisional authority should not be absolute but subject to the same limits as parental authority. In his view, the advance directive should be respected "unless it is demonstrably contrary to the present-self's best interests, with the burden of proof falling on the intervening party".[78]

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73 Parfit *Reasons and Persons* (1984) 204-206.

74 Dworkin *Life's Dominium – An Argument about Abortion and Euthanasia* (1993) 190-213. Dworkin explains (201-202) that critical interests are "[c]onvictions about what makes life good as a whole … [t]hey represent critical judgments rather than just experiential preferences". He argues (199) that "how we think and talk about dying – the emphasis we put on dying with 'dignity' – shows how important it is that life ends *appropriately*, that death keeps faith with the way we wanted to have lived".

75 Dworkin 231.

76 Bernat "The Living Will: Does an Advance Refusal of Treatment made with Capacity Always Survive any Supervening Incapacity"? 1999 *Medical Law International* 5-15.

77 MacLean "Advance directives, future selves and decision-making" 2006 *Medical LR* 291 315-320.

78 MacLean 2006 *Medical LR* 320.

A related concern is the enforcement of widely-formulated advance directives in accordance with the wishes of the patient. Living wills are often drafted in vague terms because people wish to cover a variety of possible circumstances. It is therefore not always easy to determine the patient's wishes with any certainty. The enforcement of an advance directive expressed in broad terms in other circumstances than those where the patient is terminally ill and further medical treatment is futile, is extremely problematic. Instructions in living will templates are couched in terms such as "I do not want my life to be prolonged if my condition is hopeless". Sometimes a relative or friend refers to an oral communication made by a previously competent person expressing the wish that "I don't want to be like that" or "please let me die once I become soft in the head". In such circumstances, it is very difficult for a physician to determine what particular circumstances justify the termination of life-supporting medical treatment. But consider the following example, which, on its face, is not vague. X makes a living will which provides that medical treatment should be withheld if, as a result of an accident or illness, he has complete or almost complete loss of ability to think or communicate with others. X is involved in an accident, is paralysed and has brain damage which renders him incompetent to communicate. However, he is not in a coma and cannot be diagnosed as being terminally ill. The question arises whether X should receive antibiotics if he gets pneumonia. Without any other evidence of the wishes of the patient, physicians would most probably resort to a clinical judgment of "the best interests of the patient", which would, in most such cases, result in the continuation of life-prolonging medical treatment.

Such problems may be overcome by educating patients to issue detailed and comprehensive advance directives which set out all the possible circumstances in which medical treatment should not be given and also the particular medication or treatment which should not be administered. Ideally, the patient should be advised by his or her physician in the context of an on-going physician-patient relationship.[79] The physician can explain the important medical implications to the patient with due regard to the patient's values and medical history. In South Africa, however, this would disenfranchise millions of patients who do not have a real ongoing relationship with a personal physician. It is therefore important that not only physicians in private practice, but also state health-care institutions such as hospitals and nursing homes

79 See the views of Kusman "Swing low, Sweet Chariot: Abandoning the Disinterested Witness Requirement for Advance Directives" 2006 *American Journal of Law and Medicine* 112: "Without the input of a doctor, however, the substance of the directive may be fatally defective. Many living wills contain ambiguous or contradictory instructions, reflecting a lack of comprehension of the medical issues and treatment possibilities involved." See also Hickey "The Disutility of Advance Directives: We know the Problems, but are there Solutions?" 2003 *American Health Law Association Journal of Health Law* 455 ff for a discussion of physician-imposed and patient-imposed barriers to completion of advance directives in the USA.

provide information to patients about their right to make advance directives. Support systems should be created as well to assist patients who wish to make advance directives.

Of course, uncertainty in advance medical directives can never be eliminated completely. It would seem that a combination of an instructional directive (such as a living will) and a proxy directive (in a single document or in alternative documents) would be the most effective way to ensure that a patient's wishes are honoured.[80] The proxy (for example, a person trusted by the patient) could ensure that the living will is honoured by physicians, and if the provisions of the living will are vague, the proxy could give the necessary guidance to physicians to determine the wishes of the patient. The use of combined directives would also overcome the problem of advances in medical science which the patient could not have foreseen at the time of making the advance directive.

Whatever policy is adopted, it is clear that the enforcement of advance directives cannot be achieved solely through broadly formulated ethical guidelines for health-care practitioners. This is precisely why a movement has developed in other legal systems in support of comprehensive legislative regulation of all issues concerning advance directives. The legislative measures that have been introduced elsewhere may be of value for future law reform in South Africa. But it is also important to investigate whether legal recognition of advance non-treatment directives has resulted in effective enforcement of such instructions in other jurisdictions. The discussion that follows focuses essentially on the most significant developments in other legal systems. Relevant empirical data collected in some of these legal systems are also evaluated.

7 The Recognition and Enforcement of Advance Directives in Other Legal Systems

In response to two highly publicised cases, those of *Karen Quinlan*[81] in 1976 and *Nancy Cruzan*[82] in 1991, the United States of America took the lead in regulating the enforcement of advance directives through the enactment of various legislative measures. Both these cases involved requests to discontinue life-support mechanisms by the parents of young women who were in a permanent vegetative state. Quinlan was a woman in her early twenties who was in a persistent vegetative state with no hope of recovery. Her father's request to have her respirator disconnected was granted by the New Jersey Supreme Court on the ground that she had a right of privacy to choose to forego a vegetative

80 Cf the views of Dunlap "Mental Health Advance Directives: Having one's Say" 2000 *Kentucky LJ* 327 348.
81 *In re Quinlan* 355 A2d 647 (NJ) 429 US 922 (1976).
82 *Cruzan v Director Missouri Dept of Health* 497 US 261 (1990).

existence and die of natural causes. Quinlan had no living will but had previously expressed her desire to avoid life-prolonging medical treatment in casual conversation. The first *Natural Death Act* which sets out requirements for advance directives was passed in California in 1976, following the *Quinlan* case.

In *Cruzan* the Supreme Court had to decide whether an incompetent person has the right to require the removal of life-sustaining treatment. Nancy Cruzan was in a persistent vegetative state and her parents requested the hospital to remove the treatment on the ground that such steps would be in accordance with her wishes expressed orally when she was still competent. The hospital refused and the parents applied for a court order. The Missouri court refused to grant such an order, ruling that it had not been proved by "clear and convincing evidence" that this was her wish.[83] The Supreme Court granted *certiorari* and validated the "clear and convincing" evidence standard of the state of Missouri. It held that a person has a constitutional liberty interest in refusing unwanted medical treatment and that for the purpose of the case the court would assume that a competent person has the right to refuse life-saving hydration and nutrition.[84] However, the court balanced Cruzan's liberty interest against various state interests, including the interest in the protection and preservation of human life.[85] It found that the high burden of proof required in Missouri served the state's interest without infringing too much on the individual's liberty interest and that the requirement was therefore constitutional.

Although the rulings in both cases ultimately supported the right to refuse life-sustaining interventions, the importance of clearly documenting a patient's preferences in advance was reaffirmed.[86] Currently, each one of the fifty states has adopted legislation which recognises the legal validity of advance directives in respect of refusal or withdrawal of life-sustaining medical treatment in defined circumstances. These include living wills, durable powers of attorney which allow for the appointment of surrogate decision-makers and do-not-resuscitate orders. Policy makers in Australia and Canada have followed suit and introduced similar legislation.[87] Although the various legislative models are of interest, it is impossible to discuss all of them in detail. The

83 265-269.
84 278-279.
85 280.
86 After the decision in *Cruzan* most states introduced legislation to codify their evidentiary requirements with respect to the treatment preferences of incompetent patients. These so-called "Living Will Statutes" or "Natural Death Acts" set out the requirements for advance directives but they vary widely from state to state. See Kusman 2006 *American Journal of Law and Medicine* 96.
87 The first "living will" legislation was introduced in South Australia (the *Natural Death Act* 1983(SA)) and similar legislation followed in 1988 in the Northern Territory (the *Natural Death Act 1988* (NT)). At present five of the eight states and territories have advance-directive legislation whereas only

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discussion focuses on the most important developments to the extent these may be of value for reform of South African law.

The current legal position in the United States of America is summarised briefly. State legislation on advance directives varies both in form and in substantive requirements. In certain states, even artificial nutrition and hydration are viewed as basic care and may not be refused by the patient.[88] This issue remains highly controversial and has been the topic of endless debate. The current trend is to do away with too many formal requirements for living wills.[89] Some state legislation also provides for sanctions to be imposed if healthcare practitioners fail to honour advance directives. These include the imposition of penalties for noncompliance through state licensing procedures.[90] But there seems to be general consensus that the criminal sanction is not an appropriate remedy for noncompliance.[91] Specific provisions are also included in legislation in terms of which physicians who have honoured advance directives in good faith are indemnified.[92]

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four states have legislation allowing the appointment of a proxy for health care decision-making. In Canada each province has advance-directive legislation. See Brown "The law and Practice associated with Advance Directives in Canada and Australia: Similarities, Differences and debates" 2003 *Journal of Law and Medicine* 59 59-60.

88 For instance, the Missouri statute excludes specifically from the phrase "death prolonging procedure" artificial nutrition and hydration or the administration of any medication. In the state of Colorado, the living will statute requires declarants to state specifically that they do not wish to receive artificial nutrition and hydration when they lack mental capacity in future. See Rich 1998 *Journal of Legal Medicine* 75.

89 Kusmin 2006 *American Journal of Law and Medicine* 113-116.

90 See Webster "Enforcement Problems arising from Conflicting Views of Living Wills in the Legal, Medical and Patient Communities" 2001 *University of Pittsburg LR* 793 799-801 for the position in the United States of America. In the United Kingdom, is has been reported that the General Medical Council is to announce that doctors who fail to respect the advance directives of terminally ill patients refusing treatment once they become incompetent may be struck off the roll. See http://www.telegraph.co.uk/health/healthnews accessed on 2010-05-20.

91 Webster 2001 *University of Pittsburg LR* 799-801. In a minority of jurisdictions in the United States of America minor criminal penalties may be imposed for an intentional and bad-faith failure to comply with a living will. Perry "Legal Implications for Failure to comply with Advance Directives: An Examination of the Incompetent Individual's Right to Refuse Life-Sustaining Medical Treatment" 2002 *Behavioural Sciences and the Law* 253 266-268 discusses in more detail the relevant civil causes of action which may be instituted for a refusal to honour an advance non-treatment directive. These include an action in the tort of battery; an action for pain, suffering and mental anguish for the patient and the family if life-sustaining treatments are administered contrary to the wishes of the patient or his or her surrogate. He points out that an action based on wrongful life or wrongful prolongation of life has also surfaced in American courts but that such claims have not been successful.

92 Webster 2001 *University of Pittsburg LR* 799. See also Wilmot, White &

continued on next page

In Europe, section 8(1) of the European Convention for the Protection of Human Rights (ECHR) set the tone for legal reform in this particular area of law. This section protects the individual's right to privacy.[93] In *Pretty v United Kingdom*[94] the court recognised that "the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under article 8(1) of the Convention".[95]

Although the legal validity of an advance refusal of medical treatment has not as yet been tested by the court, a challenge in terms of section 8 (of a refusal to honour such a directive) is clearly well-founded. In Europe, the most recent developments took place in England and Wales, as well as Germany. Although advance directives were recognised previously as valid and enforceable at common law in England and Wales, *The Mental Capacity Act 2005* came into force in 2007 and now clarifies the common-law rules.[96] An advance refusal of medical treatment may be made by a person eighteen years or older in writing or orally, but an advance refusal of life-sustaining treatment should be in writing, witnessed and signed.[97] The refusal can extend to artificial nutrition and hydration but not to "basic or essential care" such as warmth, shelter, hygiene and the offer of food and water by mouth.[98] To be valid, an advance refusal should be applicable to the situation which means that there should be no reasonable grounds for believing that circumstances

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Howard "Refusing Advance Refusals: Advance Directives and Life-Sustaining Medical Treatment" 2006 *Melbourne University LR* 211 220-236 for a detailed discussion of the circumstances in which a health professional or a court is permitted to disregard an advance directive in Australian law. These circumstances include: where there has been a change in circumstances for example if the patient is pregnant; if there is evidence of an intention to revoke the advance directive; where there is uncertainty as to the meaning of a directive eg, where the language is vague and imprecise or if it is based on incorrect information or an incorrect assumption.

93 The relevant part of s 8 of the European Convention of Human Rights provides: 1. "Everyone has the right to respect for his private and family life …" 2. "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

94 35 EHRR 1.

95 Par 63.

96 *Mental Capacity Act 2005*. See Jones & Jones "Advance Directives and Implications for Emergency Departments" 2007 *British Journal of Nursing* 220 and Bell "The Legal Framework for End of Life Care: A United Kingdom Perspective" 2007 *Intensive Care Medicine* 158 for a discussion of the provisions of the act and its possible application in practice.

97 Ss 24(1); 25(5) and 25(6) of the *Mental Capacity Act 2005* at www.legislation.gov.uk/ukpga/2005/9 (accessed 2011-02-02).

98 S 9.28 of the *Mental Capacity Act Code of Practice 2007* at www.publicguardian.gov.uk/docs/mca-code-practice-0509 (accessed 2011-02-02).

exist which the person did not anticipate at the time of the advance decision and which would have affected his decision had he anticipated them.[99]

There is no prescribed statutory form required for the validity of an advance directive or a requirement that an advance directive be reviewed over time. It is significant that the circumstances are not confined to "terminal" illness. The act also provides for the appointment of a health care proxy by means of a lasting power of attorney through which persons may appoint someone else to make health care decisions on their behalf, should they lose the capacity to decide for themselves.[100] The British government has been pro-active and created an institution in 2007, the "Office of Public Guardian", to support and promote decision making for those who would like to plan for their future within the framework of the *Mental Capacity Act 2005*.[101]

In Germany, the right of an individual to refuse medical treatment in an advance directive has been recognised by the courts as an expression of the right to self-determination derived from various provision of the *Grundgesetz*.[102] Because there has been uncertainty about the validity of such directives in various circumstances, legislation was adopted in 2009 which considerably clarified the position.[103] For a living will to be valid, the requirements are the following:[104] If a competent adult person had given written instructions that medical treatment should not be administered if he or she became incompetent, it must be determined whether the circumstances in which future treatment should be refused correspond to the current treatment situation. If this is the case, effect should be given to the will of the patient. Such a living will may be revoked without any formal requirements. If there is no living will, or if the instructions in the living will do not correspond to the treatment situation, the wishes of the patient or the presumed wishes of the patient should be determined on the following basis: Whether the patient has consented to or refused medical treatment or whether the patient would have consented to or would have refused medical treatment. The presumed wishes of the patient must be determined in terms of concrete indications. What should be considered in particular are earlier oral or written statements by the patient, ethical or religious convictions and personal value systems of the patient. Neither the type of condition or disease from which the patient is suffering or the stage thereof is of any relevance. (In other words, it is not limited to cases of terminal illness). It

99 S 25(4)(c) of the *Mental Capacity Act 2005*.

100 Ss 9-14.

101 See www.publicguardian.gov.uk (accessed 2011-02-02)

102 In a civil case decided in 2003, The *Bundesgerichthof* described an advance directive as an expression of the patient's continuous right to self-determination in terms of the *Grundgesetz*. See 2003 *Neue Juristische Wochenschrift* 1588 1591.

103 Ss 109a and 109b *Bürgerliches Gesetzbuch* (BGB) as amended on 2009-09-01 (BGB1 2009 2286). See Clemens (ed) *Handbuch des Arztrechts* 6 ed (2010) 1512-1516 for a discussion of these provisions.

104 Ss 1901a and 109b *BGB* discussed in Clemens *et al* 1512-1516.

is also stated explicitly that no person may be compelled to make an advance directive.[105]

In the rest of Europe the position varies considerably, depending on socio-cultural and philosophical traditions.[106] In countries where specific laws assign binding force to advance directives, the minimum requirements that must be fulfilled include a valid form (for example, a written and signed document, and in some countries the presence of witnesses to the signature); correspondence between the circumstances envisaged and those that exist; time validity and the absence of revocation of the document.[107] In Spain a compromise between values of autonomy on the one hand and beneficence on the other hand requires more substantial limitations such as conformity with good clinical practice.[108] In Italy, there are no clear laws on advance refusal of medical treatment and similar to the position in South Africa, there is no clarity about the circumstances in which advance directives are viewed as legally enforceable instruments.[109]

Jurisdictions in which advance directives have strong legal status are Germany, Switzerland, Austria, the Netherlands and Belgium.[110] The legislation introduced in the Netherlands is discussed in more detail, because it has been in effect for more than fifteen years and several empirical research projects have been undertaken more recently to determine its effectiveness. Considered from a legal point of view, the status of a written refusal of future treatment in the Netherlands is described as "one of the strongest in the world".[111] The relevant law, the *Wet op de Geneeskundige Behandelingsovereenkomst*, provides that if a person of sixteen years or older is not competent, a doctor is required to honour a refusal of treatment made in writing when the patient was still competent.[112] There are neither limits on the treatments that can be refused nor on the circumstances in which a written refusal is effective. There are also almost no formal requirements (such as witnesses; regular renewal or not even a signature or a date is required). Even the

105 *Ibid.*

106 See Andorno, Biller-Andorno & Brauer "Advance Health Care Directives: Towards a Coordinated European Policy?" 2009 *European Journal of Health Law* 207 212-223.

107 See Andorno *et al* 2009 *European Journal of Health Law* 213-218 for a discussion of the Spanish law.

108 Andorno *et al* 2009 *European Journal of Health Law* 215.

109 See Servillo & Striano "End of life: Still an Italian Dilemma" 2008 *Intensive Care Medicine* 1333 1335. These writers encourage the implementation of effective strategies to address the problems encountered in Italy with the enforcement of advance directives.

110 In France advance directives only have advisory force and are not binding upon physicians. See Griffiths, Weyers & Adams *Euthanasia and Law in Europe* (2008) 383-385.

111 Griffiths *et al* 58.

112 S 450 (3) *Wet op de Geneeskundige Behandelingsovereenkomst* (Wet 1994-11-17 Stb. 1994 837, tot wijziging van het Burgerlijk Wetboek) at www.rbng.nl/userfiles/file/wettenWGB0 accessed on 2011-02-10.

requirement that it should be in writing is questioned on the grounds that an oral refusal in advance by a competent patient excludes the presumption of consent.[113] There must be no doubt as to the authenticity of the document; the identity and competence of the author and the voluntariness of its execution.

But there seems to be room for the application of the principle of beneficence or considerations of what physicians regard as being in the best interest of the patient. A doctor can depart from the written instruction if he considers that there are well-founded reasons (*gegronde redenen*) for not doing so.[114] Dutch writers point out that there is general agreement that the doctor's personal views concerning the instruction cannot amount to a well-founded reason.[115] They are of the opinion that "well-founded reasons" refer to doubt about the authenticity of the document; the competence of its author and the meaning of the instructions.

However, empirical studies conducted in the Netherlands indicate that the *de facto* position is considerably different from what was anticipated with the enactment of this legislation.[116] One of these studies indicate that in 2005 (ten years after the legislation came into effect) advance directives had an influence in less than 2% of deaths that occurred in intensive care units (ICUs) and that fewer than 10% of doctors in ICUs considered a written advance directive as binding.[117] A more recent study has revealed that advance directives are made by less than 1% of the population as a whole, but that it is somewhat higher for patients in nursing homes (5%) and even higher for patients of general practitioners who died in the year preceding the study(almost one in ten).[118] Research indicates that a quarter of the nursing-home doctors and almost half of the general practitioners responded that they would not follow an advance directive which differed somewhat from their medical judgment. If a directive would be directly opposed to their judgment, the rate rises to almost 60% for nursing home doctors and 90% for general practitioners.[119] So it would seem as if legislative recognition of the binding nature of advance directives in itself has not encouraged doctors to honour such instructions. Some Dutch writers express the point of view that the Dutch legislation cannot be blamed for the position in practice. In their view, the blame lies with the Dutch government that

113 See the views of Griffiths *et al* 58 n 27.
114 S 450(3) *Wet op de Geneeskundige Behandelingsovereenkomst*.
115 See Griffiths *et al* 59.
116 Griffiths *et al* 163, relying on a survey conducted by Kleijer "Het wordt geregeld …" *Een onderzoek naar (zelf)-regulering bij het staken van de behandeling op Intensive Cares* (Dissertation 2005 University of Groningen); Vezzoni *Advance Treatment Directives and Autonomy for Incompetent Patients in Law and Practice* (2008) 201-209.
117 See Griffiths *et al* 162-163 n 45, relying on the research conducted by Kleijer.
118 See Griffiths *et al* 163 relying on the research conducted by Vezzoni.
119 *Ibid*.

"has done nothing to promote the use of treatment directives, to increase their quality, or to increase the willingness of doctors to abide by the instructions they contain".[120] Professional bodies, hospitals and nursing homes have also not taken steps to promote their use by patients. Similar to the position in South Africa, persons interested in drafting advance directives must approach the Euthanasia Association since healthcare workers are reluctant also in the Netherlands to become involved in assisting people who wish to make advance directives.

In Germany, an empirical survey undertaken in 2005/6 has shown that the number of people in possession of an advance directive varied between 3.5% (according to a survey on the population) and 16% (according to a survey on patients with cancer).[121] The survey (which was undertaken before the German advance-directive legislation came into force) has also suggested that legal clarification of the binding character of advance directives will not necessarily solve all the problems in dealing with these instruments in practice.[122] Concern was expressed by participants in the survey that that there is a lack of predictability because advance directives are often not concrete enough when they are written. The conclusion of this particular survey was that doctors must discuss more readily the contents of advance directives with their patients as well as with relatives and proxies of patients. Moreover, it was suggested that in order to improve the ethical and communicative skills of doctors, further education and institutional support should be provided.

It is said that more or less 36% of people in the United States of America have made advance directives, which is exceptionally high, compared to the jurisdictions considered above.[123] This can most probably be ascribed to other initiatives which have been introduced to enhance patient autonomy. As early as 1990, the federal *Patient Self-Determination Act*[124] was introduced by Congress with the aim of promoting greater knowledge and use of advance directives, as well as to foster respect for these documents. [125] It is stated that, apart from a commitment to patient autonomy, there were also other reasons that had driven the introduction of this act namely, the belief that more use of advance directives would reduce the amount and cost of aggressive

120 *Ibid*.
121 See Van Oorschot & Simon "Importance of the Advance Directive and the Beginning of the Dying Process from the Point of view of German Doctors and Judges dealing with Guardianship Matters: Results of an Empirical Survey" 2006 *Journal of Medical Ethics* 623.
122 Van Oorschot & Simon 2006 *Journal of Medical Ethics* 625-626.
123 See Kusmin 2006 *American Journal of Law and Medicine* 97, who relies on a survey by the website FindLaw.com. He notes that the use of advance directives is known to be highly correlated with income, race and education.
124 *Patient Self-Determination Act* codified at 42 USCA par 1395 (West 1992). The act came into effect on 1991-12-01.
125 See Olick 25.

end-of-life treatment for terminally ill and dying patients.[126] Be that as it may, the act mandates that healthcare institutions be conversant with statutory advance directive legislation and impart the content of such legislation to patients. Institutions such as hospitals, nursing facilities and hospices must inform patients of their right to participate in medical decisions and assist them to complete advance directives. However, it has been said that even these legislative imperatives have not achieved what they set out to do.[127]

Even in this day and age, people are still reluctant to undertake advance medical care planning. Apart from lack of support in this regard, this position may be ascribed also to various other reasons relating to culture and education; mistrust of doctors; ignorance and, in particular, death denial.[128] In a reflection on his own mortality by the British author Julian Barnes,[129] he refers to the views on death denial of the Russian composer, Shostakovich. The latter, who died in 1975, said that speaking of death was "tantamount to wiping your nose on your sleeve in company".[130] The music of Shostakovich, especially some of his later works, often invoke reflections on mortality. But Barnes tells us that the composer also privately expressed his views on mortality, as in the following words:

> We can't allow the fear of death to creep up on us unexpectedly. We have to make the fear familiar, and one way is to write about it. I don't think writing and thinking about death is characteristic only of old men. I think that if people start thinking about death sooner, they'd make fewer foolish mistakes.[131]

The point is also made in contemporary legal literature that people should be better informed and educated on the advanced planning of their own medical care.[132]

8 Conclusion

Core constitutional values in our society require that future non-treatment decisions be recognised as legally binding instructions. The South African Law Commission has taken various initiatives and formulated proposals for legislative reform in this regard. Like many other projects, these proposals have not borne fruit. The law relating to

126 *Ibid*.
127 See Rich 1998 *Journal of Legal Medicine* 79-80.
128 Perkins "Controlling Death: The False Promise of Advance Directives" 2007 *Annals of Internal Medicine* 51 54 observes: "Most people surely want 'dignified' care that is tailored to their wishes. However, the necessary detailed prior planning is emotionally draining, and most people lack the courage for it."
129 Barnes *Nothing to be Frightened Of* (2009) 26.
130 *Ibid*.
131 *Ibid*.
132 See Rich 1998 *Journal of Legal Medicine* 2006 78-97 and Brown 2003 *Journal of Law and Medicine* 65-68 for initiatives taken in Canada and the United States of America.

advance directives remains open to various interpretations and a culture still prevails that physicians are the exclusive arbiters of decisions relating to the continuation of a person's life in undignified and sometimes even inhumane circumstances. It is suggested that the commission's proposals be considered afresh, and tabled in parliament for debate by all interested parties.

This would be a step in the right direction. However, at a recent international exploratory workshop on advance directives doubts were raised on whether there is really a difference in the use of advance directives between countries where such instructions have legal force and those where they lack such legal force, because, "moral recognition is sometimes independent of legal status".[133] As indicated in this article, the experience elsewhere has shown that the best legislation cannot change perceptions. Health-care workers should be educated in order to enhance respect for the autonomous non-treatment decisions of patients expressed in advance directives. Patients should be informed by their physicians or, if they do not have a personal physician, by health-care workers in institutions such as hospitals and nursing homes, of their right to participate in decisions regarding future non-treatment. Persons appointed as proxies should also be fully informed of the wishes of patients as well as the implications and consequences of non-treatment decisions. In short, a holistic approach should be adopted that encourages open and frank discussion amongst physicians, patients and other interested parties on matters relating to future planning of medical care.

133 Andorno 2009 *European Journal of Health Law* 224 discusses the findings of an exploratory workshop on advance directives with participants from 19 European countries and the United States of America held at the University of Zurich in 2008. The conclusion of the group was that "the important thing, would be to disseminate information among patients about the possibility of making advance directives, and to motivate practitioners to respect patients' autonomous decisions".

Forget me not: Thoughts on the crossroads between law and medicine in assessing claims of amnesia

> Memory is what we are: If we lose our memories, we lose our identity and sense of self.[1]

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OPSOMMING

Vergeet-my-nie: Gedagtes oor die wisselwerking tussen die reg en die mediese wetenskappe by die beoordeling van geheueverlies

Geestesdeskundiges word op ´n gereelde basis gebruik om strafbare optrede te rekonstrueer. Een van die groot struikelblokke wat geestesdeskundiges in die gesig staar tydens die assesseringsfase hou verband met die geval waar die beskuldigde beweer dat hy of sy aan geheueverlies ly, hetsy van ´n tydelike- of permanente aard. Die bewering van amnesie, oftewel geheueverlies, lewer ´n uitdaging vir sowel die forensiese geestesdeskundige wat strewe daarna om sover moontlik aan juridiese standaarde te voldoen ten aansien van die lewering van ´n opinie, as vir regsgeleerdes wat hul sake tot die beste van hulle vermoë moet voordra. Een van die struikelblokke tydens die assessering van amnesie hou verband met die beoordeling van die waarheid of egtheid daarvan en dus om ware amnesie te onderskei van gesimuleerde amnesie. Hierdie artikel verskaf 'n oorsig rakende die aard van amnesie, die belangrikste oorsake daarvan asook die juridiese benadering tot amnesia, geskets teen die agtergrond van die wisselwerking tussen die reg en die mediese wetenskappe by die beoodeling van amnesie.

1 Introduction

Mental health professionals are frequently utilised within our criminal justice system to reconstruct criminal behaviour. One of the major obstacles facing such assessment process relates to the situation where the evaluee claims total or partial memory loss (amnesia). The latter presents a challenge to both forensic practitioners attempting to meet specific legal standards, as well as legal practitioners striving towards the effective presentation of their cases. The most difficult aspect pertaining to the assessment of amnesia is ascertaining its authenticity and as such distinguishing true amnesia from malingered or "feigned" amnesia. In this article an overview will be provided as to the nature of amnesia, the major sources of amnesia as well as the legal approach to amnesia canvassed against the backdrop of the interplay between law and medicine in the assessment of amnesia.

1 Ford *Lies! Lies!! Lies!!! The Psychology of Deceit* (1996) 178.

2 Amnesia in General

Amnesia is generally a state of mind in which a person tends to suffer from partial or complete memory loss. Amnesia is also often referred to as a short-term memory condition in which the memory is disturbed.[2] The role of amnesia is addressed in this study as it frequently comes to the fore in respect of both non-pathological as well as pathological criminal incapacity. Vorster[3] notes that memory is a complex function which is not limited to a certain area of the brain, but entails various parts functioning in conjunction with each other and that memory can be divided into three processes: registration, storage and retrieval. During amnesia there is a defect in one or more of these stages.

Rubinsky and Brandt define amnesia as:[4]

> ... a behavioural syndrome marked by a severe inability to acquire and retain new permanent memories (anterograde amnesia) often coupled with some degree of impairment in the retrieval of previously acquired memories (retrograde amnesia).

Kaplan and Sadock[5] define amnesia as the "partial or total inability to recall past experiences."

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2 Ellis "'Emotional stress' – ´n nuwe handelingsuitsluitingsgrond" 1986 *De Jure* 348; Kaliski "The criminal defendant" in Kaliski *Psycholegal assessment in South Africa* (2006) 108-109; Van Rensburg & Verschoor, "Medies-geregtelike aspekte van amnesie" 1989 *TRW* 14 40-55; Rubinsky & Brandt "Amnesia and Criminal Law: a clinical overview" 1986 *Behavioural Science and the Law* 27; Rogers & Cavanaugh "Amnesia" 1986 *Behavioural Science and the Law* (Introductory Note to volume (4)) i; Morse "Why Amnesia and the law is not a useful topic" 1986 *Behavioural Science and the Law* 99; Hoctor "Amnesia and criminal responsibility" 2000 *SACJ* 273; Vorster *An analysis of the amnesias with specific reference to 'non-pathological sane automatism'* (PHD thesis 2002 University of the Witwatersrand). See also Gillespie "Amnesia: competent functions in remembering" 1996 *British Medical Journal* 1179-1183; Lennox "Amnesia: real and feigned" 1943 *American Journal of Psychiatry* 732-743; Lynch & Bradford "Amnesia: Its detection by Psychophysiological measures" 1980 *American Academy of Psychiatry and Law* 288-297.

3 24. See also Whitty & Zongwill *Amnesia – Clinical, Psychological and Medicolegal Aspects* (1977) 60; Hoctor 2000 *SACJ* 273 274. According to Vorster (24), the following factors may affect each stage of the process:
Registration – levels of arousal – any factors that could have a bearing on this relationship of importance of information to the self emotional state intelligence and filtering processes
Storage – structure and physiology of the brain
Retrieval – emotional factors arousal and all factors affecting this situation – specific associations Vorster notes that memories related to extreme emotion may sometimes be easily recalled but may also just as easily be erased.

4 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 33; Hoctor 2000 *SACJ* 273 274.

5 Sadock & Sadock *Kaplan and Sadock's Synopsis of Psychiatry – Behavioural Sciences/Clinical Psychiatry* (2003) 286.

According to Kaplan and Sadock,[6] amnesia can be sub-divided into two categories:

(i) Anterograde – loss of memory for or pertaining to events occurring after a point in time;

(ii) Retrograde – loss of memory for or pertaining to events occurring before a point in time.

From a neuropsychological perspective, amnesia encapsulates more than merely a poor memory. Rubinsky and Brandt[7] notes that although amnesia is most often traced in neurologically-disturbed patients, a variation of it can often be observed in persons who do not have any brain dysfunction.

According to Hirst, anterograde amnesia generally consists of six unique features:[8]

(i) The rapid forgetting of new information;

(ii) Normal short-term memory capacity which refers to the ability to maintain a small percentage of information for a brief interlude;

(iii) Responsiveness to recognition probes;

(iv) Responsiveness to retrieval cues which refers to the ability to remember when provided with clues;

(v) Increased sensitivity to proactive interference,

(vi) Preserved skill learning which entails the ability to learn and retain general tasks, rules and procedures.

Rubinsky and Brandt[9] state that although not every amnesic patient displays all of the above features, it "is uncontested that it is a pattern of impaired and spared functions which characterises the amnesic syndrome". Amnesia is accordingly not merely an inability to remember, but constitutes a "pathological inability of a particular selectivity, quality and severity."[10]

According to Schacter,[11] there are four types of amnesia:

(i) Chronic organic amnesia – "... pathological forgetting that is associated with a wide variety of neurological dysfunctions, including head injury, encephalitis, ruptured aneurysm, Korsakoff's disease, anoxia, Alzheimer's

6 Kaplan & Sadock 286.
7 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 2733.
8 Hirst "The Amnesic Syndrome: Descriptions and Explanations" 1982 *Psychological Bulletin* 455-460; Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 33.
9 *Ibid*.
10 *Ibid*.
11 Schacter "On the Relation between Genuine and Simulated Amnesia" 1986 *Behavioural Sciences and the Law* 47 48 as discussed in Hoctor 2000 *SACJ* 273 274-275. See also Roesch & Golding "Amnesia and Competency to Stand Trial: A Review of Clinical and Legal Issues" 1986 *Behavioural Sciences and the Law* 4.

disease" – patients typically display signs of both anterograde as well as retrograde amnesia.

(ii) Functional retrograde amnesia – "... memory loss of one's name and personal past that is produced by severe psychological and emotional trauma ..."

(iii) Multiple personality amnesia – "... memory deficits observed in patients with multiple personality disease: Any one of the patient's personalities may have little or no access to memories acquired by another ..."

(iv) Limited amnesia – "... a pathological inability to remember a specific episode, or small number of episodes, from the recent past ..."

Rubinsky and Brandt[12] also note that the specific form or manifestation of amnesia bears important implications for the different criminal defences. As such the most prominent causes of amnesia are alcoholism, epilepsy, head trauma or injury and psychogenic amnesia.[13]

3 Sources of Amnesia

3 1 Alcohol

There are mainly two instances in which alcohol could affect a person who subsequently claims amnesia at a later stage:[14]

(i) Where acute ingestion of alcohol causes amnesia during the period of intoxication, or

(ii) Where long-term alcoholism results in a chronic memory disorder.

Acute alcohol intoxication produces a state in which new information is inefficiently stored, and old information is difficult to retrieve.[15] Short-term memory is impaired during intoxication with the severity of impairment being positively correlated with the level of alcohol in the blood.[16] Rubinsky and Brandt[17] state that as soon as blood-alcohol levels rise, the information-processing strategies used by alcoholics as well as social drinkers alternate from sophisticated strategies founded on semantic associations, to more primitive, idiosyncratic strategies.

Information gathered whilst a person is intoxicated is often only recalled when a person is in a similar physiological state. After a bout of heavy intoxication, there may be anterograde amnesia pertaining to events that occurred during this period of the so-called alcoholic "blackout".[18]

12 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 36.
13 *Ibid*. See also Hoctor 2000 *SACJ* 273 275-278; Van Rensburg & Verschoor 50-54.
14 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 36, Hoctor 2000 *SACJ* 273 275.
15 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 36, Hoctor 2000 *SACJ* 273 275.
16 *Ibid*.
17 *Ibid*. See also Ryan & Butters "Cognitive Deficits in Alcoholics" in *The Pathogenesis of Alcoholism* (eds Kissen & Begeiter)(1983) 485-538.
18 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 37-38.

Whenever a blackout arises, remote and immediate memory remains intact, but a short-term memory loss occurs in the sense that the intoxicated person is unable to recall events that occurred in the preceding five or ten minutes.[19] Van Rensburg and Verschoor[20] state that a person with alcoholic amnesia is clearly aware of what he is doing from moment to moment while intoxicated, but as a result of a lack of retention of information he is unable to recall the events at a later stage.

3 2 Epilepsy

Cases dealing with individuals with epilepsy usually involve those with complex partial seizures.[21] There are mainly three types of epileptic seizures: tonic-clonic- or grand mal seizures, absence- or petit mal seizures and psychomotor seizures.[22]

Rubinsky and Brandt[23] state that criminal cases pertaining to individuals with epilepsy usually relate to those with complex partial (psychomotor) seizures. These complex partial seizures are often associated with abnormal electrical discharges from limbic structure underlying the temporal lobes, and accordingly they were once termed "temporal lobe epilepsy".[24] Whilst experiencing a complex partial seizure, the individual does not experience a convulsion, but rather suffers a

> "clouding" of consciousness and may engage in automatic behaviour and as such "behaves in quasi-purposeful ways, yet is unresponsive to the environment and is not storing new information. When the episode is over, the events which transpired during the *ictus* are not remembered.[25]

According to Van Rensburg and Verschoor epileptic amnesia can be characterised as being well-defined.[26] The person can generally recall all activities undertaken until the point where the seizure occurred.[27] Epileptic amnesia covers the period surrounding the attack but does not relate to the person's past.[28]

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19 Hoctor 2000 *SACJ* 273 275.
20 Van Rensburg & Verschoor 51; Hoctor 2000 *SACJ* 273 275, See generally *R v H* 1962 (1) SA 197 (A) where the reliance on alcoholic amnesia coupled with automatism was unsuccessful.
21 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 38.
22 Van Rensburg & Verschoor (1989) 51. According to Van Rensburg and Verschoor "Grand Mal" seizures are associated with convulsions which can result injury on the part of the person suffering the seizure whereas "Petit Mal" seizures are fleeting moments of unconsciousness, which usually lasts a few seconds. See also Hoctor 2000 *SACJ* 273 276.
23 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 38; Hoctor 2000 *SACJ* 273 276.
24 *Ibid*.
25 *Ibid*.
26 Van Rensburg & Verschoor (1989) 52.
27 Van Rensburg & Verschoor (1989) 52; Hoctor 2000 *SACJ* 273 276.
28 *Ibid*.

Rubinsky and Brandt[29] note that the interface between epilepsy-related cognitive impairments and criminal behaviour remain uncertain. They observe that physicians and legal professionals who have written on the medicolegal aspects of amnesia emphasising epilepsy, have often conflated the states of amnesia, automatism, and impaired consciousness.

3 3 Head Trauma

An accused person who commits a crime while in clear consciousness and full possession of his or her mental capacities and, either in the course of the act or subsequent thereto, sustains an injury to the head may suffer from retrograde amnesia in respect of the act and events prior to it, as well as anterograde amnesia (post-traumatic amnesia) afterwards.[30] It is, however, true that courts are generally not very sympathetic to claims of amnesia if, during the initiation of the act and at the time of the trial, there is no anterograde amnesia.[31]

3 4 Psychogenic Amnesia or "Dissociative Amnesia"

> 'I have done that' says my memory. 'I cannot have done that' says my pride and remains adamant – at last memory yields.[32]

Psychogenic amnesia can be defined as a sudden inability to remember important information.[33] Rubinsky and Brandt[34] state that memory loss in respect of psychogenic amnesia is too extensive to be described by ordinary forgetfulness and is typically confined to incidents that took place before or surrounding the critical event or events. The memory impairment could accordingly be classified as the retrograde type. The memory loss in these instances can be for a certain period of time or for the rest of the person's life.[35]

Psychogenic amnesia is commonly known to be a method of suppressing unpleasant memories, but it could also be a reflection of a certain personality type predisposed to this type of memory loss.[36]

Psychogenic amnesia is often the result of an "emotional block". A person may experience an incident which he does not want to remember

29 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 38.
30 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 39; Hoctor 2000 *SACJ* 273 276. See also *S v Cunningham* 1996 1 *SACR* 631 (A) 639 B-C.
31 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 39; Hoctor 2000 *SACJ* 273 277. See also *Watkins v People* 158 Col 485 408P2d 425 1965 where the defence claimed that amnesia precluded the formation of criminal intent. The latter's claim was unsuccessful. Amnesia does not preclude a normal state of consciousness, intelligence and rational thought.
32 Nietzsche *Beyond Good and Evil* (1886) aphorism 68.
33 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 41; Hoctor 2000 *SACJ* 273 277; Van Rensburg & Verschoor 46. American Psychiatric Association "*Diagnostic and Statistical Manual of Mental Disorders*" (1994) 477 (DSM-IV)
34 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 41.
35 *Ibid*.
36 Vorster 28.

or he experiences a traumatic event and escapes from this by forgetting.[37] Emotional trauma in respect of the commission of the crime can thus bring about psychogenic amnesia.

According to the DSM-IV, the diagnostic features unique to dissociative (psychogenic) amnesia are the following:[38]

(i) The essential feature of dissociative amnesia is an inability to recall important personal information, usually of a traumatic nature.

(ii) It constitutes a reversible memory disturbance in which memories of personal experience cannot be retrieved verbally.

(iii) Dissociative amnesia most commonly manifests as a retrospectively-reported gap or series of gaps in recall for aspects of the individuals' life history.

(iv) It does not occur exclusively during the course of dissociative identity disorder, dissociative fugue, post traumatic stress disorder, acute stress disorder, or somatisation disorder and is not due to the direct physiological effects of a substance.

(v) The symptoms induce clinically-significant distress or impairment in social, occupational, or other important areas of functioning.

Psychogenic amnesia typically starts abruptly, usually after the occurrence of serious psychosocial stress.[39] It generally also ends abruptly with complete recovery and it seldom repeats itself.[40]

According to the DSM-IV,[41] there are distinct types of psychogenic amnesia:[42]

(i) Localised amnesia – the individual fails to recall events that occurred during a circumscribed period of time, usually the first few hours after a profoundly traumatic event;

(ii) Selective amnesia – a person can recall some, but not all of the events during a specified period of time;

(iii) Generalised amnesia – failure of recall relates to the person's entire life;

(iv) Continuous amnesia – this form of amnesia is defined as the inability to recall events subsequent to a specific time up to and including the present.

3 4 1 Examples of Psychogenic Amnesia is South African Case Law

It is extremely difficult to distinguish psychogenic amnesia from simulated amnesia, which renders the assessment of amnesia problematic and complex. A typical example within South African case

37 Van Rensburg & Verschoor 46.
38 DSM-IV 478.
39 Van Rensburg & Verschoor 47; Hoctor 2000 *SACJ* 273 277.
40 Van Rensburg & Verschoor 47.
41 American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 4 ed (1994) (DSM-IV).
42 DSM-IV 478; Hoctor 2000 *SACJ* 273 278.

law in which the concept of psychogenic amnesia was addressed, is the case of *S v Henry*.[43]

In *S v Henry*[44] the defence that was raised by the appellant was one of sane automatism. The appellant, a television technician in his late thirties, was charged in the Cape Provincial Division with two counts of murder and a third count of pointing a firearm in contravention of the Arms and Ammunition Act.[45] The first count of murder related to the killing of the appellant's ex-wife ("Mrs Henry") and the second to the killing of his ex-mother-in-law ("Mrs Symon"). The complainant in the alleged statutory offence was Mrs Symon's fiancé, Mr Thomas Davids.

The appellant raised the defence of sane automatism, claiming that he had no recollection of the shooting or of pointing the firearm at Mr Davids. The defence was rejected by the trial court and the appellant was convicted as charged.

On appeal, it was held per Scott JA[46] firstly that it is trite law that a cognitive or voluntary act is an essential element of criminal responsibility. It is also well established that where the commission of such an act is put in issue on the ground that the absence of voluntariness was attributable to a cause other than mental pathology, the onus is on the state to establish this element beyond reasonable doubt.

Scott JA stated[47] that it had been repeatedly emphasised in the past that defences such as non-pathological automatism require careful scrutiny and circumspection. The *ipse dixit* of the accused to the effect that his act was involuntary and unconsciously committed must accordingly be weighed up and assessed against the backdrop of all the circumstances and particularly against the alleged criminal conduct viewed objectively.[48] Scott JA in addition held[49] that criminal conduct arising from an argument or some or other emotional conflict is frequently preceded by some sort of provocation and such loss of temper is a common occurrence and in appropriate circumstances it might possibly mitigate, but it will not exonerate. He held[50] that non-pathological loss of cognitive control or consciousness as a result of some

43 *S v Henry* 1991 1 SACR 13 (SCA). See also Le Roux "Strafregtelike aanspreeklikheid en die verweer van nie-patologiese oftewel gesonde outomatisme" 2000 *De Jure* 190 - 193.
44 *Ibid*.
45 75 of 1969.
46 19 I-J.
47 20 C-I. See also *S v McDonald* 2000 2 SACR 493 (NPG) where a clinical psychologist for the State presented expert evidence to the effect that the appellant on account of the trauma surrounding the shooting which was the reason of the charge against the appellant, suffered from a state of retrograde dissociative amnesia – lacking the ability to recall matters after the event.
48 *Ibid*.
49 *Ibid*.
50 *Ibid*.

emotional stimulus and resulting in involuntary conduct, ie psychogenic automatism, is most uncommon. In respect of expert evidence Scott JA held:

> Generally speaking expert evidence of a psychiatric nature will be of much assistance to the court in pointing to factors which may be consistent or inconsistent as the case may be, with involuntary conduct which is non-pathological and emotion-induced. These, for example, may relate to such matters as the nature of the emotional stimulus which it is alleged served as a trigger mechanism for the condition or the nature of the behaviour or aspects of it which may be indicative of the presence or absence of awareness and cognitive control.

Scott JA discussed[51] the occurrence of psychogenic amnesia and noted that it generally refers to the subconscious repression of an unacceptable memory. It was held that whilst it is generally accepted that automatism results in amnesia, it does not follow that the converse is true. In other words, amnesia is not necessarily indicative of automatism. An accused person may therefore genuinely have no subsequent recollection of a voluntary act giving rise to criminal responsibility. Consequently, expert evidence may be of assistance to the Court in explaining the accused's behaviour.

In addition he noted[52] that finally, however, it is for the court to decide the true nature of the alleged criminal conduct which it will do not only on the basis of the expert evidence but in the light of all the facts and the circumstances of the case.

The only question in this case was whether the appellant was "acting" in a state of psychogenic automatism at the relevant time of the transgression and accordingly could not commit an act or acts giving rise to criminal liability.

It is interesting to note the aspects of expert evidence advanced by medical experts in respect of psychogenic automatism. Mr van Zyl, a clinical psychologist of Cape Town, who gave evidence on behalf of the appellant, was of the view that the appellant was indeed in a state of psychogenic automatism at the time of the shooting.[53] Dr Jedaar, who was called by the State in rebuttal, took the opposite view holding that the appellant had not been in a state of psychogenic amnesia.[54]

It appears from the evidence that there was no difference of opinion between Mr Van Zyl and Dr Jedaar as to the nature of the stimulus or trigger mechanism that was required to induce a state of psychogenic automatism. There had to be some emotionally-charged event or provocation of extraordinary significance to the person concerned and the emotional arousal that it caused had to be of such a nature as to

51 *Ibid.*
52 *Ibid.*
53 21A.
54 21B-C.

disturb the consciousness of the person concerned to the extent that it resulted in unconscious or automatic behaviour with consequential amnesia. Dr Jedaar testified that there was nothing that he could find in the appellant's account of what had been said on the fatal evening or in the appellant's account of his own emotions at the time to suggest a stimulus of the kind required to trigger a state of automatism.[55] Mr Van Zyl suggested that what triggered the appellant's state of automatism was his intense frustration arising from Mrs Henry's refusal to let him have Robyn (his daughter) for the extra night.[56] This explanation, however, did not carry much weight.

Initially Dr Jedaar confined his evidence to certain general observations regarding automatism as he had not interviewed the appellant. At the request of the appellant's counsel the case was later postponed to enable Dr Jedaar to interview the appellant and investigate the matter further. Dr Jedaar subsequently testified that when he interviewed the appellant, the latter told him that he recalled grappling with Mrs Henry for possession of the firearm and that he feared that if she gained possession of it she would use it against him.[57] According to Dr Jedaar, his subjective experience immediately prior to the shooting was not one of anger or rage, but one of fear. According to Dr Jedaar, this was wholly at variance and inconsistent with an emotional stimulus of a kind that would induce automatism.

Another aspect of the appellant's behaviour upon which the state relied in order to demonstrate that he was acting consciously was what Dr Jedaar described as "avoidance behaviour".[58] By this he referred to the appellant's hurried departure from the scene which in his own version took place even before he had found out what had happened. Dr Jedaar considered this to be wholly inconsistent with the behaviour of a person who had just had an episode of automatism.[59] He testified that he would expect such a person to be in a bewildered and confused state.[60] The court accordingly held, on the facts, both objectively and on the appellant's own account of his emotions, that the facts revealed nothing to suggest a stimulus of the kind required to trigger a state of automatism.

It was held by Scott JA that in the absence of evidence of an identifiable trigger mechanism and in the light of indications of conscious behaviour inconsistent with automatism, that the evidence did not reveal a reasonable possibility that the appellant was in a state of automatism at the relevant time. The appeal accordingly had to be dismissed.

55 21D-F.
56 22B-C.
57 22H-I.
58 23E-F.
59 23E-G.
60 23F-G.

The court per Scott JA noted that the incidence of psychogenic automatism, which entails the non-pathological loss of cognitive control due to an emotional stimulus, is rare. The court also stated that automatism often results in amnesia but that the converse is not always true. Psychogenic amnesia, which entails the subconscious suppression of unacceptable memories of the event, is a relatively common occurrence. It is accordingly possible for a person to suffer from amnesia whilst the preceding conduct was completely voluntary.[61]

4 The Legal Approach to Amnesia

In *R v H*[62] the court expressed great caution in respect of amnesia:

> [D]efences such as automatism and amnesia require to be carefully scrutinised. That they are supported by medical evidence, although of great assistance to the Court, will not necessarily relieve the Court from its duty of careful scrutiny for, in the nature of things, such medical evidence must often be based upon the hypothesis that the accused is giving a truthful account of the events in question.

It is generally accepted that mere amnesia or loss of memory does not constitute a valid defence.[63]

It remains an undeniable fact that expert evidence from forensic mental-health professionals will play a pivotal role in establishing the validity of a claim of amnesia. Rogers and Cavanaugh[64] expound on the difficulties encountered during the assessment of amnesia:

> Much of forensic practice is predicated on the successful reconstruction of the criminal or civil issue in question. The assessment process is greatly complicated when the evaluatee claims partial or total amnesia regarding his/her thoughts, emotions, perceptions, and behaviour. Of these, only occasionally can behaviour be fully reconstructed. The others are interpersonal phenomena which, at best, can be inferred from observed behaviour. This is problematic both for forensic clinicians attempting to address comprehensively specific legal standards, and for participating attorneys in the effective presentation and advocacy of their cases.

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61 See Le Roux 2000 *De Jure* 190 192.

62 *R v H* 1962 1 SA 197 (A) 208B. See also *S v Piccione* 1967 2 SA 334 (N) 335C-D, *S v T* 1986 2 SA 112 (O) 124A-D where it was held that the accused's amnesia was not attributable to involuntary or unconscious behaviour, but rather the desire to avoid the unpleasant. See also Ellis 348.

63 Strauss *Doctor, Patient and the Law* (1991) 129; Ellis 348; *S v Piccione* 335C-D; *R v Johnson* 1970 2 SA 405 (R); Kaliski 108. See also *Bratty v Attorney-General for Northern Ireland* (1961) 3 A11 ER 523 (HL) 532G-H: "The term 'involuntary act' is, however, capable of wider connotations and to prevent confusion it is to be observed that in the criminal law an act is not to be regarded as an involuntary act simply because the doer does not remember it. When a man is charged with dangerous driving, it is no defence for him to say 'I don't know what happened, I cannot remember a thing' ... Loss of memory afterwards is never a defence in itself, so long as he was conscious at the time". See also *S v Van Zyl* 1964 2 SA 113 (A) 120; *S v Cunningham* 1996 1 SACR 631 (A) 635J–636A.

64 Rogers & Cavanaugh i.

In *S v Pederson*[65] the appellant was convicted in a regional court of the murder of his wife. On the day of the murder the appellant, who apparently suspected that the deceased was committing adultery, made enquiries as to her whereabouts, and was heard to say that he was going to kill her. The deceased was warned about this threat, but ignored it. On the morning of the murder the deceased returned to her flat. While she was there the appellant stabbed her as a result of which she died. The appellant's defences at the trial were:

> (i) that he had not acted voluntarily when he stabbed the deceased;
>
> (ii) even if there had been a voluntary act, that he had not at the time of the stabbing been capable of forming the intention of killing the deceased.

The Court made important observations pertaining to amnesia. The Court per Marnewick AJ stated that a decisive feature of cases where the accused had been held not to have acted voluntarily was that the accused in those matters had truly retained no memory of the events concerned.[66] This was crucial, as true absence of memory was a strong indication that an accused had acted involuntarily. Marnewick AJ explained[67] that retrograde loss of memory is a device employed by the psyche to suppress unpleasant memories and an individual can only have a memory of an incident or event if he had had sufficient intellectual capacity at the time of the incident or even had exercised a measure of control over his or her conduct.

Expert evidence by Dr Pillay, a psychologist, was advanced in support of the appellant's defences. He testified[68] that the appellant had probably suffered an "acute catathymic crisis":

> Okay, what I'm suggesting is Mr Pederson does have the experience, encoded in his memory. What I'm contending is his ability to recall being affected by the nature of the trauma itself.

Later in his evidence Dr Pillay stated that he disagreed that Mr Pederson suffered from true amnesia. Dr Pillay opined that the memory was still present but that Mr Pederson was not able to recall it. Dr Pillay diagnosed the appellant's condition as post-traumatic amnesia due to the fact that the appellant's mind was unable to accept or integrate the experience, thus suppressing it. He stated that this was used as a defence mechanism to protect the individual from total disintegration.[69]

In evaluating[70] the appellant's amnesia Marnewick AJ explained that for the defence of sane amnesia to succeed, the absence of control by the mind over the actions of the appellant must have been present. He commented that mere loss of memory was not and had never been a

65 *S v Pederson* 1998 (2) SACR 383 (NPD). See also Reddi "General Principles of Liability, Criminal Capacity, Sane Automatism" 1999 *SACJ* 87-91.
66 390G.
67 390G-H.
68 397A-B.
69 396I-J.
70 396G-H.

defence to a charge of murder and that such loss of memory formed part of a wider concept to be relevant at all. Retrograde amnesia on the other hand fell in a category of its own as it was premised on the very basis that the accused had some memory of the relevant events, but had since lost such memory.[71] According to Marnewick AJ the statements of Dr Pillay destroyed the defence based on the absence of a voluntary or conscious act. For the events to be in the appellant's memory it would have been necessary for his cognitive functions to remain operative to a sufficient extent to record as memory the events which are witnessed and perceived by his senses. If the cognitive functions of his mind were intact to that extent, there was sufficient control of his mind over his actions to constitute his acts as voluntary acts in terms of the criminal law.

Dr Gilmer, a clinical psychologist called by the State in rebuttal, was of the opinion that Dr Pillay's opinion was dependent on the veracity of the appellant's own evidence. He explained[72] that a catathymic episode requires a "splitting off of emotion, thought and action."

According to Dr Gilmer this did not occur with the appellant as there was a coherency between the appellant's emotions, thoughts and actions which ruled out the existence of a catathymic episode or emotional storm.

It was accordingly held on the facts, including Dr Pillay's evidence as to the nature of the appellant's alleged amnesia, that the appellant's conduct before and after the stabbing of the deceased, as well as the poor impression that the appellant made as a witness, the magistrate had rightly found that the appellant had acted voluntarily when he stabbed the deceased.[73] Accordingly the appeal against the conviction was dismissed.

In *S v Van der Sandt*[74] Labuschagne J held that the accused suffered from post-traumatic amnesia created as a defence mechanism as a result of the gruesome and traumatic nature of the crime. Such amnesia, it was held,[75] does not exclude criminal liability.

In *S v Majola*[76] the appellant had been convicted of murder in a regional court and sentenced to 15 years' imprisonment in terms of the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997. The evidence revealed that he had stabbed his lover, who was eight months pregnant, with a penknife in her throat. The appellant's only defence was that he was unable to recall what had happened. And that he thus did not remember stabbing the deceased. Penzhorn AJ

71 *Ibid*.
72 397.
73 395G-H as well as 399G-J.
74 *S v Van der Sandt* 1998 (2) SACR 627 (W).
75 At 638i-j. See also Du Toit *et al Commentary on the Criminal Procedure Act* (2007) 13-16 – 13-17; *S v Els* 1993 (1) SACR 723 (E) 730d-e; Reddi 88.
76 *S v Majola* 2001 (1) SACR 337 (NPD).

rejected[77] this as a self-serving piece of evidence which was contradicted by the evidence of the State witnesses to the effect that the appellant simply came in and embarked on his aggressive path. Penzhorn AJ in addition held that, even if the appellant really did not remember, it did not assist him in the light of the evidence which was before the court. It was held[78] that no factual foundation was established for a defence of criminal incapacity, sane or insane automatism, but simply that the appellant could not remember what had happened. It was accordingly held that apart from a bare claim of amnesia there was simply nothing before the court indicative of unconscious or involuntary behaviour. The appeals against conviction and sentence were accordingly dismissed.

It is also clear that amnesia is most often raised in support of a claim of involuntary conduct or put differently, a defence of automatism.[79]

Morse[80] correctly states that behavioural conditions such as amnesia do not require special legal treatment, but should instead be regarded as evidentiary factors which should be assessed when adjudicating more general legal doctrines.

It is important that courts approach the defence of amnesia with scrutiny and circumspection even where medical evidence is advanced in support of such claim, since medical evidence is often based upon the assumption that the accused has provided a truthful account of the relevant facts in question.[81]

Amnesia does not constitute a valid defence and will not affect criminal liability unless it is connected to either automatism or criminal capacity.[82] It is clear that, when a person acts in a state of automatism, there is usually true amnesia, but the opposite is not always true.[83] Where the defence is one of lack of criminal capacity, the presence of amnesia will also not be the decisive factor.

In *S v Chretien*[84] Rumpff CJ stated:[85]

> *Een van die probleme in verband met dade gepleeg in dronkenskap is natuurlik dat die beskonkene wel weet wat hy doen terwyl hy dit doen, maar dikwels later vergeet het wat hy gedoen het. Die blote feit dat hy vergeet het wat hy gedoen het, maak hom nie ontoerekeningsvatbaar nie.*

77 340E-F.
78 341A.
79 Hoctor 2000 *SACJ* 273 282. See also *S v Henry supra*.
80 Morse (1986) 99.
81 Hoctor 2000 *SACJ* 273 279, *S v Moses* 1996 (1) *SACR* 701 (C) 713A-C, *S v Gesualdo* 1997 (2) SACR 68 (W) 74G-H.
82 Hoctor 2000 *SACJ* 273 280; *S v Piccione* 335C-D.
83 Hoctor 2000 *SACJ* 273 280; *S v Potgieter* 83A-B.
84 *S v Chretien* 1981 (1) SA 1097 (A).
85 1108C-D.

In assessing whether an accused's conduct was involuntary, it is clear that courts distinguish clearly between "true absence of memory" and "retrograde loss of memory after the event."[86]

In *S v Gesualdo*[87] the court took into account the fact that the accused had amnesia in supporting the finding that the accused lacked conative capacity at the time of the commission of the crime. Evidence of amnesia could also be advanced in support of a finding of diminished criminal capacity.[88]

5 Malingering or "Simulated Amnesia"

One of the main considerations underlying the reluctance of courts to accept claims of amnesia is the fact that many accused persons claiming amnesia are doing so deceptively. This problem is further exacerbated by the fact that there are no reliable procedures to distinguish true amnesia from simulated or feigned amnesia.[89]

Van Rensburg and Verschoor state[90] that it is difficult to distinguish simulated amnesia from psychogenic amnesia. In cases of psychogenic amnesia a person simulates amnesia but he or she does generally not realise the reason for it except for gaining sympathy.[91] In cases of simulated amnesia a person simulates amnesia in order to escape serious problems encountered at that point in time.[92] Research suggests, however, that simulators or malingerers tend to overplay their role and perform less successful on memory tests than true amnesics.[93]

Rubinsky and Brandt[94] note that statements concerning malingered amnesia within the legal literature which are at odds with neuropsychological knowledge tend to impair the courts' ability to effectively assess claims of amnesia.

Kaliski[95] correctly states that amnesia should only be regarded as a supportive indicator that, for example, an automatism occurred, and not as an excuse itself. Peter[96] also cautions that within the psycholegal context, malingering should always be borne in mind, especially when the amnesia conveniently shuts out important events. An accused person will typically have a detailed and specific recall of events up to and soon

86 Hoctor 2000 *SACJ* 273 284.
87 *S v Gesualdo* 1997 (2) SACR 68 (W).
88 Hoctor 2000 *SACJ* 273 285.
89 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 42.
90 Van Rensburg & Verschoor (1989) 49.
91 *Ibid*.
92 *Ibid*.
93 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 43.
94 *Ibid*.
95 Kaliski 106.
96 Peter 136.

after the crime, with a period of so-called amnesia.[97] In such cases the nature and quality of the accused's actions should be carefully assessed.

6 Assessment of Amnesia

During the assessment of amnesia it is pivotal to evaluate the accused's conduct before, during and after the commission of the crime in order to ascertain whether he or she was aware of what he or she was doing.[98]

Kaliski provides the following guidelines for the assessment of amnesia:[99]

> (i) Amnesia is a symptom that may be indicative of a disorder, but is not a diagnosis and accordingly amnesia cannot be raised as a defence.
>
> (ii) An identifiable cause or reason for the amnesia, such as a blow to the head or intoxication, should exist.
>
> (iii) The pattern of the amnesia should be assessed with as much detail as possible. Anterograde amnesia should be more serious than retrograde amnesia. Kaliski also notes that persons claiming severe amnesia for events that took place relative long ago but with a relatively intact short-term memory are usually malingering.
>
> (iv) Memory for the triggering event may vary – where the alleged reason for the amnesia was a head injury, the person will lack memory for the moment of injury due to the fact that it will be submerged in the retrograde as well as the anterograde (post-traumatic amnesia). When the alleged cause relates to emotional events, the triggering event is usually recalled.
>
> (v) Intoxication, especially when an alcohol "blackout" is present, generally results in either an *en bloc* memory loss which entails lack of memory of events for the period of intoxication of *fragmentary amnesia* which entails some "islets of recall" in a general sea of amnesia.
>
> (vi) An accused may have a valid reason for having amnesia, but nevertheless be criminally accountable for his actions during the commission of the alleged crime.

The role of mental health professionals in the assessment of claims of amnesia is pivotal. It is, however, true that the interface of law and medicine during the assessment of amnesia is also often blurred and conflated.

Rubinsky and Brandt[100] note that there are "glaring gaps between psychological knowledge about amnesia, especially of the psychogenic variety, and knowledge needed by courts in determining the effect of alleged memory disorders on legal responsibility." There are also marked gaps between psychological knowledge about amnesia and judicial application of such knowledge and principles.[101] Most instances of

97 *Ibid*.
98 Van Rensburg & Verschoor 54; Ellis 349, Hoctor 2000 *SACJ* 273 286.
99 Kaliski 109.
100 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 43.
101 *Ibid*.

psychogenic amnesia tend to be more the result of the crime and not the cause thereof.

7 Conclusion

Claims of amnesia in support of defences such as automatism or criminal incapacity should be assessed by courts with caution and scrutiny.

The distinct cooperation between law and medicine in respect of the assessment of amnesia is summarised by Rubinsky and Brandt[102] as follows:

> Psychologists who testify as experts should expend greater energy in efforts to clearly and completely present relevant and timely scientific knowledge. Emphasis should be placed on elucidating both what is currently known and what is not currently known about amnesia. In return, legal professionals should attempt to understand and to apply correctly neuropsychological research findings to amnesia cases.

With sufficient cooperation between law and behavioural sciences in claims of amnesia, there will be less interdisciplinary confusion.

102 *Ibid*.

Some thoughts on state regulation of South African insolvency law*

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OPSOMMING

Enkele gedagtes oor staatsregulering van die Suid Afrikaanse insolvensiereg

Die grondslag van konstitusionalisme is dat die mag van die staat omskryf en ingeperk moet word om die belange van die gemeenskap te beskerm en daarom moet die doel van enige staatsregulering in Suid-Afrika wees om die onderliggende waardes van die Grondwet te ondersteun en te beskerm. Die belang van 'n moderne insolvensieregstelsel as belangrike hoeksteen van volhoubare ekonomiese ontwikkeling is ook wyd erken en deur internasionale instellings soos die Wêreldbank gedokumenteer. Terwyl die fokus van die regshervormingsproses van die insolvensiereg dus moet wees om die belange van die gemeenskap te beskerm sal dit onrealisties wees om die breëre internasionale konteks te ignoreer.

Die artikel bespreek die geskiedenis, rol en funksie van die Meester van die Hooggeregshof en lig sekere probleme ten opsigte van die Meester se toesighoudende funksie oor die insolvensiereg uit. Die aanbeveling word gemaak dat ten einde aan die internasionale standaarde te voldoen asook die vertroue van die plaaslike gemeenskap te herwin, is dit nodig om 'n onafhanklike reguleerder as deel van 'n reguleringsraamwerk in die Suid-Afrikaanse insolvensiereg in te stel. Na aanleiding van die grondwetlike aspekte van die reguleringsfunksie asook die internasionale maatstawwe wat geïdentifiseer word, word daar dus aanbeveel dat die Suid Afrikaanse regs- en beleidmakers terugkeer na die regshervormingsproses en opnuut die konsep van staatregulering in die insolvensiereg oorweeg.

1 Introduction

The question may be asked how the concept of state regulation in general fits in with our perception of a modern insolvency law system. The key factors that influence a country's insolvency system on an economic, social and political level join forces to create the so-called "cornerstones" or "building blocks" identified as essential to an effective insolvency law system.[1] These cornerstones consist of the legal framework, which represents the various areas of law impacting on the system,[2] the institutional cornerstone, which is generally thought to be

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1 Johnson "Toward International Standards on Insolvency: The Catalytic Role of the World Bank" 2000 *Law in Transition* 71.

2 *Inter alia* insolvency law, corporate law, tax law and labour law.

the courts,[3] and the regulatory cornerstone, which consists of both the establishment and implementation of a regulatory body that has oversight and responsibility for implementing the regulatory procedures as well as the content of the regulations applicable to office holders responsible for the administration of insolvent estates. The success of the entire insolvency system rests on the proper functioning of all three cornerstones.[4]

With the recognition of the Constitution[5] as the supreme law of the land, the legal community in South Africa has had to adapt from the old concept of parliamentary sovereignty to a new model of constitutional democracy.[6] In *Holomisa v Argus Newspaper Ltd*[7] Cameron J summarised this principle very well: "The Constitution has changed the 'context' of all legal thought and decision-making in South Africa".[8] The foundation of constitutionalism is the principle that the power of the state is defined and circumscribed by law to protect the interests of society and thus the aim and purpose of any state regulation in South Africa should be to ensure compliance with the underlying values of the Constitution, which include the protection of societal interests.[9]

The significance of a modern insolvency system as a key foundation of sustainable economic development has widely been acknowledged and documented by international institutions such as the World Bank[10] and the United Nations Commission on International Trade Law

3 With regard to the institutional framework of South African insolvency law, South Africa does not at present have specialised insolvency courts. The High Courts in general deal with insolvency matters, and play their part both in applying and developing the law through case law. During the late 1990s a high-level Commission of Inquiry, the Hoexter Commission, rejected proposals for specialised insolvency courts in South Africa. See the third and final report of the *Commission of Inquiry into the Rationalization of the Provincial and Local Divisions of the Supreme Court* vol 1 Book 2 Part 3 (1997) Report number RP 201/9.

4 Uttamchandani "The Case for a Strong Regulatory Framework: The World Bank Principles in Asia" (2006) unpublished paper presented at the Forum on Asian Insolvency Reform V, China. On file with the author.

5 Constitution of the Republic of South Africa, 1996.

6 Hoexter "'Administrative Action' in the Courts" 2006 *Acta Juridica* 303.

7 1996 6 BCLR 836 (W) 836J.

8 Botha "Administrative justice and interpretation of statutes: a practical guide" in *The Right to Know* (ed Lange)(2004) 14.

9 Burns *Administrative Law under the 1996 Constitution* (2003) 28.

10 See World Bank *Principles for Effective Insolvency and Creditor Rights System* (2001) (also referred to as *Principles for Effective Insolvency and Creditor Rights System*) at http://www.worldbank.org/ifa/ipg_eng.pdfl (accessed 2011-07-31);World Bank *Revised Principles for Effective Insolvency and Creditor Rights Systems* (2005) (also referred to as *Revised Principles for Effective Insolvency and Creditor Rights Systems*) at http://siteresources.worldbank.org/GILD/Resources/FINAL-ICRPrinciples-March2009.pdf (accessed 2011-07-31); the revised and updated version *Principles for effective insolvency and creditor/debtor regimes* (2011) (also referred to as *Principles for effective insolvency and creditor/debtor regimes*) at http://siteresources.worldbank.org/INTGILD/Resources/ICRPrinciples_Jan2011.pdf (accessed 2011-07-31).

(UNCITRAL).[11] There is furthermore a general recognition that, in turn, those systems depend on the existence of strong and efficient regulatory frameworks.[12] While the primary focus of the reform process of insolvency law and institutions should thus be on how best to serve the needs and interests of society, it would be unrealistic to ignore the wider global context in which trade and commerce take place.

This article will not attempt to deal with the regulation of the insolvency profession *per se*, but will instead aim to emphasise the importance of a fresh approach to law reform in the field of state regulation of insolvency law, and subsequently certain recommendations will be made. The recommendations are not intended to be exhaustive, nor do they attempt to set out the entire groundwork for law reform in the field of insolvency law. The main objective is rather to propose and highlight certain vital design features with regard to state regulation which could complement any future policy design and law reform initiatives.

2 Overview of State Regulation from an International Perspective

In the aftermath of the Asian financial crisis in the late part of the previous century, the World Bank launched an initiative to improve the future stability of international financial systems.[13] This took the form of a project to identify certain principles and guidelines for sound insolvency systems and for the strengthening of related debtor-creditor rights in emerging markets.[14] In consensus with international partner organisations the *Principles and guidelines for effective insolvency and creditor rights system* transpired and were approved in 2001.[15] The publication has recently been thoroughly reviewed and updated and the title changed to *Principles for effective insolvency and creditor/debtor regimes.*[16] In the executive summary of the 2011 document the following significant statement is made:

11 See UNCITRAL *Legislative Guide on Insolvency Law* (2005) at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (accessed 2011-07-31). See further Wessels *Cross-Border Insolvency Law – International Instruments and Commentary* (2007) for a collection of international and regional legal instruments relating to insolvency of companies, financial institutions, and consumers, as well as to corporate rescue law.

12 Pistor "The standardization of law and its effect on developing economies" *The American Journal of Comparative Law* 2002 97. See also Joyce "The Role of Insolvency Regulators in the Past and in the Future" (2003) 4 unpublished paper presented at the International Insolvency Conference, Singapore. On file with the author.

13 Wessels "Insolvency Law" 305 in *Elgar Encyclopedia of Comparative Law* (ed Smits)(2006).

14 Wessels 2.

15 *Supra* (n 10).

16 *Ibid*.

> Strong institutions and regulations are crucial to an effective insolvency system. The institutional framework has three main elements: the institutions responsible for insolvency proceedings, the operational system through which cases and decisions are processed, and the requirements needed to preserve the integrity of those institutions – recognizing that the integrity of the insolvency system is the linchpin for its success. A number of fundamental principles influence the design and maintenance of the institutions and participants with authority over insolvency proceedings.[17]

In the context of this article it is important to take note of principle D7 of the *Principles for effective insolvency and creditor/debtor regimes* as it outlines the international standard and perspective on the role of the supervisory body in the regulation of insolvency law in general.[18] The suggested principles are specified as follows:

> Role of Regulatory Supervisory Bodies
>
> The bodies responsible for regulating or supervising insolvency representatives should:
>
> - Be independent of individual representatives;
> - Set standards that reflect the requirements of the legislation and public expectations of fairness, impartiality, transparency and accountability; and,
> - Have appropriate powers and resources to enable them to discharge their functions, duties and responsibilities effectively.

In determining whether it is feasible to bring about a new regulatory regime in South African insolvency law, reference to other jurisdictions can be made. This may prove to be a useful benchmark in order to establish whether regulation in South African insolvency law has fallen out of step with developments in other jurisdictions. Due to the fact that South African insolvency legislation has been partly modelled on English law,[19] it seems sensible to refer to the regulatory methodology within the English bankruptcy systems in an attempt to establish whether the global norms identified as such could also provide domestic policy- and lawmakers with persuasive and digestible solutions and policy considerations.[20]

The United Kingdom (UK)[21] adopted an administrative system whereby the Insolvency Service is responsible for virtually all important

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17 *Principles for effective insolvency and creditor/debtor regimes* 5.

18 *Idem* 20-22.

19 South Africa has 'inherited' most of its insolvency legislation from England. See Burdette *Framework for Corporate Insolvency law reform in South Africa* (LLD thesis UP 2002) Part 2 77.

20 See Tabb "The History of the Bankruptcy Laws in the United States" 1995 *American Bankruptcy Institute LR* 5; Martin "Common- Law Bankruptcy Systems: Similarities and Differences" 2003 *American Bankruptcy Institute LR* 367.

21 The UK consists of three separate jurisdictions or law districts: (i) England and Wales; (ii) Scotland; and (iii) Northern Ireland. The term UK in this chapter is used generically to refer to the jurisdiction of England and Wales. From a formal perspective the main source of the English bankruptcy law is to be found in the Insolvency Act of 1986.

decisions and the establishment of detailed interpretations of statutory rules.[22] This is a consequence of the English lawmakers having a shared vision that bankruptcy law is not just the concern of creditors but affects the wider society.[23] This led to the acceptance that government has a supervisory role to play, and bankruptcy law is also viewed as a public policy measure. The link between the role of the state in protecting the public interest and the administration of bankruptcy estates is illustrated by the strong administrative features of the English regulatory framework and the institutional backing of bankruptcy law in general.[24] The administrative format of the English system also minimises the role of private attorneys in the general bankruptcy process, which distinguishes the English bankruptcy process from other lawyer-oriented systems such as the United States.[25]

The most comprehensive review of English insolvency laws in over a century was introduced *via* the Insolvency Act of 1986.[26] The provisions of the Act were largely based on the recommendations contained in the Cork *Report*[27] and entailed a far-reaching reconstruction of the law pertaining to both personal and corporate insolvency. The Insolvency Act 1986 was also responsible for introducing a number of watershed innovations to the regulatory model in place at the time and established the foundation for the regulatory and legislative framework of present-day bankruptcy law in England.[28]

At present, overall responsibility for the administration of insolvency law in England and Wales rests with the Department for Business, Innovation and Skills.[29] Within the Department this responsibility is discharged by members of the Insolvency Service under the overall

22 See also Evans *A Critical Analysis of Problem Areas in respect of Assets of Insolvent Estates of Individuals* (LLD thesis 2009 UP) 2; see also Calitz thesis part III on the various regulatory models adopted in the US and UK bankruptcy systems. Fletcher *The Law of Insolvency* (2009) 6-7; Levinthal "The Early History of English Bankruptcy" 1934 *University of Pennsylvania LR* 104; Milman *Corporate Insolvency Law and Practice* (1999) 2.

23 See Ramsay "Bankruptcy in Transition: The Case of England and Wales – the Neo-liberal Cuckoo in the European Nest?" in *ConsumerBankruptcy in Global Perspective* (ed Niemi-Kiesiläinen)(2003) 225.

24 Martin 2003 *American Bankruptcy Institute LR* 367.

25 See Calitz "Developments in the United States' consumer bankruptcy law: a South African perspective" 2007 *Obiter* 397.

26 Sealy *Annotated Guide to the Insolvency Legislation* (2004) 1.

27 Report of the Review Committee: *Insolvency Law and Practice, Report of the Review Committee* (Cmnd 8558) Chairman Sir Kenneth Cork GBE (1982) (Hereinafter referred to as Cork *Report*) .

28 For a detailed discussion of the recommendations included in the Cork *Report* see Fletcher 18- 21; see also Ramsay "Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: An Unfinished Story from England and Wales" 2006 *Theoretical Inquiries in Law* 625.

29 The Insolvency Service, an executive agency of the Department for Business, Innovation and Skills, mainly acts as the interface between government and the various stakeholders in insolvency law, and although the ultimate responsibility rests with the Secretary of State for the

continued on next page

direction of the Inspector-General of the Insolvency Service.[30] The latter is responsible for exercising a controlling and supervisory function with regard to all official receivers and insolvency practitioners. The Insolvency Service, an executive agency of the Department for Business, Innovation and Skills, mainly acts as the interface between government and the various stakeholders in insolvency law, and although the ultimate responsibility rests with the Secretary of State for the Department for Business, Innovation and Skills, the day-to-day responsibility of supervision and control of the insolvency system is delegated to the Insolvency Service.

The English regulatory system can be classified as an administrative system, typified by the pervasive character of the government agency, as represented by the Insolvency Service.[31] At present, the public administrator is responsible for virtually all the key administrative decisions as well as for establishing detailed interpretations of statutory rules in bankruptcy law.[32] The core functions of the English public administrator have been identified as the administration of the insolvent estate by government-employed officials in the absence of a private-sector practitioner; focusing of resources on discharging the public interest functions of investigating and prosecuting the conduct of individual debtors and directors of failed companies; and, finally, authorising and regulating the insolvency profession. These features of a regulator are universal in almost all common-law systems, to a greater or lesser degree.

The clear message sent by the international community is thus that insolvency laws and systems are increasingly being recognised as a fundamental institution, essential for the development of credit markets and entrepreneurship in developing countries, and, in turn, those insolvency systems depend on the existence of sound and transparent institutional and regulatory frameworks.[33] In an era of globalisation of law that will inevitably accompany the globalisation of the economy, it is thus vital to any law reform effort to keep up with international trends and developments as we enter a phase in history where legal certainty and predictability are definite virtues.[34]

Department for Business, Innovation and Skills, the day-to-day responsibility of supervision and control of the insolvency system is delegated to the Insolvency Service.

30 See also http//:www.insolvency.gov.uk (accessed 2011-07-31) for the official homepage of the Insolvency Service.

31 Ss 399-401 Insolvency Act 1986 and Pt 10 Insolvency Rules 1986.

32 See Martin 2003 *American Bankruptcy Institute LR* 367.

33 *Cf* Mistelis "Regulatory aspects: globalization, harmonization, legal transplants and law reform – some fundamental observations" 2000 *The International Lawyer* 1055. See further Joyce "The role of insolvency regulators in the past and in the future" (2003) unpublished paper presented at the International Insolvency Conference, Singapore. On file with the author. See *Principles for Effective Insolvency and Creditor Rights System* 5-8.

34 Mistelis 2000 *The International Lawyer* 1069.

3 State Regulation from a South African Perspective

3 1 The Master of the High Court

In the South African insolvency law the Master of the High Court[35] (Master) is at present acting in a supervisory capacity with regard to the South African insolvency law in general.[36] The Master is appointed in terms of the Administration of Estates Act,[37] which includes the definition of the "Master" as follows:

> "[I]n relation to any matter, property or estate, means the Master, Deputy Master or Assistant Master of a High Court appointed under section 2, who has jurisdiction in respect of that matter, property or estate and who is subject to the control, direction and supervision of the Chief Master."[38]

If we very briefly refer to the historical development of the institution of the Master we find that during the period of Roman-Dutch law, the establishment of the *Desolate Boedelkamers* and the Ordinance of Amsterdam, passed in 1777, which has widely been recognised as the origin of South African insolvency law, stand out as significant milestones.[39] During 1777 an insolvency Ordinance was granted to the city of Amsterdam, which, significantly, had been responsible for the introduction of the *Desolate Boedelkamers* charged, *inter alia*, with the administration of the estates of insolvent debtors.[40] The *Desolate*

35 Hereinafter referred to as the Master or the Master's office.

36 See Calitz thesis part III on the legal, regulatory and institutional frameworks within the South African insolvency law system.

37 Act 66 of 1965. The office of the Master is staffed by civil servants in the employ of the Department of Justice and Constitutional Development (Hereinafter referred to as the Department of Justice). Only persons with prescribed legal qualifications can be appointed as Master, Deputy Master or Assistant Master. The Administration of Estates Act 65 of 1966 (Administration of Estates Act) also makes provision for the appointment of a Chief Master who shall act as the executive officer of the Master's offices and exercises supervision over all the Masters as may be necessary to bring about uniformity in their practice and procedure. See Ss 2(1)(b); (2)(2) and 3(1) Administration of Estates Act. S (1) was substituted by s 14 Judicial Matters Amendment Act 16 of 2003 and by s 3 Judicial Matters Amendment Act 22 of 2005.

38 See definition of "Master" substituted by s 1(d) Administration of Estates Laws Interim Rationalisation Act 20 of 2001 and by s 2 Judicial Matters Amendment Act 22 of 2005. Notwithstanding the suggestion in the Master's title that there is an association with the courts, the Master is not part of the formal court structure and as such not appointed as an officer of the High Court. S 34(1)(a) Supreme Court Act 59 of 1959 provides for the appointment of officers of the Supreme Court (now High Court) but does not refer to the Master. See Bertelsmann *et al Mars: The Law of Insolvency in South Africa* (2008) 29.

39 Wessels *History of the Roman-Dutch Law* (1908) 667. See also Sharrock *et al Hockly's Insolvency Law* (2006) 11.

40 Ordinance 1777 (Amsterdam) *Nederlandsche Jaarboeken* 291.

Boedelkamers was a pioneering institution that served as a precursor to the Master of the High Court.[41]

Two significant events relating to the historical development of the Master occurred in 1828. The first occurred under the second British occupation of the Cape of Good Hope, when a Charter of Justice was issued in order to revise the judicial system, which made provision for the establishment of an independent "Supreme Court" and also *inter alia* confirmed that the court had to make provision for the post of a "Master of the Supreme Court".[42] The second noteworthy event occurred with the passing of the Ordinance of 1828, when for the first time it was mentioned that in future all insolvent estates had to be administered by an official referred to as the "Master of the Supreme Court".[43]

The present-day institution of the Master acts as a "creature of statute" and possesses only the powers the statute accords, whether expressly or by necessary implication.[44] If we thus align the institution of the Master of the High Court with international norms and standards as previously identified, it is particularly difficult to clearly define the role of the Master within the context of an international insolvency regulator. From a strategic point of view, we may argue that the Master's identity is that of regulator, as it does possess certain regulatory powers, such as applying its powers to compel an insolvency practitioner to act in the interests of the creditors.[45]

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41 See generally: Wessels 661; Smith *Insolvency Law* (1988) 5; Bertelsmann 1-2; Sharrock 11; Stander *Die Invloed van Sekwestrasie op Onuitgevoerde Kontrakte* (LLD thesis 1994 Potchefstroom University for Christian Higher Education) 8-16; Dalhuisen *Dalhuisen on International Insolvency and Bankruptcy* vol 1 (1986) 1-1-1-17; Visser "Romeinsregtelike Aanknopingspunte van die Sekwestrasieproses in die Suid-Afrikaanse Insolvensiereg" 1980 *De Jure* 42; Stander "Geskiedenis van die Insolvensiereg" 1996 *TSAR* 371; Levinthal "The Early History of Bankruptcy Law" 1918 *University of Pennsylvania LR* 223-250; Burdette (LLD thesis 2002 UP); Roestoff '*n Kritiese Evaluasie van Skuldverligtingsmaatreëls vir die Individu in die Suid Afrikaanse Insolvensiereg* (LLD thesis 2002 UP).

42 The first Charter of Justice came into operation on 1828-01-01, spurred by the Proclamation of 1822-07-05, which made January 1827 the effective date for the use of English in the courts. The first Charter was subsequently followed by a second Charter, constituted by letter patent of 1832-05-04, and coming into operation on 1834-02-13, which superseded and modified it in certain aspects. See Theal *Records of the Cape Colony* (1898); Van der Walt *Geskiedenis van Suid-Afrika* (1961) 167. See further Kahn *A Review of the Recess System in the High Court* (2003) report prepared for the Department of Justice, Pretoria. On file with the author.

43 Ordinance of 1828. See Stander 1996 *TSAR* 376.

44 *Cf* Bertelsmann 29. Die *Meester v Protea Assuransiemaatskappy Bpk* 1981 2 SA 685 (T) 690; *De Lange v Smuts* 1998 3 SA 785 (CC) 853; *The Master v Talmud* 1960 1 SA 236 (C) 238.

45 S 60(a)-(e) Insolvency Act 24 of 1936 (Insolvency Act). S 379 Companies Act 65 of 1973 regulates the removal of a liquidator; Sharrock 116. See further Rudolph *Student Manual: Applying the Promotion of Administrative Justice Act in Practice* (2009) 67.

It should also be noted that although the Master is generally responsible for the supervision of South African insolvency law, this is not the only discipline it has to contend with. In addition to the regulation of insolvency law, the Master has, *inter alia*, the following functions: supervising the administration of estates of deceased persons,[46] including the registration of wills; registration of trusts;[47] supervising the administration of estates of minors and legally incapacitated persons as well as the administration of the "Guardian's Fund", where unclaimed moneys and certain funds of minors and incapacitated persons are held in reserve.[48]

3 2 Problems Relating to State Regulation of South African Insolvency Law

In recent years there has been a great deal of debate surrounding the Master's reputation as insolvency regulator, which in turn has led to this field of law increasingly being the subject of scholarly articles, reflection and debate.[49] On a larger scale the present predicament is that the Master is burdened with the task of preserving the integrity of the law relating to insolvency matters without having the necessary legal and infrastructural resources and institutional capacity to support this undertaking.[50]

The legal framework within the South African insolvency law results in the Master being involved and entangled in various technical issues relating to the administration of the insolvent estate. Consequently, the Master does not prioritise matters of a public nature, such as the investigative aspect of the cause of insolvency or being involved in the development of general insolvency policies and law reform, as these represent matters which fall outside the Master's statutory agenda.[51] Due to its multifarious character, the Master finds itself in the midst of certain challenges relating to the regulation of insolvency law. This state of

46 See Administration of Estates Act and Wills Act 7 of 1953 on the various statutory powers and duties of the Master.

47 Trust Property Control Act 57 of 1988.

48 See ss 76 (1) (b) and 86-93 Administration of Estates Act and Mental Health Care Act 17 of 2002. In terms of the Prevention of Organised Crime Act 121 of 1998, where the court has authorised the attachment of such assets by the Asset Forfeiture Unit, it appoints a curator to administer the assets. The appointed curator, however, has no authority to act as such until duly authorised by the Master.

49 Loubser "An international perspective on the regulation of insolvency practitioners" 2007 *SA Merc LJ* 123; Calitz "The appointment of insolvency practitioners in South Africa: time for change?" 2006 *TSAR* 721. See Burdette "Reform, regulation and transformation: the problems and challenges facing South African insolvency industry" (2005) unpublished paper presented at the Commonwealth Law Conference, London. On file with the author.

50 See Calitz thesis part V on the legal, regulatory and institutional frameworks within the South African insolvency law system as well as a detailed discussion of the powers and duties of the Master.

51 See Calitz thesis part VI for a discussion of the public interest aspect of insolvency law.

affairs is not only unproductive but also in direct contrast to the government's skills development policies.[52] In a recent keynote address the acting Chief-Master acknowledged the following:

> The workload in those two offices has, not surprisingly, increased at a phenomenal rate. The rightsizing initiative and filling of vacancies have inevitably resulted in the appointment of many new staff members who are still in the process of finding their feet.[53]

The lack of specialisation in the office of the Master combined with the lack of resources not only has an impact on service delivery, but also prevents the Master from effectively acting out the Constitution's commitment to "an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public".[54] A good illustration of this allegation can be found in the case of *Moseneke v The Master*,[55] where the Master opposed the application on considerations which included:

> (a) The lack of human resourses, infrastructure, training and finance to administer the intestate estates of Blacks.
>
> (b) The current workload of the masters of the high court which already provides substantial pressure and managerial problems.
>
> (c) The transferral of intestate Black estates from the magistrate's to the master's office would create chaos.[56]

Another disparity that one notices when examining the functions of the Master within the context of international standards is the lack of investigative powers of the Master relating to the cause of the insolvency. In most foreign jurisdictions the investigation into the cause of insolvency, which also includes the behaviour of the insolvent prior to the sequestration of his estate, represents a major objective in the justification of these regulatory institutions.[57] Customarily, the investigative process of insolvency law is also established as a public policy measure. Although the South African system hosts a strong

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52 See Skills Development Act 97 of 1998.

53 Basset "His master's voice: a message from the regulator" (2009) unpublished paper presented at the AIPSA Conference, Johannesburg. On file with the author.

54 See *President of RSA v SARFU* 2000 1 SA 1 (CC) at par 133. See further Hoexter *Administrative Law in South Africa* (2006) 14.

55 2001 2 SA 18 (CC). The case dealt with the constitutionality of certain provisions of the Black Administration Act 38 of 1927.

56 *Moseneke v The Master supra* par 14.

57 In the UK the Insolvency Service's Companies Investigation Branch ("CIB") investigates serious corporate abuse using compulsory powers under the Companies Act 1985. See also ss 235 and 236 Insolvency Act 1986 (Hereinafter referred to as the Insolvency Act 1986 or the Insolvency Act of 1986). Although it received the Royal Assent and became law on 1985-10-30, the government decided to delay implementation of all but a few of its provisions and to draw up a new Act, consolidating its provisions with those parts of the Companies Act 1985 dealing with receivership and winding-up. This became the Insolvency Act 1986. The Act received Royal Assent on 1986-07-25 and was brought into force on 1986-12-29.

interrogation procedure,[58] the investigative powers of the Master are limited to the general enquiries afforded by the Act, which generally aims to obtain information on the financial affairs of the insolvent and the whereabouts of property.[59] Being able to determine the cause of insolvency not only has the advantage of separating the *bona fide* insolvent from the person abusing the system, but in the context of law reform will also have substantial scientific and empirical value.

It would be fair to state that over the years one of the Master's more controversial duties has been the appointment of a provisional trustee or liquidator in an insolvent estate.[60] It is interesting to note that the 1916 Insolvency Act,[61] predecessor to the current Act, granted the Court a discretion to appoint a provisional trustee prior to appointing a final trustee, or when the trustee has been removed, or is not acting as such.[62] With the enactment of the current 1936 Insolvency Act[63] the responsibility to appoint a provisional trustee was however removed

58 Within South African insolvency law there are different types of interrogations which can as a rule be divided into public and private enquiries. The Insolvency Act provides for three different types of interrogations: the provision primarily aimed at investigating the validity of claims lodged for proof at a meeting of creditors (s 42 Insolvency Act) a creditor's enquiry in order to investigate the affairs of the insolvent (ss 64, 65 and 66 Insolvency Act) and a private Master's enquiry in terms of the provisions of s 152. Corresponding provisions contained in the Companies Act also provide for public enquiries by creditors, (ss 415 and 416 Companies Act) and provisions relating to private enquiries before the Master or a Commissioner appointed by the Master or the Court (ss 417 and 418 Companies Act). See Bertelsmann 418.

59 The UK's Cork Committee was a strong advocate of having a robust investigation procedure, linking the idea to maintaining public confidence in the ability of the bankruptcy system to weed out abuse. The investigatory function rests with the official receiver, who investigates an individual debtor as well as officers and directors of companies. If at any time the Master is of the opinion that the insolvent or the trustee of that estate or any other person is able to give any information which the Master considers desirable to obtain, concerning the insolvent, or concerning his estate or the administration of the estate or concerning any claim or demand made against the estate, he may by notice in writing delivered to the insolvent or the trustee or such other person summon him to appear before the Master or before a magistrate or an officer in the public service mentioned in such notice to deliver all the information within his knowledge concerning the insolvent or concerning the insolvent's estate or the administration of the estate. S 152(1) Insolvency Act; s 381 Companies Act. Section 381(2) Companies Act provides that the Master may at any time in relation to any winding-up examine the liquidator or any other person on oath concerning the winding-up. See Calitz thesis part V par 327.

60 S 18 Insolvency Act.

61 Act 42 of 1916 (Hereinafter referred to as the Insolvency Act of 1916 or the 1916 Insolvency Act).

62 S 57 1916 Insolvency Act.

63 It is important to note that however complete the Insolvency Act may be, it did not totally repeal the common law in respect of South African insolvency law, and that English law played an important role in the development of our insolvency law.

from the courts and the Master at present possesses the power to appoint a provisional trustee.[64]

Although the Insolvency Act states in the negative the qualifications of a trustee by declaring which persons are disqualified from acting as a trustee, it fails to state the criteria for making such an appointment.[65] This effectively confers on the Master a discretion as to the method and the identity of the person appointed as the provisional trustee of an insolvent estate.[66] Although the Insolvency Act sets out certain disqualification criteria for the appointment of trustees,[67] it does not categorically state who should be appointed by the Master as a provisional or final trustee. In order to circumvent the lack in statutory guidelines the Master, of his own accord, has over the years implemented certain measures such as the use of a register to which he could add the names of persons who, in his view, qualified as persons suitable for appointment as trustees.[68]Another informal measure had been the development of a policy document with regard to the criteria which should be followed when making a provisional appointment. The main point of concern, however, remains the legality of the Master's measures which could be vulnerable to any litigation challenging its constitutionality.[69]

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64 S 18(1) Insolvency Act. See Calitz 2006 *TSAR* 721. See further Cronje *et al Study Notes: Diploma in Insolvency Law and Practice* (2011) ch 19.

65 S 55 Insolvency Act.

66 In *Krumm v The Master* 1989 3 SA 944 (D) reference was made to a Master's Instruction which stated that because of possible bias a wide range of candidates may not be considered for appointment. The court stated that the exercise of a discretion by the Master to appoint a provisional liquidator could only be attacked on review on the basis that the Master failed to exercise his discretion at all, that he acted *mala fide*, or was motivated by improper considerations. The court held that it was not grossly unreasonable for the Master to issue and apply a directive such as the one which he did in the matter. The court concluded with the following (952F-G): "His (the Master's) approach may be said to be over-cautious, but is it not better that, if he should err, he should do so on the side of caution?" It is submitted that this decision may be influenced by s 33 of the Constitution, which provides that administrative action should be justifiable in relation to the reasons given for it. A court may order the Master to exercise his discretion properly, but will only in exceptional circumstances substitute its own decision for that of the Master. *Cf UWC v MEC for Health and Social Services* 1998 3 SA 124 (C) at 130F. See also Cronje 129.

67 See s 55 Insolvency Act for a list of these disqualifications.

68 Over time this became known as the "Master's panel". In order for one's name to be added to the register, or in order to be placed on the "Master's panel", prospective trustees have to make application to the relevant Master's office. Although each Master's office has a different *modus operandi* when it comes to the placement of prospective trustees on the panel, the procedure usually consists of the submission of certain documentation to the Master, and a subsequent interview of the candidate by a panel consisting of personnel from the Master's office, and one or more practising practitioners who represent either the Association of Insolvency Practitioners of Southern Africa (AIPSA) or the Association for the Advancement of Black Insolvency Practitioners (AABIP) (or both).

69 Burdette "Reform, Regulation and Transformation" 8.

In 2003 the Minister of Justice and Constitutional Development, reacting to persistent allegations of corruption in the appointment of insolvency practitioners, introduced a Judicial Matters Amendment Act.[70] This amendment to the current Act authorises the Minister of Justice and Constitutional Development[71] to determine a policy for the appointment of insolvency practitioners by the Master.[72] The objective behind the amendment of the Act was thus to incorporate the principles of a previous "informal" policy document into legislation.[73] Informal discussions with various stakeholders indicate that the Department of Justice is in process of finalising the policy document; however, no official document or request for commentary has yet been published.[74]

Finally, the insolvency profession is, and always has been, one of the few unregulated professions in South Africa. Although it has been indicated that the regulatory aspects of the insolvency practitioner fall outside the scope of this study, the interplay between the regulatory body and office holder represents an important part of the concept of a regulatory framework. As already indicated, the regulation of the insolvency profession lacks an adequate regulatory framework. In a

70 Act 16 of 2003. In *Beinash & Co v Nathan (Standard Bank of SA Ltd Intervening)* 1998 3 SA 540 (W), Flemming DJP confirmed the view that some liquidators acted dishonestly when he stated that liquidators and trustees were regarded by many as ineffective and "even sometimes disrespected in regard to integrity" at 545D. See Loubser 2007 *SA Merc LJ* 123.

71 Hereinafter referred to as the Minister or the Minister of Justice.

72 The relevant power was inserted into s 158(2)-(3) Insolvency Act, s 15(1A) Companies Act and s 10 Close Corporations Act, respectively. The stated aim of the legislation was first to create uniform procedures in all Masters' offices for the appointment of these functionaries and thus to promote the image of the insolvency practitioners and of the Master's division, and secondly to promote consistency, fairness, transparency and the achievement of equality in these appointments by the various Masters. See Memorandum on the Objects of the Judicial Matters Amendments Bill (2003) at par 2.2. See Loubser 2007 *SA Merc LJ* 125.

73 It is not clear when the policy document was implemented for the first time. The original policy document is termed *Policy: Strategy on/procedures for appointment of liquidators and trustees*. The document would appear to have been implemented in 1998 or 1999. The document deals not only with the appointment of trustees and liquidators, but also *inter alia* with topics such as the training and the lodging of requisitions. On file with the author. One concern is that the legislative amendments provide for the application of a policy document that has been accepted and approved of by Parliament. To date this has not been done. Other attempts to finalise the Minister's policy document include certain "draft documents" which from time to time had been made available to certain role-players in the industry and include: Department of Justice and Constitutional Development *Division: Master of the Court Policy: Strategy on/procedures for the Appointment of Liquidators and Trustees* (June 2001); *Chief Masters Directive – The appointment of Liquidators* (2007); *Minister's Policy Guideline on the Appointment of Liquidators, Curator Bonis, Trustees and Judicial Managers* (2007). On file with the author. See also Calitz 2006 *TSAR* 721.

74 The Department of Justice is apparently in the process of finalising the policy document as referred to in s 158 Insolvency Act.

recent keynote address the Deputy-Minister of Justice and Constitutional Development also acknowledged the importance of regulation of the insolvency industry and especially the importance of building institutional capacity. He stated that: "[t]he current economic climate dictates that we have an industry that is regulated properly and regulated soon."[75]

Literature on the regulation of insolvency law suggests that in the absence of a sophisticated regulatory framework, the role of the regulatory body becomes more important.[76] Consequently, it is submitted that South Africa lacks a sufficient regulatory framework with regard to the regulating and monitoring of insolvency practitioners, and as a result legitimate concerns could be raised about whether there are sufficient regulatory safeguards in place to ensure that only impartial insolvency practitioners with the necessary experience are appointed to act as office holders.[77] The absence of a proper regulatory framework and a specialised regulator could result in the general ineffectiveness of the South African insolvency system as a whole.

As has already been established, the Master acts as regulator in South African insolvency law, but is limited in power and scope to the functions and powers granted within the four corners of the Insolvency Act.[78] In comparison with the profile outlined in international instruments such as the World Bank's *Revised Draft Creditors Rights and Insolvency Standards*, the Master lacks the discretion and the authority of an authentic regulator.[79] According to its statutory purpose, the priority of the Master lies very much in protecting the interest of creditors through

75 Keynote address by Deputy Minister of Justice and Constitutional Development, Mr Andries Nel, MP, at the International Association of Insolvency Regulators (IAIR) annual general meeting and conference, Sandton, 2009.

76 Mensah *et al African Emerging Markets: Contemporary issues* (2001) on economic regulatory frameworks.

77 It is the view of various academic scholars in South Africa that the present regulatory regime is inadequate and in desperate need of reform. Loubser 2007 *SA Merc LJ* 126 comments that: "The situation at the moment is that no qualifications, whether academic or practical, no experience and no professional affiliation are required by law. As a result, there is virtually no control over or disciplinary action against negligent, dishonest or incompetent insolvency practitioners". In *Beinash & Co v Nathan (Standard Bank of SA Ltd intervening)* 1998 3 SA 540 (W) 545D, Flemming DJP confirmed this view when he stated that the liquidators and trustees were regarded by many as ineffective and "even sometimes disrespected with regard to integrity". The many media reports concerning allegations of corruption and fraud against practitioners as well as the Master's personnel have certainly done nothing to change this widely held view. See eg, *Sunday Times Business Times* (2004-03-24) 1; *Sake Beeld* (2004-03-24) 14; *Business Day* (2004-04-22) 1; "Liquidation industry rife with corruption" *Independent online* (2003-10-12). See also Loubser 2007 *SA Merc LJ* 126.

78 See Calitz "The role of the Master of the High Court as regulator in a changing liquidation environment: a South African perspective" 2005 TSAR 728.

79 See supra (n 10).

the legislative powers granted to it, in contrast to the more influential role of international regulators, who act to protect the rights of creditors and furthermore to protect the public interest. It is thus submitted that if we consider the international perspective on state regulation as well as the new constitutional dispensation, the state regulation in the South African insolvency law has become obsolete and out of sync with general international and local demands.[80]

3 3 Law Reform Proposals with Regard to State Regulation in South African Insolvency Law

The South African Law Commission (the Commission) reviewed the South African law of insolvency in the late 1980s, and has published a number of working papers for discussion, reports as well as draft legislation.[81] In 2003 the Cabinet of South Africa approved the Draft Insolvency and Business Recovery Bill,[82] and it was handed over to the Chief State Law Advisers for final certification before being referred to Parliament. However, before the certification process could be completed the absence of a business rescue model was brought to the Department of Justice's attention and the process came to an abrupt halt.[83] The new Companies Act[84] has however now come into effect on 1 May 2011, and contains a chapter on business rescue provisions for companies.[85] As this obstacle to implementing new insolvency legislation has now been removed, it is expected that steps to table new insolvency laws in Parliament will be revived, and a task team of the National Economic Development and Labour Council has also finalised a draft report on the Bill.[86]

80 See Calitz thesis part III for a detailed discussion of state regulation of insolvency law from an international perspective.

81 In 1999 the South African Law Commission published its second draft Insolvency Bill and explanatory memorandum. This explanatory memorandum and draft Bill were however officially published in 2000. The previous draft Bill was published for comment in 1996 as the Review of the Law of Insolvency. See *Draft Insolvency Bill and Explanatory Memorandum Working Paper 66; Project 63* (1996) (Hereinafter referred to as 1996 draft Bill and explanatory memorandum). See South African Law Commission, *Project 63, Commission Paper 582 Review of the Law of Insolvency* (2000) vol I & II (hereinafter referred to as Commission Paper).

82 The name awarded to the draft Bill when it was envisaged that the Business Rescue provisions for corporate entities would form part of the Insolvency Act.

83 See Burdette "Reform, Regulation and Transformation" 10. The final draft Unified Bill has not yet been officially published by the Law Reform Commission and as such the original draft Bill included in the 2000 South African Law Commission Report remains the only official version reflecting the changes proposed by the Law Reform Commission. Consequently this study will henceforth refer to the 2000 version of the Bill.

84 71 of 2008.

85 See ch 6 Companies Act 71 of 2008.

86 At the date of this publication the draft report has not been made public.

The tenor of the Commission's Draft Insolvency Bill[87] suggests that the government, at the time of issuing its report in 2000, was evidently not prepared to make the paradigm shift to bring about a change to the underlying policy and overall structure of the regulatory framework of South African insolvency law.[88] When the Explanatory Memorandum to the draft Bill is perused for amendments or revisions of the current policy and *status quo*, one of the substantive changes linked to the regulatory system is the acceptance by the Commission as a general premise that creditors should accept responsibility for the protection of their own interests.[89] The Master, however, retains its role as supervisor of the South African insolvency law and the proposals with regard to the powers and duties of the Master could at best be described as practical or technical.

There are a few recommendations in the Commission's report which have the effect of reducing the role of the Master in insolvency law.[90] Given the acknowledgement of consistent rumours of undue influence with regard to appointment procedures in the Master's office, and admission that the dominance of one group of creditors in the administration and appointment process of the estate holds a threat, proposals that the liquidator should be appointed by the court were rejected.[91] The Commission submitted that it would be more difficult to review a process where someone other than a public official such as the Master is alleged to be at fault. It therefore viewed it advisable to limit the discretion of the Master rather than remove it completely.[92]

Another significant new provision included in the draft Bill is the power bestowed on the Master to suspend a liquidator on the strength of a complaint made to him on affidavit or if the person has been charged with an offence, pending the investigation into the suitability of the liquidator to remain in office.[93] It is clear from the draft Bill that the investigation should be undertaken by the Master, but the clause fails to give any detail as to the nature and scope of the Master's power to investigate. Given the impact this proposal would have on the Master's resources, it is unfortunate that the Commission did not use the opportunity to include specific guidelines. It is also unclear whether the constitutionality of such an investigation into the rights of the individual had been carefully considered.

87 *Supra*.
88 See Burdette *A Framework for Corporate Insolvency Law Reform in South Africa* (LLD thesis 2009 UP) 656. See also Boraine "Fresh Start Procedures for Consumer Debtors in South African Bankruptcy Law" 2002 *International Insolvency Review* 1.
89 Explanatory Memorandum 14.
90 *Idem* 12.
91 *Idem* 101.
92 *Idem* 101.
93 Cl 58(2) draft Bill.

With regard to the regulation of the insolvency industry some of the more substantive changes proposed to the existing position recommended in the report of the Commission is that only a person who is a member of a professional body recognised by the Minister of Justice may be appointed as liquidator.[94] In clause 53(2) of the draft Bill the following is stated: "The Minister may from time to time publish by notice in the *Gazette* the name of a recognized professional body if it appears to him or her that such body regulates the practice of a profession and maintains and enforces rules for ensuring that a member of such body is a fit and proper person to be appointed as liquidator and meets acceptable requirements for education and practical experience and training".[95] Liquidators may also preside at meetings of creditors unless questioning is to take place at the meeting, or an interested party requests that the Master of the High Court or a magistrate should preside.[96]

The advantage of the law reform processes conducted by the Commission thus far has been that apart from the considerable amount of research that has been done over the years, the Commission has also managed to build up a wealth of expertise, knowledge and specialist contacts. Not only does the process of law reform require specialist advice in the planning and formulation of law reform, but continuity enables the Commission to acquire and apply the expertise and the resources that it has acquired over the years. The Commission should also perhaps not be criticised too harshly for not having a bold approach to the regulatory aspects of the insolvency law, as it has the difficult task of combining, on the one hand, an innovative approach which can lead to ground-breaking work and radical law reform proposals and, on the other hand, the high standards which are needed to gain the respect of those with whom they deal.[97]

The key objective of any law reform proposal should be not only to be compatible and harmonious with international best practice in the field of law, but also to incorporate the legal, economic and social context of a contemporary South Africa. It is submitted that although certain aspects of the investigation of the Commission contain recommendations that have been thoroughly worked through, a fresh approach to the subject of state regulation of insolvency law supported

94 Cronje "Country Report for South Africa" unpublished paper presented at the World Bank Global Judges Forum, (2003) at http://siteresources.worldbank.org/GILD/ConferenceMaterial/20157439/South%20Africa%20CR%20-%20Final%20Version%20%20(Per%20LK%204-8).pdf (accessed 2011-07-31).

95 This clause is partially based on the UK's model of regulation. See Calitz "System of regulation of South African insolvency law: lessons from the United Kingdom" 2008 *Obiter* 352.

96 Cl 41(3) draft Bill.

97 See also paper by Commonwealth Secretariat on "Law Reform Agencies: Their Role and Effectiveness" (2005) Accra Ghana at http://www.calras.org/Other/secretariat_paper.pdf (accessed 2011-07-31).

by a policy-based methodology is required. When assessing the present state of the law of insolvency the following statement very aptly articulates this above notion:

> This will probably mean that the old pre-Constitution jurisprudence will need to be read with circumspection – practitioners and courts should no longer be entitled to simply rely on this old case law as authority. Each and every pre-Constitutional precedent will need to once again be scrutinized, this time against the values that permeate through the Bill of Rights, so as to make sure that all law (including case law) is constitutionally compliant. That it is our duty to do this is beyond question – the common law must be developed so that it is brought into line with our Constitution.[98]

Although a detailed discussion of the new legislation on company law falls beyond the scope of this article, it is interesting to note that the new Companies Act 71 of 2008[99] contains a chapter dealing with company business rescue provisions.[100] In terms of the Act a business rescue practitioner is required to be appointed in order to give effect to and to implement these proceedings, thus introducing a new profession to the South African commercial landscape – namely that of the business rescue practitioner.[101] Section 138(1)(a) of the Companies Amendment Act[102] and the Companies Regulations require candidates to qualify as business rescue practitioners by either being (i) a member of one of the accredited professions, or (ii) licensed by the Companies and Intellectual Property Commission (CIPC).[103] According to section 138(1)(a) one of the requirements for an individual to be appointed as a business rescue practitioner of a company is that the person is a member in good standing of a legal, accounting or business management professions

98 Hopkins "The Influence of the Bill of Rights on the Enforcement of Contracts" August 2003 *De Rebus* 22.

99 Act 71 of 2008. The new Companies Act was signed by the President on the 2009-04-08 and gazetted in Gazette No. 32121 (Notice No. 421). The effective date of the Companies Act, 2008, was gazetted in GG No 34239 of 2011-05-01.

100 See ch 6 Companies Act 71 of 2008.

101 See Rushworth "A critical analysis of the business rescue regime in the Companies Act 71 of 2008" in *Modern Company Law for a Competitive South African Economy* (ed Mongale)(2009) 375.

102 Companies Amendment Act 3 of 2011.

103 The English text of s 138(1)(a) as amended by s 88 Companies Amendment Act 3 of 2011 is in conflict with the Afrikaans text as well as with the Companies Regulations 2011, as to who qualifies as business rescue practitioners. In terms of the Afrikaans version of the Act in order to be appointed as a business rescue practitioner a person has to be a member of an accredited profession "or" be licensed as such by the CIPC. The President signed the incorrect English version of the Companies Amendment Act referring to "(i) a member of one of the accredited professions, and (ii) licensed by the Commission". Reg 126(1)(b) Companies Regulations 2011 clearly provides that if a person is a member of an accredited profession such person does not have to apply for a licence. See "Corporate Renewal Solutions on the new Business Rescue provisions" at http://www.business-rescue.co.za/index.php (accessed 2011-07-31).

accredited by the CIPC.[104] At the date of writing this publication little progress has been made by the CIPC in the accreditation of any legal, accounting or business management professions. It can however be expected that attorneys and chartered accountants will ultimately be accredited, but it is still uncertain how the concept of "business management profession" would be interpreted.[105] It will also be interesting to see whether South Africa has enough appropriately skilled and experienced people who can function as business rescue practitioners and how the regulation of this latest profession will play out.

4 Proposals for Law Reform with Regard to State Regulation of South African Insolvency Law

4 1 General

Before embarking on a discussion on proposals for the development of a regulatory framework within the South African insolvency regime, it is necessary to make a few remarks regarding the subject of law reform. Now that the global norms and standards have clearly been articulated by the World Bank and organisations such as UNCITRAL, it should become a priority to examine ways of adapting them to a South African context.[106] In order to achieve these objectives, policy- and lawmakers will have to negotiate a satisfactory resolution between global norms and standards which would be acceptable on an international level, while also anticipating the difficulties that could arise out of the political and economic realities of a developing country with unique commercial and legal issues. The challenge will lie in creating a balance between, on the one hand, designing a model which will optimise the regulatory outcome, while, on the other hand, bear in mind that this should take place within an achievable and sustainable environment.

It is submitted that in order to create an effective and efficient regulatory model a complete and comprehensive overhaul of the South African insolvency law regime in general should occur.[107] Although this is ambitious, such a rigorous approach would afford national policy- and lawmakers the opportunity to embark on a comprehensive policy-based investigation of the South African insolvency law in general. An holistic approach to insolvency law reform would not only have the advantage of questioning the degree of harmonisation or convergence with insolvency regimes in other jurisdictions, but also ensure that the implementation of various policy considerations and law reform initiatives will be placed on a firm constitutional footing. If, however, a piecemeal approach is to be

104 Reg 126 Companies Regulations 2011 describes the application process to be licensed.

105 Bradsheet "The Leak in the Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioners May Adversely Affect Lenders' Willingness and the Growth of the Economy" 2010 *SA Merc LJ* 195.

106 See Calitz thesis part III ch 5 for a detailed discussion.

107 See Calitz thesis part V; part VII ch 3 for a detailed discussion.

adopted, it is submitted that any regulatory law reform objective should be complementary to, and compatible with, the South African commercial environment as a whole.

Any institutional reform initiative will however have to take cognisance of several challenges which could be encountered along the way. Apart from the cost implication and other resource constraints, issues such as institutional capacity, social, cultural and historical factors and political economy aspects may also feature. Thus, as a result of the sheer gravity of introducing such institutional change, it becomes even more important to introduce an initial policy process in order to conduct a realistic appraisal of the project, identify those factors that could influence policy outcomes and develop a policy containing clear and consistent objectives.[108] In rethinking the structure of the regulatory system in our insolvency law, policy- and lawmakers will have the opportunity to reform the process and to develop a streamlined and effective system in line with international standards and guidelines.

"It is a now a truism to affirm that in all lawmaking a gap opens between on the books and law in action."[109] It is precisely this gap that should represent a central focus theme in development of policy with regard to the regulatory framework in our insolvency law. It is increasingly recognised by scholars that the effectiveness of any insolvency law relies heavily on the institutions of implementation.[110] One of the principal decisions that will have to be made in the design and implementation of a regulatory regime is whether the Master as supervisory body should continue to exist, albeit in a revised shape, or whether a complete and independent regulatory agency should be introduced into our insolvency law.[111]

The positive aspect of persisting with the Master as regulatory authority is that the centuries-old institution will remain "as is", and no institutional or legislative changes will have to be considered. Henning[112] makes a very relevant statement when he mentions that law reform should take place for the right reason. He relates the story that business entity reform in South Africa was a response to the economic and political situation in the nation. It is submitted that the ultimate criterion

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108 Ball *Security Sector Governance in Africa: A Handbook* (2004) Centre for Democracy and Development, London par 4.6.1. at http://www.ssronline.org/ssg_a/index.cfm?id=41&p=41 (accessed 2011-07-31).

109 Halliday 17.

110 Ngok "Law-making and China's Market Transition Legislative Activism at the Eight National People's Congress" in *Problems of Post-Communism* (ed Pistor)(2002).

111 Halliday 17.

112 See Vestal "Business Law Reform in South Africa: The Right Path, The Right Reason" 2002 *Kentucky LJ* 829.
See also Henning "Reforming Business Entity Law to Stimulate Economic Growth among the Marginalized: The Modern South African Experience" 2003 *Kentucky LJ* 91.

should be whether it is possible for the Master to emerge as an efficient and effective institution capable of installing commercial trust.

The remaining option entails establishing and implementing a new independent and complete regulatory agency, responsible for overseeing and implementing the regulatory procedures in our insolvency law. The international profile of a regulatory body ranges from a government department or agency to a professional body or a combination of the two. Against this background, the following statement by Halliday[113] is significant:

> … the implementation and institution building are as important as – indeed arguably more consequential than – formal lawmaking. It is a dangerous illusion that the legal framework and institutions of an effective insolvency system can be done cheaply. Effective bankruptcy systems require the careful design, infrastructural expenditure, and political will comparable to major infrastructural projects in transportation or energy or defence. This is especially so in circumstances where there is rapid economic development and social dislocation in a society that had previously invested little in legal institutions. Failure of government to act boldly and decisively can lead not only to incapacity but instability in society and ultimately the market.

4 2 An Independent Regulatory Body

4 2 1 General

It is submitted that, given South Africa's unique political, social and economic situation, it is inevitable that the state should be involved in the regulatory process. Despite the challenges identified in our present regulatory system, it is proposed that the state nevertheless plays a significant role in the regulatory framework of the South African insolvency system, albeit in a completely revised form. The public interest has been a vital component of insolvency regulation since the earliest days and continues to occupy a position of prominence.[114] Apart from protecting certain vulnerable groups within society, the state also has a legitimate interest to ensure that the institution of credit, the lifeblood of the economy, is not abused. A combination of factors relating to *inter alia* our emerging market economy as well as the unique socio-political dynamics contributes to the recognition that the regulatory aspects of insolvency law represent a considerable social concern that cannot simply be outsourced to the private sector.

Drawing on the conclusion that the state has to be engaged in the regulatory regime, the next key issue to be addressed is thus in which format the state should become involved, and within a South African context this subject involves the future role of the Master of the High Court in a regulatory landscape. As a result of the challenges identified

113 Halliday 41.

114 The Cork *Report* par 1734 concluded that: "Insolvency proceedings have never been treated in English law as an exclusive private law matter between the debtor and his creditors; the community itself has always been recognised as having an important interest in them."

earlier in this study and especially the lack of public confidence in the current conduct of the Master,[115] it is submitted that the Master cease acting in a supervisory capacity with regard to insolvency law and disassociate itself therefrom. It is submitted that the Master should continue to exist as a government institution charged with some of the duties it presently performs, for example the administration of deceased estates, including the acceptance and custodianship of wills; protection of the interests of minors and legally incapacitated persons; controlling the registration and administration of both testamentary and *inter vivos* trusts as well as management of the Guardian's Fund. This approach would mark a return for the Master to its roots as the "Master of the Orphan Chamber".[116] This recommendation would ensure that the Master would be able to focus on the protection of the interests of minors and other vulnerable groups and would thus align its functions more closely with the values entrenched in the Constitution within the current socio-economic circumstances in South Africa.[117]

In the place of the Master's current supervisory role it is submitted that a new regulatory agency in insolvency law should be established which would fulfil the role of a complete "insolvency regulator" in insolvency law. The new independent regulatory authority would not only aim to ensure some degree of harmonisation and convergence with insolvency regimes in other jurisdictions, including important trading partners and sources of investment, but also foster more local and international confidence in our insolvency law system, by more closely mirroring the values reflected in the Constitution.[118]

4 2 2 Suggested Framework of an Independent Regulatory Body

The new independent office, which for present purposes we could refer to as the "Superintendent in Insolvency", would preferably operate as an independent Business Unit within the Department of Justice and Constitutional Development. It is recommended that the Superintendent as such should be a person of high standing with established credentials in insolvency administration and preferably hold the trust and confidence of the national commercial community. The organisational structure and design of the institution could be loosely based on the English Insolvency Service, which at present is constituted as an Executive Agency of the Department of Business, Innovation and Skills.[119] As previously mentioned South African insolvency legislation is deeply rooted in English law, resulting in South African and English laws

115 See Loubser 2007 *SA Merc LJ* 123.
116 Also referred to as the "*Weesheer*".
117 See Calitz thesis part VII for a detailed recommendation and proposal on a regulatory framework for the South African insolvency law.
118 See Calitz thesis part VII for a detailed discussion on the constitutional and administrative law aspects of state regulation of South African insolvency law.
119 The key provisions are to be found in ss 399-401 Insolvency Act 1986 and Part 10 of the *Insolvency Rules* 1986.

reflecting to a great extent similar legal philosophies and principles.[120] Although the English regulatory framework as encapsulated within the present Insolvency Act 1986[121] may not suit the South African economic conditions in a strict sense, there are adequate similarities between the two jurisdictions' historical, legal and cultural elements to constitute a distinct and identifiable practice. It is submitted that the state's role in the regulatory aspects of the law should be confined to issues which are truly public in nature and which could not be adequately performed by the creation of adequate incentives for private practitioners in the insolvency process. This approach would strike the correct balance between state and private sector interest in a country with a unique legal and socio-economic environment.[122]

It is proposed that the most prominent feature associated with the new regulatory agency should be to act as a truly independent role-player in insolvency law. According to international norms and standards the hallmarks of a regulatory system should be clarity, transparency and fairness, predictability and accountability.[123] On the basis of the converging elements identified, the key bankruptcy functions of the office of the Superintendent are recommended as: enquiry and enforcement to deal with the breach of law and abuse of the system as a matter of public interest; regulation and supervision of all insolvency practitioners, and in future the office could also become involved in the administration of cases where the assets are insufficient to meet the costs of doing so.[124] While the precise functions and duties of regulatory agencies vary between jurisdictions, in broad terms their functions consistently fall within the three abovementioned categories.[125] Therefore, the new regulatory authority would more closely simulate other international regulators and provide services more consistent with those typically associated with that of an insolvency regulator. It is proposed that the office of the Superintendent be divided into three different sections or branches which would operate independently and be responsible for investigations and enforcement, regulation of practitioners and the administration of estates where the assets would seemingly be insufficient to cover the administration costs of the estate.

The first branch, which for now we could refer to as the "Insolvency Investigations Branch", would act as an independent enforcement unit

120 See Calitz 2008 *Obiter* 352 for a illustration of how South African and English laws to a great extent reflect similar legal philosophies and principles.

121 Insolvency Act of 1986.

122 "Insolvency Law Reform: Promoting Trust and Confidence" *New Zealand Law Commission Study Paper 11* (2001) 33-35 (hereinafter referred to as *New Zealand Law Commission Study Paper*).

123 *Principles for effective insolvency and creditor/debtor regimes - Revised Principle* D7.

124 The so called "last resort" functions.

125 See Calitz thesis for a detailed discussion of the regulatory frameworks of the UK, US and the Netherlands.

and have responsibility for all public enforcement functions.[126] Prosecutions and preventions are routinely seen as the responsibility of the state in most jurisdictions; however, both activities are dependent on an adequate enquiry taking place to detect offences and abuse.[127] It is recommended that the Superintendent should at the initial stages of the insolvency process possess the powers to perform a basic level of enquiry and investigation into the events that lead to insolvency, whether relating to an individual debtor or the investigation of the conduct of a director or other company official. A further stage would include a reporting mechanism in matters requiring further substantive investigation or prosecution.[128] The facets of investigation and enforcement are once again directed at securing and assuring public confidence in the system of regulation and the process of insolvency.

The second recommended branch, which we could for now refer to as the "Insolvency Regulation Branch", would be responsible for regulating and supervising all insolvency practitioners as well as at a later stage be responsible for the regulation and appointment of Official Receivers under certain conditions.[129] The need for such state oversight is likely to increase exponentially where the insolvency practitioner is not appropriately qualified and does not have the necessary skills and expertise to undertake certain complex matters. But the risk, if not entirely removed, is very significantly reduced through the existence of an effective system of regulatory oversight.

126 See s 289 Insolvency Act 1986 - Investigatory duties of Official Receiver:
"(1) Subject to subsection (5) below, it is the duty of the official receiver to investigate the conduct and affairs of every bankrupt and to make such a report (if any) to the court as he thinks fit.
(2) Where an application is made by the bankrupt under section 280 for his discharge from bankruptcy, it is the duty of the official receiver to make a report to the court with respect to the prescribed matters ; and the court shall consider that report before determining what order (if any) to make under that section.
(3) A report by the official receiver under this section shall, in any proceedings, be prima facie evidence of the facts stated in it.
(4) In subsection (1) the reference to the conduct and affairs of a bankrupt includes his conduct and affairs before the making of the order by which he was adjudged bankrupt.
(5) Where a certificate for the summary administration of the bankrupt's estate is for the time being in force, the official receiver shall carry out an investigation under subsection (1) only if he thinks fit."

127 Zhang "Developing a Regulatory Framework for Outsourcing of Insolvency Work in Hong Kong China" 193 in OECD *Asian Insolvency Systems - Closing the Implementation Gap* (2007).

128 As a division of the English Insolvency Service, the Companies Investigation Branch (CIB) investigates serious corporate abuse using compulsory powers under the Companies Act 1985.

129 In the UK the particular civil servants referred to as Official Receiver's role was brought into existence by the Bankruptcy Act 1883. Today they are civil servants who have their own legal status and act as officers of the courts to which they are appointed.

One of the key elements within a regulatory system is the symbiotic relationship between the regulatory body and the insolvency practitioner. Those who administer insolvencies – whether appointed by the creditors, by the court or by a government agency – are given functions and powers in relation to the debtor's assets under the authority of legislation: the assets and funds are not those of the practitioner, and he has a special duty to protect them. It is submitted that the nature of the appointment is seen as that of, or closely resembling, a trustee undertaking functions and exercising public interest powers for the benefit of the creditors.[130] But these functions and powers should thus be accompanied by responsibilities and accountabilities, and mechanisms for ensuring their proper discharge of such duties.[131]

In order to implement the above objectives and ensure that an individual is fit and proper to act as an insolvency practitioner, a two-pillar system is recommended. The system will depend on compulsory membership to a "Recognised Professional Body"[132] in addition to a mandatory licensing scheme being implemented. Firstly, in order to formally practise as an insolvency practitioner, an individual will have to obtain membership from a Recognised Professional Body and, secondly, as an additional prerequisite will also be compelled to apply successfully to the Superintendent for a formal licence to practise. The regulatory branch of the Superintendent will thus firstly be responsible for conferring on certain member organisations official "Recognised Professional Body" status, and by way of a mandatory licensing system will also have the power to directly authorise practitioners to practise as such.[133] The proposed system would thus represent a hybrid system of government regulation with incorporated elements of self-regulation, as opposed to the English system of self-regulation with government oversight.[134]

The third suggested branch of the Superintendent is the "Official Receiver's Branch", which could *inter alia* be responsible for the administration of cases as last resort where the assets in the estate are insufficient to meet the cost of administration. This function could also be extended to include cases where no private sector practitioner has

130 Regulatory Working Group "Insolvency Law and the Regulatory Framework" 2000 at http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/LAWANDJUSTICE/GILD/0,,contentMDK:20154425~menuPK:146222~pagePK:64065425~piPK:162156~theSitePK:215006,00.html#9 (accessed 2011-07-31).

131 *Idem* 6.

132 Also referred to as RPB or Recognised Professional Body.

133 Both Australia and the UK have licensing systems for insolvency practitioners.

134 The Insolvency Act 1986 in the UK created an insolvency practitioner profession though the medium of delegated regulation. Two methods are provided: membership of and authorisation by a professional body recognised by the Secretary of State (s 391), or direct authorisation by a "competent authority" – for the time being the Secretary of State.

been appointed or cases where an urgent appointment, due to for example the nature of the assets, is required. The Superintendent will also be responsible for supervising the Official Receivers and the status of officer of court will be conferred upon each person appointed as Official Receiver.[135] Apart from this status in relation to which an Official Receiver would exercise its functions, the Superintendent would also be responsible for setting down certain criteria in regard to qualifications and experience in order for a person to be appointed as an Official Receiver.

The branch of Official Receivers could also be utilised as a training facility not only for government officials but also to provide technical insolvency training for insolvency practitioners. A scheme where it would be possible for practitioners to register as trainees at the branch of the Official Receivers could not only assist practitioners in obtaining practical experience but could also make a positive contribution to the resources of such office. It is submitted that the involvement of the branch of the Official Receiver in the administration of estates could gradually be phased in as part of the overall regulatory structure. This outcome would not only allow for sufficient training of individuals in this specific field of law, but also ensure that the structure and functions of this office are adequately thought through in order to be integrated successfully into the general regulatory scheme.

4 3 Complaints Mechanism

From the outset of this study it has been made clear that one of the key considerations when making recommendations regarding law reform would have to be that of public interest within the spirit of the Constitution. In order to develop a system based on accountability, which would satisfy the public interest and create trust and confidence in the system, it would be vital that key factors such as the independence of the Superintendent, the mechanisms of accountability for the insolvency practitioners and public servants as well as the procedures to receive and investigate complaints are put in place.

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135 See discussion of concept of "officer of the court" in Calitz thesis part VI. See also s 400 Insolvency Act 1986 – functions and status of official receivers:
"(1) In addition to any functions conferred on him by this Act, a person holding the office of official receiver shall carry out such other functions as may from time to time be conferred on him by the Secretary of State.
(2) In the exercise of the functions of his office a person holding the office of official receiver shall act under the general directions of the Secretary of State and shall also be an officer of the court in relation to which he exercises those functions.
(3) Any property vested in his official capacity in a person holding the office of official receiver shall, on his dying, ceasing to hold office or being otherwise succeeded in relation to the bankruptcy or winding up in question by another official receiver, vest in his successor without any conveyance, assignment or transfer."

It is submitted that the Superintendent should have a complaints mechanism in place, to be able to act as a conduit through which complains could be channelled to the respective Registered Professional Bodies, and in some cases the complaints could also be subject to an investigation by the Superintendent itself. The Registered Professional Bodies would be required to have a formal complaints procedure to ensure that these procedures are harmonised throughout the spectrum. The policy aim would be to have a disciplinary procedure in place that is just and fair to all parties concerned, including the practitioner and the complainant, and that is transparent. Doing so will create trust and confidence in the insolvency system.[136]

Apart from the internal structures, it is submitted that an "Insolvency Tribunal" should be established. It is submitted that the Tribunal should be an independent judicial body, subject only to the Constitution and the law, so as to ensure that it functions impartially and without fear of favour or prejudice. The Tribunal could function in a similar way to the Companies Tribunal,[137] and as an organ of state have a dual mandate:

(a) to serve as a forum for the adjudication of disputes as well as voluntary alternative dispute resolution in any matter arising from the Insolvency Act

(b) to carry out reviews of administrative decisions made by the Superintendent on an optional basis.[138]

The High Court would however remain the primary forum for the resolution of disputes, and for the interpretation and enforcement of the proposed Insolvency Act.

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136 See s 287 Insolvency Act 1986 - Action of Tribunal on reference:
"(1) On a reference under section 396 the Tribunal shall -
(a) investigate the case, and
(b) make a report to the competent authority stating what would in their opinion be the appropriate decision in the matter and the reasons for that opinion, and it is the duty of the competent authority to decide the matter accordingly.
(2) The Tribunal shall send a copy of the report to the applicant or, as the case may be, the holder of the authorisation; and the competent authority shall serve him with a written notice of the decision made by it in accordance with the report.
(3) The competent authority may, if he thinks fit, publish the report of the Tribunal."

137 See s 195 Companies Act, 2008.
"The Companies Tribunal or a member of the Tribunal acting alone in accordance with this Act, may –
(a) adjudicate in relation to any application that may be made to it in terms of this Act, and make any order provided for in this Act in respect of such an application;
(b) assist in the resolution of disputes as contemplated in part C of chapter 7; and
(c) perform any other function assigned to it by or in terms of this Act, or any law mentioned in Schedule 4."

5 Concluding Remarks

While there have been many efforts to reform and modernise the South African insolvency system, the process has always lacked political clout. With the current rise in insolvencies and liquidations, the importance of substantial reform efforts to establish an effective insolvency culture and legal practice should be recognised. Such a system will distribute, re-distribute, or use assets from a failed business or insolvent individual more efficiently, effectively and fairly through the insolvency process. The role of policy- and lawmakers will therefore play a major part in reforming South African insolvency law in general as well as in determining policy and developing an appropriate regulatory regime for insolvency law.

The recommendations made here will involve a paradigm shift in the perceptions of the public as well as other role-players and will require a reorientation towards all aspects of regulation in insolvency law. As previously submitted, it would be possible to attempt to weave the proposed recommendations into the present suggestions made by the Commission. This option would however not only represent a superficial approach to the reform of our regulatory regime, but will also prove to be problematic with regard to the implementation of some of the most critical aspects of the proposed regime, namely the introduction of an independent and complete regulator with functions consistent with global norms and international standards.[139]

It is thus generally concluded that South African law- and policymakers should return to the drawing board and engage in further research and consultation in order to incorporate a modern and sophisticated regulatory framework into our insolvency law. There is a pressing need to introduce a regulatory model that would not only be consistent with global norms but that can also be adapted to the particularity of our national situation. This bold approach will require not only the political will and support of national policymakers, but also the technical assistance of international financial institutions and aid agencies of

138 See s 6 Promotion of Administrative Justice Act 3 of 2000 (PAJA). Before someone can ask a court to review an administrative action, there is an important rule in the PAJA that must be complied with – the rule of exhaustion of internal remedies. This means that, where the law sets out procedures allowing someone to review or appeal a decision of the administration, these must be pursued before an affected person can approach a court. A person can therefore only ask for judicial review as a last resort. This is dealt with in s 7(2) PAJA. Internal remedies are ways of correcting, reviewing or appealing administrative decisions using the administration itself. The difference between internal remedies and the remedy of judicial review is that the judicial review is review by a court, which is independent from the administration. See Calitz thesis part IV for a detailed discussion of the administrative law aspects of state regulation in South African insolvency law.

139 See Calitz thesis part VII for further recommendations.

advanced economies.[140] Although this option will represent a costly exercise, commercial and consumer insolvencies have become too important phenomena legally as well as socially and economically to be shortchanged with nominal budgets.[141]

If the aim of any law reform proposal is to build an effective and efficient insolvency system and regulatory framework, then the development of a strong administrative component will have to be a priority. The reality of overburdened judicial services cannot be ignored, and as a result it would make sense to develop a regulatory system that is as independent from the court structure as possible. South African law- and policymakers are at present on the threshold of introducing significant new legislation into insolvency law. Interested parties will have to achieve a balance between the interests of debtors and creditors and the public interest while at the same time acknowledging the link between these interests and institutional structures and their capacities. The absence of an effective insolvency regime will have an adverse impact on the future availability of credit and foreign capital.[142] The design and development of a strong central government agency responsible for regulating South African insolvency law has therefore become vital in assuring public confidence in the system of regulation and supervision, and in the process of insolvency law.[143]

140 Halliday 34.
141 Ziegel "Bill-55 and Canada's Insolvency law Reform Process" 2006 *Canadian Business LJ* 76.
142 See Falke *Insolvency Law Reform in Transition Economies* (LLD thesis 2005 Humboldt University) 27.
143 *Cf* Mistelis 1057.

The deductibility of value added tax on costs incurred to raise share capital: A critical analysis of the *ITC 1744* case

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OPSOMMING

Die aftrekbaarheid van belasting op toegevoegde waarde op kostes aangegaan om aandele uit te reik: 'n Kritiese ontleding van die *ITC 1744*-saak

Maatskappye gaan dikwels wesenlike kostes aan by die uitreik van aandele om bedrywighede te finansier. Tans voer die Suid-Afrikaanse Inkomstediens (SAID) aan dat belasting op toegevoegde waarde (BTW) aangegaan op aandeeluitreikingskoste nie aftrekbaar is nie. Hierdie siening is gebaseer op die *ITC 1744*-saak. Die uitspraak in die *ITC 1744*-saak is gebaseer op die mening uitgespreek in ´n Europese hofsaak wat in 1994 beslis is. Sedertdien het die *European Court of Justice* (ECJ) in ´n aantal sake die aftrekbaarheid van BTW op aandeeluitreikingskoste oorweeg en beslis dat insetbelasting in sekere gevalle aftrekbaar sal wees. In hierdie artikel word die vraag gestel of argumente soortgelyk aan die argumente gevolg deur die ECJ in Suid-Afrika aangevoer kan word. Gebaseer op die ontleding van die argumente in die ECJ-beslissings, binne die konteks van die Suid-Afrikaanse wetgewing, word aangevoer dat daar gebiedende gronde bestaan om in Suid-Afrika te argumenteer dat ´n aandeeluitreiking nie ´n lewering daarstel nie en dat aandeeluitreikingskoste as ´n algemene bokoste beskou kan word. Hierdie argumente kan die SAID aanmoedig om die siening wat tans gehuldig word by die aftrekbaarheid van BTW op aandeeluitreikingskoste in Suid-Afrika, te hersien.

1 Introduction

It is at the heart of any business to raise capital to start up or expand its activities.[1] In doing so, several types of costs, such as share transfer secretarial charges, legal fees, fees payable to merchant bankers and specialist consultants, as well as listing fees, may be incurred, often in

* The authors acknowledge the valuable feedback and input to the article by Ferdie Schneider, Pierre-Pascal Gendron, Eugen Trombitas, Micheal Evans, Jolayne Trim and Piet Nel.

1 Du Toit *et al Corporate Finance: A South African Perspective* (2010) 336.

significant amounts,[2] especially in the private equity industry.[3] Value added tax (VAT) is levied on the supply of these services.[4] The level of share issue costs is significantly affected by the deductibility (or not) of the VAT paid on the share issue costs incurred by the entity issuing the shares[5] and can become an important factor in determining how and how much finance will be raised.[6]

During 2002, in the case of *ITC 1744*,[7] it was held that a company cannot deduct the VAT paid on share issue costs, even if such costs are incurred to raise finance for a new business venture that would ultimately entail the making of taxable supplies.[8]

This view was based on the principles of the judgment of the European Court of Justice (ECJ) in the case of *BLP Group Plc v Commissioner of Customs and Excise*.[9] in which it was held that the deductibility of the VAT paid on an expense depends on the existence of a direct and immediate link between an expense and a taxable supply.[10] Even though the South African Revenue Service (SARS) is not bound to follow a decision of the Tax Court,[11] the view expressed in *ITC 1744* is favourable to SARS and is currently the only case law providing guidance on the matter in South Africa. The current SARS policy in respect of the deductibility of VAT on share issue costs is therefore based on the *ITC 1744* case.[12]

The *BLP Group Plc* judgment was laid down in 1994. Subsequently a number of judgments in respect of share issue costs have been delivered

2 For example, a placement fee of 20 per cent of the proceeds received from the share issue was incurred in the case of *ITC 1744* 65 SATC 154 for a placement of shares in the venture capital market.
3 Gasparotto "Achieving clarity on VAT for holding companies" (2008) *International Tax Review* March 2008.
4 VAT is levied on the supply of these services in terms of s 7(1)(a) Value Added Tax Act 89 of 1991 (the VAT Act). The proviso to s 2(1) specifically excludes activities relating to the issue of shares from the definition of financial services to the extent that it attracts a fee, commission, merchant's discount or similar charge. These financial services are therefore not exempt from VAT in terms of s 12.
5 For example, share issue costs of R114 (including VAT) are reduced to R100 if input tax can be deducted. If input tax cannot be deducted this cost remains at R114. The deductibility of input tax therefore reduces the cost to the company paying the share issue costs by 12.28 per cent (calculated as R14/R114).
6 Firer *et al Fundamentals of Corporate Finance* (2004) 505.
7 65 SATC 154.
8 *Idem* 158.
9 European Court Reports PI-0983 ("*BLP Group Plc* case").
10 *ITC 1744* 158.
11 De Koker *Silke on South African Income Tax* (2010) § 25.4.
12 Badenhorst *et al Ensight* (2010) February 2010, available at http://www.ens.co.za/newsletter/briefs/taxFeb10entitlement.html (accessed 2010-11-20); Silver "Share transactions - A VAT chance?" *Deloitte Tax News* 2 2010, (http://www.deloitte.com/assets/Dcom-SouthAfrica/Local%20Assets/Documents/Tax%20News%202%20of%202010.pdf (accessed 2010-11-20);

continued on next page

by the ECJ. These judgments have changed the view in Europe[13] on the deductibility of VAT on share issue costs.[14] As reliance was previously placed on the views of the ECJ in *ITC 1744*, it is submitted that the reasoning followed by the ECJ may provide compelling arguments to reconsider the position in South Africa.

The objective of this article is to analyse the views expressed in respect of the deductibility of VAT on share issue costs in the judgments of the ECJ subsequent to the *BLP Group Plc* case in order to determine whether compelling grounds exist to advance similar arguments in the South African context. If such grounds exist, it may provide a basis to reconsider the position in South Africa that is based on the judgment in *ITC 1744*.

In light of the object of the article the analysis commences in section 2 with a discussion of the *ITC 1744* judgment, followed by an investigation into the relevant ECJ case law in section 3. The possibility of following similar arguments to those of the ECJ in the South African context is considered in section 4.

2 The *ITC 1744* Case

In *ITC 1744* the Cape Tax Court was presented with an appeal by a company that was incorporated to exploit a patent to manufacture steel shipping containers suitable for road freight. In order to raise finance to commence its activities the vendor employed a specialist in the venture capital market to place its shares in the market. The company paid the specialist a placement fee equal to 20 per cent of the capital raised for the services provided. The specialist levied VAT on the supply of these services.[15]

The question before the court was whether the company was allowed to deduct the VAT on the placement fee paid to the specialist. In answering this question, the court had to consider the definition of "input tax" in section 1 of the VAT Act, which determines that where a vendor is concerned

'input tax' means –

Schneider "Tax authorities adopt more practical approach for financial services" *KPMG Global Indirect Taxes* (2009); PricewaterhouseCoopers "Holding company expenses - Have you over-claimed input VAT?" *VAT Alert* (2009) 2009-11-05.

13 The views expressed in the judgments were in terms of the Sixth Council Directive 77/388/EEC of 1977-05-12 on the harmonisation of member states' laws relating to turnover taxes - Common system of value added tax: uniform basis of assessment *Official Journal L 145 13/06/1977 P 0001 - 0040* (hereinafter referred to as the "Sixth Directive"), the statute that governs VAT in the European Community.

14 Stewart & Bernier "Deductibility of VAT on the cost of issuing new shares" *International Tax Review* September 2004.

15 *ITC 1744* 156.

> (a) tax charged … by –
>
> (i) a supplier on the supply of goods or services made by that supplier to the vendor ...
>
> where the goods or services concerned are acquired by the vendor wholly *for the purpose of consumption, use or supply in the course of making taxable supplies* ...[16] (own emphasis).

The company contended that although issuing its shares is an exempt supply of a financial service,[17] the connection between the issuing of shares to raise finance and its business of making taxable supplies (to manufacture and sell containers) was sufficiently close to justify the deductibility of input tax on the placement fee. It argued in favour of this contention that the company would not have been able to manufacture and supply the containers in the absence of this service and the consequent failure to raise finance.[18]

However, Conradie J did not agree with this view. In arriving at his judgment he relied on the *BLP Group Plc* case and supported this by a reference to *Customs and Excise Commissioners v UBAF Bank Ltd*.[19]

The issue considered in the *BLP Group Plc* case was whether VAT on professional fees paid to merchant bankers, who advised on the disposal of shares held in a subsidiary, would be deductible. The purpose of the disposal of the shares, according to *BLP Group Plc,* was to raise funding to settle debts that arose from its taxable transactions. The legislation relating to the deduction of input tax relevant in this case stated: [20]

> *[I]n so far as goods and services are used for the purposes of his taxable transactions*, the taxable person shall be entitled to deduct …
>
> (a) VAT due or paid ... in respect of goods or services supplied or to be supplied to him by another taxable person. (own emphasis)

The ECJ ruled that a direct and immediate link was required between the professional fees paid in respect of the shares disposed of by *BLP Group Plc* and its taxable transactions to be able to deduct input tax on the transactions. The court was of the opinion that there was a direct and immediate link between the professional fees incurred and the disposal (transfer) of shares, an exempt supply; and further that the ultimate purpose of the taxable person, in this case to raise funding to settle debts arising from taxable transactions, was not relevant when considering the deductibility of the input tax.[21]

16 Definition of input tax in s 1 VAT Act.
17 This view of the company was based on the assumption that the issue of shares is an exempt supply in terms of s 12(a) & s 2(1)(d) VAT Act. This assumption proved to be contentious in the ECJ cases discussed in Part 3 of this article.
18 *ITC 1744* 156.
19 1996 STC 372 (hereinafter referred to as the "*UBAF Bank* case").
20 Article 17(2) of the Sixth Directive.
21 *ITC 1744* 158.

In support of the "direct and immediate link" test, Conradie J referred to the *UBAF Bank* case[22] where a company incurred fees for advisory services related to the acquisition of shares in three subsidiaries. The purpose of acquiring the subsidiaries was to strip the existing leasing businesses out of them to enable the taxpayer to expand its existing leasing business. In this case the judge concluded that there was a direct and immediate link between the fees incurred and the taxpayer's existing leasing business, and applied the "direct and immediate link" test in favour of the taxpayer.[23]

Relying on the "direct and immediate link" test laid down by the European courts in the cases discussed above, Conradie J held that a direct and immediate link existed between the share issue costs incurred by the appealing taxpayer in *ITC 1744* and the issue of the shares that was not part of the taxpayer's business of manufacturing and selling containers, but rather an exempt supply in his view.[24]

3 Views of the European Court of Justice

The judgment in *ITC 1744* relied on two cases, neither of which involved share issue costs. In relying on these cases it is submitted that Conradie J was of the opinion that the principles established in these cases may similarly be applied to share issue costs. Views expressed by the ECJ on the deductibility of VAT on share issue costs since 2000 differ from those in *ITC 1744*. This raises the question whether the principles from the *BLP Group Plc* and *UBAF Bank* cases, which dealt with a sale of previously issued shares and an acquisition of shares respectively, could similarly be applied when new shares are issued. The relevant ECJ cases and the fundamental principles laid down in each case are considered next.

3 1 *Cibo Participants SA v Directeur Régional des Impôts de Nord-Pas-de-Calais*

In *Cibo Participants SA v Directeur régional des impôts de Nord-Pas-de-Calais*,[25] Cibo Participants SA ("Cibo") acquired shares in three subsidiary companies. It incurred various costs in respect of acquiring these shares, including fees to perform an audit on the companies acquired, negotiation fees, and fees for tax and legal assistance. Cibo deducted the input tax on these costs, but the deduction was disallowed by the tax authorities on the grounds that the costs were incurred to

22 *Supra*.
23 *ITC 1744* 158.
24 *ITC 1744* 158. The ECJ judgments subsequent to the *BLP Group Plc* case established the principle that issuing shares is not a supply and can therefore not be exempted. This casts some doubt on whether Conradie J's view that the principles laid down in respect of the transfer of shares could similarly be applied in the context of share issues was appropriate.
25 ECJ Case C-16/00 (hereinafter referred to as the "*Cibo* case").

acquire shares and receive dividends that are exempt and non-taxable transactions.[26]

Despite the fact that the matter at issue concerned share acquisition costs, as opposed to share issue costs, the judgment laid down principles later applied by the ECJ in matters concerning the issue of shares.[27] The first question confronting the court was whether Cibo's acquisition of the shares would result in a taxable transaction.[28] In terms of article 4(2) of the Sixth Directive[29] a prerequisite for a transaction to be taxable is that it must be an economic activity performed by a taxable person. The court held that earning dividends was not an economic activity since the receipt of dividends from the subsidiaries did not in itself constitute consideration in exchange for a supply of goods or services by Cibo.[30] It was further held that in this case the object of Cibo's acquisition of shares in the subsidiaries was to become involved in the management of these subsidiaries in exchange for a management service fee. This involvement was regarded as an economic activity, which meant that Cibo was conducting economic activities (transactions) that were subject to VAT (i.e. taxable transactions).[31]

The second question considered by the court was whether Cibo was entitled to deduct input tax on the advisory fees.[32] As the input tax system was designed to relieve the burden of VAT payable by a trader on taxable activities, the court held that expenditure incurred must be linked to the output activity (supply) in order to apply the "direct and immediate link" test laid down in the *BLP Group Plc* case.[33] The nature of the output activity (supply) to which the expenditure is linked determines whether the input tax on the expenditure can be deducted.[34] As the dividends earned did not constitute consideration for a supply, the cost to acquire the shares in the subsidiaries could not be linked to this transaction or a specific supply. Instead it was held that the expenditure should be viewed as a general cost of performing all the entity's supplies. This implied that the expense had a direct and immediate link with the business as a

26 *Cibo* case § 9.
27 Refer to the discussion of the *Cibo* case in the *KapHag* case below.
28 *Cibo* case § 14.
29 Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value-added tax: uniform basis of assessment.
30 *Cibo* case § 41. A similar view was put forward with reference to the South African context by Connell "Holding Companies to account: The expense apportionment conundrum" 2004 *SALJ* 117.
31 *Cibo* case 26 § 22.
32 *Idem* § 24.
33 *Idem* § 27 & § 29.
34 *Idem* § 31.

whole; hence the deductibility of input tax depended on the nature of the activities (supplies) of the entity's business.[35]

The principle that emerged from this case was that expenditure had to be linked to activities or supplies when applying the "direct and immediate link" test. If expenditure cannot be linked to a specific economic activity or supply, it has to be viewed as a general cost that benefits the business as a whole (i.e. all the supplies made by the business).

3 2 *KapHag Renditefonds v Finanzamt Charlottenburg*

In *KapHag Renditefonds v Finanzamt Charlottenburg*,[36] KapHag Renditefonds ("KapHag") was a partnership, established under the German civil law to acquire a development right to land on which it intended to erect buildings to lease out and manage. In November 1991 a new partner contributed an amount of capital to the KapHag partnership. Legal fees, on which VAT was levied, were incurred to facilitate admission of the new partner. KapHag deducted the input tax on these fees, but the tax authorities disallowed the deduction.[37]

The question posed to the ECJ in this case was whether admission of a new partner in exchange for a contribution by the partner was a supply rendered by the partnership.[38] It was held that the partnership did not supply any goods or services to the new partner. This view was based on the argument that the partner had merely been provided with the expectation of sharing in future partnership profits in virtue of owning a share of the partnership's assets by the existing owners of the partnership. As a result the acquisition of the new partner's share of the partnership's assets was not a supply rendered by the partnership.[39] As no goods or services had been supplied to the new partner (no economic activity), the contribution made by the new partner did not constitute a consideration for something supplied to him/her by the partnership. Instead the contribution represented the performance of an obligation towards the object of the partnership.[40] The admission of the new partner did therefore not fall within the ambit of the VAT system.[41] The court held that exemption of a supply under article 13B(d)(5) could not be applied since no supply had been made.[42]

The main principle laid down in this case was that the admission of a new partner did not amount to a supply of a good or service by the

35 *Idem* § 33.
36 ECJ Case C-442/01 (hereinafter referred to as the "*KapHag* case").
37 *Idem* § 12–15.
38 *Idem* § 22.
39 *Idem* § 24 & § 42.
40 *Idem* 34 § 25.
41 *Idem* 34 § 41.
42 Article 13B(d)(5) of the Sixth Directive exempts "transactions, including negotiation, excluding management and safekeeping, in shares, interests in companies and associations, debentures and other securities" from VAT.

partnership, hence the transaction did not fall within the ambit of the VAT system and therefore could not be exempt from VAT. Following this judgment, the question arose whether this same principle could be applied to share issues. The application of this principle in the context of a company issuing shares was tested in *Kretztechnik AG v Finanzamt Linz*,[43] which is discussed below.

3 3 *Kretztechnik AG v Finanzamt Linz*

As this was the first case dealing with share issue costs, it is of particular importance to the objective of this article, namely to analyse the VAT treatment of share issue costs. Kretztechnik AG (hereafter "Kretztechnik"), a company incorporated in Austria, was involved in the development and production of medical equipment. The company was listed on the Frankfurt stock exchange with a view to raising capital in order to expand its activities. Expenditure was incurred by Kretztechnik to be admitted to the stock exchange. As in the *Cibo* and *KapHag* cases, Kretztechnik claimed a deduction for input tax on the expense but was denied this deduction by the tax authorities on grounds that the share issue cost related directly and immediately to a share issue which is an exempt transaction.[44] At this point it is worth noting that the judgment by Conradie J in *ITC 1744* was based on the same ground.[45]

The two questions posed to the court in respect of the share issue costs have been addressed in different contexts (disposal and acquisition of shares as well as the admission of a partner to a partnership) in the *BLP Group Plc*, *Cibo* and *KapHag* cases. The first question to consider was whether the issuing of shares constitutes a supply of services.[46] The court concluded that similar to the admission of a new partner in the *KapHag* case, no service is supplied by a company when it issues shares in exchange for the share issue price. It was held that the company does not supply a service as it does not transfer any existing rights or any portion of the company's property to the new shareholder. On the contrary, the judge was of the view that the company was the acquiring party in this transaction since it acquired new capital and did not supply any goods or services in exchange. As there was no supply, the transaction was not an economic activity and therefore not within the scope of the VAT system.[47] It was submitted that if the issue of shares is not an exempt supply, the exempt-supply rule for share transactions in article 13(5)(d) of the Sixth Directive would be confined to the economic activities involving the acquisition and disposal (supplying) of previously issued shares.[48]

43 ECJ Case C-465/03 (hereinafter referred to as the "*Kretztechnik* case").
44 *Idem* § 12–14.
45 Firer *et al* 158.
46 *Kretztechnik* case § 15.
47 *Idem* § 24–28.
48 *Idem* § 20.

The second question was whether Kretztechnik was allowed to claim an input tax deduction on a supply of services to it that related to issuing shares, a transaction which the court found not to constitute a supply in answering the first question. As in the Cibo case, this question was considered in view of the neutrality objective of the VAT system. The principle laid down in the Cibo case was applied to achieve this neutrality, and it was held accordingly that the "direct and immediate link" test only applied where a link existed between expenditure incurred by the entity concerned and supplies made by that entity. If the expenditure could not be linked to a specific supply, it followed that it had to be viewed as a general cost that benefited the business as a whole. The deductibility of input tax on the expenditure then depended on the nature of the activities of the business as a whole (taxable or non-taxable).[49] Given that the issue of shares was not considered a supply by the court, the share issue costs could not be attributed to this activity or supply and therefore formed part of the general costs of the business. If the business activities financed by the share issue included any non-taxable transactions, input tax could be deducted only to the extent of the entity's taxable transactions.[50]

The *Kretztechnik* case established and confirmed two principles relating to share issue costs. Firstly, it was confirmed that as with the admission of a new partner, a share issue does not constitute a supply. Secondly, in applying the "direct and immediate link" test share issue costs should not be linked directly and immediately to the issuing of shares, as this is not a supply, but should rather be treated as a general cost of the business as a whole.

The application of the *Kretztechnik* judgment and the apportionment of the deductible input tax were illustrated in *Securenta Göttinger Immobilienanlagen und Vermögensmanagement AG v Finanzamt Göttingen*[51] discussed below.

49 *Idem* § 36.
50 *Idem* § 38.
51 ECJ Case C-437/06 (hereinafter referred to as the "*Securenta* case").

3 4 *Securenta Göttinger Immobilienanlagen und Vermögensmanagement AG, as the Legal Successor of Göttinger Vermögensanlagen AG v Finanzamt Göttingen*

Securenta Göttinger Immobilienanlagen und Vermögensmanagement AG ("Securenta") is a company that is involved in the following activities:

(a) Acquisition, management and disposal of real estate (taxable supply);

(b) Acquisition and disposal of securities (exempt supply); and

(c) Holding of financial investments (not an economic activity and therefore not relating to a taxable transaction).

In 1994 the company paid fees to arrange the issuing of new shares and to admit new silent partners into the business. Securenta claimed a deduction for the full input tax on these fees, relying on the judgment in the Cibo case to claim that a general benefit accrued to its business from the finance raised.[52]

In delivering its judgment the court accepted *Securenta's* argument that the issuing of shares did not constitute a supply, confirming the views in the *KapHag* and *Kretztechnik* cases.[53] Relying *inter alia* on the *Cibo* case, it further confirmed that the share issue costs incurred in the case under review were part of the general costs of the business as a whole.[54] The question considered by the court in this case was whether *Securenta* was entitled to deduct the full input tax on this general cost or not.[55] As in the *Cibo* and *Kretztechnik* cases, it was held that with a view to the neutrality objective of the VAT system the input tax could only be deducted to the extent that the supplies made by the business as a whole resulted in taxable transactions.[56] Securenta was therefore only entitled to claim a deduction of input tax on the share issue costs to the extent that such costs were attributable to its taxable activity of dealing in real estate.[57]

The Securenta case confirmed the principles of the *Kretztechnik* case in respect of the nature of a share issue and also illustrated how the "direct and immediate link" test should be applied to share issue costs that are considered to be general costs. In the four cases discussed up to this point the underlying transactions (admission of a partner and the issue of shares) were not regarded as constituting a supply. The last case, *Skatteverket v AB SKF*,[58] illustrates the application of the principles laid down by the judgments discussed above where the transaction at issue constitutes a supply. This judgment is of particular importance in this

52 *Idem* § 13.
53 *Idem* § 28.
54 *Idem* § 29.
55 *Idem* § 17.
56 *Idem* § 25.
57 *Idem* 49 § 31.
58 ECJ Case C-29/08 (hereinafter referred to as the "*SKF* case").

article as it considered the same type of transaction as the *BLP Group Plc* case following the *Kretztechnik* judgment.

3 5 *Skatteverket v AB SKF*

AB SKF (hereinafter "*SKF*") is a company that holds investments in subsidiaries and is involved in the management of these subsidiaries. The company disposed of its investment in two of its subsidiaries and therefore ceased to provide management services to these former subsidiaries. According to *SKF* it disposed of its investments in the subsidiaries to raise funding for its other business activities (which only involved taxable transactions). *SKF* therefore deducted the full input tax on the services provided to it in respect of the disposal of shares. The tax authorities disallowed this input tax deduction.[59]

The court held, as it had in the *Cibo* and *Kretztechnik* cases, that the output transaction relating to the services rendered to *SKF* had to be identified. The services were supplied to *SKF* in respect of the disposal of shares. Unlike the issuing of new shares, the disposal or transfer of previously issued shares held as an investment constitutes a supply. This supply is an economic activity that is an exempt transaction in terms of article 13(5)(d) of the Sixth Directive. It was held that the input tax on the services provided could therefore not be deducted as input tax to the extent that the services resulted directly and immediately in an exempt transaction.[60] However, the court did leave room for *SKF* to argue that the services were provided to obtain funding for the business as a whole and that a portion of the expense could therefore be regarded as a general cost to the business.[61]

The view held in respect of the deductibility of VAT on costs incurred to transfer existing shares in this judgment was consistent with that in the *BLP Group Plc* judgment and therefore confirmed that this view was upheld by the ECJ. The *SKF* case did, however, highlight that a distinction has to be made between share issues and the transfer of previously issued shares as the nature of the transactions differ.

3 6 Concluding Thoughts on the ECJ Views

From the ECJ cases discussed, it can be concluded that it was established in European case law that the issuing of an entity's own shares does not constitute an economic activity or a supply of a service.[62] This must be distinguished from the transfer of previously issued shares held for trading purposes or as an investment, which is an exempt supply within the scope of the European VAT system.[63] Secondly, the principle was established that in order to apply the "direct and immediate link" test laid

59 *Idem* § 20–24.
60 *Idem* 56 § 73.
61 *Idem* 56 § 73.
62 Illustrated by the *KapHag*, *Kretztechnik* and *Securenta* cases.
63 Illustrated in the *SKF* case.

down in the *BLP Group Plc* case, expenditure must be attributable to supplies or economic activities to achieve VAT neutrality.[64] The deductibility of the input tax on the expense will depend on the nature of these supplies or activities. If the expense cannot be linked to a specific supply or activity, which will be the case when share issue costs are incurred, it should be viewed as a general cost that benefits the entity's business.[65]

As the objective of the article is to establish whether similar arguments can be followed in respect of the deductibility of input tax on share issue costs in South Africa, the next part of this article comprises a critical analysis of the relevant requirements in the South African context.

4 Critical Analysis of the ECJ arguments in the South African Context

When considering whether similar arguments to those followed in the ECJ judgments may be plausible in the South African context, this must be approached with caution as differences may exist between the basis of the European VAT system and that obtaining in South Africa.[66] One view may be that the ECJ's reasoning could provide an indication of the appropriate input tax treatment of share issue costs in South Africa given that the European VAT system was consulted during the development of the South African VAT system[67] and *ITC 1744* was premised extensively on the ECJ's views in the *BLP Group Plc* case. However, differences may exist between the South African and European VAT systems, as the VAT Act was ultimately modelled on the New Zealand Goods and Services Tax (GST) legislation[68] and not the European VAT system. The appropriateness of the arguments followed by the ECJ in the South African context must therefore be considered in light of any differences between the VAT Act and the Sixth Directive, as well as the views in New Zealand on the matters contemplated.

This part of the article provides a critical analysis of the requirements of the VAT Act to establish whether the arguments followed by the ECJ in respect of share issue costs could be advanced in the South African context. This analysis considers the possibility of advancing similar argument based on the two main grounds of the ECJ for allowing a deduction of input tax on share issue costs.

64 Held in the *Cibo* case, and applied in the *Kretztechnik*, *Securenta* and *SKF* cases.
65 Illustrated in the *Kretztechnik* case and applied in the *Securenta* case.
66 De Koker § 25.4. In the case of ITC 1853 *The Taxpayer* (2011) 135 (ITC 1853 case) it was reiterated that it should be considered whether arguments followed in other jurisdictions were decided under comparable VAT or GST legislation if similar arguments are put forward in the South African VAT context.
67 Myburgh & Schneider *Managing VAT* (2007) 3.
68 Schenk & Oldman *Value Added Tax: A comparative approach* (2007) 112.

The ECJ's first ground for deducting input tax on share issue costs was that the issuing of an entity's own shares was not a supply and could therefore not be an exempt supply.[69] The question whether the issuing of an entity's shares is a transaction that falls within or is deemed to fall within the scope of the VAT Act in the South African context is considered next.

4 1 Is the Issuing of an Entity's Shares a Transaction that falls within or is deemed to fall within the Parameters of the VAT Act?

Section 7(1)(a) of the VAT Act, which imposes VAT on a transaction, must be consulted to answer this question. This section reads as follows:

> Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added tax –
>
> (a) on the *supply* by any vendor of *goods or services* supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him ...[70] (own emphasis).

The emphasis added indicates that the requirements of section 7(1)(a) only apply when goods or services are supplied. The introduction to section 7(1)(a) further exempts certain transactions from VAT. It is submitted that section 12 can, however, only exempt a transaction if it would have been subject to VAT in terms of section 7(1)(a) prior to the application of section 12 (i.e. it constitutes a supply of goods or services).

In terms of article 2(1) of the Sixth Directive VAT is imposed in Europe on the supply of goods or services by a taxable person. It is therefore submitted that the requirements of the VAT Act and the Sixth Directive are similar in that a supply of goods or services must take place for VAT to be imposed on a transaction.

In the *KapHag* and *Kretztechnik* cases it was held that the issuing of a company's own shares did not constitute a supply under the Sixth Directive, as the new shareholders (or partners) merely received a prospect of sharing in the profits of the company (or partnership) in exchange for their contributions. In other words, the company (or partnership) did not give anything up or provide anything to the new shareholders (partners). On the contrary, the judge concluded that the company acquired something (capital) as opposed to relinquishing something when shares were issued in the *Kretztechnik* case. As no supply was made by the company, the contribution paid by the new shareholder could not be viewed as consideration received. For a similar argument to be advanced in the South African context it is of critical importance to determine whether the term "supply" has a similar

69 Refer to the *Kretztechnik* & *Securenta* cases.
70 S 7(1)(a) VAT Act.

meaning in terms of the VAT Act as the meaning given to this word by the ECJ and the Sixth Directive.[71]

> The term "supply" is defined in the VAT Act to include:
>
> > a performance in terms of a sale, rental agreement, installment credit agreement and *all other forms of supply*, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected.[72] (own emphasis).

As this definition is not exhaustive and includes a reference to "all other forms of supply", the specific nature of a supply in the context of the matter under review remains an open question. To explore the meaning of the phrase "all other forms of supply", the ordinary meaning of the term "supply" as well as the meaning of the term "supply" as provided in case law will be considered. As the New Zealand GST Act[73] contains a similar reference to "all forms of supply" in section 5(1), guidance on the meaning of "supply" from New Zealand case law will be taken into account.

A dictionary definition often provides a court with insight into the ordinary meaning of words in a statute.[74] "Supply" is defined in the Oxford Advanced Learner's Dictionary as "*to make available* for use or *to provide* something to someone ..." (own emphasis), and in the Cambridge Dictionary as "*to provide* something that is wanted or needed ..." (own emphasis). Similarly, it is defined in the Merriam-Webster dictionary as "*to provide* ..., *to make available*, to satisfy ... or *to furnish*" (own emphasis). These definitions of "supply" as a verb indicate an act whereby the supplier gives something to another person.

It is submitted that the ordinary meaning of the term "supply" supports the *Kretztechnik* argument that a share issue is not a supply if the view is taken that a company does not provide or give up anything when it issues its own shares. However, case law that may extend the meaning of the word "supply" beyond its ordinary meaning for the purposes of the VAT Act must be considered. In the case of *Shell's Annandale Farm (Pty) Ltd v CSARS*[75] it was held that a supply can only take place in the form of an act or action performed by a supplier in order to accomplish a supply. However, the judge did not expand on the nature of the act required. In the judgment pronounced in the case of *National Educare Forum v CSARS*[76] it was concluded that the action referred to in the Shell's Annandale Farm case included an act where something was

71 As the object of the article is to consider the deductibility of VAT incurred on share issue costs, the discussion will be limited to an analysis of the nature of share issues in South Africa. Hence, the nature of admission of a partner into a partnership will not be considered in the South African context.
72 Definition of supply in s 1 VAT Act.
73 Goods & Services Tax Act 41 of 1985 ("GST Act").
74 *Blue Circle Cement Ltd v CIR* 1984 2 SA 764 (A).
75 62 SATC 97 ("Shell's Annandale case").
76 2002 3 SA 111 (Tk HC).

provided or delivered. It is submitted that this definition of "supply" does not extend the meaning of the term beyond its ordinary meaning.

In the context of the New Zealand GST system, where the term "supply" is not defined, the courts had a similar view to the two South African cases mentioned when the word "supply" was interpreted to mean "furnished with or provided to".[77] As the courts in New Zealand held the view that contractual rights and obligations often determine whether a "supply" has been made,[78] case law dealing with such rights and obligations may also provide useful insight to the meaning of "supply". In contexts other than VAT where these rights and obligations have been considered, the term "supply" has been interpreted to mean "to give something".[79] Despite the fact that it has been submitted that the use of the phrase "all forms of supply" includes a broad range of activities related to the term "supply", New Zealand courts have held the view that this wide interpretation should not result in a transaction where an amount is received but where something has not been provided to or furnished to the counterparty by the recipient of the amount being included in the meaning of "supply".[80] Trombitas[81] argues that, based on the case law in New Zealand, grounds exist to support the views in the *Kretztechnik* case that a share issue does not constitute a supply in New Zealand.

It is worth noting that in the United Kingdom case of *Trinity Mirror Plc (formerly Mirror Group Newspapers Ltd) v Customs and Excise Commissioner*[82] it was held that the issuing of a company's own shares constituted a supply within the ordinary meaning of the word. However, subsequent to the *Kretztechnik* judgment Her Majesty's Revenue and Customs (HMRC) announced that this view was incorrect and afforded taxpayers the opportunity to claim input tax on past share issue costs for a period of three years prior to the announcement.[83]

Lastly, the term "consideration" is defined in the VAT Act as "a payment in respect of, in response to, or for the inducement of a supply of goods or services".[84] If no goods or services are supplied, an amount received would not meet the definition of consideration. It can therefore be concluded that the mere fact that an amount has been received does not necessarily mean that a supply has taken place for the purposes of the VAT Act. Based on this argument it is submitted that this definition

77 *Databank Systems Ltd v CIR* [1987] NZLR 312 (HC).
78 *Rotorua Regional Airport Ltd v CIR* (2010) 24 NZTC 23, 979 (HC).
79 *Pacific Tawling Ltd & Anor v Chief Executive of the Ministries of Fisheries & Anor* (1999) 2 NZLR 388.
80 *Commissioner of Inland Revenue v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 (CA).
81 Trombitas "GST Fundamentals: Supply and out-of-scope transactions" in *Taxation issues: Existing and emerging* (ed Maples & Sawyer) (2011).
82 2001 STC 192 (Ct. App. 2001)(UK).
83 *HMRC Business Brief* 12/2005 (2005-06-15).
84 Definition of supply in s 1 VAT Act.

therefore also does not widen the meaning of "supply" in the context of the VAT Act to include any transaction where the taxpayer receives an amount.

Based on the conventional meaning of "supply" in the context of the general discipline, specific definitions in the VAT Act, as well as interpretations of the concept of supply according to VAT case law, an action where something is given up, provided, made available or delivered is required for a transaction to constitute a supply. If this line of reasoning is followed, grounds may exist to advance a similar argument to that of the ECJ, namely that the issuing of shares is not a form of supply as the company does not provide, furnish or give something to the new shareholder, in the South African context. This argument may, however, be nullified if the specific transaction of issuing a company's shares is explicitly deemed to be a supply in terms of the VAT Act.

Three provisions have to be considered to determine whether a share issue is explicitly deemed to be a supply in terms of the VAT Act. Firstly, as stated earlier, the definition of a supply does not explicitly include a transaction whereby shares are issued. Secondly, the meaning of an exempt supply and the exemption provision must be considered. An exempt supply is defined as "*a supply* that is exempt from tax under section 12" (own emphasis).[85] This definition presupposes that there is a supply. The exemption provision in section 12 states that:

> [T]he *supply* of any of the following goods or services shall be exempt from the tax imposed under section 7(1)(a):
>
> (a) the supply of any financial services, but excluding the supply of financial services which, but for this paragraph, would be charged with tax at a rate of zero per cent under section 11.[86] (own emphasis).

It is submitted that this provision only applies when a supply has been made and does not deem the issue of shares to be a supply if it would not be a supply otherwise. Lastly, the definition of a financial service includes "the *activities* which are *deemed* by section 2 to be *financial services*" (own emphasis).[87] Section 2 deems "the issue, allotment or transfer of ownership of an equity security or a participatory security" to be a financial service.[88] One argument would be that the wording of section 2 only determines the nature of activities that are regarded to be financial services, and does not deem a transaction that would not be a supply otherwise to become a supply. On the other hand, it could be argued that the definition of a financial service would not have included the issue of an equity security if it was the intention of the legislator that this transaction was not a supply. The criticism against the latter argument is

85 Definition of exempt supply in s 1 VAT Act.
86 s 12(a) VAT Act.
87 Definition of financial service in s 1 VAT Act.
88 s 2(1)(d) VAT Act.

that this view is merely based on speculation about the intention of the legislator and could be an instance in the South African tax legislation where a provision or definition refers to items that do not fall within the scope of such a provision or definition.[89] Such a view would have been justified if the definition of the VAT Act explicitly defined a financial service to be a supply,[90] as it is done in the Australian legislation.[91] Based on the three provisions considered above, it is submitted that no provision in the VAT Act explicitly deems the issue of an entity's own shares to be a supply.

Based on the discussion above, grounds may exist to conclude that there appears to be no significant differences in the meaning of the word "supply" between the European and South African VAT systems in the context of share issues. It is submitted that arguments similar to those of the ECJ may be advanced in respect of the meaning of "supply" in the South African context in respect of the issuing of shares. These arguments provide support for the view that the issue of shares will not constitute a supply in South Africa, in which case it follows that the issue of shares cannot be an exempt supply. This view contradicts that expressed by Conradie J in *ITC 1744*, namely that the issue of shares is an exempt supply. As illustrated in the *SKF* case, a transaction involving a transfer of existing shares, which is a supply that can be exempt, differs in nature from that involving the issuing of shares, which is not a supply. It appears as if this distinction may not have been made when the *ITC 1744* case was concluded.

In light of the arguments submitted above grounds exist to contend that a share issue is not a supply in the South African context. In determining whether the reasoning of the ECJ in respect of the deductibility of input tax on share issue costs may be appropriate in the South African context, the analysis continues by considering the requirements of the VAT Act as regards the deduction of input tax.

89 There have been instances where provisions in South African tax legislation have been drafted to specifically refer to an item, while that item was not within the scope of the provision. An example of such drafting was s 64B(5)(c) of the Income Tax Act 58 of 1962 that, prior to the amendment by the Revenue Laws Amendment Act 74 of 2002, exempted liquidation dividends declared from profits of a capital nature from STC. In terms of paragraph (a) of the definition of a dividend, liquidation distributions made from profits of a capital nature were specifically excluded from a dividend as defined. S 64B(5)(c) therefore exempted a transaction that was never a dividend from STC, a tax that was only levied when a dividend was present.

90 This is the reason provided by the Australian tax authorities for viewing the issue of shares as a supply (Evans "Capital raising costs – the wrong side of the mirror?" 2007 *The Tax Specialist* 126).

91 The Australian Goods and Services tax system [A New Tax System (Goods and Service Tax) Act (1999)] uses the words "financial supplies" as opposed to "financial services" in the South African legislation. The definition of financial supplies states any provision of an interest in an equity as a form of property is a financial supply.

5 Input Tax Deduction Requirements

The second ground of the ECJ's argument was that expenditure had to be linked to supplies (whether taxable or not) in order to apply the "direct and immediate link" test laid down in the *BLP Group Plc* case when determining whether input tax can be deducted or not. If this test was applied, share issue costs had to be viewed as a general cost that benefited all the supplies made by the business.[92] It is therefore important to investigate whether, in terms of the provisions of the VAT Act, share issue costs can be regarded as general costs that benefit the business as a whole of the entity incurring the costs. In order to broach this question the definition of input tax and the provisions of section 17(1) of the VAT Act must be considered. In terms of the VAT Act input tax:

> in relation to a vendor, means –
>
> (a) tax charged under section 7 and payable in terms of that section by – ...
>
> (ii) a supplier on the supply of goods or services made by that supplier to the vendor ...
>
> where the goods or services concerned are acquired by the vendor wholly *for the purpose of consumption, use or supply in the course of making taxable supplies* or, where the goods or services are acquired by the vendor partly for such purpose, to the extent (as determined in accordance with the provisions of section 17) that the goods or services concerned are acquired by the vendor for such purpose.[93] (own emphasis).

Provided that a vendor has obtained the necessary documentation,[94] the VAT payable by the vendor for a VAT period may be reduced by the input tax in respect of the supply of goods and services to the vendor during the relevant period.[95] However, this reduction is subject to section 17 which, consistent with the definition of input tax, states that a vendor can only deduct input tax to the extent that the goods or services supplied to the vendor are consumed, used or supplied in the course of making taxable supplies.[96] A core requirement of both the definition of input tax and section 17(1) is therefore that input tax can only be deducted to the extent that the goods or services concerned are acquired by the vendor for the purposes of consumption, use or supply in the course of producing taxable supplies.

Article 17(2) of the Sixth Directive that allows for a deduction in respect of input tax, provides that

> in so far as goods and services are *used for the purposes of his taxable transactions*, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

92 Refer to the *Cibo*, *Kretztechnik* and *Securenta* cases.
93 Definition of input tax in s 1 VAT Act.
94 s 16(2) VAT Act.
95 s 16(3)(a)(i) VAT Act.
96 s 17(1) VAT Act.

(a) Value Added Tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person.[97] (own emphasis).

The requirement of the Sixth Directive that corresponds with the determination "for the purpose of consumption, use or supply in the course of making taxable supplies" contained in the VAT Act reads: "in so far as goods and services are used for the purposes of his taxable transactions". Both requirements only allow a deduction of input tax if the expenditure relates to taxable supplies (the VAT Act) or taxable transactions (Sixth Directive). The question to consider at this point, is therefore whether taxable supplies are different from taxable transactions. The latter are economic activities (the supply of goods or services) that are subject to VAT.[98] A taxable supply is defined as "any supply of goods or services which is chargeable with tax under the provisions of section 7(1)(a), including tax chargeable at a rate of zero per cent under section 11".[99] Both terms refer to transactions where goods or services supplied are subject to VAT and exclude exempt supplies. It is therefore submitted that there is no significant difference between the meaning of "taxable supplies" and "taxable transactions".

In light of the above analysis, it is submitted that there is no significant difference between the requirements respectively imposed on input tax deductions in South Africa and in the European Union that could impede the application of the arguments in the ECJ judgments in South Africa. It would therefore be appropriate to use the "direct and immediate link" test to apply the provisions of the VAT Act. Conradie J signaled concurrence with this view by applying the principle from the *BLP Group Plc* case in *ITC 1744*.[100]

Similarly, Davis J relied on the views expressed in the *SKF* case, in which the "direct and immediate link" test was applied, when he considered the deductibility of input tax incurred on overhead costs in the South African VAT context in *ITC 1853*. It is submitted that case law dealing with input tax deductions in New Zealand's GST Act may not necessarily be relevant to the discussion as the requirements to deduct input tax differ from those in the VAT Act and the Sixth Directive.[101]

97 Art 17(2) Sixth Directive.
98 Article 2(1) Sixth Directive.
99 Definition of taxable supply in s 1 VAT Act.
100 *Ibid*. 7 at 157.
101 In terms of s 3A(1) New Zealand GST Act input tax is defined as "tax charged under s 8(1) on the supply of goods and services made to that person, being goods and services acquired for the *principal* purpose of making taxable supplies" (own emphasis). Neither the VAT Act nor the Sixth Directive requires goods or services to have been acquired for the *principal* purpose of making taxable supplies in order to be able to deduct input tax. It is submitted that this requirement may impact significantly on whether a direct link is required between the goods or services acquired and the input tax incurred, as was illustrated by the judgment in the case of the *CIR v Trustees in the Mangaheia Trust and Trustees in the Te Mata Property* (2009) 24 NZTC 23 711.

Based on the above discussion, it is submitted that grounds exist to argue that where expenditure cannot be linked to a specific supply, the "direct and immediate link" test should be applied in South Africa by linking the expenditure incurred to the supplies of the business as a whole, similar to the application of this test in Europe. Given the arguments advanced in support of the view that a share issue is not a supply, grounds may exist to view share issue costs as a general cost that benefits the business as a whole in South Africa. Input tax on this share issue costs would then be deductible to the extent that the business makes taxable supplies.

6 Conclusion and Summary

In *ITC 1744* it was held that VAT levied on costs incurred to issue shares in a company was not deductible when the share issue costs were incurred to raise finance for the business of manufacturing and supplying containers because there was no "direct and immediate link" between the taxable supplies that the company was going to make and the funding obtained. It was held that such a direct and immediate link did exist between the expenditure and the issue of shares, which Conradie J considered to be an exempt supply. The requirement of a direct and immediate link to the entity's taxable supplies was based on the ECJ judgment pronounced in 1994 in the *BLP Group Plc case*.

Subsequent to the *BLP Group Plc* case, a number of ECJ judgments were instrumental in changing the view in Europe on the deductibility of input tax on share issue costs. An important principle was laid down in the *KapHag* and *Kretztechnik* cases where it was held that the issuing of an entity's own shares did not constitute a supply of goods or services. Proceeding from this principle, it was held in the *Cibo* and *Kretztechnik* cases that when determining whether input tax on share issue costs would be deductible, such costs should be viewed as general costs that benefit the business as a whole as it cannot be directly and immediately linked to a transaction that is not a supply.

As *ITC 1744* is only a Tax Court judgment, it is not binding on the high court or the supreme court of appeal.[102] Given the grounds on which the ECJ allowed the deduction of input tax on share issue costs in certain instances in Europe and the arguments in favour of following a similar line of reasoning in South Africa put forward in this article, the time may have come for taxpayers in South Africa to challenge the current SARS policy.

102 De Koker § 25.4.

For a few dollars more: Overcharging and misconduct in the legal profession of the *Zuid-Afrikaansche Republiek*[*]

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OPSOMMING

Vir ´n paar doller meer: Oorvordering en wangedrag in die regsberoep van die Zuid-Afrikaansche Republiek

Die regslui van die *Zuid-Afrikaansche Republiek* (*ZAR*) is al beskuldig daarvan dat hulle gewetenloos en ondergekwalifiseerd was en ook buitensporige fooie gevra het van hul kliënte. Hierdie artikel ondersoek sekere van hierdie aantygings. Eerstens word daar gekyk na die regulasie van die kwalifikasie- en toelatingsvereistes van lede van die regsprofessie, asook na verwante aangeleenthede soos die "dual practice" tradisie en die impak van die eksamenraad. Tweedens word die regulasie van regskostes bekyk. Derdens word enkele gevalle van wangedrag in die regsprofessie van die *ZAR* kortliks bespreek. Ten slotte maak die outeur sekere gevolgtrekkings en lewer kommentaar oor sekere aspekte.

The more I think about it, Old Billy was right Let's kill all the lawyers, kill 'em tonight.[1]

-The Eagles *Get over it*

1 Introduction

The lawyers practising in the old *Zuid-Afrikaansche Republiek*[2] (*ZAR*) have been accused on more than one occasion of being unscrupulous

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1 http://www.azlyrics.com/lyrics/eagles/getoverit.html (2010-10-28).

2 The name "*De Zuid-Afrikaansche Republiek*" was officially adopted by a resolution of the *Volksraad* on 1853-09-19 and confirmed by art 1 1858 Constitution – see respectively Eybers *Select Constitutional Documents Illustrating South African History 1795-1910* (1918) 360 Doc no 179 and 363*ff* Doc no 182. (The name was at some point amended by another *Volksraad* resolution dated 1853-11-21 and changed to "*De Zuid-Afrikaansche Republiek Benoorden de Vaalrivier*", but the original name was retained thereafter by the 1858 Constitution.) The use of the name later became a political issue when, after the British annexation ended in 1881 (see n 54 *infra*), the British authorities disapproved of the use of that name in official documents (Irish University Press Series *British Parliamentary Papers Colonies Africa* [hereafter *BPPCA*] Transvaal Vol 37 (1971) No 13 at

continued on next page

and self-serving.[3] In his autobiography, Sir H Rider Haggard remembered them as follows: To put it mildly, the lawyers who frequented the Transvaal courts were not the most eminent of their tribe. Indeed some of them had come thither because of difficulties that had attended their careers in other lands.[4]

In addition, the perception exists that this group of lawyers was not only under qualified, but also that they were infamous for overcharging.[5]

However, Kotze CJ sketched a contrary picture and remembered them quite differently:[6]

> I still have pleasant recollections of my early experience on the bench during the period of annexation, and of the good service and loyalty of these old practitioners.[7]

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62 and No 14 at 62). The then Attorney-General, EJP Jorissen, responded that the name "South African Republic" (the English translation) "is the old name of the country … and regarded with affection by every burgher in the land" (*BPPCA* Transvaal Vol 37 (1971) No 31 at 101 Annexure 2 at 102-103). The British then pointed out that the Convention of Pretoria of 1881-08-03 (publ in Eybers 455-463 Doc no 200) referred to the "Transvaal Territory" and that the Transvaal and the South African Republic did not have the same boundaries (*BPPCA* Transvaal Vol 37 (1971) No 41 at 267). However, in the London Convention dated 1884-02-27 (publ in Eybers 469-474 Doc no 204), a subsequent treaty between Britain and the Transvaal State, Britain acquiesced and reverted to the use of the name "The South African Republic". For purposes of this article, to avoid confusion with the later province of Transvaal and the Republic of South Africa after 1961, the original name, namely *Zuid-Afrikaansche Republiek* (or its acronym *ZAR*) will be used, also when referring to the period before the *Volksraad* resolution of 1853-09-19.

3 In a letter to his father dated 1878-04-07, H Rider Haggard mentioned that he had to deal with "a lot of gentlemen whose paths were the paths of self-seeking …" (publ in Haggard *The Days of my Life: An Autobiography* (ed Longman) (1926) 114).

4 Haggard 108.

5 Haggard accused them of overcharging and of their clients being "mercilessly fleeced" (109). Hahlo & Kahn *The Union of South Africa. The Development of its Laws and Constitution* (1960) 231 n 70 further refers to Tromp *Herinneringen uit Zuid-Afrika ten tijde der Annexatie van de Transvaal* (1897) in this regard. However, it is submitted that this source is incorrectly cited there as Tromp merely stated that it was possible for the inhabitants of the Transvaal, in general, to become rich without much energy, knowledge or hard work (195) and that it was possible for attorneys in particular to earn a lot of money because of the litigiousness of the population (195-196). He was much more scathing towards members of the medical profession of that time, which he referred to as "*kwakzalver(s)*" with bills "*die bijna ongeloofelijk zijn*" (196).

6 Kotzé *Biographical Memoirs and Reminiscences Vol 1* (date unknown, publ Maskew Miller, Cape Town) [hereafter Kotzé Vol 1] 540-541. Kotzé actually had a lot of praise for the local bar practising at the time of the creation of the high court in 1877. He mentioned that they "understood how to prepare their cases and conduct them with proper care and attention", and that "[s]ome of them displayed quite good ability as pleaders, for they were anxious to learn, and were in earnest in their work" (540).

7 Kotzé Vol 1 541.

The purpose of this article is to investigate these opposing views on the reputation of the legal profession in the *ZAR* until 1900.[8] This will be done by firstly setting out the matter of the qualifications of lawyers during this period and secondly, by examining possible evidence regarding the claims of overcharging and misconduct against this group.

2 Qualifications

2 1 Required Qualifications

The first statute[9] dealing with the administration of justice in the *ZAR* was *De Drie en Dertig Artikelen* promulgated on 9 April 1844[10] which was confirmed by a resolution of the *Volksraad* on 23 May 1849.[11] This statute contained general provisions[12] on "law sessions" (*teregt-zittengen*) but did not mention legal representatives other than stating that a person could either plead his own case before the *Regtbank* or instruct another person to do so on his or her behalf.[13]

The stipulations regarding the administration of justice as contained in

8 Apart from the period when the *ZAR* was first annexed by Britain (1877-1881), this paper deals only with the administration of justice in the *ZAR* while not under British rule. The Anglo-Boer War commenced on 1899-10-11 and ended on 1902-05-31 with the signing of the *Vrede van Vereeniging* treaty. Thereafter the *ZAR* became a British colony.

9 See also Koté "The administration of justice in the South African Republic (Transvaal)" 1919 *SALJ* 129.

10 As publ in Eybers 349*ff* Doc no 174.

11 As publ in Eybers 357 Doc no 175; See also Kotzé 1919 *SALJ* 129.

12 The general provisions dealt with matters such as public order at the law sessions (arts 2, 3); obstruction of justice (arts 4, 5); the crimes of treason (arts 9, 10), perjury (art 17), assault (art 18 used the terminology "wie iemand stouten of slagen"), slander or defamation (arts 19, 27), murder, patricide, infanticide, poisoning (art 20), theft (art 21) and other property related crimes (art 22), refusal to go on commando when summoned (art 23), opening of another's letters (art 24), abduction of children (art 28); non-compliance with rules relating to building (art 26); the application of the *Hollandsche wet* (art 31); and the treatment of servants (art 33). For a general discussion on *De Drie en Dertig Artikelen,* see Kotzé Vol 1 436-437; Kahn "The history of the administration of justice in the South African Republic" 1958 *SALJ* 295-297; Scott "The administration of justice in the Transvaal 1836-1910" in Mellett, Scott & Van Warmelo *Our Legal Heritage* (1982) 91-92.

13 Art 16. The statute did, however, make provision (in art 6) for certain grounds that prevented a person from acting as a judge. These grounds made no mention of required qualifications, but dealt mostly with possible factors that could influence the impartiality of the judge. The terminology used in this provision referred to a "judge" (*regter*) despite the fact that the law sessions of that time were presided over by a *landdrost*. For a discussion of the duties of *landdrosts* before the 1858 Constitution, see Van der Westhuizen & Van der Merwe "Die geskiedenis van die regspleging in Transvaal (1835-1852)" 1976 *De Jure* 265.

the Constitution of 1858[14] were more extensive and sophisticated.[15] It made provision for the establishment of a *hof van den landdrost* in each district, with appeals to a higher *hof van den landdrost* with six or at least four *heemraden*. The highest court was the *hoog-geregtshof*[16] which sat at least twice a year.[17] To each court was assigned a clerk and a messenger.[18] Although the Constitution even established *weesheeren* and a *weeskamer*,[19] it made no mention of legal representatives or their required qualifications.[20] However, in *Bijlage No 3*[21] to the 1858 Constitution, it was stipulated that a person could only use the title of *procureur* after acquiring an *acte van toelating* from the *Uitvoerende Raad* (Executive Council).[22] A person had to apply for admission in writing to the Executive Council providing proof of membership of the *Nederduitsche Gereformeerde Gemeente* as well as proof of ability,

14 As publ in Eybers 363*ff* Doc no 182. For a general discussion of the provisions of the 1858 Constitution, see Kahn 1958 *SALJ* 302-306; Van der Westhuizen & Van der Merwe 1977 *De Jure* 95-96.

15 Arts 15, 127-170. See also Kotzé Vol 1 436-437.

16 Art 143. In *Bijlage 3* to the 1858 Constitution (see n 21 *infra*) the highest court was referred to as the "*Hoog Geregtshof*". The terms used to refer to the high court differed in the various official documentation and legislation. For purposes of this article, the term refered to in the document under discussion will be used. Furthermore, art 3 of *Bijlage 3* made provision for the election of a chairman of the *Hoog Geregtshof* by the *landdrosten* from among themselves (3 *landdrosts* had to preside at each sitting – see art 143 of the 1858 Constitution), and art 4 stipulated that the clerk of the *landdrost* of the place where the *Hoog Geregtshof* sat, would act as *griffier*.

17 Art 144. At each sitting, the order in which cases were heard, were determined as follows: criminal cases of first instance, appeals in criminal cases, and only then were appeals in civil cases heard (arts 1, 35 and 42 of *Bijlage 3* to the 1858 Constitution).

18 Art 143. A person wanting to be appointed as a clerk had to meet certain requirements: he had to be an enfranchised citizen, have not had any dishonouring sentences passed against him and be over 21 years of age (art 134). Furthermore, both clerks and messengers had to take an oath of office (arts 141 and 142 respectively).

19 Art 184.

20 The Constitution did, however, set minimum requirements for other judicial officers: *landdrosts* had to be enfranchised citizens for at least two years, as well as members of the Dutch Reformed Congregation, not have had any dishonouring sentence passed against them, be thirty years or older and own immovable property within the Republic (art 128); *heemraden* had to meet the same requirements as those for *landdrosts* with the exception of having to own immovable property within the Republic (art 129); jurors were expected to be enfranchised citizens, have had no dishonouring sentences passed against them and be thirty years or older (art 131). *Veldcornetten* were also appointed (arts 127, 145) and their duties were set out in a separate document, entitled *Instructie voor de Veldcornetten* promulgated on 1849-04-09 and approved by resolution of the *Volksraad* on 1858-09-17 (publ in Eybers 410ff Doc no 183). An oath of office had to be taken by *landdrosts* and *heemraden* (art 139 of the 1858 Constitution), jurors (art 140 of the 1858 Constitution) and *veldcornetten* (art 62 of the *Instructie voor de Veldcornetten*). See also n 18 *supra* regarding the oaths of clerks and messengers of the courts.

21 Approved by the *Volksraad* on 1859-09-20.

22 Art 50 *Bijlage 3*. Non-compliance was punishable with a fine of 100 rijksdaalders.

without defining what "ability" referred to.[23] An application was then granted by the Executive Council[24] after consultation with the State Attorney.[25] In 1876 this rule was extended to prohibit the use of the titles of *advocaat* (advocate), *notaris* (notary) and *agent* by persons not in possession of an *acte van toelating*, obtained from the Executive Council.[26] The requirement regarding membership of the *Nederduitsche Gereformeerde Gemeente* was also amended to include membership of any *Protestantsche* church.[27]

Law 1 of 1874 was drafted by the State Attorney of that time, James Buchanan,[28] and provided for the regulation of civil and criminal procedures in cases before the *geregthoven van landdrosten* and the

23 Art 51 *Bijlage 3*.

24 Art 53 *Bijlage 3*. The *acte* was then signed by the President and the Secretary of the Executive Council as well as by the State Attorney. The applicant had to pay a fee of 100 rijksdaalders for the issuing of the *acte*. This means that at that time, the admission of attorneys (*procureurs*) were dealt with by the executive, and not by the judiciary.

25 Art 52 *Bijlage 3*.

26 Decision of the *Volksraad* of 1876-06-14 (art 219). Non-compliance was severely punished with a fine of £7 10s for each separate offence.

27 *Idem* (art 220). The wording erroneously referred to membership of the "Ned. Hervormde" church.

28 James Buchanan has been described as "a lawyer of ability" (Kotzé 1919 *SALJ* 133); as possessing "exceptional diligence and [a] brilliant intellect", as "a conscientious jurist and an outstanding lawyer" (Moll *sv* "Buchanan, James" in *Dictionary of South African Biography* [hereafter *DSAB*] Vol II (2nd impr 1983) 95-96); and as a "sound lawyer and an eloquent speaker" (Kotzé Vol 1 275). He was born in Cape Town on 1841-09-21 and his law career commenced on 1865-02-01 when he set up practice as an advocate at the Cape Bar. He participated in the western circuit of the Cape circuit court until 1871. On 1872-12-09 he became Attorney-General of the *ZAR*, where he remained until 1875. During this brief period, he implemented changes to the administration of justice, one example being Law 1 of 1874, despite having only one clerk and no permanent office space. He also played a role in the establishment of the first police force in the *ZAR* and drafted legislation relating to insolvency matters, the latter which was never accepted by the *Volksraad* due to certain conservative elements (Kotzé 1919 *SALJ* 133). From 1876 to 1880 Buchanan was a puisne judge with the Supreme Court in the Orange Free State, whereafter he left for Kimberley where he was appointed as the recorder, and in Sep 1882 judge president, of the Supreme Court of Griqualand West, where he remained until his retirement in Sep 1887. During his law career, he was also the editor of the Menzies Reports, containing cases decided by the Supreme Court of the Cape of Good Hope, and authored *Precedents in Pleading: Being Forms Filed of Record in the Supreme Court of the Colony of the Cape of Good Hope* (1878) as well as a work on *Decisions in Insolvency* (1879). (It is interesting to note that in both the Menzies Reports as well as *Precedents in Pleading* he is mentioned as James L Buchanan, although Moll *sv* "Buchanan, James" in *DSAB* Vol II (2nd impr 1983) 95 refers to him merely as James Buchanan.) He furthermore translated several volumes of Johannes Voet's *Commentarius ad Pandectas*. In addition to his law career, he was actively involved in politics, journalism and cultural matters. For more detail on the life of James Buchanan, see Moll *sv* "Buchanan, James" in *DSAB* Vol II (2nd impr 1983) 95-96; Kotzé Vol 1 275-276, with a portrait of James Buchanan opposite.

geregthoven van landdrosten en heemraden.[29] In addition to the already existing offices of clerks and messengers of the court, the Law further made provision for the judicial office of *griffier*.[30] However, with regard to legal representatives, the Law merely stated that no person, other than an attorney (*procureur*) properly admitted[31] before the *hoogere geregtshoven* could act as such.[32] The Law unfortunately did not define what these requirements for proper admission entailed. Agents could also appear as legal representatives in the lower courts (*geregthoven van landdrosten* and *geregthoven van landdrosten en heemraden*) by acquiring a licence from a *landdrost*.[33] The only requirements for such a licence entailed the passing of an examination before the *Commissie van Examinatoren in de Reghtsgeleerdheid*[34] and being of a good character.[35]

29 See the preamble to the Law. For example, regarding civil cases, the Law contained prescribed forms for *dagvaarding* (art 10 (*civiele zaken*) and art 6 (*crimineele zaken*)), *subpoena op getuige* (art 18 (*civiele zaken*) and art 7 (*crimineele zaken*)), *acte van securiteit* (arts 35, 47), *lastbrief ter executie* (art 43), *kennisgeving van beslag* (art 46), the certificate in appeals (art 52) and the *lastbrief* for arrest (art 16 (*crimineele zaken*)). (Unless otherwise specified, all references to arts in this Law refer only to provisions dealing with civil cases.)

30 Art 5 contained the prescribed oath of office to be taken by the *griffier*.

31 Persons applying for admission as an attorney or advocate in the high court, had to pay stamp duty in the amount of £30 (s 7 of Law 2 of 1871). Once admitted, a practitioner had to obtain a licence, renewable annually at a cost of £15 (s 5 of Law 2 of 1871). In 1882 this rule was amended by a decision of the *Volksraad* dated 1882-06-27 (despite an extensive search, I was not able to obtain a copy of this decision): henceforth licences could be obtained for periods of a year (for £25), six months (for £18 15s) or three months (for £10 10s).

32 Art 1 (*civiele zaken*) read as follows: "*Niemand zal geregtigd zijn als procureur of agent voor eene partij optredende, eenige betaling te eischen als zoodanig volgens tarief, dan dezulken, die behoorlijk geadmitteerd zullen zijn, hetzij als procureurs voor de Hoogere Geregtshoven of als agenten voor de mindere*." (The reference to the claim for payment according to tariff was omitted by an amended provision (art 216) accepted by a resolution of the *Volksraad* dated 1876-06-14.) It seems this prohibition applied only to legal representation in civil cases as there was no corresponding article in the section dealing with procedures in criminal cases. This further correlates with Law 2 of 1871 in terms of which tariffs charged by attorneys and law agents were regulated only with regard to civil matters; the costs in criminal matters could be determined by agreement between the attorney or law agent and his client (see n 113 *infra*). Regarding law agents, see n 76 *infra*.

33 Art 1. The stamp duty payable at admission was £12 (s 7 of Law 2 of 1871). Licences expired on 31 Dec and had to be renewed annually at a cost of £10 (s 5 of Law 2 of 1871).

34 See par 2 3 *infra*.

35 Art 2. This article also specified the procedure to be followed before the granting of a licence.

On 18 May 1877, after the annexation of the *ZAR* by Britain,[36] a proclamation was promulgated by the new administrator of the colony, Sir Theophilus Shepstone. This proclamation met with the approval of the press[37] and dealt with aspects of the administration of justice with particular regard to matters involving the high court. In addition to, among others, the establishment of the said court,[38] provision for the appointment of one judge,[39] one *meester en griffier* and one *baljuw*,[40] as well as the seat[41] and jurisdiction[42] of the court, the proclamation specifically dealt with the admission of lawyers. All *advokaten* (advocates), *procureurs* (attorneys), *notarissen publiek* (notaries) and *ontwerpers van acten* (conveyancers) were from that time approved, registered and admitted by the high court.[43] Persons who had been practising as advocates and attorneys before the promulgation of this proclamation could be admitted as such by the high court.[44] It was also possible for the following persons to be admitted to practice: persons who had been admitted as members of the bar in the United Kingdom, or in the colonies of de *Kaap de Goede Hoop*[45] or Natal and who had not been refused admission or become incompetent[46] could be admitted as advocates; persons who had practised as attorneys or solicitors at the *Griffie Hoven* at Westminster or Dublin, or in the ecclesiastical courts in

36 Britain annexed the *ZAR* by a proclamation issued on 1877-04-12: as publ in Eybers 448ff Doc no 198. See also the *Gazette Extraordinary* (*ZAR*) of 1877-04-12.

37 *De Volksstem* (1877-05-23) "The High Court – Official changes". However, a few weeks later, the same newspaper was quick to point out some of the shortcomings of the proclamation (see *De Volksstem* (1877-06-06) "Het Hoog Geregtshof" and (1877-06-13) "Andermaal het Hooge Hof").

38 Art 1 of the Proc (see n 36 *supra*).

39 Art 2. JG Kotzé was appointed as the first judge of the high court of the *ZAR* in 1877 by Sir Theophilus Shepstone. In 1881 he was appointed as Chief Justice and served in that capacity until his dismissal by Pres Kruger on 1898-02-16 as a consequence of the constitutional crisis. Much has been written about the constitutional crisis, but due to space constraints, this will not be discussed here. For more on this topic, see Kew *John Gilbert Kotzé and the Chief Justiceship of the Transvaal, 1877-1881* (MA dissertation 1979 UNISA) *passim*; Hahlo & Kahn 107-110; *Paul Kruger and the Transvaal Judiciary* Vigilance Papers 3 (1900) *passim*.

40 Art 8.

41 Art 3.

42 Arts 4 and 5. Art 4 excluded jurisdiction in disputes between *inboorlingen*, while art 5 determined jurisdiction in all appeals and reviews from the lower courts.

43 Art 9.

44 Art 10.

45 In the Cape, admission to the legal profession at that time was regulated by Act 12 of 1858 (Cape). Advocates had to obtain a certificate of merit, as well as a certificate of the higher class in law and jurisprudence (s 2 Act 12 of 1858). From 1873 it was also possible to gain admission by acquiring a Bachelor of Law degree from the newly established University at the Cape of Good Hope (s 20 Act 16 of 1873 (Cape)). For a critical analysis of the quality of the training involved for this degree, see Pont "Die opleiding van die juris in Suid-Afrika" 1961 *Acta Juridica* 68-70, 73-75.

46 "*[E]n die niet afgewezen of op eene andere wijze onbevoegd zijn geworden …*"

England or Ireland, or were members of The Society of Writers to Her Majesty's Signet in Scotland[47] or attorneys of the high courts of the Cape[48] or Natal and who had never been struck from the roll of any of these courts or suspended from practice could be admitted as attorneys; persons who were admitted to practise as notaries or conveyancers in the colonies of the Cape[49] or Natal and who had not been suspended or become incompetent[50] could be admitted as notaries or conveyancers respectively.[51] The rules for admission were the same as those applicable at the Cape in 1876.[52] These stipulations meant that thenceforth all persons wishing to be admitted as advocates or attorneys had to have been admitted as such elsewhere and therefore had to have obtained the relevant required legal training. Furthermore, members of the legal profession could then be suspended or have their privileges revoked by the high court if necessary.[53]

Four years later, soon after the British annexation came to an end,[54] the new government issued a proclamation confirming that all members of the legal profession who had been practising as such at the time of the proclamation, could continue to practise provided that they take a

47 For more on the history of the Society, see Robinson, Fergus & Gordon *European Legal History Sources and Institutions* (1994) 240; Society of Writers to H.M. Signet (Great Britain) *A History of the Society of Writers to Her Majesty's Signet: With a List of the Members of the Society from 1595 to 1890 and an Abstract of the Minutes* (1890) ix-lxv [hereafter referred to as Society of Writers]; as well as the official website of The Society of Writers to Her Majesty's Signet available at http://www.thewssociety.co.uk/index.asp?tm=14 (accessed 2010-11-24). This Society developed by association with the King's Secretary through their duty of drafting official documents and applying thereupon the royal private seal (Signet) of the early Scottish Kings. The clerks of the Secretary's office became known as "writares to the signet" (Society of Writers xvii). Although the first use of the Signet was recorded in 1369, the Society was officially established only in 1594. In addition to their work in the Secretary's office, they also acted as clerks of court and were closely linked to the College of Justice (*idem* xvii-xviii). To become a member of the Society, a person had to have some knowledge of business matters, the law and conveyancing, Latin as well as "a mastery of the art of penmanship" (*idem* xvii). An apprenticeship and passing an examination were also requirements (*idem* xlvi, xxv).

48 Attorneys had to obtain a certificate of merit and serve articles for three consecutive years (s 3 of Act 12 of 1858 (Cape)).

49 The admission of notaries in the Cape was regulated by ss 4 and 5 Act 12 of 1858 (Cape).

50 "… *en die niet geschorst of op andere wijze onbevoegd zijn geworden*."

51 Art 9.

52 *Ibid*. Regarding the admission to the legal profession in the Cape, see nn 45, 48 and 49 *supra*.

53 Art 11.

54 In terms of The Convention of Pretoria, dated 1881-08-03 (publ in Eybers 455-463 Doc no 200), Britain granted the Transvaal "complete self-government, subject to the suzerainty of Her Majesty" and certain reservations and limitations. Proc 1881-08-08 (as publ in Eybers 463-464 Doc no 201; also publ in Jeppe (ed) *De Locale Wetten der Zuid Afrikaansche Republiek 1849-1885* (rev Kotzé 1887) 1010) mentioned 1881-08-08 as the date that independence was regained.

prescribed oath.[55] They were still subject to suspension or revocation of privileges by the high court should "een wettelijk oorzaak" exist.[56] This applied to advocates, attorneys, notaries and conveyancers.

In accordance with Proclamation 14 of 1892, attorneys or solicitors of any of the courts of record in London or Dublin, Writers to Her Majesty's Signet or law agents[57] admitted to practise in the Supreme Courts in Scotland, or attorneys admitted to practise in the Cape could be admitted to practise in the *ZAR* provided that no order of suspension applied to any of them.[58]

For admission as an attorney, notary and conveyancer, the High Court Rules of 1887[59] required successful completion of the second-class examination in law and articles of three consecutive years.[60] To be admitted as an advocate, a person had to pass the first-class examination in law. Persons who had been admitted to the Bar in the Cape, or who had qualified as an advocate at one of the *hoogescholen* (or universities) in the Netherlands could be granted admission to practise as an advocate in the *ZAR*. All other persons who had received their legal training abroad had to pass a supplementary examination. Furthermore, a qualified advocate could be permitted to practise as an attorney, although not in a dual capacity.[61]

55 Art 6 Proc of 1881-08-09 *Staats-Courant der ZA Republiek* of 1881-08-18 (publ in Jeppe 1011-1013). This proclamation was ratified, confirmed and added to by s 1 Act 3 of 1883 which dealt with the administration of justice and the proper composition of the *hoog geregtshof* and the circuit courts.

56 Art 7 Proc of 1881-08-09.

57 In 1902 the secretary of the Incorporated Society of Law Agents in Scotland, JW Barty, complained to the Undersecretary of State for Colonies regarding the inconvenience caused by the related formalities in this regard. Law agents admitted in Scotland, and who had not signed the roll of the Supreme Court in Scotland, were required to return to Edinburgh in person to pay stamp duty of £30 and sign the roll: see TAB [refers to the Pretoria Archives Repository] GOV Vol 22 GEN 614/02 3-4, letter dated 1902-07-26 enclosed in despatch from J Chamberlain to Milner, 1902-08-12.

58 S 11 Proc 14 of 1892.

59 Proc of 1887-08-29 *Staats Courant der ZAR* of 1887-09-14 *Bijvoegsel* [hereafter referred to as the High Court Rules 1887].

60 S 75 High Court Rules 1887. The articles could be served with a practising attorney, notary or conveyancer. Alternatively, the person could have served as clerk to the State Attorney or one of the judges of the high court, or as the registrar or assistant-registrar.

61 S 75 High Court Rules 1887.

The High Court Rules of 1899[62] also contained requirements regarding admission. Advocates had to obtain a certificate of the first class in law from the board of examiners.[63] Advocates who had been admitted in foreign jurisdictions, were no longer admitted at random,[64] but had to pass an examination in subjects determined by the court. As before, attorneys (and notaries)[65] had to obtain a relevant certificate[66] from the board as well as complete articles for a period of three successive years.[67] Although conveyancers, too, had to obtain a certificate from the board, they were not required to do articles.[68] Persons who had been admitted in foreign jurisdictions as attorneys, notaries or conveyancers had to pass a supplementary examination and attorneys and notaries had to serve the required period of articles.[69] Such persons could further only be admitted if the requirements for admission in the foreign jurisdiction were the same or "more favourable" than in the *ZAR*.[70] All advocates, attorneys, notaries and conveyancers had to take a prescribed oath upon admission.[71] Interestingly, although women could become advocates, they were barred from the professions of attorneys, notaries and conveyancers.[72] Lastly, although the 1899 High

62 Rules and Regulations (1899) of the High Court of the South African Republic (hereinafter referred to as the High Court Rules 1899)(publ in Barber, Macfayden & Findlay *The Statute Law of the Transvaal* (1901) 1118-1154). Regulations for the lower courts were promulgated as Law 11 of 1892. S 9 Law 11 of 1892 stipulated that an advocate was allowed to appear in the lower courts only when instructed to that effect by an admitted attorney or law agent. S 101 also provided that a law agent was not allowed to appear in the lower courts without a certificate proving he had passed the necessary examinations.

63 For more on the board of examiners, see par 2 3 *infra*.

64 S 102 High Court Rules 1899.

65 S 103(b) High Court Rules 1899. A notary could only serve articles with a practising attorney. A person already admitted as an attorney only had to serve articles of one year before applying for admission as a notary.

66 Although the provision did not explicitly state which certificate, it most probably referred to a certificate of the second class in law.

67 S 103(a) High Court Rules 1899. The articles could be served as a clerk or pupil with a practicing attorney (in which case the contract had to be registered at the high court and with the Law Society), or as a clerk of the State Attorney, or as a clerk to a judge of the high court, or as registrar or assistant registrar, or as taxing officer.

68 S 103(c) High Court Rules 1899.

69 S 103(d) High Court Rules 1899.

70 *Ibid*.

71 S 107 High Court Rules 1899.

72 See ss 102, 103(a), (b) & (c) High Court Rules 1899. Although this discrepancy is interesting, it was probably merely an oversight of the Legislature, especially since advocates were allowed to be admitted as attorneys (s 104 of the 1899 Rules). Furthermore, there were no known female advocates at that time. The first challenge to the all male-rule was the case of *Schlesing v Incorporated Law Society* 1909 TS 363, in which the female applicant applied for admission as an attorney (and not an advocate). From the comments by the court in its judgement, it is clear that at that time, ten years after the promulgation of the 1899 High Court Rules, the *ZAR* legal fraternity still viewed the profession as exclusive to males. It is therefore unthinkable that the High Court Rules 1899 could have intended to

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Court Rules acknowledged law agents,[73] it did not deal with their admission requirements since they did not have right of appearance in the high court.

2 2 Dual Practice

It should be borne in mind that until 1877, dual practice was permitted in the *ZAR*. This meant that attorneys could perform the duties of advocates and *vice versa*.[74] As mentioned before,[75] a third, lower branch of the profession consisted of law agents.[76] Kotzé CJ himself was very critical of the dual practice system,[77] despite opposition from the legal profession[78] and the press.[79] Probably due to his insistence it was

open the advocacy profession to females. Women were only allowed to be admitted as legal practitioners from 1923 (Act 7 of 1923). Regarding gender stereotyping by the courts in this regard, see Wildenboer "Through rose coloured glasses: gender stereotyping in the South African courts" 2008 1 *Speculum Juris* 32-35.

73 S 110a High Court Rules 1899 only mentioned law agents regarding the exceptional circumstances in which an attorney could share his fees for work done in the high court with a person who was not a qualified and practising attorney.

74 Kotzé 1919 *SALJ* 134. For a legal historical overview of the divided legal profession, alternatively dual practice, in South Africa, see Wildenboer "The origins of the division of the legal profession in South Africa: A brief overview" 2010 2 *Fundamina* 199-225.

75 See nn 32 and 33 *supra*.

76 Law agents were only permitted to appear in the lower courts and had no *locus standi* in the high court: Kotzé 1919 *SALJ* 134. After 1877 they had to pass an examination known as a third class certificate in law: see Kotzé 1919 *SALJ* 138; see also nn 33-35 *supra*, as well as n 91 *infra*.

77 Kotzé Vol 1 422-424; *Ex parte Auret* (1888) 2 SAR 228 where Kotzé CJ stated that "it is undesirable that a practitioner should constantly be changing from an advocate to an attorney and *vice versâ*" (229). He then continued by instituting a new rule which required a minimum of two terms lapsing between having one's name removed from one roll and applying to be admitted on the other roll (*ibid*). See also Van der Westhuizen & Van der Merwe 1977 *De Jure* 245.

78 In separate, albeit similar letters dated Jan 1878, two members of the legal profession addressed the government on the subject of separating the office of attorney from that of advocate. SJ Meintjes, signing his letter "Attorney" (TAB SS Vol 262 R220/78, letter to the Government Secretary Transvaal dated 1878-01-22) and JC Preller, signing his letter "Adv. Atty" (TAB SS Vol 263 R237/78: although the letter is undated, a pencil inscription on the original document stated that it was "Recv Jan 23". Interestingly, these letters show an almost word-for-word similarity which gives me reason to believe that both letters were written and delivered, if not on the same date, then within a few days of each other.) refer to the last session of the high court where the judge (Kotzé) indicated that he was drafting new rules of court in this regard. They then pointed out, first, that the judge himself had said, in the case of *O'Leary v White*, that the dual practice system "worked well" in Natal because it was "less expensive to the community" and, secondly, that their privilege to practise as both attorney and advocate, was guaranteed in terms of the Annexation Proclamation and confirmed by a certificate from the high court when readmitted to practise as such. They did, however, acknowledge that at a later stage (30 to 35 years from then) it might be "advisable" to reconsider the dual practice system.

79 *De Volksstem* (1878-01-01) "Regterlijk".

decreed in 1877 that the legal profession was to be divided and that admission to one branch would prevent admission to the other, although persons who had been permitted to practise in both branches before that date could still continue to do so.[80] Even this concession was later retracted by the 1884 High Court Rules[81] which prohibited a person from practising in the dual capacity of an advocate and an attorney. From that date the *ZAR* had a truly divided legal profession. Nevertheless, a qualified advocate could be admitted as an attorney on the condition that he had not practised as an advocate in the six months prior to his application.[82]

Although there were very specific requirements for admission to the profession, it said little about the actual legal knowledge of practitioners. The next question therefore concerns the extent of the legal knowledge expected of them.

2 3 The Board of Examiners[83]

A major change that affected the qualifications of legal professionals was implemented in 1878. Earlier, a board of examiners responsible for testing potential legal practitioners consisted of four members, namely three local attorneys and the chairman, Mr NJR Swart.[84] Mr Swart had no qualifications and the other members of the board were locally qualified.[85] Moreover, the fact that Dr EJP Jorissen, a theologian with no legal knowledge, was able to pass this examination after a mere three months of study, casts some doubt on the standard of the examination.[86]

80 Art 9, 10 Proc of 1877-05-18 publ in Jeppe 703-707. See also Van der Westhuizen & Van der Merwe 1977 *De Jure* 245.

81 S 75 Proc *Staatscourant ZAR* of 1884-02-21 [hereafter referred to as the High Court Rules 1884]. This provision was repeated in subsequent amendments: see s 75 High Court Rules 1887; s 104 High Court Rules 1899.

82 S 104 High Court Rules 1899.

83 The official name of the board was the "Board of Examiners in Law and Jurisprudence" (see s 1 Rules published as GN 76/1878 *Transvaal GG* of 1878-06-04). However, for purposes of this article, it will merely be referred to as the "board of examiners".

84 Nicolaas Jacob Reinier Swart was a theologian before accepting the position of government secretary of the *ZAR* on 1871-11-08. He also acted as State Attorney from Oct 1875 to Jun 1876. For more on the life and career of Swart, see Spoelstra *sv* "Swart, Nicolaas, Jacob Reinier" in *DSAB* Vol I (1968) 817-818. Interestingly, Swart himself was of the view that advocates should not be examined in the *ZAR*, but rather receive their training at a university (see the inter office note made by Swart on a letter from Kotzé to Swart in his capacity as Acting Secretary to Government dated 1877-08-01 – TAB SS Vol 242 R2835/77 24).

85 Kotzé Vol 1 528; Kew 87.

86 Van der Westhuizen & Van der Merwe 1977 *De Jure* 259 notes that Jorissen had privately studied the works of Van Leeuwen, Van der Linden and Grotius before passing the required examination on 1876-05-31 (see also Kotzé Vol 1 528). See also Jorissen *Transvaalse Herinneringen 1876-1896* (1897) 8 for his personal memories of that examination. See also Kotzé *Memoirs and*

continued on next page

Justice Kotzé found the lack of legal training intolerable as it ruined his ideal of a trained and knowledgeable legal profession. In response to his request,[87] the members of the board would in future include the judge of the high court[88] and the Attorney-General[89] in their official capacities, as well as two advocates of the high court,[90] to be nominated by

Reminiscences Vol 2 (1949) (hereinafter Kotzé Vol 2) 114-115 who described the examination in the local statute law as "an easy matter" and mentioned that the examination itself was conducted in Dutch to test the language abilities of the candidates.

87 TAB SS Vol 242 R2835/77 24-27, letter by JG Kotzé to the Acting Secretary to Government dated 1877-08-01. This letter contained preliminary regulations drafted by Kotzé which addressed issues such as the composition of the board, the regularity of examinations, the three classes of certificates and the contents to be prescribed as study material for each certificate. See also Kew 87 n 49.

88 At that time, Kotzé himself.

89 At that time, EJP Jorissen. Ironically, Jorissen also had no legal qualifications (Kotzé Vol 1 526-528; see also n 86 *supra*. For a discussion of Kotzé's role in exposing Jorrisen's lack of insight into legal matters, as well as other factors contributing to the subsequent dismissal of Jorissen, see Kew 79-83). Jorissen had received training as a theologian in the Netherlands and was appointed as State Attorney on 1876-07-09 at the behest of Pres Burgers (Jorissen 7-10; Ploeger *sv* "Jorissen, Eduard Johan Pieter" in *DSAB* Vol II (1972) 353). On 1878-10-01 he was succeeded by CG Maasdorp (Kew 83), after which Jorissen remained in practice as a dual capacity lawyer (Kotzé Vol 1 537). According to Kotzé, Jorissen's lack of legal training did not prevent him from earning £600 annually as Attorney-General of the *ZAR* before the British annexation (Kotzé Vol 1 415). However, in 1883 when the salary was raised to £1000 per year, it was also stipulated that the State Attorney had to have the required qualifications (VRR 1883-07-04, publ in Jeppe 1216). Jorissen, despite his protests, subsequently lost his position (Kahn "The history of the administration of justice in the South African Republic" 1958 *SALJ* 407; Jorissen 129-130. For a description of the duties of the Attorney-General at that time, see Scott in Mellett, Scott & Van Warmelo 97). In 1890, however, he was appointed as judge of the high court (Ploeger 355).

90 HWA Cooper and SJ Meintjes were the first to be appointed (GN 79/1878 *Transvaal GG* of 1878-06-18; Kew 88 n 51). Both these appointments were made on the recommendation of Kotzé with the purpose of involving, and thereby acquiring the cooperation of, the existing profession (Kew 88. See also TAB SS Vol 285 R1926/78 128-129 for Kotzé's letter to Osborne dated 1878-06-10 where he writes: "Again altogether to pass over the old boys will not do…" and that an appointment should "show the old practitioners that they are not forgotten"). Interestingly, Meintjes had been a member of the board of examiners a few years earlier as well and had resigned from that position on 1869-08-21 (TAB SS Vol 112 R763/69 85). The reason given for his resignation concerned Meintjes' confession of inadequacy in performing his duties. However, despite his own reservations, he was later reappointed since his name appears again in that capacity in an official notice dated 1871-12-16 (TAB SS Vol 112 R326/71 257). Also interesting is the fact that Meintjes himself had no formal legal training. He settled in Pretoria after a reward of £50 was offered by the Cape government in June 1864 for his capture. He had previously left Graaff-Reinet under a cloud when some businesses suffered bankruptcy, allegedly as a result of his actions. However, since he had been declared insolvent earlier in 1858, his creditors never succeeded in recouping their losses from him. For more information on SJ Meintjes' life, see Thornhill *sv* "Meintjes, Stephanus Jacobus" in *DSAB* Vol III (1977) 594-595.

government. Also, three categories of certificates to be awarded to successful candidates were identified and the syllabus for each published.[91] From that time onwards, advocates had to obtain a first-class certificate;[92] attorneys, notaries and conveyancers a second-class certificate; and law agents a third-class certificate.[93] Examinations could be taken twice annually[94] and operated on a points system. For example, one Max Fleischack was found worthy of admission as a law agent during the examination held on 31 March 1885 as he was awarded 384 points out of a maximum of 600 for his knowledge of Van der Linden, and 359 points out of a maximum of 600 for his knowledge of the local legislation.[95] As a result, he received a third-class certificate.[96]

91 GN 76/1878 *Transvaal GG* of 1878-06-04 and 1878-06-11. Agents were examined on the local laws and on Van der Linden's Laws of Holland. Attorneys, notaries and conveyancers were examined on the same, as well as Roman law, English law and notarial practice. Advocates were examined on jurisprudence (Austin and Maine), Roman law (the Institutes, as well as parts of the Digest), the local laws, Van der Linden, Grotius, Van der Keessel, and English law (law of contracts, torts, evidence, criminal law, equity). Amended syllabi were published in 1887 (GN 229 *Transvaal GG* of 1887-09-07 *Bijvoegsel*) [hereafter referred to as the Examination rules 1887]. Although some amendments had been made, the basic structure of the syllabi remained the same. In terms of the Examination Rules 1887, advocates were now additionally expected to have knowledge of the works of Voet and Van Leeuwen, and to have studied Dutch criminal law. Likewise, attorneys, notaries and conveyancers were expected to study Grotius, Van Leeuwen, Van der Keessel, Pothier and the rules of the high and lower courts.

92 See also Proc of 1895-05-31 (publ in Barber, Macfadyen & Findlay 722-723).

93 See also Kew 87.

94 Report by the *Commissie van Examinatoren in de Rechtsgeleerdheid* to the Government Secretary dated 1858-04-02 (TAB SS Vol 1051 R1678/85 208); see also the notice of such an examination: TAB SS Vol 1184 R1018/86 117. S 2 Law 16 of 1896 provided that examinations in law and jurisprudence would be held on the first Tuesday in the months of April and October. Examinations were taken between 09h00 and 12h00, and between 14h00 and 17h00 (s 6 Supplement to Law 6 of 1895, publ in Barber, Macfadyen & Findlay 599-603).

95 TAB SS Vol 1051 R1678/85 208. From the same document it appears that a candidate only passed the examination if he obtained a minimum of 300 points or more in each section of the examination. It is unclear whether this points system was used before the changes made in 1878. However, in two separate earlier documents of the board of examiners, no mention was made of points earned by the successful candidates, nor of the subjects covered in the examination. In each document it was merely stated that the candidate concerned had sufficient knowledge to practise as an attorney (the candidate in question was William Emil Hollard: TAB SS Vol 132 R326/71 257 – for more on Hollard, see the text to n 127*ff*) or had completed "een voldoend examen" (the candidate in question was GA Roth: TAB SS Vol 211 R1797/76 301).

96 TAB SS Vol 1051 R1678/85 210. A possible relation, Albert Reinhold Fleischack, passed the examination as a conveyancer a year later. However, the report of the examination board did not state the points earned by this candidate (TAB SS Vol 1197 R1553/86 148).

In 1887 additional requirements were set.[97] Candidates wishing to take one of the three examinations in law first had to obtain other basic certificates.[98] Also, candidates that had received their training abroad could be required to sit for a supplementary examination.[99] Examinations were taken orally and in writing.[100] The fees payable for each examination were also stipulated.[101]

Some eight years later it was determined[102] that the requirements for examinations had to correspond to those of neighbouring states and colonies in South Africa to enable the mutual recognition of diplomas and degrees.[103] Further, the syllabi for each certificate were once again published[104] and a separate examination for conveyancers was introduced.[105] Candidates who were caught making use of "unfair aids" during the examination could be prohibited from taking examinations for a period, or ever again.[106]

It is apparent then that during the early years of the *ZAR*, qualifications and training were not considered a prerequisite for entrance into the legal profession. Instead, measures were put in place to exclude unwanted persons from the profession, namely an undefined "ability" as well as objective proof of White Afrikaner morality in the form of

97 See n 91 *supra*.

98 S 11 Examination rules 1887. Candidates of the third-class examination first had to have obtained a third-class teacher's certificate, alternatively have passed satisfactorily in certain subjects. Likewise, candidates of the second-class examination first had to have obtained a first-class teacher's certificate, alternatively have passed satisfactorily in certain subjects. Candidates of the first-class examination first had to have passed an examination on literature and science, which included study of languages (Dutch, English, Latin as well as a choice between Greek, French or German), history, accounting, mathematics and chemistry. With the exception of a few minor changes, these requirements remained mostly the same with the promulgation of new provisions in 1895: see s 14 Supplement to Law 6 of 1895 (publ in Barber, Macfadyen & Findlay 599-603) [hereafter referred to as the Examination rules 1895].

99 S 13 Examination rules 1887. This was reiterated by s 16 Examination rules 1895. In *Ex parte A Morice* (1895) 5 Off Rep 264 an applicant who had been admitted as a solicitor by the Supreme Court of England and who had passed the separate examinations for attorneys and conveyancers, and had later been admitted as an attorney in the *ZAR*, received permission from the court to take the entrance examination for notaries.

100 S 3 Examination rules 1887; s 3 Examination rules 1895.

101 The fees varied between £8 and £15 per examination (s 7 Examination rules 1887 and s 9 Examination rules 1895).

102 Law 6 of 1895.

103 S 8 Law 6 of 1895.

104 The various syllabi remained mostly unchanged. One change concerned the first-class examination which thenceforth consisted of two separate parts which had to be taken at least one year apart.

105 The required subject knowledge was the same as for the third-class examination, with additional knowledge of conveyancing practice.

106 S 7 Examination rules 1895. The corresponding provision (s 6) in the Examination rules 1887 merely mentioned the possible removal of the candidate's name from the examination list.

membership of the Dutch Reformed Church. Although this untenable position was addressed from 1877 onwards, persons who had been admitted under the old regime were unaffected and could continue to practice. As a result, the last two decades of the nineteenth century saw two groups emerge in the legal profession: the older practitioners with little or no formal training, and the new legally trained practitioners.

3 Overcharging

In response to a public request,[107] the first[108] official tariff of costs pertaining to legal practitioners was laid down by Law 2 of 1871. This Law regulated the fees that could be charged by attorneys in the high court,[109] distinguishing between *illiquide* and *liquide zaken*. The Law also regulated costs of law agents,[110] notaries[111] and transactions passed by the *registrateur van acten* or *landdrosts*.[112] In criminal matters, however, the fees could be determined by agreement between the attorney or law agent and his client and was therefore not regulated.[113] Notaries were required to submit their accounts for taxation.[114] In 1877 the Acting Attorney General requested the government that all fees payable in public offices be converted to stamp duty. Among the reasons for this request was that it would "be a safer way of collecting … the payment of fees".[115]

More than ten years later the Legislature deemed it necessary to promulgate more extensive provisions regarding tariffs of costs. Act 8 of

107 The request, however, dated back five years to 1866 and was addressed to the President and the Executive Council (Kahn "The history of the administration of justice in the South African Republic" 1958 *SALJ* 308).

108 See Van der Westhuizen & Van der Merwe 1977 *De Jure* 256 who mention, after such a request by the *landdrost* of Potchefstroom, a *Volksraadsbesluit* of 1839 fixing costs regarding *landdrost en heemraden*. However, this was ´n decision by the Natal *Volksraad*, and can therefore, strictly speaking, not be classified as *ZAR* legislation.

109 S 13 Law 2 of 1871. In terms of a decision of the *Volksraad* on 1873-06-11, the reference to practice in the high court was thenceforth omitted (see Jeppe 437 n 2). As a consequence, attorneys could then charge the same fees for work done in the high and lower courts.

110 S 14 Law 2 of 1871. S 15 provided for fees due regarding debt collection and operated on a sliding scale.

111 S 16 Law 2 of 1871.

112 S 7 Law 2 of 1871. The fees related to, among others, transactions regarding the transport of immovable property, the execution of estates as well as ante nuptial agreements. All fees were payable as stamp duty.

113 Ss 13 & 14 Law 2 of 1871. See also the resolution of the *Volksraad* of 1870-06-21 (Art 211) (publ in Barber, Macfadyen & Findlay 90) which stipulated that unless ordered otherwise by a court, costs in criminal cases had to be borne by Government.

114 S 16 Law 2 of 1871. The taxation was done by the *landdrost* of the region in which the notary resided.

115 TAB SS Vol 249 R3698/77 37. See also Haggard 109-110 who cited one of the reasons for the implementation of stamp duty as the large percentage of fees on taxed bills of costs payable to the Treasury which was still unpaid.

1883[116] contained detailed specifications regarding costs and from that time onwards fees were calculated per page.[117] The 1883 Act provided that if an attorney's bill of costs was taxed down by more than a quarter of the total amount of the bill, that attorney had to pay all the costs relating to the taxation, including the drafting of the bill, the attendance at the taxation master as well as the relevant stamp duty due.[118] Unlike the 1871 Law, the 1883 Act also specifically regulated the fees of advocates.[119] This suggests that overcharging had occurred on a regular enough basis to warrant state regulation of fees.

The 1887 High Court Rules made the taxation of all bills of costs (between party and party, and between attorney and client) compulsory. Non-compliance could result in the relevant attorney being suspended or struck from the roll.[120]

The regulation of bills of costs was further streamlined by Law 12 of 1899 which determined that all bills of costs in lawsuits in the high court and the lower courts had to be taxed.[121] The taxing master could then demand proof that the services claimed for in the bill, had indeed been rendered.[122] Furthermore, an advocate could no longer charge for more than five consultations per bill,[123] and, in the case of postponements of

116 Publ in Jeppe 1200-1209.

117 Eg, whereas in terms of Law 2 of 1871 an attorney could charge anything between 3s and 5s per letter, the same attorney could now charge 5s for the first page of every letter of demand (or other letters) and an additional 2s 6d for every following page. Act 8 of 1883 also required a minimum amount of words (75) per folio (see s 1 *Bijgaande regels voor het tarief voor procureurs* of Act 8 of 1883, publ in Jeppe 1201-1202).

118 S 2 *Bijgaande regels voor het tarief voor procureurs* of Act 8 of 1883, publ in Jeppe 1201-1202.

119 Eg, an advocate was entitled to charge £1 1s for each unopposed application, and £2 2s for each opposed application. Interestingly, Kotzé remembered that, during his time at the Cape Bar less than ten years earlier, junior counsel was allowed to charge five guineas when briefed for a trial (Kotzé Vol 1 175). It is not clear whether this fee was all inclusive or whether it was merely the allowed daily fee. He further mentioned that he earned less than £100 during his first year of practice and £160 during his second and that he had to do some freelance writing for the press to supplement his income (*ibid*). It is noticeable that the income he received as a freelance writer (£100 - £120 annually) was almost worth double what he then earned at the Bar.

120 S 86 High Court Rules 1887.

121 S 1 Law 12 of 1899. However, the taxing of all bills of costs for lawsuits in the lower courts had already been compulsory since 1892 (s 51 Law 11 of 1892). It appears as if this provision was not always followed as closely as it should have been, because by 1899 the legislator felt it necessary to add a penal clause: S 13 Law 12 of 1899 provided that an attorney or agent, practising in the lower courts, who received payment for a bill of costs without having it taxed, were to be suspended from practice or struck from the roll.

122 S 4 Law 12 of 1899.

123 In a bill of costs between party and party (s 7 Law 12 of 1899).

exceptions or appeals, could only charge for the term that an exception or appeal was on the roll for the first time.[124]

The taxation of bills of costs in legal disputes was first suggested[125] in 1877 by H Rider Haggard during his term as master and registrar of the high court. He deemed this necessary after it had become known that certain advocates and attorneys took to agreeing to each other's bills of costs which were then not sent for taxation. Not surprisingly, Haggard pointed out that such a practice was potentially very harmful to clients as this meant that the lawyers could charge what they wanted. He recalled[126] that one of the first bills of costs brought to him for taxation, was for an amount of around £600. He taxed it down by half.

State intervention to curb overcharging by legal professionals came as a welcome relief to the public of that time, especially the *Boers*, who were considered "extraordinarily litigious".[127]

4 Misconduct

Misconduct and unethical behaviour among members of the legal profession in the *ZAR* were not uncommon. Due to the constraints of this article, only a few interesting examples will be discussed.

William Emil Hollard[128] practised as an attorney during the 1870s and 1880s. Stories and rumours about Hollard's life abound, although most of these have not been proven conclusively for lack of documentary evidence. Apparently Hollard came from Danzig, West Prussia, where he had been a painter and a soldier. Without any apparent legal training, he

124 S 8 Law 12 of 1899.

125 In a letter to the Colonial Secretary dated 1877-12-05: TAB SS Vol 258 R4625/77 170-171.

126 Haggard 109. According to Haggard, the lawyers then appealed against his decision, but was only granted very little in addition to the amount allowed by himself.

127 "In those days the Boers were extraordinarily litigious; it was not infrequent for them to spend hundreds or even thousands of pounds over the question of the ownership of a piece of land that was worth little" (Haggard 109). *Contra* Juta *Reminiscences of the Western Circuit* (undated, Cape Town) 86: "It is sometimes said that the farmers of certain districts are a litigious class, but there does not seem to be any good ground for this statement." And at 88: "Though not litigious they are extremely tenacious of what they consider to be their rights." Juta then tried to illustrate this point with an example. He told of a certain farmer who had instituted legal action in the hope of regaining a mule worth £25 that he had previously bought for his son; in the end his legal costs were more than £300 (88-91). Arguably however, this example serves to illustrate precisely what Juta attempts to refute.

128 For more on Hollard, see Van Warmelo *sv* "Hollard, William Emil" in *DSAB* Vol IV (1981) 241-242; Roberts "The Bar in Pretoria" in *Pretoria (1855-1955)* (ed Engelbrecht)(1955) 173-194; Scott "*Weatherley v Weatherley: dramatis personae*" 1979 1 *Codicillus* 13.

was admitted as a law agent in 1870[129] and as an attorney in the following year.[130] He practiced in dual capacity and is considered to have been one of the founding members of the Pretoria Bar.[131] However, he was also a fugitive of the law on more than one occasion and was accused of crimes such as theft, prison-break, murder and fraud, although never convicted of any of them.[132] For example, in 1876 he was struck from the roll of attorneys and prohibited from acting as sworn translator or as conveyancer.[133] This was surely linked to the *lastbrief tot apprenhentie* for Hollard issued on the same date because of an alleged crime of *falsiteit en bedrog* allegedly committed on 20 March 1873.[134] Haggard most probably referred to him in his autobiography as one of the lawyers of the ZAR who "was reported to have committed a murder and to have fled from the arm of justice".[135] It is furthermore rumoured that Hollard once, during cross-examination, angered a witness in the famous divorce case of *Weatherley v Weatherley*[136] so much so that he was challenged to a duel.[137] Despite his lack of legal training and poor language skills,[138] he had a successful practice as partner in Hollard & Keet[139] and was able to afford one of the most expensive houses in Pretoria.[140]

Not only the practitioners, but also government officials were guilty of behaviour unbecoming to their positions, one of which was AJ Munnich[141] who was dismissed from his position as Attorney-General on

129 On 1870-04-06: GN 305 in *Staats Courant der Zuid-Afrikaansche Republiek* of 1870-04-12. On the same date he was also appointed as translator: GN 303 in *Staats Courant der Zuid-Afrikaansche Republiek* of 1870-04-12.

130 On 1877-07-20. The official documentation of the board of examiners stating that he had passed his attorneys' examination is dated 1871-03-16 (TAB SS Vol 132 R326/71 257). The document was signed by SJ Meintjes, JC Preller and M Clevens, who were most probably his examiners.

131 Roberts 180-182.

132 *Idem* 186 n 37.

133 On 1876-09-19: GN 272 in *Staatscourant Zuid-Afrikaansche Republiek* of 1876-09-20.

134 GN 271 in *Staatscourant Zuid-Afrikaansche Republiek* of 1876-09-20.

135 Haggard 108.

136 1879 (2) Kotzé 66.

137 Vlok "Glimpses of life in early Pretoria" in *Pretoria (1855-1955)* (ed Engelbrecht)(1955) 40; Kotzé Vol 1 513; Scott 1979 1 *Codicillus* 17. Duels had been declared illegal in terms of a GN of 23 Jul 1863 (publ in Jeppe 147), but this did not prevent Hollard from accepting the challenge (Kotzé Vol 1 513).

138 Roberts 187 n 40; Van Warmelo *sv* "Hollard, William Emil" in *DSAB* Vol IV (1981) 242. Kahn describes Hollard as one of the "weaker brethren of the 'old guard'" (Kahn "The history of the administration of justice in the South Africa Republic" 1959 *SALJ* 46).

139 Roberts 190.

140 Roodt-Coetzee "Die Republikeinse Pretoria: kultureel en sosiaal" in *Pretoria (1855-1955)* (ed Engelbrecht)(1955) 140-141.

141 There seems to be some confusion as to the spelling of Munnich's surname. The spelling used by scholars and in official documentation vary between "Munnich", "Munnick" and "Munnik". However, Munnich himself used the spelling of "Munnich" (see his letter to the Chairman and members of the *Volksraad* dated 1866-08-15 publ in Breytenbach *Suid-Afrikaanse*

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18 October 1866. Complaints[142] of dereliction of duty prompted an investigation which revealed that this had occurred on at least two occasions.[143] In addition, he had accepted a gift from an accused on trial in exchange for the withdrawal of charges. Notwithstanding, this did not mean the end of Munnich's legal career. In 1876 he was one of EJP Jorissen's examiners[144] and in 1877 he was offered a position as puisne judge by President Burgers.[145]

The bench itself doesn't have a spotless history. Justice Benedictus de Korte[146] had to resign his office as criminal law judge in 1896[147] after allegations of partiality and professional misconduct. The first allegations were made by the press two years earlier and new information continued to be published regularly after that. It was alleged that because of personal debt, De Korte had inappropriately involved himself with the administration of justice on more than one occasion, had dishonoured a cheque, had mortgaged his immovable property to two different persons and had failed to settle an account for official travel expenses in spite of receiving a travel allowance to that effect.[148] A special court, consisting of five members of the *Volksraad* and three members of the judiciary,[149] found De Korte not guilty of official misconduct but held that he had

Argiefstukke: Notule van die Volksraad van die Suid-Afrikaanse Republiek 1866-1867 Transvaal Part 6 (1956) (hereafter Breytenbach *SA Argiefstukke*) Annex 31 at 114). This will therefore be the spelling used for purposes of this article.

142 In a letter to the President and members of the Executive Council dated 1866-07-10, it was requested that Munnich immediately be suspended for the reason "dat hij volgens 's lands wetten zijn plicht niet betracht". The writers of the letter feared divine justice in that "de vloek der Voorzienigheid op land en volk" might affect everybody if Munnich was permitted to stay on in his position (TAB SS Vol 78 R679/66 146).

143 Notice of the State Secretary dated 1866-10-22 publ in Breytenbach *SA Argiefstukke* Annex 55 155-156.

144 Kotzé Vol 1 417.

145 Roberts 180. Munnich was not able to take up the judgeship because of the British annexation that followed shortly after.

146 For more about De Korte's life and career, see Van Warmelo *sv* "De Korte, Benedictus" in *DSAB* Vol IV (1981) 118-119.

147 His letter of resignation to Kotzé CJ is dated 1896-06-28 (TAB SS Vol 5425 R6146/96 133-134). *Contra* Van der Merwe "Skuld en skandaal in die hooggeregshof van die ZAR" 1979 *De Jure* 251 who dates the letter to two days earlier, namely 1896-06-26.

148 According to the charge-sheet, De Korte was officially charged with misconduct ("wangedrag") based on three grounds. The first ground concerned De Korte's acquisition of 100 shares of the company Eckstein & Co far below its market value; the second ground concerned two bills of exchange drawn by De Korte on Eckstein & Co, knowing that the company did not owe him any money and that the company did not have the funds to honour the second bill of exchange; the third ground concerned a payment made by Eckstein & Co to De Korte with the implication that this was done as an appreciation of De Korte's granting of an application by Eckstein & Co. See TAB SS Vol 5425 R6146/96 153.

149 Kotzé was the chairman of the special court. See TAB SS Vol 5425 R6146/96 116.

acted contrary to the dignity expected of a member of the bench.[150] It was this finding that prompted De Korte's letter of resignation. He then practised in a private capacity.[151]

The magistrate's clerk of Marthinuswesselstroom in the district Wakkerstroom, one J Vos, was dismissed from his position by the *Volksraad* after he was found to have acted improperly by illegally registering 120 farms.[152] Vos responded that he was unfairly dismissed and demanded to be reinstated.[153]

In 1892[154] a professional body, the *Orde van Procureurs en Notarissen in die Zuid-Afrikaansche Republiek* (hereafter referred to as the *Orde*), was established to regulate the attorneys' profession.[155]

150 The details and complications of the allegations are explained in Van der Merwe 1979 *De Jure* 242-251.

151 Anonymous "Editorial" 1896 *Cape LJ* 241.

152 Decision of the Executive Council dated 1866-08-29 and the letter to J Vos publ in Breytenbach *SA Argiefstukke* Annex 85 at 228. It is interesting that the letter dismissing Vos from his position was dated more than a month (1866-07-23) before the Council's decision. See also TAB SS Vol 78 R728/66 260-262 for a list of the mentioned farms.

153 Undated letter from J Vos. I was not able to find this document, but it is referred to in Breytenbach *SA Argiefstukke* xvii (w) as one of the documents that came under consideration by the *Volksraad* during 1866. Of interest is a letter from the office of the Attorney-General to the State President dated 1867-04-25, stating that there were not sufficient grounds for prosecution ("geene genoegzame gronden bestaan") (TAB SS Vol 78 R730/66 278).

154 Although rumours to that effect circulated as early as 1887 (Anonymous 1887 *Cape LJ* 120). An Incorporated Law Society for the Cape had already been established a few years earlier in terms of Act 27 of 1883 (Cape). In 1878 LP Ford, on behalf of the practicing members of the Bar of the High Court of the *ZAR*, wrote a letter to the Secretary to Government stating that it was their intention to establish themselves into a society such as the one in Natal (TAB SS Vol 260 R50/78 156). However, it is unclear whether this "society" was intended for advocates only, or for dual practitioners, since Natal followed the dual system of practice at that time (Wildenboer 2010 2 *Fundamina* 217-218). Although the *ZAR* followed the practice of a divided legal profession since 1877, practitioners who had been admitted before that date could still practice in dual capacity (see par 2 2 *supra*).

155 In terms of GN 371 of 1892-10-13 (*Staatscourant* of 1892-10-19) (publ in Van Niekerk *Die Prokureursorde van Transvaal Eeufees* (1992) 4-6). Van Niekerk dates the establishment of the *Orde* to 1892-10-19 (Van Niekerk 3). This original body was replaced by the Incorporated Law Society of the Transvaal in terms of s 1 of Proc 18 of 1902. However, three years earlier, the High Court Rules 1899 (see n 62 *supra*) already made use of the translated term, namely the "Incorporated Law Society" (ss 103(a), (b) and s 106 High Court Rules 1899). Similar to the 1899 High Court Rules (s 106), the Proc of 1902 required candidates applying for admission to practice at the high court, to give written notice thereof two weeks in advance to the Law Society (s 7). This requirement did not apply to practitioners who had already been admitted. It is submitted that the purpose of this provision was to extend the monitoring function of the Law Society so that it not only kept an eye on its existing members, but also on potential new members since the Society could screen the persons admitted to the profession.

Membership was compulsory.[156] However, it seems that not all the members of the profession were ecstatic about a regulatory body. This is evident from the case *Ingelyfde Orde van Procureurs en Notarissen in De Zuid Afrikaansche Republiek v Buskes & 45 Anderen*[157] in which the *Orde* claimed outstanding subscription fees from its members. At least one attorney, William Thomas Hyde Frost, countered that he did not owe the monies because he did not want to be a member of the *Orde*. Frost argued that he had been admitted to practice before the *Orde* was established, and that its *Reglement* therefore did not apply to him as it did not have retrospective effect. He furthermore stated that he did not want to be a member of the *Orde* because of its "peculiar apathy in protecting the interests of the profession"[158] and mentioned three reasons that, in his view, illustrated this apathy. All three these reasons concerned the profession's tolerance of the law agents.[159] Lastly he complained that there were no privileges to being a member of the *Orde*, and that the promised law library had not yet materialised.[160] Despite these arguments, the court found in favour of the *Orde* and instructed the respondents to pay the outstanding moneys.[161]

From its inception, the *Orde* viewed high standards in training as crucial in the existence of the legal profession. Whereas the *Orde* at first had no input in the examinations set for attorneys and notaries by the board of examiners, it was decided on 17 May 1894 to request a higher standard of examinations for attorneys and notaries.[162] In addition, the *Orde* vigilantly guarded the dignity of the profession[163] and took swift action against any of its members whose behaviour was thought to bring disrepute to the profession. For example, in the case of *De Ingelyfde Orde van Procureurs en Notarischen in de ZAR vs PM Fitzgerald*,[164] the respondent was said to have acted contrary to the dignity and the duties of his profession.[165] The application was nevertheless dismissed.[166]

156 Art 2 *Reglement* of the *Orde* (publ in Van Niekerk 4-6) stated that all the admitted attorneys and notaries in the *ZAR* were *ipso jure* members of the *Orde*.

157 TAB ZTPD Vol 8/601 Ref 10612/1899 237*ff*.

158 See Frost's letter to Edw. Mawby Esq. dated 1894-07-19: *idem* at 254.

159 His three reasons were first, that law agents, who could only appear in the lower courts, were allowed to brief counsel regarding both civil and criminal matters in the high court; second, that certain attorneys in Pretoria afforded some "facilities" and "allowance for work" to law agents; and third, that some law agents had attorneys in their employ and performed high court work in the names of those attorneys (*idem* at 254-255).

160 *Idem* at 255.

161 A few respondents were granted extension to oppose the application: see the handwritten judgement issued on 1898-12-12 (*idem* at 237).

162 Van Niekerk 6. On 1894-09-20 the board of examiners accepted a secrecy policy, to which the only outsider privy to this knowledge, was the secretary of the *Orde* (*ibid*). This further illustrates the involvement of the *Orde* with matters previously handled by the board of examiners alone.

163 See also ss 25 & 26 *Reglement* (n 156 *supra*).

164 TAB ZTPD Vol 8/384 Ref 6560/1893 347*ff*.

165 See the affidavit of Edward Rooth dated 1893-08-14 (*idem* at 351-352).

166 On 1893-11-06.

5 Conclusion

At the start of this article, two opposing views of the lawyers of the old *ZAR* were presented, namely that of Sir H Rider Haggard[167] and that of Chief Justice Kotzé.[168] Perhaps a little background information is appropriate to put these views into context. Despite his lack of legal training,[169] Haggard was appointed as master and registrar of the high court of the *ZAR* in 1877. He resigned a year later in May 1878.[170] In contrast, Sir John Gilbert Kotzé[171] was a trained lawyer[172] and had practised as an advocate[173] before being offered a position on the bench of the *ZAR*. His judicial career in the *ZAR* spanned from 1877 to 1898, seventeen years of which he held the position of Chief Justice.[174] Therefore, when considering these two opposing views, one should keep in mind that Kotzé spent considerably more time dealing with the lawyers of the *ZAR* than Haggard did. Secondly, it should be noted that Haggard has been accused, by none other than Kotzé himself, of distorting fiction with fact.[175] When weighing the opposing views against each other, it would seem that, from the outset, the scales are slightly tipped in favour of that of Kotzé.

Nevertheless, there seems to be some truth to the perception that the lawyers practising during the early years of the *ZAR* were unqualified. The first legislation prescribing at least some legal training was only promulgated in 1874.[176] Before that, specific religious affiliation and

167 See nn 3, 4, 5 *supra*.

168 See nn 6, 7 *supra*.

169 At a later stage, Haggard did read for law at Lincoln's Inn upon his return to England in 1881. However, at the time of his appointment as master and registrar of the high court of the ZAR, he did not have any legal training. For more on Haggard's life and career, see Goedhals *sv* "Haggard, *Sir* Henry Rider" in *DSAB* Vol I (1968) 340-341.

170 TAB SS Vol 341 R1777 218-221. In accepting the resignation, the Colonial Secretary's Office stated that it regretted losing the "services of an officer who has performed difficult duties so satisfactorily" (*idem* at 221).

171 Kotzé was baptised as Johannes Gysbert Kotzé, but chose to make use of the anglicised version, namely John Gilbert, throughout his life. See Hiemstra *sv* "Kotzé, Johannes Gysbert" in *DSAB* Vol I (1968) 458.

172 He completed the matriculation examination of the University of London, and in 1872 received the LLB degree, also from the University of London. He was called to the Bar of the Inner Temple in London on 1874-04-30 and was admitted as an advocate of the Cape Bar on 1874-08-18. See Hiemstra 458; Kotzé Vol 1 109, 112, 136, 156, 170.

173 At both the Cape Bar and that of the Eastern Districts Court (Hiemstra *sv* "Kotzé, Johannes Gysbert" in *DSAB* Vol I (1968) 458; Kotzé Vol 1 166-209).

174 Kotzé Vol 1 425, 702; Hiemstra *sv* "Kotzé, Johannes Gysbert" in *DSAB* Vol I (1968) 458-460. See also n 39 *supra*.

175 He wrote: "Those who knew Haggard recognized in him a man of honour and truth. But his was an extraordinary mind. He was emotional and much given to romancing. His imagination impelled him into a world of fancy which for the time had complete hold of his sense, and hence he described as fact what was mere fiction" (Kotzé Vol 1 488 n 1).

176 Hahlo & Kahn 234 agrees that the stricter regulation of the profession as well as the judiciary after 1877 improved the standards of "pleading and

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mere ability were considered sufficient qualifications for a would-be lawyer. By the end of the nineteenth century, however, admission to the legal profession was more strictly regulated and specific requirements for admission were applied.

Worse than the state of the legal profession, was the state of the bench (referring to the *landdrosts*) of that time.[177] Kotzé wrote that the *landdrosts* were all "laymen, frequently uneducated, and none of them had received any legal training".[178] He named a few individuals who, in his opinion, were "men of common sense and character",[179] but this clearly could not compensate for the lack of legal knowledge on the part of those supposed to administer justice.[180] Even worse was the fact mentioned that a few of these *landdrosts* were illiterate and as a result, the clerk or registrar of the court who prepared the judgement, often influenced the decision handed down by the court.[181]

With regard to the misconduct of legal professionals, the *ZAR* undoubtedly had its share of shysters and charlatans. However, this is

adjudication".

177 This dilemma was not limited to the *ZAR* only: for a criticism of this dilemma, see Pont 1961 *Acta Juridica* 65-66. Judicial duties were not the only responsibilities of *landdrosts* in the *ZAR*: these also included farm inspections, administration of schools, postal and traffic matters, as well as the collection of taxes. In fact, the first *landdrost* of Pretoria resigned after less than three years after being appointed, not only because of frustration with the lack of support from the government, but also because of health reasons. (For a description of the duties and hardships of the first *landdrost* of Pretoria, see Breytenbach "Andries Francois du Toit: sy aandeel in die Transvaalse geskiedenis" 1942 2 *Argief-Jaarboek vir Suid-Afrikaanse Geskiedenis* 22.) This matter was considered serious enough to merit legislation relieving at least the *landdrost* of Pretoria of the duty of collecting taxes and other related duties (Law 9 of 1881).

178 Kotzé Vol 1 440; see also Kahn 1958 *SALJ* 309. This was partially a result of the lack of required legal training for *landdrosts* and *heemraden* in, for example, the 1858 Constitution (see n 20 *supra*). Hahlo & Kahn 235 notes that even after 1881, the bench, with a few exceptions, was "undistinguished" and appointments were made not necessarily as much on the grounds of career excellence, than on nepotism and favoritism. In addition, most judges were appointed at a relatively young age (see also Van der Westhuizen & Van der Merwe 1977 *De Jure* 246 n 59) and they did not remain on the bench for long, but left for other official posts or the lure of private practice.

179 Kotzé Vol 1 440. The incompetence and impartiality of *landdrosts* seems to have been an issue even as late as 1882 (see *De Volksstem* (1882-05-24); see also Van der Westhuizen & Van der Merwe 1977 *De Jure* 100).

180 Kahn 1958 *SALJ* 310 also ascribes the weak position of the bench at that time to lack of a statute book and law reports; see also Van der Westhuizen & Van der Merwe 1977 *De Jure* 99.

181 *Ibid*. Kotzé described an amusing incident in which a clerk of the court, presiding in the absence of the *landdrost*, after hearing arguments from counsel, dismissed them with the words "Ik versta er geen bliksem van" ("I do not understand a damn thing" (my translation)). When pressed about an order as to costs, he responded that they had to decide that amongst themselves, but that he definitely was not going to pay it (Kotzé Vol 1 441).

certainly true of all legal societies, both past and present.[182] Moreover, such cases were individually addressed in the *ZAR* and later a regulatory body was established to monitor potential as well as existing practitioners.

Notwithstanding, it should be borne in mind that the *ZAR* was a young and developing state. The administration of justice was still in its infancy and not a primary concern of the newly-appointed rulers. In general, there were other more immediate concerns that needed the attention of the state. It was probably for these reasons that any person with merely an interest in law was permitted to fulfil the functions of the early legal professionals.[183]

182 See eg *I* 4 13 11(10) which referred to infamous procurators; Anonymous "The brotherhood of the Bar" 1890 *Cape LJ* 148 who referred to the "black sheep" of the English Bar: "men whose sole aim and object in life is to secure advancement by any pitiful device within their reach."

183 See also Wildenboer 2010 2 *Fundamina* 224.

Orality in African customary- and Roman law of contract: a comparative perspective[1]

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OPSOMMING

Oraliteit in Afrika gewoonteregtelike- en romeinse kontraktereg: 'n Vergelykende beskouing

Suksesvolle hervorming van Afrika gewoontereg hang saam met ´n begrip van die historiese antesedente van die regstelsel. Antieke Romeinse reg met haar uiterste formalisme, rituele en simboliek bly 'n belangrike vertrekpunt om antieke gewoontereg te belig wat preliterêr van aard was. Die bestaande persepsie is dat Afrika gewoontreg, na analogie van die Romeinse reg, slegs reële kontrakte ken en dat aanspreeklikheid slegs volg op gedeeltelik of volle nakoming van verpligtinge van 'n party. Die geldigheid van herdie aanname asook bestaande interpretasies van ander geselekteerde aspekte van die kontrak in die Afrika gewoontereg word getoets by wyse van vergelyking met die *stipulatio* van die antieke Romeinse reg. Die analise geskied teen die agtergrond van oraliteit en die fokus is op die verhouding tussen woorde, bedoeling en kontraktuele aanspreeklikheid, konkretisering van verbale kommunikasie en seremonie en die rol van *fides*.

1 Introduction

African customary law is frequently scrutinised against the yardstick of the Constitution of the Republic of South Africa, 1996, with a view to its reform. But successful law reform is dependent on an understanding of the fundamental values of the legal system to be reformed and the true nature of its historical antecedents. This presents a particular problem for customary law. African culture was characteristically preliterate and there are no ancient written sources of customary law compiled by indigenous Africans themselves. The fact that existing knowledge of that law is mostly confined to interpretation by non-African jurists only exacerbates the difficulty in finding information on the true traditional African law.

The most basic information on customary law may be gleaned from non-legal materials on African culture. These include the texts of early

1 This is a much expanded version of a paper presented at at the 64th Session of the *Société Internationale "Fernand de Visscher" pour l'Histoire des Droits de l'Antiquité* on *"Communication et Publicité dans l'Antiquité: Profiles, Juridiques, Sociaux, économiques"*, held 2010-09-28 to 2010-10-02 in Barcelona, Spain. The paper was published in 2010 (4) *Studia Iurisprudentia* (*http://studia.law.ubbcluj.ro*). The paper is available at http://studia.law.ubbcluj.ro/articol.php?articolId = 366 (accessed on 2010-10-25).

travellers, some of which date from as early as the fifteenth century,[2] and anthropological and ethnological writings which started appearing from the mid-nineteenth century onwards. However, it is not an easy task to extricate information on customary laws and institutions from these sources since their principal focus was not substantive law. Importantly, though, they contain information on the traditional African law untainted by foreign extrapolations and preconceived Western ideas. Moreover, they prove that already as early as the fifteenth century, Southern African societies were socially and politically well-ordered and had established legal orders.

Other sources of law are colonial reports of commissions of enquiry and parliamentary committees. Although there was initially little interest in the laws and institutions of the indigenous populations in Southern Africa, colonial administrators soon realised that African customary law was tenacious and that it had become necessary to regulate the application of that law formally. Moreover, they had insufficient knowledge of it and this prompted them, from the 1830s onwards, to compile reports on customary law and the regulation of its application. These reports provide additional information on the law, especially those which deal exclusively with substantive law. The first book on South African customary law as such, appeared in 1858. It was Colonel Maclean's *Compendium of Kafir Laws and Customs* which was a compilation of various sources of the laws of the amaXhosa.[3] It took

2 Examples of such works, dealing with Southern Africa, are Olfert Dapper *Kaffrarie, of Lant der Hottentots* (1668), Willem ten Rhyne *Schediasma de Promontorio Bonae Spei* (1686) and Johannes Gulielmus de Grevenbroek *Gentis Africanae circa Promontorium Capitis Bona Spei Vulgo Hottentotten Nuncupatae Descriptio* (1695). These works were published in 1933 with translations and annotations by the Van Riebeeck Society in Cape Town as Schapera (ed) *The Early Cape Hottentots*. Also of interest is Ioannis Leonis Africani *De Totius Africae Descriptione, Libri IX* (1556). John Mensah Sarbah *Fanti Customary Laws* (1897) published in London, which deals with the customary laws of the Fanti and Akan tribes of the Gold Coast, is based on the works of travellers of the fifteenth, sixteenth and seventeenth centuries. It also contains judicial decisions on customary laws. The Hakluyt Society has issued numerous works by early travellers to and in Africa (especially the West Coast) which, with careful scrutiny, yield interesting information on customary laws. See, *A Description of the Coasts of East Africa and Malabar in the Beginning of the Sixteenth Century* by Duarte Barbosa (1514, tr Henry E J Stanley 1865) and *The Chronicle of the Discovery and Conquest of Guinea* by Gomes Eannes de Azurara (1540, tr Charles Raymond Beazley 1896); Willem Bosman *A new and accurate description of the coast of Guinea, divided into the Gold, the Slave, and the Ivory Coasts* (1700, tr 1705).

3 Colonel Maclean was Chief Commissioner in British Kaffraria. His *Compendium* consisted, among others, of papers of a certain Reverend Dugmore, initially published in 1846 and 1847 in *The Christian Watchman*; a letter from Maclean; notes of Warner, the Tambookie agent in British Kaffraria in 1856; and notes of Brownlee, Commissioner of the Gaika People. Brownlee was the Secretary of Native Affairs at the Cape and was actively involved in "Native Administration". He was later appointed as Gaika Commissioner in the Transkeian Territories. He spoke fluent Xhosa

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more than half a century before further works started appearing[4] and during the 1950s the School of Oriental and African Studies embarked upon the first comprehensive project on the restatement of African customary law in former British colonies.

In view of the dearth of legal sources compiled by indigenous Africans themselves, scientific analyses of African law are generally moulded in what is accepted as universally intelligible, or rather "Western" legal language. In turn, because there are superficial likenesses in the legal phenomena of most legal systems in the primitive and the early stages of their development, customary law has frequently been described by analogy to Roman law. Even though there is a common perception that African law has never progressed beyond a primitive stage,[5] early Roman law remains a useful point of reference, as it, too, had many features that scholars believed to be relics of the primitive point of its development. These include the extreme formalism, ritual, symbolism and the ubiquitous magic.[6] It is therefore not surprising that scholars have frequently turned to Roman law to elucidate customary law. This jurisprudential method unfortunately frequently led to the imposition of Roman legal rules on the traditional African law and consequently the attribution of questionable characteristic features to African legal relations and the law regulating them.

Some sixty years ago already, the Director of the School of Oriental and African Studies project on the restatement of African customary law, Professor Anthony Allott, warned that the traditional African law of contract was being re-interpreted by the western courts and was consequently rapidly being displaced by the imposed colonial law.[7] It is

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and authored various books and papers on African laws and customs, among others *Reminiscences of Kafir Life and History and Other Papers* (1896). His "Laws relative to religion and other customs" were taken up in *Maclean's Compendium.*

4 Seymour's *Native Law and Custom* was published by Juta & Co in Cape Town in 1911.

5 Menski *Comparative Law in a Global Context* (2006) 466.

6 See Diósdi *Contract in Roman Law. From the Twelve Tables to the Glossators* (1981) 42-43; Wasserstein & Fassberg "Form and formalism: A case study" 1983 *American Journal of Comparative Law* 627 627-630; Tuori "The magic of mancipatio" 2008 *RIDA* 499*ff*; Kaser *Das römische Privatrecht Vol 1* (1971) 39. MacCormack "Formalism, symbolism and magic in early Roman law" 1969 *Tijdschrift voor Rechtgeschiedenis* 439 445-446, referring to the anthropological works of Gluckman and Malinowski, avers that the lack of formalism in African law and culture illustrates its primitivity: "[I]ndeed ... the more primitive the legal system the less likely it is to be formalistic."

7 See Allott's "Introduction" which appears in all the African Law Project's publications in the *Restatement of African Law Series*. Examples of publications in this Series are: Cotran *Kenya: The Law of Marriage and Divorce* (1968) Vol I (Restatement of African Law: 1); Cotran *Kenya II: The Law of Succession* (1969) (Restatement of African Law: 2); Ibik *Malawi I: The Law of Marriage and Divorce* (1970) (Restatement of African Law: 3); Ibik *Malawi II: The Law of Land, Succession, Movable Property, Agreements and Civil Wrongs* (1971) (Restatement of African Law: 4).

indeed true that a reliance on a "non-African" framework to explain and interpret customary law threatens its continued existence and today, in South Africa only fractions of the true traditional African law form part of the official state law.

The prevailing perception is that by analogy with the Roman concept, customary law knows only real contracts, and that liability accordingly ensues only where one party has in fact partially or completely fulfilled his obligation.[8] In this article, the objective is to test the validity of this assumption and of existing interpretations of other selected aspects of African customary law of contract by way of a comparative analysis with ancient Roman law and by retracing available historical sources. It should be borne in mind that there was no "general model of a contract"[9] in African customary law and attempts to explain that law with reference to Roman should be approached with caution.

This analysis will be primed against the backdrop of one of the shared characteristic features of African customary and Roman law, namely the general emphasis on orality.[10] The focus will be on the best known verbal contract in Roman law, the *stipulatio*,[11] a contract which, significantly, has been referred to as a method of contracting rather than as a contract of a specific kind.[12]

The pre-eminence of orality in African culture is a well-established fact, and understandable, given its preliterate tradition. In Roman law, though, this feature is rather unexpected, bearing in mind that it developed, from early on, in a literate culture. In the fifth century BC, already, the Twelve Tables were inscribed on tablets. However, there are conflicting views on when exactly writing was first introduced in private

8 Gluckman *The Ideas in Barotse Jurisprudence* (1972) 177-179 describes a case adjudicated by a traditional court: A fisherman had paid in part for a net to be manufactured. Upon completion of the net, the King's steward forced the net maker to sell the net to the King. Although the court found against the fisherman, general opinion was that had one of the "judges" not been corrupt, the decision would have been in the fisherman's favour in terms of Barotse law; see generally Gluckman 177-182. See, Prinsloo & Vorster "Elements" in *Indigenous Contract in Bophuthatswana* (Centre for Indigenous Law)(1990) 6-7, 10-11; Whelpton *Inheemse Kontraktereg* (LLD thesis 1991 UNISA) 81-83.

9 Gluckman 176; see generally 175-176.

10 The emphasis on orality was not limited to these two ancient societies; see Kaser Vol 1 39*ff*, 230*ff*; Kaser *Das römische Privatrecht Vol 2* (1975) 73*ff*, on the shared characteristic features of formalism and orality in ancient societies.

11 Anecdotal evidence of this contract abounds in the literature: see, eg , Plautus *Bacch* 880-883; Cic *Rhet Her* 2 13-14 and *Ep Att* 16 11 7; *De Or* 2 100; *De Leg* 1 14; Quintillian *Inst* 4.2.6. See also generally on verbal contracts: Ulpianus *Inst* 3 15; D 45 1; Modestinus D 49 7; Kaser Vol 1 538-543.

12 Nicholas *An Introduction to Roman Law* (1962) 166 193; Diósdi 41; Harrill "The influence of Roman contract law on early baptismal formulae" Papers Presented at the Thirteenth International Conference on Patristic Studies, Oxford 1999 Belgium 2001 (35) *Studia Patristica* 277.

legal acts.[13] The Twelve Tables confirms that during the fifth century BC orality still dominated in private legal acts and that legal documents were not an essential component of the legal process in early Roman law. Hence, Table VI 1 states: "When a person makes bond and conveyance, according *as he specified with his tongue* so shall be the law."[14] By the end of the Roman Republic,[15] purely verbal contracts still existed, even though by that time legal documentation was firmly established in legal practice.

2 Words, Intent and Contractual Liability

The relationship between the objective verbal utterances, the subjective intention of the parties and contractual liability in the Roman *stipulatio* will be considered first and then I will consider the extent to which Roman-law principles could enlighten African customary contracts.

2 1 Roman Law

In Roman law, there was an inextricable link between form and the spoken word. Legal significance was attached to a verbal contract only if the words used to reach an agreement were cast in a specific form. Accordingly, liability ensued on the contract only if the parties conformed to prescribed ritualistic formal requirements.

Until the post-classical era, Romans drew no distinction between an external and an internal component in the verbal contract, that is, between the external declarations (*verba*) of the parties and their internal intentions (*voluntas*).[16] As a result, there was not necessarily a connection between the formal words uttered and the subjective will of the parties; the words could thus neither be regarded as a manifestation nor serve as proof of their intent. In fact, the intention of the parties in verbal contracts was of minor importance. The Romans were surprisingly indifferent to problems of evidence which were regarded as the domain of the judge, not the jurist. The contracting parties relied

13 See, eg, Kaser Vol 1 230-231; *contra* Schulz *History of Roman Legal Science* (1953) 25; Albrecht *A History of Roman Literature from Livius Andronicus to Boethius* (1997) 631; Meyer *Legitimacy and Law in the Roman World. Tabulae in Roman Belief and Practice* (2004) 36*ff*.

14 My emphasis. *Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita ius esto.* (Translation by the Yale Law School's Avalon Project at http://avalon.law.yale.edu/ancient/twelve_tables.asp (accessed 2010-08-31)). See further Meyer 37-43. By the second century BC Cato provided written forms for contracts for gathering and milling olives, sales of olives and grapes, lease of land for winter pasture and sale of increase of flock. Cato *de Agr* 144-147 149 150; Varro (first century AD) in *de re Rust* 2 2 5-6, 2 3 5, 2 4 5, 2 5 10-11, for example, gives ancient formulae for the guaranteed purchase and sale of, eg, sheep, goats, swine and cattle.

15 Cicero clearly distinguishes between written and unwritten law, and specifically refers to legal documentation in *mancipatio* and *stipulatio*: Cicero *ad Att* 12 17;16 11 7, *de Orat* 2 24; see too, Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* (1990) 71.

16 Zimmermann 563-565, 622, 626.

principally on *fides* as security.[17] It was only in post-classical law that the emphasis shifted to protection and that the formalities were aimed at securing proof in the event of litigation.[18]

The formal declarations manifested intent between the parties themselves and were not intended to communicate their real intention to the outside world. Watson[19] states that the function of these declarations was merely to show the parties themselves "that they intended to make a *contract*".

The formality, or the external ritual,[20] only served as judicial proof that the contract had been concluded.[21] It did not provide proof of the real intention of the parties, the object of the obligation, or whether one or both parties were obligated to perform in future.[22] The law gave consequence to and enforced the actual wording of the *stipulatio* without looking into the surrounding circumstances of the promise or undertaking. The *stipulatio* was thus enforceable in accordance with the wording even when the words did not reflect the intention of the promissor or had no connection with reality.[23]

In 66 BC, the introduction of the *exceptio doli* and then the *exceptio metus causa* enabled the judge to start taking cognisance, to a limited extent, of the surrounding circumstances in which the contract was concluded and so to contextualise it. That rendered the reason for its conclusion more relevant.[24] Nevertheless, it still did not alter the fact that

17 *Idem* 70, 89, 624-625.

18 Kaser Vol 1 39*f*, Vol 2 (n 10) 73*f*, indicates that in certain instances something additional was required to formal words to bring about public knowledge and to serve as evidence of the intention of the parties. Thus, in the acts *per aes et libram* and *confarreatio* witnessess were required and in others, the co-operation of the magistrates. The purpose of these actions was to express the content of the obligation, not to serve as protection in case of litigation as was the case in post-classical law.

19 Watson "Artificiality, reality and Roman contract law" 1989 *Tijdschrift voor Rechtsgeschiedenis* 151.

20 Amos *The History and Principles of the Civil Law of Rome* (1883) 203 refers to it as an "outward ritual".

21 Amos 202-204; 215; 219.

22 *Idem* 202; De Zulueta *The Institutes of Gaius* Part II *Commentary* 151-152; Zimmermann 70 83-84; Wasserstein & Fassberg 1983 *American Journal of Comparative Law* 627.

23 Harrill 276*ff* states that validity of the legal act came from its form not from *consensus*. *Cf*, too, Amos 202, Watson 1989 *Tijdschrift voor Rechtsgeschiedenis* 151 155-156; Kleyn "The reality of real contracts" 1995 *THRHR* 16 16-17. This is in line with Watson's view (at 147-148) that law is an artificial creation of legislators, judges and jurists which gives a distorted view of social reality.

24 See, eg, G 4 116a: Thus, if I have taken a stipulary promise from you of a sum of money, on the understanding that I will advance you the amount on loan, and then I do not advance it, it is undeniable that an action lies against you for the money; for you are legally liable to pay it, being bound by the

continued on next page

in essence the law gave consequence to the formal words rather than to the will of the parties.

2 2 African Customary Law

It is generally accepted (in the literature) that contractual negotiations in African customary law were informal and that there was no outward ritual necessary to create liability. In accordance with Africa's oral tradition, agreements were always entered into verbally, but unlike Roman law words did not have to be moulded in a specific form. Importantly though, a verbal agreement was not sufficient to create liability. This is illustrated by the Tswana maxim that "yesterday's word does not slaughter an ox",[25] and the Fanti saying that "nobody buys the footprints of a bullock".[26] It is not unexpected that this particular feature of African customary law of contract gave rise to the perception that that law knew only real contracts (Roman-law *contractus re*) and that a contract could be constituted only by an agreement *and* the transfer of a thing.

It is indeed true that the transfer of property was crucial in legal transactions.[27] However, historical sources confirm that in contract the physical activity that transformed the parties' verbal communication into a concrete experience did not necessarily have to relate to the agreement. Concretisation of the words (the intention of the parties) could take the form of performance or part performance in terms of the agreement, or the transfer of property unrelated to the performance in terms of the agreement, such as the making of a gift. Thus Grevenbroek, a seventeenth-century traveller, reported that the "Hottentots" who traded cattle with the merchants of the Cape of Good Hope did not consider themselves contractually bound unless an exchange of gifts had taken place.[28] Likewise, among the Fanti, the handing over of *trama* (earnest) was essential to "bind the contract" and a merchant did not regard the contract as binding unless the *trama* had been transferred.[29]

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stipulation; but, because it is inequitable that you should be condemned on this account, it is settled that you must be protected by an *exceptio doli mali*. *Cf* De Zulueta 151; Nicholas 22 164; Thomas *The Institutes of Justinian* (1975) 209.

25 "Lentswe la maabane ga le thlabe kgomo."

26 Sarbah 93.

27 See Gluckman 1989 *Tijdschrift voor Rechtsgeschiedenis* 151 176; *contra* Vorster "Independent service" in *Indigenous Contract in Bophuthatswana* (ed Myburgh)(1990) 52-53.

28 *Primo magnam tabaci portionem ... exporrigunt ... secus se non obligari tenerre contractum ... .* (At first the traders display a big portion of tobacco ... otherwise the natives do not think themselves bound to the contract); and further: *Tumque nostratibus e longinquo obviam eunt mercatoribus (etom schaep dicunt), opimum conferentes vervecem aliqua dictae plantae donatio fieri debet, quam talis vervecis munere compensant.* ([O]n these occasions they [the Khoikhoi] come a long distance to meet our traders, bringing with them a prime wether (they call it *etom schaep*) – a portion of the tobacco must be given as a present, for which their return is the gift of the wether.): Grevenbroek 136 137.

29 Sarbah 86*ff*.

Towards the end of the seventeenth century, Willem Bosman,[30] a trader in the service of the Dutch West India Company, wrote about the Dutch ivory trade on the Coast of Guinea:

> As great Lovers of Brandy as they are, they will not yet, when they first come on Board and are ask'd to Drink, touch a Drop before they have received a Present. And if we should happen to stay too long before we give them any thing, they will boldly ask us if we imagine that they will Drink for nothing ... and he that intends to Trade here, must humour them herein, or he shall not get one Tooth on Board. Thus the Merchant which would deal here, ought to be very well Armed with *Job's* Weapon, without which nothing is to be done.

Further verification that the transfer of property was not necessarily related to performance in terms of the agreement, may be found in two letters, written in the late nineteenth century in Setswana to a Tswana News Paper, *Mahoco a Becwana*, published during the years 1883-1896 by the London Missionary Society. In view of the scarcity of early written sources in any African vernacular, by indigenous Africans, these letters are indeed rare. What contributes to their value is that they do not contain second-hand interpretations of cultural information by non-Africans, but the narratives of Africans themselves.[31] From 1883, for eight years, letters were published regarding the function of the transfer of bridewealth (*bogadi*). In one of these letters, a certain Baruni Makutle wrote: "Anything that is done formally is done with a cow. That is why when we confirm a marriage, we take cattle" and "[i]t is said that *bogadi* should be paid to formalize the marriage".[32] In addition, Montshiwa Tawana, Paramount Chief of the Tshidi Barolong tribe from 1884 to 1896, wrote that the transfer of bridewealth "establishes and confirms marriage" and "we use it as proof [of the marriage]".[33]

Today the practice of handing over gifts in marital negotiations still exists and betrothal or the agreement to transfer marital guardianship over a woman to the family of the prospective husband is concretised when the boy's family offers a gift to the girl's family to ratify the verbal

30 Bosman Letter XX 404 and see further 405; at 409 he indicated that mainly wax, honey and elephant tusks were traded. Bosman was the second-highest official in service of the Dutch West India Company in Elmina, the main Dutch trading port on the West Coast of Africa for more than fourteen years. In his work *A New and Accurate Description of the Coast of Guinea, Divided into the Gold, the Slave, and the Ivory Coasts*, he describes, among others, the trading practices of the indigenous populations of what is today Ghana, Togo, Benin and Western-Nigeria. The practice of handing over gifts not related to performance in terms of the agreement was confirmed also by Johan Snoek, whose narrative was published as Letter XXII (487), dated 1702-01-02, an appendix to Bosman's letters. He wrote: "[a]fter giving them their *dasje* or Present, I dealt with them for the Ivory at the dearest Rate".

31 A selection of the letters written in Setswana to the editor of the news paper by literate Africans was translated into English and edited by Mgadla & Volz. It was published in 2006 in Cape Town as *Words of Batswana. Letters to Mahoko a Becwana 1883-1896* Vol 37 of the Second Series of the Van Riebeeck Society.

32 *Idem* 145-146.

33 *Idem* 161.

agreement.[34] Negotiations for the transfer of marriage goods are protracted and when the families have reached an agreement, an animal is slaughtered to confirm the verbal agreement. This animal does not form part of the marriage goods which have to be handed over. [35]

Empirical researchers have documented also other instances where property is transferred independent of the performance due in terms of the agreement. Among the Tswana, for example, it is customary for a person to invite people to assist him in doing a specific task. This verbal agreement is validated by the slaughtering of an animal which is divided among those who agreed to do the work. The gift of the meat does not form part of the contract and is not regarded as payment for the services to be rendered.[36]

It is not surprising that Schapera,[37] who had an exceptional knowledge and profound understanding of African customary law and culture, reported for the Tswana of Botswana that executory contracts created legal liability. As to be expected, this statement was not received positively among scholars, like Epstein and Gluckman[38] who dismissed his view as an incorrect interpretation of Tswana law.

Based on historical sources, also, Sarbah[39] reported that executory contracts were valid. He reported that for a valid sale of land, it was required that *trama* be paid and that "[v]aluable consideration, that is gold, money, or chattel, [be] paid, given, *or promised*" (my emphasis).

3 Concretisation of Words

From the above it is apparent that words or verbal communication *per se* did not create contractual liability in either Roman or African law, but that the words had to be concretised. However, the way in which this occurred differed.

34 In infant betrothals, the family of the baby boy gives a goat and a cow to the family of the baby girl. Church "Betrothal and marriage: Contractual aspects" in *Indigenous Contract in Bophuthatswana* (ed Myburgh) (1990) 84-86 interprets this custom as part performance *and* as a method of confirming liability to transfer the girl in marriage when she reaches a marriagable age.

35 The custom of transferring marriage goods differed among the different ethnic groups. Full performance was not always a requirement for a valid marriage: See Maclean 47-52 for a detailed description of such negotiations among the indigenous people of British Kaffraria; Vorster *et al Urbanites' Perceptions of Lobolo: Mamelodi and Atteridgeville* (2000) 76.

36 Vorster 52-53.

37 Schapera "Contract in Tswana law" in *Ideas and Procedures in African Customary Law* (ed Gluckman)(1969) 327-328.

38 *Cf* Gluckman 180, 182-185.

39 Sarbah 86.

3 1 Roman Law

The emphasis on orality in Roman law did not reduce the significance of formalism. In fact, as indicated, there was a fixed connection between words and form. The most distinguishable feature of early Roman law was what Schulz referred to as "actional formalism", meaning that all legal acts had a specific form.[40] Thus, in the *stipulatio* not the words but the form or external ritual created the legal bond and liability did not flow from the parties' agreement but rather from the exchange of the prescribed formal phrases.[41]

The "outward ritual"[42] of the *stipulatio* entailed that the communication had to be in the form of oral [43] questions and answers[44] *inter praesentes*;[45] that there had to be exact correspondence between question and answer;[46] and that *unitas actus* was required, that is, the answer had to follow immediately after the question.[47]

It was ritualistic formalism, then, not writing, that served as the concretisation of the spoken word in the *stipulatio*.[48] During the pre-classical period of Roman law, written documentation was not regarded as a legal formality.[49] The most obvious reasons for this phenomenon were that the physical presence of the parties was regarded as a

40 Schulz 25-26.

41 According to Harrill 279, the oldest surviving non-legal description of the *stipulatio* may be found in Varro *Rust* 2 2 5-6.

42 For a general discussion of this ritual, see Zimmermann 72-75; Kaser Vol 1 539*ff*; Meyer 116-117; Buckland *A Textbook of Roman Law from Augustus to Justinian* (1966) 434-435.

43 Gai 3 105: That a dumb man can neither stipulate or promise is obvious. The same is accepted also in the case of a deaf man, because it is necessary both that the stipulator should hear the words of the promissor and that the promissor should hear those of the stipulator.

44 Gai 3 92: "A verbal contract is formed by question and answer, thus: 'Dost thou solemnly promise that a thing shall be conveyed to me?' 'I do solemnly promise.' 'Wilt thou convey?' 'I will convey.' 'Dost thou pledge thy credit?' 'I pledge my credit.' 'Dost thou bid me trust thee as guarantor?' 'I bid thee trust me as guarantor.' 'Wilt thou perform?' 'I will perform.'" The requirement of specific words – originally limited to Latin, *spondere*, and for Roman citizens – was relaxed in classical times when any words could be used: Buckland *Textbook* 434-435 *contra* Nicholas "The form of the stipulation in Roman law" 1953 *LQR* 63 65ff. There is however recent documentary evidence that slaves and foreigners could make use of the *sponsio*: Urbanik "Sponsio servi" 1998 *Journal of Juristic Papyrology* 185 185-201, quoted in Harrill 278 n 2.

45 Gai 3 136: "[A] verbal obligation cannot be formed between parties at a distance"; see also Gai 3 138. *Cf* Meyer 255.

46 Gai 3 102.

47 Venuleius *D* 45 1 137*pr*: *continuus actus*; Modestinus *D* 44 7 52 2; Ulpianus *D* 46 4 8 3; Gaius *D* 44 7 52 2; De Zulueta 153; Nicholas 1953 *LQR* 63 64-65; Buckland *A Manual of Roman Private Law* (1939) 264; cf Meyer 116-117.

48 See Zimmermann 80-82 for a discussion of the conversion of the verbal contract into a written one.

49 Kaser *Das römische Zivilprozessrecht* 2 ed (1996) 10-11; Metzger "Roman judges, case law, and principles of procedure" 2004 *Law and History Review* 264*ff*; Meyer 2 36-39.

guarantee against misunderstanding and as enhancing clarity;[50] the widespread and general illiteracy, the prevailing methods of writing, and time constraints.[51] The predominant opinion among scholars is that although it was usual to reduce the oral agreement to writing in classical law, this was not a requirement for a valid contract but was purely for evidentiary purposes.[52]

There is no agreement on precisely when the written *stipulatio* replaced the oral one. Some scholars are of the opinion that the time could be fixed in the post-classical era, with Emperor Leo's rescript of 472 which removed the requirement of the formal words; [53] others hold that the rescript abolished only the use of *specific* formal words and not the oral contract itself.[54]

Interestingly, Meyer shows that writing on *tabulae* was part of the *stipulatio* from very early on. Although Roman jurists never explicitly mentioned writing as a prerequisite for, or part of, the *stipulatio*, according to her one should nevertheless bear in mind that "their analytical world left much out".[55] This is illustrated by the fact that Gaius, for example, never mentioned that there must be a *continuus* or *unitas actus* for a valid stipulation. Meyer further maintains that Gaius never claimed his assessment to be a complete description of the *stipulatio* and that it was rather a description of its "core nature";[56] that his description lends itself to speculation; and that it certainly does not prove conclusively that the *stipulatio* was oral rather than written. Based on Roman texts, scholars have debated the possibility also of various other actions being part of the *stipulatio*, such as the pouring of libations, offering the right hand as a symbol of the *fides*, a combination of these two actions, and holding and breaking a reed.

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50 Schulz 25-26.

51 Metzger 2004 *Law and History Review* 264 262*ff*.

52 Zimmermann 79; Kaser Vol 1 540*ff*, Vol 2 373; MacCormack "The Oral and Written Stipulation in the Institutes" in *Studies in Justinians Institutes in Memory of JAC Thomas* (eds Stein & Lewis)(1983) 96*ff*; Du Plessis "The Roman concept of lex contractus" 2006 *Roman Legal Tradition* 79-80. Nicholas 1953 *LQR* 63 77*ff*, 233*ff*. De Zulueta 155 observes that Cicero, as layman, was wrong to assume that *stipulationes* were among the *res quae ex scripto aguntur*: written *stipulationes* were valid only if orally confirmed and oral *stipulationes* were valid irrespective of whether they had been documented; see further 156 -157.

53 Amos 202; Harrill 275 276; Buckland *Manual* 263; Zimmermann 71 esp n 20.

54 Nicholas 196; Nicholas 1953 *LQR* 63 65*ff*; see also Thomas 209; Kleyn 1995 *THRHR* 16 18-19.

55 See Meyer 117; see further 116-117 and the sources quoted in nn 102-106; 253-261. Based on Roman texts, scholars have debated the possibility also of various other actions being part of the *stipulatio* such as the pouring of libations, offering the right hand as a symbol of the *fides*, a combination of these two actions and holding and breaking of a reed.

56 *Contra* Nicholas 1953 *LQR* 63 65*ff*, who argues that Gaius provided an exhaustive list of formal words.

Diósdi, too, is of the opinion that that the predominance of orality had not endured that long and that already during classical times the speaking of formal words was no longer necessary where there was a written document in place.[57] He claims that the Roman jurists "were not interested in whether the parties had recited the *stipulatio* contained in the document"[58] and concludes that the polemic is merely a topic of modern scholarly debate.

3 2 African Law

Although there were no formalities as regards the actual communication of the intentions of the parties and although no form or ceremony was required for a contract to be regarded as valid, contracts in African law were nonetheless not completely without form. There were certain ritualistic behavioural and linguistic requirements that had to be observed, some of which correspond with the outward ritual of Roman law. Thus, both parties had to be present and actual words had to be spoken.[59]

Unlike the position regarding the *stipulatio* described above, *consensus*, or the subjective meeting of the parties' minds, played an important role in customary law of contract and agreement was reached by an extended process of deliberation between the contracting parties and between the parties and members of their respective families.[60] The physical activity that accompanied the verbal agreement was the manifestation that agreement had subjectively been reached.

In Tswana law, this process is described as "*go tshitsinya*", which literally means "to introduce".[61] Contracting parties had to be present when *consensus* was reached. Further, the object of the contract had to be physically pointed out *and* described. Because the whole process of reaching consensus and concluding a contract was concretised, it was much easier to determine the real will of the parties. In fact, in an interview, a panel of experts for the Tswana was puzzled when the idea was put to them that one contracting party could make a mistake about

57 Diósdi 52, see generally 51*ff*. He avers that the only requirement was that the parties be present.

58 *Ibid*.

59 As in Roman law, the nod of a head was not an indication of a party's intention.

60 With regard to the Fanti, see, eg, Sarbah 86; see also Bosman 404 Letter XX; On 1702-09-01, in Letter XXI (at 433), which appears as an appendix to Bosman's narrative, Dawid van Nyendael wrote that "they are very tedious in Dealing ... [it takes] generally eight to ten Days before we can agree with them for: But this is managed with so many Ceremonious Civilities, that it is impossible to be angry with them." Traditionally parties to a contract consisted of groups. However, individual property (eg clothes, ornaments, animals) has become increasingly recognised and individuals are nowadays allowed to conclude contracts with regard to such property: see Prinsloo & Vorster "Parties" in *Indigenous Contract in Boputhatswana* (ed Myburgh)(1990) 2122.

61 See Whelpton 8183.

the identity of the other party or about the identity of the object of the contract.[62]

In contrast to the Roman *stipulatio*, where abstract form completely overshadowed the subjective expectations of the parties, contracts in African law were posited in reality. The parties retained their specific identities defined by their membership of specific family groups. The object of the contract never became a "colorless commodity"[63] and the intention of the parties remained of paramount importance.

The fact that there were specific conventions as regards behaviour and taboo further confirms that there were ritualistic boundaries in the verbal agreement. An integrated relationship existed between language, magic and religion in African culture.[64] Language was the oral expression of African cultural life and played an important role in social and legal relations. The various language taboos illustrate the close affinity between language and the superhuman. Cattle, for example, were regarded as an important form of legal tender and a complex cattle terminology existed. Terms employed to refer to cattle differed, depending on whether they were used in a legal, religious or kinship context. Thus, where the family of a young man approached a girl's family to discuss a possible betrothal, they first offered her family the gift of an animal which, in that context, was referred to as *vula'mlomo* or "opening the mouth".[65] Animals were distinctively identified in transactions, using established, refined and complex linguistic colour-pattern terminology as well as personal names.[66]

In the early twentieth century, in a case heard by the Eastern Districts Local Division of the High Court, the Judge observed:[67]

> The subject-matter of the transaction being cattle, the defendant pointed out to the plaintiff certain five beasts easily identified, especially among Kaffirs, by their colour, horns, formation and other marks, and the plaintiff from that day to this has had no trouble in recognising which cattle were so pointed out to him as the *lobolo* which he accepted; and indeed there is no plea or contention on the defendant's part that [the] plaintiff is claiming cattle other than those so pointed out to him.
>
> We therefore come down to this: Is the form of delivery adopted to be void in law, because physical delivery was not resorted to, or because, while symbolic delivery was intended, the cattle were not separated from the rest of the herd,

62 *Idem* 85.
63 See Wonnell "The abstract character of contract law" 1990 *Connecticut LR* 437 438-441.
64 Myburgh "Language" in *Anthropology for Southern Africa* (ed Myburgh)(1981)140-144.
65 Gluckman 183. Poland, Hammond-Tooke & Voight *The Abundant Herds. A Celebration of the Cattle of the Zulu People* (2003) 34.
66 Poland, Hammond-Tooke & Voight 36-37; they point out that this intricate naming and classification has significant alliterative and lyrical qualities.
67 *Xapa v Ntsoko* 1919 EDL 177 181.

> and the defendant did not say at each inspection, "I gave you this one." It sounds rather like the echo of a Roman stipulation if it be necessary.

Also kinship terminology was complex and differed among the ethnic groups. Among the Nguni tribes, for example, parents-in-law and children-in-law had to avoid using words phonetically resembling each other's names. The restrictions on the use of certain words remind of the limitation in Roman law on the use of *spondeo* to Roman citizens.[68]

4 *Fides*

The prevalence and endurance of verbal contracts in early Roman law have been attributed to the importance of the Roman virtue of *fides*. This immediately begs the question whether the absence of purely verbal contracts in African customary law was related to the possible absence of *fides* in African culture.

4 1 Roman Law

Literature on the topic affirms that *fides* which in Roman culture implied trust and trustworthiness was an elemental postulate of Roman religious, socio-political and legal life.[69] For Romans it was the most sacred thing in life.[70] It formed the foundation of the binding effect of obligations, not only in the *ius gentium*, but also in the *ius civile*. Everybody, irrespective of nationality, was expected to observe the duty to keep his or her world.[71]

The centrality of *fides* in Roman life was not an attribute conceived of by modern Romanists. *Fides* is a recurring theme in the works of Cicero,[72] and it is referred to, among others, by Seneca[73] and Cornelius Nepos.[74] The Greeks, too, commented on the extraordinary fidelity of

68 The restrictions had possible religious origins in the oath before the Roman gods: Gai 3 92; Sandars *The Institutes of Justinian* (1903) 333; Harrill 277; De Zulueta 153: Gai 3 92 points out that the *sponsio* was restricted to Roman citizens but that other forms of stipulation were also available to foreigners and that other languages could even be used, as long as the parties could understand each other.

69 See among others Fromchuck *The Concept of Fides in the Histories of Tacitus*, (PhD thesis 1972 Bryn Mawr College, University of Michigan Ann Arbor) 1*ff*; Van Zyl *Justice and Equity in Cicero* (1991) *passim*; Meyer 150*ff*; Zimmermann 68-70; Schulz *Principles of Roman Law* (1936) 223*ff* (esp 326-328 for the significance of *fides* in law).

70 See Cicero *in Verr* 2 3 3 6: *fidem sanctissimam in vita qui putat*.

71 See, eg, Kaser Vol 1 27, 33, 35, 39, 87 esp his references to the connection between *fides* and sacral law.

72 See, eg, *de Rep* 4 7, *ad Fam* 16 10 2, *de Offic* 1 7 23; in *de part Orat* 22 78 Cicero observes: "That part of virtue displayed ... in matters of trust [is called] faith."

73 *Ben* 3 15(1-2).

74 *Att* 9 5.

the Romans. Polybius[75] noted that bound by their pledge of *fides*, even Roman officials, who were *ex officio* most exposed to the temptation, were restrained from skimming public funds.[76]

Cicero saw *fides* as "*fit quod dicitur*"[77] and associated it with justice (*iustitia*) and other related virtues. In fact, according to him *fides* formed the very foundation of justice.[78] Within the context of the *stipulatio*, his proposition that *fides* derived from a promise made good, is certainly appropriate and underwrites its importance in legal conduct. [79]

Interestingly, in contrast to the opinion of modern Roman-law scholars, Seneca[80] and Cornelius Nepos[81] saw the formality of the *stipulatio* as evidence of the absence of *fides*. In their view informal agreements should suffice between friends and *fides* should eliminate the necessity for formal contracts.

4 2 African Law

It does not appear far-fetched to assume that the vital importance of the transfer of property in legal transactions and the concomitant absence of purely verbal contracts in African customary law were due to the fact that *fides* did not play a significant role in African culture.

However, trust between people, specifically neighbours, was certainly important in ancient Africa and it was regarded as morally reprehensible to break a promise.[82] Gluckman, who did extensive empirical research among the Barotse of Zambia, observed that all legal relationships in

75 *Hist* VI 56.14-15: "... whereas among the Romans those who as magistrates and legates are dealing with large sums of money maintain correct conduct just because they have pledged their faith by oath. 15. Whereas elsewhere it is a rare thing to find a man who keeps his hands off public money, and whose record is clean in this respect, among the Romans one rarely comes across a man who has been detected in such conduct ... ." Also Cicero remarked on the role of *fides* in affairs or relationships of trust: *de part Orat* 22 78: *in creditis rebus fides*; cf Van Zyl 97-98.

76 At 21, Meyer comments that "it was at first rare (although eventually better known) for suspicion of corruption to touch the Romans themselves".

77 *de Rep* 4 7: *Fides enim nomen ipsum mihi videtur habere, cum fit, quod igitur*. (Faith seems to me to get its very name from the fact that what is promised is performed).

78 *de Offic* 1 7 23: *fundamentum autum est iustitiae fides*; *Cf* also Van Zyl 123.

79 In his *de Offic* 1 7 23 he wrote that undertakings and agreements (*dictorum conventorumque*) should be upheld and the resulting obligations be discharged. This applied in both public and private acts.

80 *Ben* 3 15(1-2): 1 *Utinam nulla stipulatio emptorum venditori obligaret nec pacta conventaque impressis signis custodirentur, fides potius illa servaret*. 2 *Sed necessaria optimis praetulerunt et cogere fidem quam expectare malunt ...*

81 *Att* 9 5: "[H]e came to the rescue and lent her the money without interest and without any contract, considering it the greatest profit to be known as mindful and grateful, and at the same time desiring to show that it was his way to be a friend to mankind and not to their fortunes ... "

82 *Cf* Mahoney "Contract and neighbourly exchange among the Birwa of Botswana" 1977 *J of African Law* 40 at 59.

their law were based on "generosity and the utmost good faith".[83] He reconciled the apparent conflict that, on the one hand, good faith was central in all spheres of African life and, on the other hand, that a mere agreement did not incur liability, as follows: Liability in contract was indeed only incurred when performance had taken place or property transferred, but once the obligation was created, it was governed by good faith.[84]

The pre-eminence of trust in social and legal relationships was likewise reported for the Birwa of Botswana. Among these people, neighbours within the same settlements formed neighbourhood sets that frequently interacted with each other. These sets of people were not jurally defined units like households, but were informally dependent upon each other's co-operation for their welfare and safety. Special relationships of trust existed between such neighbours who assisted each other in various activities such as reciprocal labour exchanges, and who contracted with each other, among others, to acquire livestock. [85]

Bosman,[86] too, reported at the end of the seventeenth century that if the Dutch traders abided by their ancient customs, Benin traders honoured their agreements: "[i]f we comply with them, they are very easy to deal with, and will not be wanting in anything on their Part requisite of a good Agreement."

It is therefore not the lack of *fides* that explains why purely verbal contracts were unknown in African law, but rather the fact that African law and culture were characteristically non-specialised. This feature manifests itself in the lack of separation, differentiation, classification, and delimitation of, amongst others, knowledge, concepts, ideas, duties and interests; and hence in a concomitant lack of abstraction.[87] It was the emphasis on the concrete and the fact that legal reasoning was founded in sensory observation, a natural corollary of the general pre-literate condition of ancient Africa that gave rise to the need to concretise abstract principles.

5 Conclusion

There are many intersections in the law of ancient Roman and African contracts and a superficial analysis of orality in the Roman law of contract provides insights that one could usefully employ in understanding the African law of contract.

Roman society found legal certainty in formalism, which is the extreme adherence to form, because well-defined form made legal acts

83 Gluckman 175 and generally 174-176.
84 Albeit not in the modern ethical sense: see *idem* 180, 182-185.
85 Mahoney 40, 49-53; *cf* Gluckman 170*ff*.
86 Van Nyendael 433 Letter XXI.
87 Myburgh *Papers on Indigenous Law* (1985) 2*ff*.

memorable. In the *stipulatio* form was manifested in specific ritualistic words.

In African society, the emphasis on the concrete and the lack of abstraction excluded words as formality. However, specific behavioural conventions, which were not limited to delivery in terms of the contract, conferred form and created legal certainty, gave rise to liability, and were regarded as manifestations of the intention of the parties. Contrary to the traditional view, performance or part performance in terms of the contract was not the only way in which the verbal agreement could be confirmed and in that sense contracts in African law differed from real contracts in Roman law.

Historically the incorrect interpretation of African customary law by the imposition of Roman-law principles has caused much hardship for the indigenous population. The misinterpretation of the *lobolo* contract is but one such example. The transfer of bridewealth was regarded as performance in terms of a bilateral real contract to purchase a wife. As a result, agreements related to bridewealth were regarded as *contra bonos mores*. Had such agreements rather been explained by analogy with the Roman *dictio dotis*,[88] a unilateral formal verbal contract to transfer marriage goods,[89] indigenous Africans would have been spared the long and arduous journey to have their marriages recognised in law.

88 In classical law this obligation was enforceable by a *condictio*. It fell into disuse when Theodosius II made enforceable any informal promise of a dowry (C Th 3 13 4).

89 Sandars 333; Thomas 208.

The right to development in the African human rights system: The *Endorois* case*

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OPSOMMING

Die reg op ontwikkeling in die Afrika-menseregtestelsel: Die *Endorois*-saak

Die doel van hierdie artikel is om die impak van die uitspraak in *Centre* for *Minority Rights Development (namens Endorois) v Kenya (Endorois uitspraak)* oor die verwesenliking van die reg to ontiwikkeling in Afrika se menseregte sisteem te ondersoek. Na ´n oorsig van die reg tot ontwikkeling, wat uit eie gekarakteriseer is deur omstredenheid, gaan die artikel voort om te wys hoe die *Endorois* uitspraak wegbeweeg van die uitspraak in die *Social and Economic Rights Center and the Center for Economic and Social Rights v Nigeria (SERAC uitspraak), Democratic Republic of the Congo v Burundi, Rwanda, and Uganda (DRC uitspraak)* en *Kevin Mgwanga Gumne et al v Cameroon (Gumne uitspraak).* Die Endorois uitspraak omksryf die konsep van "*peoples*"; maak duidelik wie die begunstigdes van die reg tot ontwikkeling is en beklemtoon die rol van die staat as die primêre pligdraer. Dit verduidelik ook die inhoud van die reg tot ontwikkeling wat veelsydig is omdat dit bestaan uit elemente van nie-diskriminasie, deelname, verantwoordingspligtigheid, deursigtigheid, regverdigheid en keuses asook vermoëns. Verder, verduidelik dit die drempel van mense se deelname benodig in die ontwikkelingspogings en beklemtoon die onmiddellike totstandkoming van menseregte soos omskryf in die *African Charter on Human and Peoples Rights*. Die *Endorois* uitspraak gee leiding oor hoe om die beregbaarheid van die reg tot ontwikkeling te verseker. Voor die *Endorois* uitspraak, is al hierdie eienskappe van die reg tot ontwikkeling nooit opgeklaar deur die Afrika-Kommissie in die *SERAC*, *DRC* en *Gumne* gevalle nie.

1 Introduction

The communication *Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois) v Kenya*[1] (*Endorois* case) decided by the African Commission on Human and Peoples' Rights (African Commission or the Commission) in 2009 dealt with the violation of freedom of conscience and religion,[2] the rights to property,[3] to culture,[4]

* I thank Dr Magnus Killander for commenting on earlier draft.

1 Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya.* See African Commission, 27th Activity Report, 2009.

2 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 8.

3 ACHPR, art 14.

4 ACHPR, art 17.

to natural resources[5] and the right to development (RTD) of indigenous peoples.[6] This article focuses specifically on the RTD because not only is the RTD binding in the African Charter on Human and Peoples' Rights (ACHPR); its justiciability was tested for the first time through the case under study.

After the exhaustion of local remedies,[7] the Centre for Minority Rights Development (CEMIRIDE) with the assistance of Minority Rights Group International (MRG) and the Centre on Housing Rights and Evictions brought the case on behalf of the Endorois community to the African Commission. The complainants claimed the forced eviction of the Endorois (a pastoralist group) from their ancestral land at Lake Bogoria in central Kenya in the 1970s, to set up a national game reserve and tourist facilities. According to the complainants, the eviction of the Endorois people from their land amounts to the violation of the rights referred to above.

In examining the violation of the RTD, the African Commission found that the lack of "meaningful participation"[8] by the Endorois people who "were informed of the impending project [on their land] as a *fait accompli*",[9] was a violation of the right under discussion. The Commission also found that the RTD was violated as a result of encroachments upon Endorois peoples' choices and capabilities.[10] Put differently, the RTD is underpinned by empowerment and freedom of the beneficiaries.[11] In reaching its decision, the Commission clarified the concept of "peoples" and the content of the RTD as never before.

In what will follow, the article briefly clarifies the RTD in international law before focusing on the significance of the *Endorois* decision on the realisation of the RTD.

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5 ACHPR, art 21.
6 ACHPR, art 22.
7 According to art 56 (6) ACHPR, communications "shall be considered if they are sent after exhausting local remedies, if any, unless it obvious that this procedure is unduly prolonged".
8 The UN Declaration on the right to development (UNDRTD), A/RES/41/128, art 2(3).
9 Par 281. For more on this see Morel "Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*" 2010 *Housing and ESCR Rights Law Quarterly* 5.
10 *Idem* par 283.
11 Sen *Development as freedom* (1999) 35; see also Steiner *et al International human rights in context Law, politics, morals – Text and Materials* (2007) 1434.

2 The RTD in International Law: An Overview

25 years have passed since the UN General Assembly officially recognised the right in the United Nations Declaration on the Right to Devepment,[12] 18 years since a consensus involving all governments was reached on it,[13] and 13 years since the UN Open Ended Working Group was established and an Independent Expert on the right[14] was appointed, and 7 years since, the UN High-Level Task Force on the Implementation of the RTD was established,[15] yet the right remains controversial in scholarly debates and at the UN level.

The RTD is the subject of scholarly disagreements. Commenting on the book *Development as human right - Legal, political and economic dimensions,*[16] Whyte claims that the book is an intellectual disaster,[17] whereas Louise Arbour, former UN High Commissioner for Human Rights believes that it is an "excellent scholarly writing".[18] This testifies the controversy on the right in question. In the same vein, while Bedjaoui and others see the RTD as the most important human right or "the necessary condition for the achievement of all other human rights",[19] or as a "right to rights",[20] as a "basic right", as Henry Shue[21] put it, or "enabling right"[22] to use Abi-Saab words, it is also claimed that

> [t]he right to development is little more than a rhetorical exercise designed to enable the Eastern European countries to score points on disarmament and collective rights [and that] it also permits the Third World to 'distort' the issues of human rights by affirming the equal importance of economic, social

12 Adopted by the UN General Assembly in Resolution 41/128 of 1986-12-04.
13 Vienna Declaration and Programme of Action 1993-06-14–25, UN General Assembly A/Conf.157/23 1993-06-12.
14 Commission on Human Rights, Resolution 1998/72 adopted without a vote on 1998-04-22 appointed Arjun Sengupta as the UN Independent Expert of the RTD.
15 The fifth session of the Working Group on the right to development recommended among other things the constitution of a High Level Task Force for the Implementation of the RTD within the framework of the working Group. This recommendation was adopted at the 60th session of the Commission for Human Rights in its Resolution CHR 2004/7.
16 Andreassen & Marks *Development as a human right. Legal, political and economic dimensions* (2006).
17 Whyte "Review of development as a human right" *Electronic Journal of Sustainable Development* 1, issue 1 at http://www.ejsd.org/public/journal_bookreview/1 (accessed 10 December 2010).
18 Andreassen & Marks iii.
19 Bedjaoui "The difficult advance of human rights towards universality in a pluralistic world" proceedings at the colloqium organised by the Council of Europe in co-operation with the International Institute of Human Rights, Strasbourg 1989-4-17–19; 32-47.
20 Dimitrievic "Is there a right to development?" paper presented at the annual convention of the International Studies Association, Cincinnati, Mar 1982.
21 Shue *Basic rights* (1980) 19-20.
22 Salomon "Legal cosmopolitanism and the normative contribution of the right to development" in *Implementing the right to development: the role of international law* (ed Marks) (2008) 17.

> and cultural rights and by linking human rights in general to its 'utopian' aspiration for a new international economic order.[23]

This strong stand against the RTD is supported by Donnelly[24] who sees no legal or even moral reason for an RTD. Even though he believes that it is correct to link human rights and development,[25] he also believes that "the right to development is neither philosophically [nor] legally justified nor a productive means to forge such a linkage",[26] and he proceeds to explain "how not to link human rights and development"[27] because such a right is a hindrance in the search for how to connect human rights and development.[28] Similarly, Shivji, [29] claims that the RTD is grounded "on an illusory model of co-operation and solidarity".

However, to Donnelly's claim that the RTD has no philosophical foundation, M'baye[30] responds that any development endeavour has a human dimension that can be "moral, spiritual and [even] material", and to Shivji, he speaks as a cosmopolitan and locates the RTD in the realm of international "solidarity which must be at the centre of all conducts, of all human politics, [of] man himself".[31]

In total disagreement with Mbaye's contention, Bello[32] criticises the RTD on the ground that it is

> [t]oo woolly and does not easily invite the degree of commitment that one expects unequivocally in support of an inescapable conclusion; …The right to development appears to be more like an idea or ideal couched in a spirit of adventure, a political ideology conceived to be all things to all men in a developing world, especially Africa; it lacks purposeful specificity; it is latent with ambiguity and highly controversial and ''directionless;'' it strikes a cord of the advent of the good Samaritan.

Sharing this view, Rosas[33] argues that "the precise meaning and status of the right is still in flux". In other words, the significance of the RTD is

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23 Alston "Making space for new human rights: The case of the right to development" 1998 *Harvard Human Rights Journal* 20.
24 Donnelly "In search of the unicorn: The jurisprudence and politics of the right to development" 1985 *California Western International LJ* 473.
25 *Idem* 477.
26 *Idem* 478.
27 Donnelly "The right to development - How not to link human rights and development' in *Human rights and development in Africa* (edsWelch & Meltzer)(1984) 261.
28 Donnelly (1985) 478; also Donnelly (1984) 274.
29 Shivji *The concept of human rights in Africa* (1989) 82.
30 M'baye "le droit au développement comme un droit de l'homme" 1972 5 *Revue des droits de l'homme* 513.
31 *Ibid*.
32 Bello "Article 22 of the African Charter on Human and Peoples' Rights" in *Essays in Honour of Judge Taslim Olawale Elias* (eds Bello & Adjibola)(1992) 462.
33 Rosas "The right to development" in *Economic social and cultural rights* (eds Eide, Krausus & Rosas) (2001) 251.

unclear. In support of this opinion, Alfredsson[34] observes that it may be just to sustain that the RTD at least as provided for by the UN Declaration on the right to development (UNDRTD) is not yet binding on states. In this regard, one of the most radical rejections of the RTD is from Ghai[35] who argues that the right is dangerous for the human rights discourse as it:

> [w]ill divert attention from the pressing issues of human dignity and freedom, obfuscate the true nature of human rights and provide increasing resource and support for state manipulation (not to say repression) of civil society and social groups and [lead] the international community for many years in senseless and feigned combat on the urgency and parameters of the right.

Ghai's position is too extreme and seems to be a threat to the concept of human dignity itself, hence the correctness of Baxi's[36] view that qualifies Ghai's as "cynical perspective". In fact, the law of development is "not only a new discipline but also … a juridical technique for carrying on the struggle against underdevelopment",[37] and this is in line with Eleanor Roosevelt's view, which in the early days of the Universal Declaration of Human Rights (the Universal Declaration) observed: "We are writing a Bill of Rights for the world, and … one of the most important rights is the opportunity for development".[38] In agreement with this view and basing their arguments on the UN Charter,[39] on the Universal Declaration,[40] and on the 1966 International Covenant on Economic, Social and Cultural Rights,[41] Chowdury and De Waart[42] claim that the RTD is a human right in international law.

The disagreement on the RTD goes beyond academic circles and reaches the UN were the Non Aligned Movement and poor countries proponents of the RTD oppose the "outsiders" who are always against

34 Alfredsson "The right to development: Perspective from human rights law" in *Human Rights in domestic law and development assistance policies of the Nordic countries* (eds Rehof & Gulmann)(1989) 84.
35 Ghai "Whose human rights to development" Human Rights Unit Occasional Paper (1989) as quoted by Baxi *Human rights in post human world: Critical essays* (2007) 124.
36 Baxi 124.
37 Espiell "The right to development" *Revue des Droits de l'Homme* 5 (1972) 190.
38 Johnson, "The contribution of Eleanor and Franklin Roosevelt to development of international protection for human rights" (1987) 9 *Human Rights Quarterly* 19 – 48.
39 Art 55 & 56.
40 Art 28.
41 Art 2.
42 Chowdhury & De Waart "Significance of the right to development in international law: An introductory view' in *The right to development in international law* (eds Chowdbury, Denters & De Waart)(1992) 10.

the right.[43] As a result of this divergence, the RTD is politicised as illustrated by the voting pattern on its resolutions.[44]

3 The Significance of the *Endorois* Decision on the RTD

Apart from the 2004 Arab Charter,[45] as alluded to earlier, the ACHPR is the only human rights treaty in which the RTD is legally binding. Article 22 of the ACHPR reads as follows:

> (1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
>
> (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Through this provision, the ACHPR sets obligatory standards that states cannot bargain away, or negotiate. In fact, state parties to the ACHPR intended to create legal rights and duties. Therefore, in this context, the RTD is a legal right which should be fulfilled by state parties. This development is viewed as an aspect of African contribution to the human rights discourse. Evans and Murray[46] observed: "The African Charter is unique in codifying a legally binding right to development upon states".

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43 Marks "The human right to development: between rhetoric and reality" 2004 *Havard Human Rights Journal* 142.

44 In 1998, the resolution E/CN.4/RES/1998/72 was adopted at the Commission for Human Rights (CHR) without a vote whereas at the General Assembly, 125 votes in favour, 1 vote against and 42 abstentions were recorded for the resolution A/RES/53/155. In 1999, the resolution E/CN.4/RES/1999/79 was adopted at the CHR without a vote and at the General Assembly 119 votes for, 10 against and 38 abstentions were recorded for the resolution A/RES/54/175. In 2000, the resolution E/CN.4/RES/2000/5 was adopted without vote at the CHR and the resolution A/RES/55/108 was also adopted without a vote at General Assembly. At the CHR in 2001 the European Union (except the United Kingdom) was for the RTD, 3 abstentions (United Kingdom, Canada and the Republic of Korea) were recorded and Japan and the USA voted against (see Commission on Human Rights Res. 9, U.N. ESCOR, 57th Sess., at 68, UN Doc. E/CN.4/2001/167 (2001); The same year (2001), at the 56th session of the General Assembly (Sep–Dec) 123 votes in favour and 4 against (Denmark, Israel, Japan, and the USA), with 44 abstentions were recorded (see GA Res 150, U.N. GAOR, 56th Sess, Supp No 49, at 341, UN Doc. A/2890 (2001); At its 57th session in December 2002, where the General Assembly adopted the conclusions of the Open-Ended Working Group on the RTD, it recorded 133 votes in favour, 4 votes against (USA, Australia, the Marshall Islands and Palau), and 47 abstentions (see GA Res 556, UN GAOR, 57th Sess, Supp No 49, UN Doc A/57/49 (2002)).

45 (2004) Arab Charter on Human Rights (revised version) art 2.

46 Baldwin and Morel "Group rights" in *The African Charter on Human and Peoples' Rights –The system in practice, 1986-2006* (eds Evans & Murray)(2008) 270. The RTD is binding in the ACHPR (art 22) as well as in its protocol on the rights of women in Africa (art 19 which provides for the right to sustainable development for women). More discussion on the issue will be provided in the course of the study.

On this premises, the African Commission rendered the *Endorois* decision in which the RTD was adjudicated.

Prior to *Endorois*, *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*,[47] (the *SERAC* case) was the most authoritative decision of the African Commission recognising collective or peoples' rights. The *SERAC* decision emphasised the responsibility of a state party to the ACHPR for failing to regulate the actions of a non-state actor (Shell Corporation), which violate human rights in a community, the Ogoni peoples' rights.

Nevertheless, *SERAC* did not clarify the concept of "peoples" in article 21 and 22 of the ACHPR.[48] In fact, on this issue, the African Commission seems to follow the trend set in its earlier decisions where it avoided to pronouncing on the right of people to self-determination.[49] Indeed the concept of "people" is vague, unclear and keeps changing, hence Ougergouz[50] argues that the concept of "people in the African Charter is a Chameleon-like concept". In the same vein, Olowu[51] argues that the African Commission plays "the ostrich game" on the issues of "peoples". In avoiding this concept, the African Commission confused the Niger Delta with "Ogoniland" and failed to investigate whether to Ogoni communities could qualify as a specific group to be identified as a specific people[52] who could be right holders of the RTD. Even in the first interstate communication filed before the African Commission, *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda,*[53](the *DRC* case) and the case *Kevin Mgwanga Gumne et al v Cameroon*[54](the *Gumne* case) where the RTD was discussed, "peoples" were not defined without ambiguity In *Gumne,* the Commission found that

> the people of Southern Cameroon" qualify to be referred to as a "people" because they manifest numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection, and political outlook. More importantly they identify themselves as a people with a separate and distinct identity.[55]

47 *SERAC & Another v Nigeria*, ACHPR, 2001, 15th Annual Activity of the African Commission 2001, 2002. Banjul, the Gambia.
48 Olowu *An integrative rights-based approach to human development in Africa* (2009) 155.
49 See the *Katangese Peoples' Congress v Zaire* (the *Katangese* case) (2000) AHRLR 72 (ACHPR 1995).
50 Ougergouz *African Charter on human and peoples' rights – A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 204 & 211.
51 Olowu 155.
52 *Ibid.*
53 Communication 227/99, *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda* Annex IV, 20th Annual Activity Report of the African Commission, 111.
54 Communications, 266/2003; 26th Annual Activity Report of the African Commission, Annex IV.
55 *Idem* par 179.

However, "peoples" remained flawed because the finding of the Commission was followed by the reasoning which informed the Katangese case where "peoples" were not defined. Accordingly, because Cameroon is party to the AU Constitutive Act and was party to the OAU Charter:

> [t]he Commission is obliged to uphold the territorial integrity of the Respondent State. As a consequence, the Commission cannot envisage, condone or encourage secession, as a form of self-determination for the Southern Cameroons. That will jeopardise the territorial integrity of the Republic of Cameroon.[56]

This reasoning is informed by the belief that the recognition of the distinct identities of minorities constitutes a "threat to national unity and undermines the objective of nation building".[57] In the Katangese case, the Commission held that it had an obligation to uphold the territorial integrity and sovereignty of all member states of the OAU and those state parties to the African Charter.[58] In these cases, the Commission did not find the violation of peoples' rights and this outcome is linked to the "ostrich game" played on "peoples". This approach hinders the protection of peoples rights that will be superseded by national unity. This happened in violation of the 1989 reporting Guidelines[59] and the 1994 Declaration on a Code of Conduct for Inter-African Relations[60] which urge African states to provide information on measures taken to protect all national minorities.[61]

However, the African Commission through the *Endorois* decision "has exorcised the ghosts of its previous wobbly conception of peoples".[62] Indeed, "peoples" and specifically indigenous people are now clarified.

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56 *Idem* par 180.

57 Morel 55; Morel "Defending Human Rights in Africa: The Case for Minority and Indigenous Rights" 2004 *Essex Human Rights Review* 55; see also Nmehielle *The African human rights system, Its law, practice, and institutions*. (2001)143.

58 The *Katangese* case, para 5.

59 Guidelines for National Periodic Reports, Second Activity Report of the African Commission on Human and Peoples' Rights (adopted June 1989), Annex XII, Guidelines para. III.2, art 19.

60 Declaration on a Code of Conduct for Inter-African Relations, Assembly of Heads of State and Government, 30th Ordinary Session, Tunis, Tunisia, 1994-06-13–15. Par 4 reads: "We reaffirm our deep conviction that friendly relations among our peoples as well as peace, justice, stability and democracy, call for the protection of ethnic, cultural, linguistic and religious identity of all our people including national minorities and the creation of conditions conducive to the promotion of this identity".

61 Morel 55.

62 Sing'Oei "The Endorois Of Kenya: From Non-Beneficiaries To Active Stakeholders" - Indigenous Peoples Issues and Resources (2010) 2 available at http://indigenouspeoplesissues.com/index.php/components/components/plugins/content/attachments/index.php?option = com_content&view = article&id = 4828:the-endorois-of-kenya-from-non-beneficiaries-to-active-stakeholders&catid = 55:africa-indigenous-peoples&Itemid = 77 (accessed 2011-06-07).

Relying on the Report of the Working Group on Indigenous Peoples,[63] the Commission highlighted the identification criteria of indigenous people to be:

(a) the occupation and use of a specific territory;

(b) the voluntary perpetuation of cultural distinctiveness;

(c) self-identification as a distinct collectivity, as well as recognition by other groups;

and

(d) an experience of subjugation, marginalisation, dispossession, exclusion or discrimination.[64]

The Commission went on to identify the Endorois peoples and to protect their rights in these terms:

> The alleged violation of the African Charter by the respondent state are those that go to the heart of indigenous rights – the right to preserve one's identity through identification with ancestral lands, cultural patterns, social institution and religious systems. The African Commission therefore accepts that self-identification for the Endorois as indigenous individuals and acceptance as such by the group is an essential component of their sense of identity.[65]

This case is important as it clearly identifies the beneficiaries or rights holders of the RTD and stresses the role of the state as the primary duty bearer.

A far as the content of RTD is concerned, similar to the *DRC* and *Gumne* cases, the *SERAC* case did not shed light on the content of the right. In *SERAC*, though the Commission was of the view that the RTD was violated, it did not pronounce such violation in its final decision. In fact, it referred to the violation of the RTD while emphasising the violation of 'the right to food implicit' in several violated provisions.[66] The Commission affirmed that:

> The Communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (article 4), the right to health, and the right to economic, social and cultural development (article 22). By its violation of these rights, the Nigerian government trampled upon not only the explicitly protected rights, but also upon the right to food implicitly guaranteed.[67]

This is surprising because the African Commission missed the opportunity to provide a dynamic reading of the law to clarify the scope and protect the RTD. All provisions of the ACHPR in which the right to

63 *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* submitted in accordance with the "Resolution on the Rights of Indigenous Populations/Communities in Africa" adopted by the African Commission on Human and Peoples Rights at its 28th ordinary session (Published by IWGIA, 2005), see Chapter 4.
64 *Endorois* case par 150.
65 *Idem* par 156-157.
66 *Idem* par 64.
67 *Ibid*.

food is implicit could have been read together to do so. The Commission espoused the language of the plaintiff instead of interpreting the law to find the violation of the RTD in its final decision. In fact, in the same case, the Commission found the violation of the right to shelter (which is not provided for in the Charter) through the combination of the protection of the right to health, property and family.[68] A similar approach could have linked other human rights together to pronounce on the violation of the RTD, even if the latter was not expressly provided for by the ACHPR.

Furthermore, the notion of "peoples" discussed earlier, the right to wealth and natural resources and to adequate compensation in case of spoliation under article 21 of the ACHPR provide a legal basis to clarify and adjudicate the RTD as provided under article 22. Nonetheless, the Commission failed to do so. A better reading of the ACHPR could have been useful in clarifying the content of the RTD, especially if one is to consider Okafor's[69] view that in addressing the RTD, "one must take account of the interconnectedness and seamlessness of the rights contained in the African Charter".

However, through *Endorois*, the Commission departed from "the doctrine of implied rights"[70] which assisted in finding the violation to the right to housing and food in *SERAC*. It went for the broad interpretation of the law which enabled it to consider the interdependency of the rights in protecting the RTD. As a result, the Commission highlighted the holistic character of the RTD which encompasses elements of non-discrimination, participation, accountability and transparency, equity and choices as well as capabilities.[71] It clarified the RTD as being both "constitutive and instrumental",[72] hence the violation of either procedural or substantive element constitutes an encroachment on the right.

Furthermore, unlike *SERAC*, *Endorois* clearly set the benchmark for participation needed for the realisation of the RTD. In this respect, "prior informed consent" is the minimum standard to be achieved by states before undertaking any development endeavors in indigenous peoples' communities. The African Commission declared:

> The State has a duty to actively consult with the said community according to their customs and traditions. This duty requires the State to both accept and disseminate information, and entails constant communication between the parties.[73]

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68 *SERAC* case par 60. For more analysis on this see Olowu 153 & 154.
69 Okafor "'Righting' the right to development: A socio-legal analysis of article 22 of the African Charter of Human and Peoples' Rights" in *Implementing the right to development – The role of international law* (ed Marks)(2008) 55.
70 Sing'Oei *op cit.*
71 *Endorois* case par 128.
72 Idem par 277.
73 Communication 276/2003, para 289.

As far as the legal regime of collective rights is concerned, *Endorois* also departed from *Gumne* and *SERAC*. Though under the ACHPR, human rights are submitted to the principle of immediate realisation, the African Commission through the *Gumne* and *SERAC* cases submitted socio economic rights[74] and the RTD[75] to progressive realisation based on the availability of resources.

It could be argued that the African Commission is empowered[76] to use international law including the General Comments of the Committee on Economic Social and Cultural Rights in reaching its decision. Nevertheless, this approach worked because Cameroon in the *Gumne* case and Nigeria in the *SERAC* case are parties to the International covenant on Economic Social and Cultural Rights (ICESCR). Olowu correctly questions: "[W]ould there have been credible and justifiable basis for the Commission to apply the same approach were it to involve a state that is not party to ICESCR?"[77] In fact, such an approach would not have worked for countries like Botswana, Mozambique, or Comoros that are not party to the ICESR.[78]

In the *Endorois* decision however, there was no emphasis on the progressive relisation. It could be argued that the Commission brought back the principle of immediate realisation of human rights enshrined in the ACHPR by simply calling upon Kenya to remedy the violation of the rights of the Endorois community.

4 Concluding Remarks

The aim of this article was to examine the impact of the Endorois case on the realisation of the RTD in the African human rights system. After an overview of the RTD characterised by the controversy on its nature, the article proceeds to show that *Endorois* departs from SERAC, DRC and *Gumne*. In this respect, Endorois defines the concept of "peoples", clarifies the beneficiaries of the RTD and stresses the role of the state as the primary duty bearer. It also explains the content of RTD which is multifaceted as it comprises elements of non-discrimination, participation, accountability and transparency, equity and choices as well as capabilities. In addition, it explains the threshold of people's participation needed in development endeavors and emphasises the immediate realisation of human rights as subscribed to the ACHPR. The Endorois decision provides guidance on how to ensure the justiciability of the RTD.

74 *SERAC* case par 48 &52.
75 *Gumne* case par 206.
76 Art 61 ACHPR.
77 Olowu 154.
78 *Ibid*.

The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005

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OPSOMMING

Die geld of die boks: Perspektiewe op roekelose krediet ingevolge die Nasionale Kredietwet 34 van 2005

Die Nasionale Kredietwet 34 van 2005 (hierna die NKW) lei die konsep van roekelose krediet vir die eerste keer In Suid-Afrikaanse kredietwetgewing in. Die NKW poog om roekelose kredietverlening te voorkom deur voorooreenkoms-assessering ingevolge artikel 81 daarvan verpligtend te maak en maak verder voorsiening vir verskeie remedies ten opsigte van roekelose krediet. Daar word aan die howe verskeie magte verleen afhangende van die soort roekelose krediet wat toegestaan is. Aansienlike onduidelikheid bestaan egter oor die basis waarop die magte van die hof om te beveel dat ´n totale of gedeeltelike tersydestelling van die regte en verpligtinge van die verbruiker, aan wie roekelose krediet soos beoog in artikel 80(1)(a) en 80(1)(b)(ii) toegestaan is, uitgeoefen moet word. Dit is voorts ook nie duidelik op watter basis ´n hof ten aansien van voormelde soorte roekelose krediet moet besluit tussen tersydestelling van die verbruiker se regte en verpligtinge of opskorting van die krag en effek van die ooreenkoms nie. Hierdie bespreking stel praktiese ondersoek in na die aard van roekelose krediet en die wyse waarop ´n voorooreenkoms-assessering gedoen moet word. Die remedies ten opsigte van roekelose krediet word ontleed in 'n poging om die praktiese effek van die magte van die hof vas te stel ten opsigte van die verskillende gevalle van roekelose krediet waarvoor die NKW voorsiening maak. Die prosedurele implikasies verbonde aan roeklose krediet word ook ondersoek.

1 Introduction

In the preamble to the National Credit Act 34 of 2005 (hereinafter "the NCA") it is *inter alia* stated that this comprehensive piece of consumer credit legislation, of which the debt relief provisions effectively came into operation on 1 June 2007, aims to promote responsible credit granting and use and for that purpose prohibits reckless credit granting. Section 3(c) further elaborates on this objective by indicating that one of the purposes of the NCA is promoting responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and discouraging reckless credit granting by credit providers and contractual default by

consumers.[1]

The concepts of reckless credit granting and over-indebtedness as set out in part D of chapter 4 of the NCA are new concepts introducing novel debt relief remedies into South African consumer credit law.[2] Over-indebtedness refers to the situation where the preponderance of available information at the time that a determination is made, indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party. For this purpose regard must be had to the consumer's financial means, prospects and obligations[3] and probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.[4] The debt relief remedies offered in respect of over-indebtedness, namely voluntary debt review in accordance with section 86 of the NCA or court-ordered debt review as envisaged by section 85 of the NCA, aim to achieve debt restructuring which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.[5]

Reckless credit, on the other hand, which in essence penalises the disregard by the credit provider for the consequences of granting credit in certain circumstances, may encompass a situation where the consumer becomes over-indebted as a result of reckless credit granting but it also extends to other situations .Regard should be had to section 80 of the NCA to determine whether credit has been granted recklessly.[6] As such it is provided that a credit agreement is reckless if, at the time that the agreement was made, or at the time when the credit limit is increased[7]

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1 S 3(c)(i) & (ii) National Credit Act (NCA). See also Renke "Measures in South African consumer credit legislation aimed at the prevention of reckless lending and over-indebtedness: An overview against the background of recent developments in the European Union" 2011 *THRHR* 208 209.

2 See further Otto & Otto *The National Credit Act Explained* (2010) 58-63,77-79; Scholtz *et al Guide to the National Credit Act* (2009) ch 11. See also Vessio "Beware the provider of reckless credit" 2009 *TSAR* 274.

3 S 79(1)(a) NCA.

4 S 79(1)(b) NCA.

5 S 3(i) read with s 85, 86, 87 and 88 NCA. See the discussion of over-indebtedness and its accompanying debt relief remedies in Scholtz *et al* par 11.3.

6 *Desert Star Trading 145 (Pty) Ltd v No 11 Flamboyant Edleen CC* 2011 2 SA 266 (SCA).

7 The provisions regarding reckless credit as set out in s 80(1) NCA do not apply to an increase in terms of s119(4) NCA. S 119(4) NCA provides that if a consumer, at the time of applying for the credit facility or at any later time, in writing has specifically requested the option of having the credit limit automatically increased from time to time, the credit provider may unilaterally increase the credit limit once a year and by an amount as indicated in the subsection. Thus, in such instance a pre-agreement assessment as prescribed by s 81, as discussed hereinafter, will not be necessary.

(a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time;[8] or

(b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that

(i) the consumer did not *generally*[9] understand or appreciate the consumer's risks, cost or obligations under the proposed credit agreement;[10] or

(ii) entering into that credit agreement would make the consumer over-indebted (own emphases added).[11]

There may thus be some overlap between reckless credit and over-indebtedness but this will not necessarily be the case in all instances of reckless credit and conversely, there may be many instances where a consumer may have become over-indebted after he or she entered into a credit agreement but not as a result of credit having been extended recklessly, for instance where a consumer is retrenched after having entered into a credit agreement that he or she could well have afforded while still employed.[12] Reckless credit entitles the consumer to a number of debt relief remedies, including debt rearrangement in the instance where the extension of reckless credit resulted in the over-indebtedness of the consumer.

The purpose of this discussion is to investigate the concept of reckless credit, the remedies it affords and its procedural implications.

8 S 80(1)(a) NCA.This type of reckless credit appears to be reckless *per se* and will also be referred to as type one reckless credit for purposes of this discussion. See also Vessio 2009 *TSAR* 274 281.

9 It is to be noted that this subsection is broadly worded and does not require that the consumer should "specifically" not have understood the risks, costs and obligations under the agreement but merely requires a "general" lack of such understanding.

10 S 80(1)(b)(i) NCA. This will also be referred to as type 2 reckless credit for purposes of this discussion.

11 S 80(1)(b)(ii) NCA. See also Scholtz *et al* par 11.1. In this instance there is thus an overlap between over-indebtedness and reckless credit. This will also be referred to as type three reckless credit for purposes of this discussion. See further Vessio 2009 *TSAR* 274 275 where she indicates that The Oxford English Dictionary defines "reckless" as "disregarding the consequences or danger etc; rash" and concludes that reckless lending includes not only the act of disregarding the consequences but also the act of not analysing at all, or analysing incorrectly, one's client or potential client in the carrying out of certain prescribed assessments or investigations.

12 Scholtz *et al* par 11.1.

2 Reckless Credit

2 1 Scope of Application

Reckless credit and its accompanying debt relief remedies, as provided for in part D of chapter 4 of the NCA, apply only to natural person consumers[13] who entered into credit agreements governed by the NCA on or after 1 June 2007.[14] Thus it is not available to juristic person consumers and further it does not operate retroactively,[15] meaning that a natural person consumer will not be able to rely on reckless credit in respect of a credit agreement entered into before 1 June 2007. In this context though, regard must be had to the extended definition of juristic person in the NCA, namely that it includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if there are three or more individual trustees or the trustee itself is a juristic person, but does not include a stokvel. The effect of this definition is that a trust may thus qualify as either a natural person or as a juristic person depending on the number or identity of its trustees and where it qualifies as a natural person it will be entitled to rely on reckless credit but not where it is regarded as a juristic person.

As indicated, the concept of reckless credit can only apply if the agreement is a credit agreement to which the NCA applies.[16] Thus it can only apply in respect of a credit facility,[17]credit transaction[18] or credit guarantee[19] as set out in the NCA. In this context regard should be had to section 4(2)(c) of the NCA which provides that the NCA applies to a credit guarantee only to the extent that it applies to a credit facility or credit transaction in respect of which the credit guarantee is granted. This means that where a natural person consumer for instance stood surety for a juristic person with an asset value or annual turnover of more than one million rand, in respect of a credit transaction entered into on or after 1 June 2007, the NCA will not apply to the credit transaction being an exempt transaction[20] and will consequently also not apply to the credit guarantee (suretyship), with the effect that the surety, despite being a natural person, will not be able to raise the issue of reckless credit.[21] If for instance a small or intermediate[22] credit transaction is entered into by a small juristic person with an asset value or annual

13 S 78(1) NCA.
14 Otto & Otto 9.
15 Scholtz *et al* par 11.1. Obviously this is so because compulsory credit assessment as set out in s 81 NCA was not a requirement before entering into credit agreements until the coming into operation of the reckless credit provisions of the NCA.
16 S 4(1) NCA. Regarding credit guarantees, see Stoop & Kelly-Louw "The National Credit Act regarding suretyships and reckless lending" 2011 2 *Potchefstroom Electronic Law Journal* 66.
17 S 8(3) NCA.
18 S 8(4) NCA.
19 S 8(5) NCA.
20 S 4(1)(a) to (d) NCA.
21 *Nedbank Ltd v Wizard Holdings* 2010 5 SA 523 (GSJ).
22 S 9 NCA.

turnover of less than R1 million, then the NCA will apply to that credit transaction. However, given that section 4(2)(c) uses the words " to the extent " it is submitted that a natural person who stood surety for a juristic person consumer with regard to a credit agreement to which the NCA has limited application as set out in section 6 of the NCA will not be able to raise the issue of reckless credit as section 6 provides that part D of chapter 4 does not apply to juristic persons and thus a juristic person cannot rely on reckless credit granting.

It is further to be noted that sections 81 to 84 of the NCA, and any other provisions in part D of chapter 4, to the extent that they relate to reckless credit, do not apply to[23]

(a) a school loan or a student loan;

(b) an emergency loan;

(c) a public interest credit agreement;

(d) a pawn transaction;

(e) an incidental credit agreement; or

(f) a temporary increase in the credit limit under a credit facility,[24]

provided that any credit extended in terms of paragraph (a) to (c) above is reported to the National Credit Register in the prescribed manner and form, and further provided that in respect of any credit extended in terms of paragraph (b), reasonable proof of the existence of the emergency as defined in section 1 of the NCA is obtained and retained by the credit provider.

2 2 Prevention of Reckless Credit by Assessment and Truthful Answering

The NCA contains specific measures aimed at prevention of reckless credit which places obligations on credit providers as well as consumers.[25] As such, a credit provider is prohibited from entering into a reckless credit agreement[26] and further from entering into a credit agreement without first taking reasonable steps to assess:[27]

(a) the proposed consumer's

(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

(ii) debt repayment history as a consumer under credit agreements;

(iii) existing financial means, prospects and obligations; and

23 S 78(1) NCA.
24 See also s 80 read with s 119(4) NCA.
25 See in general Otto & Otto 77 -79; Scholtz *et al* par 11.4; Stoop & Kelly-Louw 2011 2 *PER* 67 86; Renke 2011 *THRHR* 208.
26 Renke 2011 *THRHR* 208 223 where he points out that this is a general prohibition.
27 S 81(2) NCA.

(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.

The consumer is also enjoined to prevent reckless credit granting by the requirement in the NCA that when applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the required assessment.[28] It is thus submitted that where, for instance, a consumer applies to enter into a specific credit agreement with a specific credit provider, such consumer may not during the time that the credit provider is considering the aforementioned application, enter into any further credit agreements with other credit providers without disclosing full details thereof to the first mentioned credit provider in order to enable such credit provider to include such information in the section 82-assessment.

It should be noted that the assessment required by section 81 is more comprehensive than a mere affordability assessment as the consumer's general understanding of the risks, costs and obligations should also be assessed and it should be evident from the assessment that regard was also had to the consumer's debt repayment history. It is submitted that in this regard credit providers may be well advised to comply with the plain language requirement as set out in section 64 of the NCA. Although the NCA requires that the credit provider takes reasonable steps to assess the aspects as listed in section 81(2)(a) and (b), it does not set out what these reasonable steps are. Section 82 of the NCA provides that a credit provider may determine for itself the evaluative mechanisms and models or procedures to be used in meeting its assessment obligations under section 81, provided that any such mechanisms, model or procedure results in a fair and objective assessment. Vessio aptly remarks that the wording of section 82 is interesting in that the positive responsibility appears to be on the credit provider to ask the correct information gathering questions.[29] Notice should however be taken of section 61(5) of the NCA which provides that a credit provider may determine for itself any scoring or other evaluative mechanism or model to be used in managing, underwriting and pricing credit risk, provided that any such mechanism or model is not founded or structured upon a statistical or other analysis in which the basis of risk categorisation, differentiation or assessment is a ground of unfair discrimination prohibited in section 9(3) of the Constitution.[30]

This right of the credit provider to determine its own evaluative mechanism is subject to the right of the National Credit Regulator to pre-approve the evaluative mechanisms, models and procedures to be used for assessment purposes in respect of developmental credit agreements

28 S 81(1) NCA.
29 Vessio 2009 *TSAR* 274 279.
30 The Constitution of the Republic of South Africa, 1996.

and to publish guidelines proposing evaluative mechanisms, models and procedures to be used in respect of other credit agreements.[31] A guideline published by the National Credit Regulator is not binding on a credit provider, except with regard to developmental credit or if so ordered by the National Consumer Tribunal.[32]

If the Tribunal finds that a credit provider has repeatedly failed to meet its obligations under section 81, or customarily uses evaluative mechanisms, models or procedures that do not result in a fair and objective assessment, the Tribunal, on application by the National Credit Regulator may require that credit provider to apply any guidelines published by the National Credit Regulator or apply any alternative guidelines consistent with prevalent industry practice, as determined by the Tribunal.[33]

To date the National Credit Regulator has not yet published any general guidelines for the assessment purposes set out in section 81.

It is further submitted that, given the fact that the reckless credit remedy is not to the avail of juristic persons, a section 81 pre-agreement assessment appears to be a compulsory prerequisite only where a credit agreement is entered into with a natural person consumer. However, although not compulsory in the case of juristic persons, it is good business practice to also conduct a pre-agreement assessment along the lines mentioned hereunder where the consumer is a juristic person, obviously with the necessary changes required by the context.

For purposes of the comprehensive compulsory pre-agreement assessment as required by section 81, it is thus submitted that the credit provider must implement non-discriminatory evaluative measures, cast plainly[34] in an official language that the consumer reads and understands,[35] which should *inter alia* address the following aspects:

(a) Whether the consumer understands and appreciates the risks and costs of the credit and his or her rights and obligations as a consumer under the credit agreement. It is submitted that this can objectively be achieved by inserting a clause into the credit application indicating that the risks and costs of the credit and the consumer's rights and obligations as a consumer under a credit agreement have been explained to him or her by the credit provider and that the consumer expressly acknowledges that he or she understands and appreciates his or her rights and obligations as a consumer.[36]

(b) The consumer's debt repayment history as a consumer under credit agreements. It is submitted that for this purpose, unless the consumer is an existing client of the credit provider and the credit provider has access to the

31 S 82(2) NCA.
32 S 82(3) NCA.
33 S 82(2)(a) & (b) NCA.
34 S 64 NCA.
35 S 63 NCA.
36 Scholtz *et al* par 11.6. See also Vessio 2009 *TSAR* 274 280 fn 42.

consumer's debt repayment history, the credit provider should do a credit bureau check as that will give an indication as to whether the consumer has a good or bad debt repayment history. A bad debt repayment history, eg judgments due to non-payment of debt might serve to expose the consumer as a possible reckless credit risk in the sense that entering into a credit agreement with him or her might lead to the consumer's over-indebtedness. It is submitted that it is prudent that the assessment contain a reference to the fact that the credit provider did have due regard to the consumer's debt repayment history as required by section 81(2)(a)(ii).

(c) The consumer's existing financial means, prospects and obligations. It should be borne in mind that "financial means, prospects and obligations" has an extended meaning in terms of the NCA which will enable the credit provider to also take into account the financial means, prospects and obligations of any other adult person within the consumer's immediate family or household, to the extent that the prospective consumer and that other person customarily share their respective financial means and mutually bear their respective financial obligations.[37]

(d) Where the consumer has or had a commercial purpose for applying for or entering into a particular credit agreement, the credit provider may for purposes of assessing the consumer's financial means, prospects and obligations also have regard to the reasonably estimated future revenue flow from that business purpose.[38] It is submitted that in this regard the credit provider should thus require projected profit margins of the business venture from the consumer .The assessment in the case where the consumer has such commercial purpose for applying to enter into a credit agreement must indicate that there is a reasonable basis to conclude that such commercial purpose may prove to be successful.

(e) Assessment should be done not only of the means prospects and obligations of a consumer under a credit facility or a credit transaction to which the NCA applies, but also of the surety in respect of such credit facility or credit transaction.[39]

2 3 Time for Determination of Reckless Credit

In terms of section 80(2) of the NCA the question whether reckless credit was granted is determined with regard to the time the agreement was made. No regard should be had to the ability of the consumer to meet the obligations under that credit agreement or understand or appreciate the risks, costs and obligations under the proposed credit agreement at the time that the determination is being made. A determination of reckless credit will thus always entail an *ex post facto* enquiry. It is clear that the moment of entering into the agreement is the definitive moment for determining whether credit was granted recklessly and consequently the mere fact that a consumer in respect of whom no credit assessment was done can actually afford the credit or that a consumer who has been assessed but did not understand the risks, costs and obligations under

37 S 78(3) NCA.
38 S 78(3)(c) NCA.
39 See Stoop & Kelly-Louw 2011 2 *Potchefstroom Electronic Law Journal* 67 for a detailed discussion regarding the obligation to do a s 81-assessment in respect of a surety.

the credit agreement has in the meantime grasped such risks, costs and obligations, will not provide the credit provider with a defence against an allegation of reckless credit.

2 4 Complete Defence Against Reckless Credit

For the purposes of the NCA, it is a complete defence to an allegation that a credit agreement is reckless if the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by section 81 *and* a court or the Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment.[40]

This complete defence is only available to a credit provider who can prove that both requirements of section 81(4) of the NCA are met.[41] The NCA however does not mention specific aspects that would indicate "materiality" as referred to in section 81(4).[42] It is submitted that in each specific instance the facts of the particular matter and the extent of the untruthfulness of the consumer will have to be considered in order to determine whether it can be said that the credit provider's ability to make a proper assessment was materially influenced.

2 5 Debt Relief Powers of Court in Respect of Reckless Credit

2 5 1 Court may Suo Motu *Look into Issue of Reckless Credit*

Section 83(1) of the NCA provides that despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, the court may declare that the credit agreement is reckless, as determined in accordance with part D of chapter 4 of the NCA. Unlike section 85 of the NCA, which requires an allegation of over-indebtedness before a court can exercise its powers relating to over-indebtedness, section 83 does not require an allegation of reckless credit before a court can exercise its powers with regard to reckless credit. It thus appears that a court can *suo motu* look into the issue of reckless credit during court proceedings in which a credit agreement is being considered.[43] Given that the words "court proceedings" is used, it is clear that a court can make use of these powers

40 S 81(4)(a) & (b) NCA.
41 Scholtz *et al* par 11.4.1.
42 *Horwood v Firstrand Bank Ltd* unreported South Gauteng High Court case nr 36853/2010.The court indicated (par 6) that not every failure by a consumer to fully and truthfully answer the credit provider's request for information as part of the prescribed assessment will entitle the credit provider to the complete defence mentioned in s 81(4) NCA.The question as to what would constitute such materiality was however left open by the court (par 15).
43 *Scholtz et al* par 11.4.5. See also *African Bank Ltd v Myambo* 2010 3 SA (GNP) 298.

in action and application proceedings.[44] Although a debt counsellor may during a debt review in terms of section 86 determine that a specific credit agreement is reckless, it is only a court which can actually declare that specific agreement reckless.[45] Furthermore it should be noted that it is not a requirement of the NCA that the consumer is obliged to approach a debt counsellor for purposes of a determination of reckless credit before such issue may be raised and it is submitted that either the consumer or the court (*suo motu)* may raise the issue of reckless credit without the assistance of a debt counsellor.

In respect of the approach to be taken by a court when determining whether reckless credit was granted, the court in *SA Taxi Securitisation (Pty) Ltd v Mbatha*[46] remarked:[47]

> While one of the purposes of the NCA is to discourage reckless credit, the Act is also designed to facilitate access to credit by borrowers who were previously denied such access. An over-critical armchair approach by the court towards credit providers when evaluating reckless credit, or the imposition of excessive penalties upon lenders who have recklessly allowed credit, would significantly chill the availability of credit especially to the less affluent members of our society.

2 5 2 Court may not Deviate from Section 83 Powers

Section 130(4)(a) of the NCA provides that if in any debt procedures in a court, the court determines that the credit agreement was reckless as described in section 80 it *must* make an order contemplated in section 83. The court thus has no discretion in such an instance to deviate from the powers given to it by section 83 and can make no other orders than those provided for in the said section. It is important to note that the NCA does not regard a reckless credit agreement as an unlawful agreement and thus it is clear that the debt relief afforded in respect of a reckless credit agreement is limited to the relief set out in section 83 and does not extend to the relief provided in section 89(5) of the NCA in respect of unlawful credit agreements.[48]

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44 S 86(6) NCA provides that if a consumer seeks a declaration of reckless credit during a debt review in terms of s 86 NCA, the debt counsellor must determine whether any of the consumer's credit agreements appear to be reckless.

45 A debt counsellor is defined in reg 1 as "a natural person who is registered in terms of s 44 of the NCA offering a service of debt counseling. Debt counselling is also defined in reg 1 as "performing the services contemplated in s 86 of the NCA".

46 2011 1 SA 310 (GSJ).

47 Par 37. See also *SA Taxi Securitisation Pty) Ltd v Nako* unreported case Eastern Cape High Court no 19/2010.

48 Boraine & Van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" 2010 *THRHR* 1.

2 5 3 Powers Where No Credit Assessment was Done or the Consumer did not Understand the Risks, Costs and Obligations Under Credit Agreement

The NCA endows a court with the same powers where no credit assessment as required by section 81 was done prior to entering into a credit agreement with the consumer as in the instance where the credit provider, having conducted an assessment entered into the credit agreement with the consumer despite the preponderance of information available to the credit provider indicating that the consumer did not *generally* understand or appreciate his or her risks, costs or obligations under the proposed credit agreement. If a court declares that a credit agreement is reckless in terms of section 80(1)(a) (no prior credit assessment) or 80(1)(b)(i) (consumer did not *generally* understand risks, costs or obligations under the credit agreement), the court *may* make an order setting aside all or part of the consumer's rights and obligations under *that* credit agreement, as the court determines just and reasonable in the circumstances *or* suspending the force and effect of *that* credit agreement in accordance with section 83(3)(b)(i).[49]

Thus, in respect of the first two types of reckless credit as envisaged by section 80(1)(a) and 80(1)(b)(ii) of the NCA, the court has a discretion to order either partial or complete setting aside of the consumer's rights and obligations under the agreement or suspending the force and effect of the specific agreement. The NCA is however silent on how a court should decide which one of the aforementioned orders it should make.[50] It treats both the situation where no credit assessment was done as well as the situation where a credit assessment was actually done but the consumer did not understand the relevant risks, costs and obligations in the same manner without differentiating between the two. It also does not differentiate between the situation where performance in terms of the agreement has not yet occurred and the situation where the parties have already performed. For example: The credit provider has advanced money or goods and the consumer has or has not made certain payments. The section is further silent on the rights and obligations of the credit provider in the instance where the consumer's rights and obligations under the credit agreement are set aside partially or completely. It is further notable that these consequences may follow even if the consumer is not over-indebted.[51]

It may thus be asked, given the absence of any express indication, how a court must decide whether to set aside the rights and obligations of a consumer under a credit agreement or to merely suspend the force and effect of such credit agreement?[52] If the court does decide to opt for setting aside the consumer's rights and obligations, one may ask on what

49 *Ibid.*
50 *Idem* 3.
51 *Ibid.*
52 *Ibid.*

basis it will for instance regard it as "just and reasonable in the circumstances" to only partially set the consumer's rights and obligations under the agreement aside as opposed to completely? It is submitted that the absence of clear guidelines regarding the setting aside of the consumer's rights and obligations, and the absence of an indicator as to when setting aside will be more appropriate than suspension, may lead to a fragmented approach by the courts and requires clarification.

2 5 3 1 *Setting Aside of a Reckless Credit Agreement*

It is submitted that where performance in terms of the reckless credit agreement has not yet occurred it might appear "just and reasonable in the circumstances" that the court may rule that the consumer has no further rights and obligations.[53] It will thus for all practical purposes effectively amount to cancellation of the contract and both parties will be absolved from reciprocal performance.[54]

Where however performance has already occurred, for example, the credit provider advanced a loan amount or delivered a vehicle to the consumer and the consumer has or has not made certain agreed payments and the agreement is set aside, the next question to be asked relates to restoration.[55] As reckless credit agreements do not constitute unlawful credit agreements[56] for purposes of the NCA with the grave consequence of forfeiture of the credit provider's rights as provided for by section 89(5) of the NCA, it is submitted that the credit provider will be able to claim restoration of any performance based on for example, unjustified enrichment of the consumer.[57]

In *SA Taxi Securitisation (Pty) Ltd v Mbatha*[58] the court indicated that if the consumer has a valid complaint that, but for the recklessness of the credit provider, the consumer would never have become involved in the credit transaction, it might be "just and reasonable "to set aside the agreement.[59] In that event, according to the court, the agreement would be null and void as if it had never been.[60] As a consequence, the credit provider, who remains owner of the vehicle which was financed in this specific instance, would become entitled to restoration thereof.[61] On the other hand the consumer, who no longer has any obligations under the

53 *Idem* 4.
54 *Ibid.*
55 *Idem* 7.
56 S 89 NCA, which sets out the various instances of unlawful agreements, does not contain a reference to a reckless credit agreement.
57 Boraine & Van Heerden 2010 *THRHR* 1.
58 2011 1 SA 310 (GSJ).
59 Par 47.
60 *Ibid.*
61 *Ibid.* See also *SA Taxi Securitisation (Pty) Ltd v Chesane* 2010 6 SA 557 (GSJ) par 28 and *SA Taxi Securitisation (Pty) Ltd v Booi* unreported case Eastern Cape High Court no 4077/2009.

agreement that has been set aside, would be relieved of any further indebtedness or deficiency claim under the agreement.[62]

2 5 3 2 *Suspension of a Reckless Credit Agreement*

It is submitted that the choice by a court to order a suspension of the force and effect of a reckless credit agreement rather than the complete or partial setting aside thereof, should be guided by the question whether the lack of assessment or the lack of comprehension by the consumer of the risks, costs and obligations under the credit agreement subsequently (some time after the conclusion of the agreement) lead the consumer to become over-indebted, thus creating a situation in which the consumer requires a "debt-breather" in the form of a suspension in order to recover financially to a situation where he or she is again able to resume payments in respect of the reckless agreement. This situation which envisages the occurrence of over-indebtedness at some stage later than the moment that the agreement was entered into, should be distinguished from the situation mentioned in section 80(1)(b)(ii) of the NCA where the specific agreement caused the consumer to become over-indebted at the very moment he or she entered into the said credit agreement. The essence of this submission in respect of a court's suspensive powers regarding reckless credit is that suspension as provided for in section 84 of the NCA and discussed hereinafter, envisages that the agreement will resume again after the suspension is lifted. As such it appears to be a remedy designed to provide temporary debt relief aimed at alleviating over-indebtedness and not merely an arbitrary punishment to a credit provider who extended reckless credit. It is further submitted that where the facts of a particular matter clearly indicate that a consumer will not recover financially despite a suspension in accordance with section 84, it will be futile for the court to order such suspension.

Other than is the case with setting aside of the consumer's rights and obligations as discussed above, the NCA contains a more detailed, although not altogether clearer, indication in section 84 of what a suspension of the force and effect of a credit agreement entails. During a period that the force and effect of a credit agreement is suspended in terms of the NCA:[63]

> (a) the consumer is not required to make any payment required under the agreement;
>
> (b) no interest, fee or other charge under the agreement may be charged to the consumer;
>
> (c) the credit provider's rights under the agreement, or under any law in respect of that agreement, are unenforceable, despite any law to the contrary.

Once a suspension of the force and effect of a credit agreement ends, all the respective rights of the credit provider and consumer under that

62 *Ibid*.
63 S 84(1) NCA.

agreement are revived[64] and are fully enforceable except to the extent that a court may order otherwise.[65] However, no amount may be charged to the consumer by the credit provider with respect to any interest, fee or other charge that were unable to be charged during the suspension.[66]

Thus it appears that where a suspension is appropriate, the penalty for the credit provider in having extended reckless credit lies in the fact that the credit grantor will not receive any payment in respect of the agreement for the period of suspension, will forfeit the interest and other charges that would have accrued during that period and will not be able to enforce the agreement by for instance cancelling the agreement and repossessing the financed item, if any.

It may however be asked how a suspension in terms of section 84 affects the credit provider's security, eg a motor vehicle financed in terms of an instalment agreement? Is the consumer entitled to retain the depreciating security whilst not making any payments? The NCA does not specify or limit the period of suspension and it may well be that the court orders a suspension which may run over a considerable period of time. Neither does section 84 expressly state that the consumer is obliged to return the financed item to the credit provider for the period of suspension or that the consumer is entitled to retain possession of such item whilst the suspension is in force.

Two different points of view may be taken in this regard. On the one hand it may be argued that the bar against enforcement of the agreement read together with the right of the consumer to stop making payments for the period of suspension whilst not being placed under an express obligation to return the financed item to the credit provider for the period of suspension, viewed against the backdrop that the agreement is not cancelled or set aside but merely suspended, indicates that the legislature intended that the consumer cannot be deprived of possession of the financed item during the period of suspension.

On the other hand, the NCA strives to balance the competing rights of consumers and credit providers.[67] When one takes this view, it seems manifestly unfair to allow the consumer, during a period of suspension of a reckless credit agreement to retain the credit provider's depreciating security whilst not making any payments and to also penalise the credit provider further by non- receipt of payments and the forfeiture of interest and other charges for the period of suspension. From this perspective,

64 It is submitted that this is an unfortunate choice of word, as the suspension does not end or terminate the relevant rights and obligations. "Resume" instead of "revive"may have been a more appropriate choice.

65 S 84(2)(a)(i) & (ii) NCA.

66 S 84(2)(b) NCA.

67 S 3(d) NCA provides that one of the purposes of the NCA is promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers.

the mere fact that a section 81- assessment was not done or that the consumer, despite the assessment did not understand the risks, costs and obligations under the agreement, does not entitle the consumer to free possession and use of the financed item as consolation.

The court in *SA Taxi Securitisation (Pty) Ltd v Mbatha*[68] took the view that if the effect of the agreement is suspended, *all* elements of the agreement would have to be suspended.[69] It indicated that although section 81(4)(c) contemplates that the credit provider will not be entitled to enforce its rights during a period of suspension, that subsection must be read with subsection 81(4)(a) and (b) of the NCA.[70] It consequently held that there is no basis for reading into the language of the NCA a provision that when suspension is appropriate, the court also has the power to permit the consumer to utilise the security in a manner which will permit it to deteriorate during the period of suspension. According to the court "It seems unlikely that the legislature ever intended that the consumer could keep the 'money *and* the box'".[71]

It is submitted that although section 84 bars enforcement during a suspension and absolves the consumer from payment during the suspension it does not necessarily imply that the consumer may possess and use the credit provider's depreciating security to the credit provider's detriment during such suspension. What if the suspension ends and the consumer is still not in a financial position to resume payments under the credit agreement? Possibly the provision that is made in section 84(2) for a "revival" of the respective *rights* and obligations of both the parties once the suspension ends, may shed more light upon the matter. In this regard it may be asked why it would be necessary to state in section 84(2) that the consumer's rights are revived if section 84(1) does not make any specific mention of the consumer's rights. It is submitted that the only reasonable inference to be drawn from this is in fact that section 84(1), although not in express terms, by implication envisages that the consumer's right to possession and use of the financed item be suspended for as long as the suspension is in force.

On a practical level thus: Although the credit provider will not be entitled to cancel the agreement and repossess the financed item in terms of enforcement proceedings, it would appear that the consumer is also not entitled to remain in possession of that item and to use it during the period of suspension, unless the consumer can provide adequate security that the credit provider will not suffer any harm due to

68 2011 1 SA 310 (GSJ).
69 Par 48.
70 Par 45.
71 Par 46. The court indicated (par 48) that if the effect of the agreement is merely suspended, all elements of the agreement would have to be suspended and that this would mean that the consumer would not be entitled to retain possession of the vehicle during the period of suspension but that at the same time the consumer would not have to make any payments under the agreement during the suspension period.

depreciation and use of the financed item during a suspension. It is submitted that should it transpire during a suspension that the credit provider will suffer irreparable harm due to depreciation of his security whilst in possession of the consumer, which will inevitably be the case in many instances,[72] at least with regard to most movable property, if the consumer uses it without paying for it, the credit provider may, if the facts permit, approach the court for an interim attachment order to secure the safekeeping of the movable financed item pending the expiry of the suspension.[73] Such an interim safekeeping attachment order does not amount to enforcement proceedings and will thus not fall under the bar against enforcement contained in section 84 of the NCA.[74] One may even venture as far as suggesting that this is an order that the court can make *suo motu* when it declares the credit agreement reckless and orders suspension, as it may be argued that it appears to be implied in section 84(1) read with section 84(2) that the consumer's rights to the financed item is also suspended. However in view thereof that the position regarding possession of the credit provider's security during a suspension is somewhat uncertain, and there is no guarantee that a court may take such a liberal view as to make an order *suo motu,* it is submitted that it would be prudent for a credit provider who faces a possible suspension of a reckless credit agreement to approach the court for an interim attachment order to be made simultaneously with any order declaring the credit agreement reckless and suspending the force and effect thereof.

An issue which complicates the above explanation and needs further consideration is the question as to what should be done in the instance where the financed item that is subject to a suspension, is immovable property? The inconvenience and cost of requiring the consumer to vacate the immovable property for the period of suspension would be immense. Should it be held that a consumer whose credit agreement is suspended may continue to occupy the immovable property that is subject to the credit agreement but the consumer whose credit agreement in respect of a movable item, such as a motor vehicle is suspended, may not stay in possession of the vehicle during the suspension might probably give rise to a claim that it infringes on the latter consumer's right to equality. Should one try to take the dim view that suspension in terms of section 84 is only appropriate within the context of movable property, it would lead to a reverse accusation where the consumer in respect of immovable property can then complain about being treated unequally.

It is doubtful whether the legislature even contemplated all of the above scenarios when section 84 was drafted but it is submitted that

72 It is submitted that a consumer who cannot afford to repay his debt in terms of a credit agreement, is also usually not in a position to pay the security premiums applicable to the item financed in terms of that agreement.
73 See *SA Taxi Securitisation v Chesane* 2010 6 SA 557(GSJ).
74 *Ibid*. See also Otto & Otto 113.

section 84 might eventually be more complicated to interpret and apply than would initially appear. Probably this confusion could have been avoided to some extent if the legislature clearly provided in section 84 that where the instalment agreement relates to a movable item, such item should be returned to the credit provider during the period of suspension. However, the position relating to immovable property would then still be problematic within the context of equal treatment of consumers.

It also does not appear as if this problem can be cured by providing for partial rescission of the rights and obligations of the consumer where immovable property is at stake and to take the view that suspension is only appropriate where movable items are concerned. Rescission even if only partial, implies that certain of the consumer's rights and obligations come to an end, whereas suspension contemplates that the rights and obligations in terms of the agreement resume once the suspension ends.

It is further submitted that it would also have contributed to legal certainty if section 83 indicated in which instances and on what grounds a complete or partial setting aside of the consumer's rights and obligations would have been more appropriate and in which instances a suspension of the force and effect of the credit would have been more suitable. In respect of setting aside one can at least deduce that the court will have regard to facts which makes such complete or partial setting aside "just and appropriate in the circumstances" but insofar as determining that a suspension is the more appropriate order, section 83(2)(b) contains no clear guidelines for making such order. As submitted above, a suspension may be held to be more appropriate where the consumer has performed in terms of the reckless credit agreement but has subsequently become over-indebted and is in need of temporary debt relief. In the end however, it appears that the choice between a setting aside and a suspension will essentially be a common sense decision guided by the facts of a particular case.

2 5 4 *Powers of Court where Entering into Specific Credit Agreement Caused Over-Indebtedness*

In respect of the third type of reckless credit as described in section 80(1)(b)(ii) of the NCA, namely where a section 81-assessment was done, but the credit provider disregarded the preponderance of available information and still entered into a credit agreement with the consumer which agreement toppled the consumer into the abyss of over-indebtedness at the moment of conclusion into the agreement, once the court has declared the agreement reckless it:[75]

75 S 83(3) NCA. See s 87 NCA which provides: "(1)(a) If a debt counsellor makes a proposal to the Magistrate's court in terms of section 86(8)(b) or a consumer applies to the magistrates court in terms of section 86(9), the Magistrate's court must conduct a hearing and, having regard to the proposal and information before it and the consumer's financial means,

continued on next page

(a) must further consider whether the consumer is over-indebted at the time of those court proceedings; and

(b) if the court concludes that the consumer is over-indebted the court *may* make an order:

(i) (i) suspending the force and effect of that credit agreement until a date determined by the court when making the order of suspension; and

(ii) (ii)restructuring the consumer's obligations under any other credit agreements, in accordance with section 87.

Before making the order as set out in section 83(3) the court is obliged[76] to consider the consumer's current means and ability to pay his or her current financial obligations that existed at the time the agreement was made.[77] In addition the court has to consider the expected date when any such obligation under a credit agreement will be fully satisfied, assuming the consumer makes all the required payments in accordance with any proposed order.[78]

Where the court thus grants the debt relief as set out in section 83(3) it will effectively mean that the court will make an order suspending the credit agreement which was entered into recklessly and caused the consumer to become over-indebted and that all the consumer's other credit agreements, excluding the aforementioned agreement, in respect of which the consumer has subsequently also become over-indebted as a result of the reckless credit granting, will be restructured.

It thus appears that the legislature intended to penalise the credit provider in respect of this third type of reckless credit by suspending the credit provider's right to payment and enforcement and forfeiture of interest, fees and charges which would otherwise have been charged during that period and by giving preference to restructuring of other credit agreements in respect of which the consumer may subsequently have become over-indebted as a result of having entered into the suspended reckless credit agreement.

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prospects and obligations may -
reject the recommendation or application as the case may be; or
make an order declaring any credit agreement to be reckless, and an order contemplated in section 83(2) or (3), if the Magistrate's court concludes that the agreement is reckless;
an order rearranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii); or
both orders contemplated in subparagraph (i) and (ii)."
It is further provided by s 87(2) NCA that the National Credit Regulator may not intervene before the Magistrate's court in a matter referred to it in terms of s 87.

76 S 83(4) NCA uses the word "must".

77 S 83(4)(a) NCA.

78 S 83(4)(b) NCA.

Insofar as the other credit agreements that will be restructured are concerned, such restructuring will have to occur in terms of section 86(7)(c) and will entail

> (a) extending the period of the agreement and reducing the amount of each payment accordingly;
>
> (b) postponing during a specified period the dates on which payments are due under the agreement;
>
> (c) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or
>
> (d) recalculating the consumer's obligations because of contraventions of part A or B of Chapter 5, or Part A of Chapter 6.[79]

It is submitted that the court's power to postpone dates of payments in terms of section 86(7)(c) should not be confused and equated with the court's power to suspend a reckless credit agreement in terms of section 84. Further, it is clear from section 86(7)(c) that unlike in terms of a section 84-suspension, the court is not empowered to "write off" interest when ordering a debt restructuring.[80] Once these debts have been restructured, the provisions of section 88(3) will apply to such restructured debt, thus effectively preventing enforcement by the credit provider whilst the consumer duly makes payments in terms of the debt restructuring order.[81]

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79 Part A of ch 5 NCA deals with unlawful credit agreements and provisions.part B deals with disclosure, form and effect of credit agreements. Part A of ch 6 NCA deals with collection and repayment practices.

80 Scholtz *et al* par 11.3.3.2.

81 S 88(3) NCA provides that: "Subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i) may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until -
the consumer is in default under the credit agreement; and
one of the following has occurred:
an event contemplated in subsection (1)(a) through (c); or
the consumer defaults on any obligation in terms of a rearrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.
S 88(1) NCA provides that a consumer who has filed an application for debt review in terms of s 86(1), or who has alleged in court that he or she is over-indebted must not incur any further charges under a credit facility or enter into any further credit agreement, other than a consolidation agreement, with any credit provider until one of the following events has occurred:
(a)the debt counsellor rejects the application and the prescribed time period for direct filing in terms of section 86(9) have expired without the consumer having so applied;
(b)the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application;

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2 6 Procedural Perspectives

It is submitted that reckless credit may constitute both a cause of action in those instances where the consumer takes the initiative to have the agreement declared reckless as well as a defence on the merits in those instances where the credit provider has instituted legal proceedings based on the credit agreement against the consumer. In practice however, it appears that reckless credit is usually raised as a defence by a consumer in response to a credit provider's enforcement attempts.

Given that section 81, requiring the pre-agreement assessment, is cast in peremptory terms[82] and in view thereof that courts may *suo motu* enquire into the aspect of reckless credit, it is submitted that a credit provider, when instituting legal proceedings to enforce a credit agreement, should allege in its particulars of claim that an assessment as required by section 81 was done prior to entering into the agreement. It is thus submitted that compliance with the provisions of section 81 can be regarded as a statutory requirement and that failure to allege such compliance might render the credit provider's particulars of claim excipiable for lack of a complete cause of action. Where a matter is undefended, failure to make such allegation may also jeopardise the granting of default judgment as it can be expected that a court will *suo motu* enquire into the aspect of reckless credit.

Where a credit provider fails to allege in its particulars of claim that a pre-agreement assessment was conducted, the consumer may thus except against the particulars of claim. In the event that such assessment was indeed conducted but merely not alleged in the particulars of claim, the court should uphold the exception and the credit provider can then cure its defective particulars of claim by an appropriate amendment. Should it transpire that such an assessment was never conducted an amendment will not cure the defect. In view thereof that failure to conduct a pre-agreement assessment constitutes reckless credit *per se* it would appear that the appropriate order for the court to make in such instance would be to set the particulars aside on the basis of an incurable excipiability and to make an order in terms of section 83, as expressly obliged by section 130(4)(a).

Where the credit provider alleges in its particulars of claim that a section 81-assessment was conducted prior to entering into the credit agreement, the defendant can of course raise a number of defences, namely:

(c)or a court having made an order or the consumer and credit providers having made an agreement re-arranging the consumer's obligations, all the consumer's obligations under the credit agreements as rearranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement.
See *Firstrand Bank Ltd v Fillis* 2010 6 SA 565 (ECP).

82 As indicated, s 81 provides that the credit provider "must" not enter a credit assessment without first doing the necessary assessment.

(a) that although an assessment was conducted, it did not amount to a proper assessment as envisaged by the NCA;

(b) that despite the assessment and the indication by the preponderance of available information that the consumer did not generally understand the risks, costs and obligations under the credit agreement, the credit provider disregarded it and still entered into the credit agreement with the consumer (which essentially also implies the assessment was not conducted properly);

(c) that despite the assessment, the credit provider still elected to enter into the credit agreement with the consumer and disregarded the indication by the preponderance of available information that entering into that specific agreement would make the consumer over-indebted.

Where the consumer alleges, at summary judgment stage, that in respect of a specific credit agreement the credit has been extended recklessly, it is submitted that a bald allegation of reckless credit will not qualify for purposes of warding off summary judgment. In this regard the consumer should state the nature and grounds pertaining to the specific type of reckless credit that is relied upon.[83] Essentially the same principle applies to the drafting of the consumer's plea: a defendant must clearly and concisely state the nature of his defence and all the material facts on which it is based, in such a manner that the plaintiff knows exactly which case it has to meet.[84]

In *SA Taxi Securitisation (Pty) Ltd v Mbatha* the court, in considering an application for summary judgment, indicated that the consumer-defendants failed to set out their defence of reckless credit with sufficient particularity. The court then gave the following non-exhaustive guidelines in respect of the information which would need to be disclosed regarding the consumer's defence:[85]

In respect of reckless credit as provided for in section 80(1)(a) of the NCA, the court indicated that details should have been given of the negotiations leading up to the conclusion of the agreement and the parties to the negotiations should have been identified.[86] The consumer-defendant should also have disclosed details concerning any credit application that the defendant signed and the circumstances in which he or she signed those credit applications as this information would have enabled the court to evaluate whether there is a basis for the allegation that no assessment was conducted under the NCA.[87] It is respectfully submitted that by imposing these obligations upon the defendant, the court is in fact to some extent burdening the consumer with an onus which should rightfully be that of the credit provider. It is submitted that where the credit provider seeks summary judgment against the consumer, the credit provider is the party who is obliged to make the

83 *Breitenbach v Fiat SA (Edms) Bpk* 1976 2 SA 226 (T).
84 *Neugebauer & Co Ltd v Bodiker & Co (SA) Ltd* 1925 AD 316 AT 319*; FPS Ltd v Trident Construction (Pty) Ltd* 1989 3 SA 537 (A) 542.
85 Par 55*ff*.
86 Par 56.1.
87 *Ibid*.

necessary allegations in its particulars of claim regarding an assessment having been conducted prior to entering into the agreement. If such allegation is made and the consumer-defendant wishes to contest it, then the consumer-defendant should provide detail indicating that such an assessment was in fact never conducted or was not conducted properly in the manner envisaged by section 81 of the NCA.

In respect of reckless credit as described in section 80(1)(b)(i),the court indicated that the consumer – defendant should provide information demonstrating his or her level of education and experience at the time relating to the risk of incurring credit.[88] According to the court this would have involved a disclosure by the consumer-defendant of prior credit transactions entered into.[89]

As regards reckless credit as described in section 80(1)(b)(ii), the court indicated that the consumer-defendant should provide details of his or her indebtedness at the time the agreement was concluded as well as information concerning the defendant's income and expenditure.[90] Information should also be provided concerning the consumer-defendant's current levels of indebtedness.[91] It is submitted that the consumer-defendant should also indicate that proper disclosure of his or her complete state of indebtedness was made to the credit provider at the time of the assessment.

Insofar as the credit provider is concerned, it is thus clear that the credit provider bears the onus to prove that a pre-agreement assessment was conducted. Consequently where the credit provider failed to conduct a pre-agreement assessment the credit provider will not be able to escape a declaration of reckless credit. Where however the consumer in his or her plea admits that a credit assessment was done but alleges lack of *generally* understanding the risks, costs and obligations under the credit agreement, it is submitted that the credit provider should file a reply to the consumer's plea alleging facts which, if proven, would show that such risks, costs and obligations were duly explained to the consumer or demonstrating that the consumer has been party to various previous credit agreements thus justifying the inference that the consumer was sufficiently educated regarding such risks, cost and obligations. Also, where the consumer in his or her plea admits to an assessment having been conducted but pleads that entering into the specific credit agreement made him or her over-indebted, the credit provider could file a reply alleging either that the defendant was not catapulted into over-indebtedness by that specific agreement or that the consumer failed to answer the credit provider's request for information fully and truthfully

88 Par 56.2.
89 *Ibid.*
90 Par 56.3. In this case the court indicated that the consumer should also have indicated income derived from using the vehicle as a taxi.
91 Par 56.4.

thus materially influencing the credit provider's ability to make a proper assessment.

That having been said, it may be remarked that insofar as summary judgment proceedings are concerned, the credit provider being the plaintiff-applicant, unfortunately does not have the luxury of filing a replying affidavit to the consumer-respondent's opposing affidavit. The grave reality thereof would then be that in the event where the credit provider alleges in its particulars of claim that an assessment was conducted, the consumer defendant could for instance in an opposing affidavit allege that despite the assessment the credit provider entered into a credit agreement with the consumer which made the latter over-indebted or that the preponderance of available information indicated that the consumer did not understand the risks, costs and obligations under the agreement. Due thereto that the summary judgment procedure does not allow for a replying affidavit, the credit provider will not be able to set the matter straight by providing evidence to the effect that the consumer did not become over-indebted as a result of that specific agreement or did not answer fully and truthfully to the credit provider's requests for information, which failure materially influenced the credit provider's ability to do the necessary assessment or was sufficiently educated regarding the risks, costs and obligations under the agreement. It might thus be time to rethink the introduction of a replying affidavit by the credit provider in summary judgment proceedings, at least insofar as credit agreements governed by the NCA are concerned.[92] Otherwise the only option might be for the plaintiff to draft a "novel-like" particulars of claim containing every conceivable allegation necessary to pre-empt possible defences based on reckless credit that a consumer may have.

6 Conclusion

The legislature has through the NCA introduced the concept of reckless credit and its accompanying debt relief remedies into South African consumer credit law with the aim of preventing reckless credit granting and affording appropriate relief in instances where credit has been extended recklessly despite the prohibition against entering into a reckless credit agreement contained in section 81. It appears that the compulsory assessment required by section 81, if done comprehensively, might serve to curb reckless credit granting in many instances. Insofar as the debt relief afforded in respect of type one and two reckless credit as set out in section 80(1)(a) and 80(1)(b)(ii) is concerned, it is submitted that sections 83(2)(a) and (b) do not contain sufficient indication to as how the court should determine whether to order a complete or partial setting aside of the rights and obligations of

92 See in this regard the remark by Wallis J in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* unreported KZN case no 7089/09 par 26.

the consumer under a credit agreement or whether to order a suspension of the force and effect of the specific credit agreement in respect of which credit was extended recklessly. It is further submitted that although the aforesaid section makes no mention of the rights and obligations of the credit provider once a complete or partial setting aside is ordered, there may be instances where the credit provider will be entitled to restoration of its performance. With regard to suspension of a credit agreement in terms of section 84 it appears that suspension is a suitable remedy where the consumer to whom credit has been granted, is over-indebted and needs temporary debt relief, and that it is appropriate in instances in which the reckless credit granting immediately caused the consumer to become over-indebted as well as where it subsequently had the effect that the consumer, some time after entering into the agreement, became over-indebted. It also appears that section 84(1) by implication, would have the effect that the consumer's right to possession of the financed item is also suspended for the duration of the suspension order made by the court, although the practical effect of such order in the instance where the financed item is immovable property, may be problematic.

Finally, it may be remarked that the remedies in respect of reckless credit is not a large gift bag being handed over to the consumer which entitles him or her to "keep the money and the box" whilst the credit provider is sent to the corner without anything. The objectives of the prohibition against reckless credit granting have a very specific aim, namely to prevent and alleviate reckless credit granting and over-indebtedness and it is this objective towards which the remedies in respect of reckless credit should be applied. It should however also be borne in mind that these remedies can only be effective if they are effective on a procedural level as well and as such legislative intervention to clarify the various problematic procedural aspects relating to reckless credit as discussed above, is necessary.

Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate*

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OPSOMMING

Artikel 14 van die Kinderwet 38 van 2005 en die verskyningsbevoegdheid van 'n kind

Artikel 14 van die Kinderwet bepaal dat elke kind die reg het om ´n saak na ´n hof te bring asook om bygestaan te word om ´n saak aldus te bring. In hierdie bydrae word artikel 14 en die invloed/gevolge daarvan op ´n kind se verskyningsbevoegdheid ondersoek. Met die oog hierop word die gemeenregtelike beperkings op ´n *infans* en ´n minderjarige se verskyningsbevoegdheid oorweeg. Daar word ook aangedui hoe hierdie beperkings in die verlede gehanteer is en hoe die rol van byvoorbeeld die kurator *ad litem* in regspraak aangewend en ontwikkel is. Die Grondwet het in artikel 28(1)(h) vir kinders ´n reg op regsvertenwoordiging in siviele sake op staatskoste beding, mits dit andersins tot wesenlike onreg sou lei. Die regspraak het daartoe bygedra dat die onderskeie rolle van ´n kurator *ad litem* en ´n artikel 28(1)(h)-regsverteenwoordiger uitgeklaar is. Alhoewel artikel 14, veral in samewerking met artikel 10, ´n bydrae lewer om kinders se deelname in die regsproses te verseker, word aan die hand gedoen dat artikel 14 nie met die gemeenregtelike beperkings op ´n kind se verskyningsbevoegdheid weggedoen het nie.

1 Introduction

The Children's Act[1] introduces new possibilities regarding child litigation in South Africa. The inclusion of section 14 in the Children's Act raises the question whether it is possible for children to institute proceedings in a court. Section 14 states that "[e]very child has the right to bring, and to be assisted in bringing a matter to a court, provided that matter falls within the jurisdiction of that court". One of the objectives of the Children's Act is "[t]o give effect to certain rights of children as contained in the Constitution".[2] The Constitution contains a general provision granting "everyone" (thus including children) the right to access to

* We express our gratitude to Professor Johan van der Vyver who read the manuscript and who, through his suggestions and comments, contributed very meaningfully to its refinement. However, we take full responsibility for the views expressed herein.

1 38 of 2005.

2 The introductory part of the long title of the Children's Act 38 of 2005, hereafter the Children's Act. See also s 2(b) Children's Act.

courts.[3] Furthermore it adds in the children's section[4] the right to be assigned a legal practitioner in civil proceedings affecting the child.

The aim of this article is to investigate the common-law rules applicable to a child as a party to litigation in South Africa. Furthermore, it is to determine to what extent section 14 has amended the common-law rules and whether a child can litigate in person without the assistance of his or her parent or guardian and if not, to consider the feasibility of such a development in South African law.

Common-law rules in respect of the child as an *infans*[5] and a minor have remained unchanged and unchallenged until the partial commencement of the Children's Act in 2007.[6] The Children's Act *inter alia* pioneered a new era in child participation in legal proceedings which necessitated the consideration of the child's right of access to a court as indicated in section 14 of the Children's Act.[7]

2 Common-law Rules Regarding a Child's Capacity to Litigate

2 1 *Infans*

When considering the child's capacity to litigate, the common law distinguished between the child's capacity as an *infans* and as a minor.[8] In common law the *infans* had no capacity to litigate, at least not in his or her own name.[9] Consequently an *infans* could not sue or be sued in his or her own name.[10] The parent or guardian of the *infans* had to sue

3 S 34 Constitution of the Republic of South Africa, 1996, hereafter the Constitution. This section deals with the right of everyone "to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". See Davel "General principles" in *Commentary on the Children's Act* (eds Davel & Skelton)(2007) 2-19.

4 S 28(1)(h) Constitution.

5 Minors below the age of seven years.

6 With effect from 2007-07-01 by proclamation published in *GG* 30030 of 2007-06-29.

7 See De Bruin *Child Participation and Representation in Legal Matters* (LLD thesis 2010 UP) 151, 288 *et seq*.

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

9 Voet 2 4 4, 26 7 12. This incapacity of the *infans* originated from Roman law and was incorporated in common law as part of the Roman law influence in Holland. Compare De Groot 1 8 4; Voet 2 4 4; Van der Keessel *Theses Selectae* 127, *Praelectiones* 1 8 4.

10 Voet 2 4 4; *Guardian National Insurance Co Ltd v Van Gool* 1992 4 SA 61 (A) 66G. Compare Hahlo & Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 376 n 48; Hosten *et al Introduction to South African Law and Legal Theory* (1995) 567; Van der Vyver "Verskyningsbevoegdheid van minderjariges" 1979 *THRHR* 129 130-131; Van der Vyver & Joubert *Persone- en Familiereg* (1991) 174 who refer to an *infans* as "volkome selfverskyningsonbevoeg".

for or be sued on behalf of the *infans*.[11] However, the *infans* was the party to the lawsuit[12] and not the parent or guardian.[13] Therefore, any rights or obligations arising from the court order were the rights and/or obligations of the *infans*.[14] The parent or guardian had to represent the *infans* in court because the *infans* did not have independent standing in court.[15]

2 2 Minors[16]

In general, a minor had limited capacity to litigate[17] as a plaintiff, defendant, applicant or respondent in a civil lawsuit.[18] The general tenor regarding litigation in the common law involving minors was that minors had no *persona standi in iudicio*[19] and could not institute court proceedings or defend legal proceedings without the assistance of their parents or guardians.[20] The minor had to be assisted by his or her natural guardian when issuing summons or be assisted by his or her guardian in a representative capacity when being sued. Alternatively an action could

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

12 Spiro *Parent and Child* (1985) 199.

13 Voet 2 4 4 informs that an *infans* cannot in any way issue summons or be summoned but is represented by his or her parents or guardians.

14 Van der Vyver 1979 *THRHR* 131; Van der Vyver & Joubert 174.

15 Voet 2 4 4; Van der Keessel *Theses Selectae* 127, *Praelectiones* 1 8 4.

16 Ie "minor" in the narrow sense: children aged seven or more but below the age of majority. See n 7 above.

17 De Groot 1 4 1, 1 8 4. Compare Van der Vyver 1979 *THRHR* 131; Spiro 202 *et seq*.

18 *Van Rooyen v Werner* (1892) 9 SC 425 430; *Lasersohn v Olivier* 1962 1 SA 566 (T); *Wolman v Wolman* 1963 2 SA 459A-B; *President Insurance Co Ltd v Yu Kwam* 1963 3 SA 766 (A) 772C; *Jones v Santam Bpk* 1965 2 SA 542 (A) 546D; *O'Linsky v Prinsloo* 1976 4 SA 843 (O) 846-847; *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 386E-F.

19 De Groot 1 4 1 mentions the exception in criminal matters where minors had to appear in court themselves.

20 De Groot 1 4 1 explains that minors do not have the capacity to litigate because they do not care for themselves or manage their own affairs. See also De Groot 1 6 1, 1 7 8, 1 8 4; Groenewegen *De Leg Abr* 3 6 3 2; Van Leeuwen 5 3 5. Voet (2 4 4) mentions that minors may not be summoned without the authority of a guardian. He adds (5 1 11) that a minor ought not to institute proceedings without a guardian and explains (26 7 12) that a guardian's duty is to appear on behalf of his ward in legal proceedings, whether he institutes an action on behalf of a minor or defends him when the minor has been sued by another. See also Van der Keessel *Theses Selectae* 127 where he explains that a minor could not appear in court either as plaintiff or defendant without the assistance of his or her guardian. In *Praelectiones* 1 8 4 he comments that the principles in law did not allow whatsoever that minors who institute proceedings or defend such proceedings could do so in their own name. Compare Van der Linden 1 5 5 and 3 2 2 where he mentions that if an action is to be instituted by a minor, it must be brought in the name of the guardian and if one wishes to sue a minor, the guardian must be summoned.

be brought by or against the minor assisted by his guardian. A minor who had not reached the "age of discretion"[21] had to sue or be sued in the name of his or her parent or guardian. Where the minor had reached the "age of discretion" he or she could either act as plaintiff or defendant assisted by the guardian, or had to sue or be sued through the agency of the guardian.[22]

3 Interpreting Section 14 of the Children's Act

Section 14 of the Children's Act is one of two predominant sections relating to child participation in legal proceedings, the other being section 10. In terms of section 14 every child has the right to bring, and to be assisted in bringing a matter to court. Section 10 provides for "every child that is of such an age, maturity and stage of development … to … participate in an appropriate way". It also adds that "views expressed by the child must be given due consideration". The child's right to participate in judicial proceedings can either occur through direct participation "or through a representative or an appropriate body, in a manner consistent with … procedural rules".[23] Section 14 thus provides an opportunity to realise section 10 as it links a child's right to participation with his or her right of access to a court.[24]

Section 14 of the Children's Act has a general application and is thus not confined to matters relating to the Children's Act.[25] The Children's Act places a corresponding duty on parents and guardians to represent children and to assist them.[26] For the present discussion the question if section 14 has any effect on the common-law rules regarding the child's capacity to litigate, and if so, to what extent, is to be considered. One view is that an extension of the child's capacity to litigate may be derived from a literal interpretation of the words "every child" in section 14.[27]

Heaton explores the possibility of section 14 amending the common-law rule that an *infans* does not have the capacity to litigate.[28] She mentions that it is arguable that section 14 amends the common law by conferring limited capacity to litigate on an *infans* thereby entitling the *infans* to assistance that will supplement the *infans*' limited capacity. She doubts whether the legislature intended to change the common law.[29] The reason for this is that it would lead to the extraordinary result that an

21 The "age of discretion" mentioned in *Sharp v Dales* 1935 NPD 392 396 ostensibly refers to an age when the minor knows what is being done on his or her behalf. In *Sharp v Dales* the child was fourteen years old.
22 Compare *Sharp v Dales* 1935 NPD 392 396; *Mokhesi v Demas* 1951 2 SA 502 (T).
23 Art 12(2) United Nations Convention on the Rights of the Child, 1989 (CRC).
24 Albeit not the only opportunity, see s 28(1)(h) Constitution.
25 The only requirement is jurisdiction of the court. The jurisdictional aspect of the children's court is dealt with in s 45 Children's Act.
26 S 18(3)(b) Children's Act.
27 Considered by Heaton *Law of Persons* (2008) 92.
28 90.
29 90, 92.

infans would be able to litigate with his or her guardian's assistance while being unable to enter into an elementary contract with his or her guardian's assistance.[30] When entering into a contract is considered, the parent or guardian will have to do so for and on behalf of the *infans* and mere assistance will be insufficient.[31] Heaton[32] comments that a child over the age of seven years has the right in terms of section 14 to insist on having his or her limited capacity to litigate be supplemented by means of his or her parent, guardian, *curator ad litem* or the High Court.[33] It must be noted that section 14 makes no distinction between children below seven and children aged seven and above. It is therefore difficult (or impossible) to read the differentiation into the section.

It has been correctly pointed out that there is a distinction between participation and representation.[34] However, will a child not sometimes need the assistance of a legal representative to bring a matter to court? If this is the case, then the interrelatedness of section 14 of the Children's Act and section 28(1)(h) of the Constitution is apparent. The fact that a child sometimes has no capacity to litigate on his or her own does not deprive that child of the right of access to a court in terms of section 14 of the Children's Act.[35]

Section 39 of the Constitution which deals with the extension and development of the common law in an open and democratic society applies in this regard.[36] Reading section 14 of the Children's Act (which includes the phrase "every child") in conjunction with section 39(2)[37] of

30 Boezaart "Child law, the child and South African private law" in *Child law in South Africa* (ed Boezaart)(2009) 22-23 agrees that although legislature intended that every child should have access to the courts, it is doubted that this intention included supplementing the *infans*'s capacity to litigate.

31 Except if the *de minimis non curat lex* principle applies.

32 *Op cit* 90.

33 The High Court has inherent jurisdiction over all children as upper guardian.

34 Heaton 89 n 44. Because the *infans* has no *locus standi in iudicio*, the parent, guardian or *curator ad litem* institutes the action on behalf of the *infans* and thereby complies with the aim of s 14 of the Children's Act that "every child has the right to bring and to *be assisted* in bringing a matter to a court".

35 Compare *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T) where the court appointed a *curator ad litem* to safeguard and investigate the interests of the thirteen children who were held in detention at Dyambo. The court later appointed the same legal representative in terms of s 28(1)(h) of the Constitution so as to allow the wishes and desires of the children to be placed before court (59A-B). See also discussion by Sloth-Nielsen "Realising children's rights to legal representation and to be heard in judicial proceedings: An update" 2008 *SAJHR* 500-501.

36 *Investigating Directorate: Serious Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motors Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) par 20 - 26.

37 S 39(2) Constitution provides that "[w]hen interpreting any legislation, and when developing the common law, every court ... must promote the spirit, purport and objects of the Bill of Rights". See *Investigating Directorate: Serious Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motors Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) par 20.

the Constitution raises the question whether the legislature intended to amend the common law and if so, to what extent has the common law been amended in respect of children's capacity to litigate. The extension and development of the common law in an open and democratic society requires scrutiny of the applicable common-law rules.[38] If the legislature intended to amend the child's capacity to litigate the Bill of Rights has to be scrutinised for such an interpretation.[39] There is no indication in the Bill of Rights that the legislature intended to supplement the common law in relation to the *infans*' capacity to litigate. There is also no indication in the Children's Act that the legislature intended to supplement the *infans'* capacity to litigate.[40] The same applies to minors. Section 14 does assure a child of the right to be assisted in bringing a matter to court, thereby complying with the general provision of section 34 of the Constitution.

On the other hand, the Children's Act in some instances where the child's participation is vital, provides a mechanism to enable the child to have access to court. The following are examples:

(a) The Children's Act provides for participation by the child with regard to parental responsibilities and rights agreements.[41] A child, *with leave of the court*, may bring an application to amend or terminate a parental responsibilities and rights agreement.[42] If section 14 of the Children's Act granted the child capacity to litigate, why would section 22(6) require the court's permission in this instance? The most likely interpretation seems to be that in this instance the child's right of access to a court in terms of section 14, entails an entitlement to obtain assistance in seeking leave to bring an application to amend or terminate a parental responsibilities and rights agreement. As mentioned above,[43] the interrelatedness between section 14 of the Children's Act and section 28(1)(h) of the Constitution becomes apparent because the child will need assistance.[44]

(b) Similarly section 28 of the Children's Act, when dealing with a court-ordered termination, extension, suspension or restriction of parental

38 Rautenbach "Introduction to the Bill of Rights" in *Bill of Rights Compendium* (eds Mokgoro & Tlakula)(1998) 1A19 mentions that section 39(2) at all times applies to the interpretation of all legislation and the determination of the contents of all rules of common law and not only when considering their constitutionality.

39 Whether directly or indirectly. S 8(3) Constitution states that when applying the provisions of the Bill of Rights in order to give effect to a right in the Bill of Rights, a court must apply or if necessary develop the common law to the extent that legislation does not give effect to that right.

40 Heaton 92 doubts whether it was the intention of legislature.

41 S 22 Children's Act read with regs 7, 8 General Regulations Regarding Children, 2010 contained in GN R261 in *GG* 33076 of 2010-04-01 and Form 5 issued in terms of Annexure A General Regulations Regarding Children.

42 S 22(6)(a)(ii), 22(6)(b)(ii) Children's Act. See Heaton "Parental responsibilities and rights" in *Commentary on the Children's Act* (eds Davel & Skelton)(2007) 3-16 on which court should be approached for permission to amend or terminate the agreement.

43 See par 3 above.

44 Du Toit in "Legal representation of children" in *Child Law in South Africa* (ed Boezaart)(2009) 106 regards it as implicit that in order to bring a matter to court, a child will need the assistance of a legal practitioner.

responsibilities and rights, grants the child permission to bring such an application.[45] However, the court's leave is again required for him or her to do so.

(c) The same applies when a parenting plan that was made an order of court has to be amended or terminated: The child acting *with leave of the court* may bring the application.[46]

These examples seem to indicate that section 14 was not intended to deal with the formal requirements applying to litigation by or on behalf of a child. It seems that section 14 grants a child a right to bring his or her case to court without setting out procedural requirements on how that right is to be realised.

4 The Minor's Capacity to Litigate

The parent or guardian of a minor will normally litigate for and on behalf of the child.[47] The minor (aged seven or more) may sue or be sued in his or her own name assisted by his or her parent or guardian.[48]

Furthermore, courts have a wide discretion to appoint someone to substitute the guardian, commonly known as a *curator ad litem*, in conducting litigation in the name and in the interests of the minor.[49] Four established instances exist in South African law where a *curator ad litem* may be appointed by a court to represent a minor in legal proceedings.[50] These instances are where the minor has no parent or guardian;[51] where the interests of the minor clashes with those of the parent or guardian or if a possibility of such a clash exists;[52] where the

45 S 28(3)(c) Children's Act.
46 S 34(5)(b) Children's Act.
47 See par 2 2 above.
48 Whether the minor is assisted by his or her parent or guardian in litigation the result is the same. It is the minor who is party to the suit and not the parent or guardian. Compare in general Van der Vyver & Joubert 176-177; Cockrell "Capacity to litigate" in *Boberg's Law of Persons and the Family* (eds Van Heerden, Cockrell & Keightley)(1999) 897-900 and authority cited. Boezaart *Law of Persons* (2010) 88 suggests that the two forms, representation and assistance, are interchangeable. See also Heaton 112-113.
49 *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (2011-03-29) par 12. An "*ad hoc* guardian" as explained in *Martin v Road Accident Fund* 2000 2 SA 1023 (WLD) 1036I.
50 Davel "The child's right to legal representation in divorce proceedings" in *Gedenkbundel vir JMT Labuschagne* (ed Nagel)(2006) 25; Cockrell 902.
51 *Swart v Muller* (1909) 19 CTR 475; *Yu Kwam v President Insurance Co Ltd* 1963 1 SA 66 (T); *Wolman v Wolman* 1963 2 SA 452 (A) 459; *Mort v Henry Shields-Chiat* 20011 SA 464 (C); *Ex parte Visser: in re Khoza* 2001 3 SA 524 (T); *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T) 175H-J. The court is reluctant to appoint a *curator ad litem* where the minor's guardian is alive and available as mentioned in *Ex parte Oppel* 2002 5 SA 125 (C) 128I-J where the court indicated that only in exceptional cases will a *curator ad litem* be appointed.
52 *Curator ad litem Letterstedt v Executors of Letterstedt* 1874 Buch 42; *Wolman v Wolman* 1963 2 SA 452 (A) 459B-D; *B v E* 1992 3 SA 438 (T). See *Martin NO v Road Accident Fund* 2000 2 SA 1023 (WLD) 1035A and 1035C.

parent or guardian of the minor cannot be found;[53] or where the minor's parent or guardian unreasonably refuses to assist the minor.[54] The *curator ad litem* has the child's interests at heart.[55] This is amplified by the reported judgments to date on the appointment of a *curator ad litem* to assist a child in matters that may possibly affect the interests of that child.[56] A few examples serve to illustrate such appointments:

(a) The case of *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)*[57] dealt with the joint adoption of children by a same-sex couple. The court had a thorough report filed by a *curator ad litem* appointed by the court *a quo* regarding the welfare of the couple's teenage children and of children (born and unborn) in general.[58]

(b) The case of *S v M (Centre for Child Law as Amicus Curiae)*[59] involved the sentencing of the primary caregiver of young children. The court appointed a *curator ad litem* to represent the interests of the children of the appellant.[60]

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53 As was the case in *Curator ad litem of Letterstedt v Executors of Letterstedt* 1874 Buch 42 45; *Ex parte Bloy* 1984 2 410 (D). Compare Cockrell 902; Heaton 112-113.

54 *Ex parte Oppel* 2002 5 SA 125 (C) 131. This can be regarded as a form of conflict of interests between the parent or guardian and the child. See further Van der Vyver & Joubert 178; Cockrell 903 n 12.

55 The *curator ad litem* will generally be an advocate whose function will be to present legal argument in favour of the minor: *Martin v Road Accident Fund* 2000 2 SA 1023 (WLD) 1035B-C and 1036B. See Kassan *How can the voice of a child be adequately heard in family law proceedings* (LLM dissertation 2004 UWC) 48; Sloth-Nielsen "Realising children's rights to legal representation and to be heard in judicial proceedings: an update" 2008 *SAJHR* 495 500-502.

56 Eg *Martin v Road Accident Fund* 2000 2 SA 1023 (WLD) 1035; *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC) par 3 201E/F–202A-B; *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T).

57 2003 2 SA 198 (CC).

58 Par 3 201F/G-G/H where the court held that "where the interests of children are at stake, it is important that their interests are fully aired before the Court so as to avoid substantial injustice to them ... Where there is risk of injustice, a court is obliged to appoint a curator to represent the interests of children". Skweyiya AJ observed that this obligation "flows from the provisions of s 28(1)(h) of the Constitution". Sloth-Nielsen 2008 *SAJHR* 501 rightly questions whether a child's legal representative fulfils or should equate to, a *curator ad litem*. The legal representative does not represent the views of "non-clients" not before court, such as children generally, nor is it clear that all the foreign children as clients in the *Centre for Child Law* case would necessarily have given their legal representative the same instructions.

59 2008 3 SA 232 (CC).

60 Par 6 (240) read with par 30 (250). Sloth-Nielsen 2008 *SAJHR* 501 mentions that the court did not explicitly consider whether the *curator ad litem*'s appointment afforded sufficient representation of the children's views as opposed to the children's interests. In par 36 (252-253) of the judgment it is seen that the court did not indicate that the appointment of a *curator ad litem* is not called for when considering the best interests of the child in a criminal matter such as where the best interests of the child are accounted for when considering an appropriate sentence for the child's parent.

In some other instances a minor has full capacity to litigate in civil matters. These are the following:

(a) When the High Court grants a minor *venia agendi* for purposes of particular proceedings.[61]

(b) Where an unmarried father who is himself a minor is sued in the maintenance court for maintenance of his child.[62] Likewise a minor complainant has *locus standi in iudicio* to claim maintenance.[63]

(c) When a minor intending to get married applies to the High Court for the substitution of parental consent.[64] It is necessary to distinguish between two situations in this regard. Firstly, where the minor has no parent or guardian or is for any good reason unable to obtain the consent of the parent or guardian the application must be brought to the children's court.[65] Secondly, where the

61 Applications for *venia agendi* where minors could approach the High Court for an order to institute a civil action may in exceptional circumstances still occur but it is doubtful seeing that the age of majority has been lowered. However, the requirement is that the minor has attained an "age of discretion". In the majority of the applications the applicants were close to majority. See in this regard *In re Cachet* (1898) 15 SC 5 where the petitioner was nineteen years old, but the court refused the application. (The age of majority was twenty one at that stage.) In *Mare v Mare* 1910 CPD 437 the age of the petitioner was not indicated. The court held (438) that the law regarding *venia agendi* had become obsolete. However, in *Ex parte Goldman* 1960 1 SA 89 (D) the court granted an application for *venia agendi* to a twenty-year-old man who was an orphan. (The age of majority was still twenty one.) See further Van der Vyver 1979 *THRHR* 133; Cockrell 904-905 and authority cited; Himonga in *Wille's Principles of South African Law* (gen ed Du Bois)(2010) 188; Heaton 113.

62 *Govender v Amurtham* 1979 3 SA 358 (N) 362B-C. At 362A-B the court held that an order made against an unmarried minor father is not invalid because the minor had no *locus standi*.

63 *Govender v Amurtham* 1979 3 SA 358 (N) 362A-B.

64 Application for substitute consent can be brought to the children's court or the High Court as upper guardian of minors. Applications brought to the children's court are governed by the provisions of s 25(1) Marriage Act 25 of 1961. If the parent, guardian or children's court refuses consent to the marriage of a minor, the minor may on application apply for consent to be granted by a judge of the High Court. See in this regard *Lalla v Lalla* 1973 2 SA 561 (D) 563A-B where the court held that "the very nature of the proceedings disqualifies [the minor] from such assistance as is normally given"; *De Greeff v De Greeff* 1982 1 SA 882 (O); *B v B* 1983 1 SA 496 (N) where a seventeen-year-old girl successfully brought an application for consent to marry. Compare Van der Vyver & Joubert 179 who opine that a minor ought to have capacity to litigate in all cases where application is made to substitute parental consent with that of the High Court as upper guardian of all minors. The phrase "parental substitution" includes that of a person who has received specific parental responsibilities and rights in terms of s 18(1) Children's Act to consent, in terms of s 18(3)(c)(i) Children's Act, to a child's marriage.

65 Reasons abound, eg the parent could have disappeared or has left the country and cannot be traced or is in a coma or is suffering from a mental illness. An application in terms of s 25(1) Marriage Act 25 of 1961 will only be considered by the children's court of the district where the minor is resident if the minor has no parent or is for any good reason unable to obtain the consent of the minor's parents or guardian. The children's court

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parent, guardian, or the children's court unreasonably refuses consent.[66] A judge of the High Court can overrule a refusal by the children's court and can authorise the marriage irrespective of the refusal of the child's parents or guardian.[67]

In exceptional cases, usually in urgent matters, the court will grant permission to persons other than a parent, guardian or *curator ad litem* to act on the minor's behalf.[68] The court may also use its inherent power as upper guardian of minors to assist a minor.[69] When a minor institutes proceedings without assistance or required consent, it has been argued that the proceedings are void.[70] The correct view is deemed to be that

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may refuse consent. S 25(1) Marriage Act provides that if the commissioner of child welfare of the district or area in which the minor is resident is satisfied after proper inquiry that the minor has no parent or guardian or is for any good reason unable to obtain the consent of his or her parents or guardian to enter into a marriage, such commissioner of child welfare may at his or her discretion grant written consent to such child to marry a specified person. A commissioner of child welfare may not grant consent if any or both parents or guardian of the child refuse to grant consent to the marriage. A minor may not bypass the children's court and approach the High Court in terms of s 25(4) Marriage Act: see *Ex parte Visick* 1968 1 SA 151 (D) 154; *Ex parte Balchund* 1991 1 SA 479 (D). Compare also Van der Vyver & Joubert 510; Sinclair assisted by Heaton *The Law of Marriage* (1996) 367 381; Heaton 106-107. Although the Child Care Act 74 of 1983 has been repealed with effect from 1 April 2010, s 25 Marriage Act 25 of 1961 still applies to the children's court and reference to the commissioner of child welfare and Child Care Act should be substituted with children's court and Children's Act.

66 S 25(4) Marriage Act 25 of 1961 allows for such refusal to consent to the marriage of a minor to be considered by a judge of the High Court on application.

67 Ss 25(1), (4) Marriage Act 25 of 1961. Compare *Allcock v Allcock* 1969 1 SA 427 (N) 429 where the court explained what s 25(4) required of a judge to apply his mind to: (i) whether the parental refusal is "without adequate reason" and (ii) whether it is contrary to the interests of the minor. Unless he or she is of the opinion both that the parental refusal is without adequate reason and that such refusal is contrary to the interests of the minor, he or she shall not grant consent to the proposed marriage. See also *Ex parte F* 1963 1 PH B9 (N); *Coetzee v Van Tonder* 1965 2 SA 239 (O); *Kruger v Fourie* 1969 4 SA 469 (O); *Jinnah v Laattoe* 1981 1 SA 432; *Ward v Ward* 1982 4) SA 262 (D); *Lalla v Lalla* 1973 2) SA 561 (D) 563A-B.

68 See *Ex parte Nader* (an unreported decision discussed by Smit "Ex parte Nader 1975 (O)" 1976 *THRHR* 84) where a third party filed an application for consent to the High Court on behalf of a minor who had to undergo an appendectomy. The required consent was granted by the court. The court did not enquire into whether the applicant had the necessary competency to represent the minor. In *Yu Kwam v President Insurance Co Ltd* 1963 1 SA 66 (T) the biological father had instituted an action on behalf of his minor child under the mistaken impression that he was the legal guardian of his child. Compare Van der Vyver & Joubert 179; Cockrell 906.

69 As was the case with *Vista University, Bloemfontein Campus v Students Representative Council, Vista University* 1998 4 SA 102 (O) where the court assumed the responsibility for assisting all the minors who were not assisted by their guardians.

70 *Yu Kwam v President Insurance Co Ltd* 1963 1 SA 66 (T) 69B. As the father, acting *bona fide*, had such a close relationship with the minor, the court

continued on next page

the proceedings are not necessarily void and that a judgment in favour of the minor is valid and enforceable, but not a judgment against the minor.[71]

Whether an emancipated[72] minor has *locus standi in iudicio* is as yet undecided. The question of *locus standi in iudicio* was considered in *Ahmed v Coovadia*[73] and *Sesing v Minister of Police*.[74] In *Ahmed v Coovadia* the court accepted that a minor could be sued without parental assistance if he was bound to an agreement on the basis of his emancipation. It was mentioned that "[t]he authorities seem to show, though not as clearly as one would like, that liability, and therefore *locus standi in judicio*, is limited to transactions that are connected with the business or other sphere of emancipation".[75] In *Sesing v Minister of Police* it was necessary to distinguish between absolute or complete emancipation and relative or incomplete emancipation. The facts of this case are that a minor sued the Minister of Police and a policeman for damages arising from physical injuries sustained in a shooting incident and claimed, *inter alia*, that he was tacitly emancipated. The court decided that there is a difference between the case where a minor, free from parental authority, is permitted to manage his own affairs and the case where a minor, because of disinterest shown by his parent, is left to his own devices. The court ruled that a minor is emancipated when his parent or guardian agrees, either expressly or tacitly, that he can act as an economically independent person. The court came to the conclusion that the minor had not succeeded in proving that he was in fact emancipated. The court left the question open whether emancipation

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without any hesitation appointed a *curator ad litem* and granted permission to amend the pleadings (69E-F).

71 Boezaart (2010) 90 adds that this aligns with the principle that a minor acting without authority can improve but not burden his or her position. The general rule in South African law is that minors cannot incur liability without the assistance of their parent or guardian. See Cockrell 906 who informs, with reference to Voet 5 1 11, that it is only a judgment against the minor that is void; a judgment in the minors favour is valid and enforceable against the other party. See too Spiro 201-202; Van der Vyver 1979 *THRHR* 129 141; Van der Vyver & Joubert 182-183.

72 Emancipation was received from Roman-Dutch law. Compare *Riesle and Rombach v McMullin* (1907) 10 HCG 381 386; *De Villiers v Liebenberg* (1907) 17 CTR 867 869; *Le Grange v Mostert* (1909) 26 SC 321; *Dickens v Daley* 1956 2 SA 11 (N) 13D-E; *Ex parte Van den Heever* 1969 3 SA 96 (EC) 99A-B; *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 3 SA 221 (C) 224A-B; *Ex parte Botes* 1978 2 SA 400 (O) 402B; *Sesing v Minister of Police* 1978 4 SA 742 (W) 745H-746A. See also Heaton 115; Himonga 191.

73 1944 TPD 364 366.

74 1978 4 SA 742 (W) 745, 746C. Cockrell "The Law of Persons and the Bill of Rights" in *Bill of Rights Compendium* (eds Mokgoro & Tlakula)(1996) 3E22 in a sound criticism of the judgment based on the Constitution questions whether s 28(2) Constitution might now render a different result on identical facts. His conclusion is that the best interests of the child (based on the paramountcy of s 28(2) Constitution) should not mandate a differential application of settled rules of law in an effort to promote short-term interests of the child. Compare Boezaart (2010) 80.

75 The court also stated that the minor would not be liable on the agreement if the parent retracted the emancipation (366).

includes *locus standi in iudicio*. This case illustrates the precarious position of a minor relying on emancipation to support his *locus standi in iudicio*. In *Sesing v Minister of Police* the minor was left without a remedy.

It is concluded that emancipation does not include *locus standi in iudicio* because emancipation does not create majority status and the consent of the parent can be withdrawn at any time[76] and in doing so terminate the emancipation of the minor. It appears that in the past courts have frequently assumed that an emancipated minor has *locus standi in iudicio*.[77] As the age of majority has been lowered, it is probable that it may become less important in the future.[78] Furthermore, section 28 of the Children's Act will provide a solution as an application can be made in terms of this section to terminate parental responsibilities and rights if circumstances so require.[79] It is suggested that justice did not prevail in the *Sesing* case. The common law provided solutions such as *venia agendi* or the appointment of a *curator ad litem*. In the *Vista* case the court of its own accord assisted the minors.[80] However, if all the traditional mechanisms fail, it is suggested that section 14 of the Children's Act should/can in future prevent minors from being denied justice in this way.

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76 See Van der Vyver & Joubert 155; Kruger & Robinson "The legal status of children and young persons" in *The Law of Children and Young Persons in South Africa* (ed Robinson)(1997) 28-29 support this viewpoint. See also Cockrell 908-910 nn 29, 30; Heaton 117; Himonga 192 n 203.

77 *Cairncross v De Vos* (1876) 6 Buch 5 where De Villiers CJ said that it had been proved that a eighteen-year-old had been emancipated and acquired a "*persona standi in judicio*"; *Orkin v Lyons* 1908 TS 164 where the court held that a seventeen-year-old had been emancipated and assumed that he had *locus standi in iudicio*; *Dama v Bera* 1910 TPD 928 where the defence of *locus standi in iudicio* was specifically raised, the court assumed *locus standi in iudicio* and found that the respondent had been emancipated. See also *Venter v De Burghersdorp Stores* 1915 CPD 252; *Dickens v Daley* 1956 2 SA 11 (N).

78 S 17 Children's Act repealed the Age of Majority Act 57 of 1972 as a whole and with it the possibility of applying for an order to be declared a major. In the majority of cases involving tacit emancipation the minors alleged to have been emancipated were older than eighteen years, with the exception of *Steenkamp v Kamfer* 1914 CPD 877 and *Pleat v Van Staden* 1921 OPD 91 where the minors were seventeen years old and *Ahmed v Coovadia* 1944 TPD 364 where the minor was fifteen-and-a-half years old. See also Cockrell 473; Heaton 115.

79 S 28 Children's Act provides for the termination, extension, suspension or restriction of any or all parental responsibilities and rights. The child in question may bring this application himself or herself, with the court's consent: s 28(3)(c) Children's Act.

80 Especially in child-headed households that are increasingly found in South Africa where a child does not have a parent or guardian. Does this mean that the child does not have a remedy in law? It is submitted that s 14 should be applied and the child may approach the Legal Aid Board for assistance, especially in view of the decision in *Legal Aid Board v R* 2009 2 SA 262 (D).

5 What Has Section 14 of the Children's Act Achieved?

One of the very first cases in which the litigation project of the Centre for Child Law at the University of Pretoria was involved, was *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk*.[81] In *casu* Hartzenberg J observed that the children[82] involved in a disputed access (now contact) application had an interest in the outcome of the proceedings.[83] The court considered the question whether the children ought to be joined as parties in the proceedings and observed that unless they were joined as parties, they would not be able to appeal against an adverse order.[84]

At the request of the mother an application for the appointment of a *curator ad litem* for the children was brought before De Villiers J, who agreed that the children required legal assistance, but was in favour of an appointment in terms of section 28(1)(h) of the Constitution. Section 14 was not operative at that stage. Subsequently a legal practitioner was appointed in terms of section 28(1)(h).[85] The court voiced its concern regarding the failure of children in general to be granted the opportunity to communicate their views or to have their interests independently placed before the court.[86] The court emphasised that the Constitution enjoins the court to protect the best interests of children and only if the children or somebody on their behalf presents the views of the children to the court, will the court have a balanced presentation of the situation.[87] The two children were later joined as parties to the proceedings.

81 [2005] JOL 14218 (T).

82 Two girls aged fourteen and twelve years of age.

83 Par 8. The mother refused the children's father contact with his daughters because of his alleged violent behaviour. The court ordered the parents and children to submit themselves to therapy to try and normalise family relationships. However, the children refused to submit to treatment.

84 Par 8 with reference to *Re Children Aid Society of Winnipeg and AM and LC Re RAM 7 CRR* where the court held that in a matter dealing with the guardianship of a child, the child can be joined as a party in order to allow the child to appeal an adverse order affecting the child. Furthermore, that this gives proper effect to the provisions of section 28(1)(h) Constitution.

85 Par 5. De Villiers J indicated that he was of the view that it would be better for the State Attorney to appoint a legal practitioner in terms of s 28(1)(h) Constitution. Following this suggestion, the State Attorney appointed Adv Sceales as representative of the children.

86 Par 6.

87 Par 7 and 8 where the court remarked that the appointed legal practitioner will be best equipped to present the case for the children if he can do so independently from both parents. See also *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) par 53 (787H-788A/B) where Sachs J remarked that the court has not had the assistance of a *curator ad litem* to present the interests of the children. In the High Court it was accepted that the state would represent the interests of the children which the court found "unfortunate". The children, many of whom would have

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The question now remains whether section 14 would have made any difference if the section was in effect at the time. It is apparent from the wording of section 14 that the legislature intended to align this right of the child with the general provision contained in section 34 of the Constitution.[88]

Comparing section 10 of the Act with the provisions in article 12[89] of the Convention on the Rights of the Child and article 4(2) of the African Charter on the Rights and Welfare of the Child,[90] justifies the conclusion that section 10 should be read with section 14 of the Children's Act to extend the child's participatory right to be heard in matters affecting the child.[91] Section 14 in turn enhances the child's participatory right by extending this right of the child to matters where the child initiates civil litigation.[92] When comparing section 14 with article 12(2) of the

been in their late teens and capable of expressing their views, were not given that opportunity. The court made the very important remark that "[a]lthough both the State and the parents were in a position to speak on their [the children's] behalf, neither was able to speak in their name". This view was reaffirmed in *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC) par 3 (201E/F-202A-B) by Skweyiya AJ; see n 57 above.

88 "[E]veryone" in s 34 Constitution includes a child and s 14 Children's Act transmits this right to children in the Children's Act. S 34 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, another independent and impartial tribunal or forum. Compare Davel (2007) 2-19; Heaton 89.

89 Art 12(1) CRC provides that states parties are obliged to ensure that children who are capable of forming their own views are given the opportunity to express those views in all matters affecting them. Furthermore, the views of children must be considered in accordance with the age and maturity of those children. Art 12(2) CRC enables state parties to enact procedural rules obliging the participation of children in any matter affecting them but not to restrict the participation of children. Compare Van Bueren *The International Law on the Rights of the Child* (1995) 139; Lücker-Babel "The right of the child to express views and to be heard: An attempt to interpret article 12 of the UN Convention on the Rights of the Child" 1995 *IJCR* 391 397-398.

90 African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/24.9/49 (1990) (ACRWC).

91 Art 4(2) ACRWC provides that children who are capable of forming their own views have the right to express those views freely in all judicial or administrative proceedings affecting them. Davel (2007) 2-14 comments that the right of the child to be heard as provided in art 4(2) ACRWC may at first glance appear to be more restricted than the scope of art 12 CRC. However, the ACRWC is specific with its provision that the child may be heard as a party to the proceedings either directly or through an impartial representative. The importance of this provision is found in the determination of how the child is to be heard. See further Davel (2006) 20-21.

92 S 28(1)(h) Constitution does not refer directly to the child's right of participation but implies such a right in civil proceedings. The same argument prevails for the child's right of access to a court. It may be argued that s 28(1)(h) Constitution implies such right of access for the child. Therefore, it is submitted that both sections 10 and 14 align with s 28(1)(h)

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Convention on the Rights of the Child[93] and article 4(2) of the African Charter,[94] the section should be interpreted extensively to allow the broadest possible platform for the voice and views of children to be heard and considered in court.[95] Therefore it can be argued that section 14[96]

Constitution. Davel (2007) 2-23 points out that the limitation of "substantial injustice" in s 28(1)(h) Constitution is not found in s 14 Children's Act. The word "assist" further enhances the participatory right of the child.

93 Art 12(2) CRC provides for the participation of a child and the representation of the child in judicial proceedings. Art 4(2) ACRWC has a similar though different worded provision. The provision that the child "shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child" is the execution of the assurance given in art 12(1) CRC and therefore the precursor "[f]or this purpose". Art 37(d) CRC provides that every child deprived of his or her liberty shall have the right to "prompt access to legal and other appropriate assistance" as well as the right to challenge the legality of such deprivation of liberty before a court or other competent, independent and impartial authority. Where a child is removed and placed in temporary safe care without a court order in terms of s 152 Children's Act, the removal is to be "reviewed" by the court as soon as possible. The deprivation of the child's liberty in a children's court matter is no less traumatic than the deprivation of a child's liberty in a criminal matter. Yet in a criminal matter art 37(d) CRC comes to the child's rescue with prompt access to legal assistance. However, in children's court proceedings the presiding officer decides, in terms of s 55 Children's Act, if it would be in the best interests of the child to have legal representation and then refers the matter to Legal Aid South Africa who uses the substantial injustice criterion.

94 A similar provision is found with the words "[i]n all judicial or administrative proceedings affecting a child ... opportunity shall be provided for the ... child to be heard ... as a party to the proceedings". Kassan 22 agrees that allowing the child as a party to the proceedings "creates the basis for the child to be included as third parties (with representation) in divorce proceedings in addition to their parents being parties". The application goes further than divorce proceedings and indeed includes all proceedings where the child has a major interest as a party, eg application for protection by a parent in domestic violence, maintenance and care and contact disputes. S 4(4) Domestic Violence Act 116 of 1998 provides that "[n]otwithstanding the provisions of any other law, any minor ... may apply to the court for a protection order without the assistance of a parent, guardian or any other person". Therefore, any child who is of such age, maturity and stage of development may apply for a protection order and has the right to legal representation at state expense if substantial injustice would otherwise result.

95 See *MEC for Education, Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) par 56 (494 D/E-G). This is in line with the provisions of art 12(2) CRC and especially art 4(2) ACRWC, both of which emphasise the participation through a representative, which may be a legal representative. Art 4(2) ACRWC creates a platform for children to be granted legal representation as a party to proceedings instituted by their parents such as divorce proceedings (Kassan 22). Davel (2007) 2-23 indicates that the word "assisted" in s 14 Children's Act has a more extensive application than "representation" as found in s 28(1)(h) Constitution. Sloth-Nielsen 2008 *SAJHR* 500 draws an important distinction between the appointment of a *curator ad litem* representing the interests of the child as opposed to the views of the child himself or herself.

96 S 14 refers to "every child" and places no limitation on the right of access to court.

is linked to section 28(1)(h) of the Constitution[97] and extends beyond the reach of section 10 which limits participation to those children who are "of such age, maturity and stage of development" as to be able to participate and express their views in an appropriate way.[98]

The Children's Act extends the jurisdiction in matters in which a children's court may adjudicate.[99] The provision allowing an application for the care of and contact with a child to be considered by the children's court[100] ensures that more children may have a say as to their right to be cared for and to have contact with their parents.[101] The child's right to access a court and to be assisted in doing so enhances the child's participatory right even further.[102]

Recent case law has confirmed that a child may apply directly to the Legal Aid Board for a legal representative to be appointed in terms of section 28(1)(h) of the Constitution: In *Legal Aid Board v R*[103] a twelve-year-old girl approached Childline for assistance in a divorce dispute where custody was in dispute. The court appointed a legal practitioner in terms of section 28(1)(h) based on its finding that substantial injustice would likely result if a separate legal representative was not appointed for the child.[104] The court held that the Legal Aid Board was entitled at the state's expense to render assistance to a minor in the discharge of the

97 S 28(1)(h) Constitution provides that "[e]very 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". This is the view of Davel (2007) 2-20. However, Heaton 89 does not agree and argues that assistance does not necessarily mean that the child is entitled to legal representation. She takes this argument further (89 n 44) and comments that assistance is not the equivalent of legal representation and therefore it cannot be said that s 14 Children's Act links up with s 28(1)(h) Constitution. Assistance is a different concept from legal representation and refers to the conduct that is needed to supplement the minor's limited capacity to act or to litigate. This argument is difficult to implement when a child's guardian is withholding assistance from the child and the child wants to approach the court for a remedy. Eg the child wants to enforce his or her right to maintenance against the child's parents and not one of the parents is willing to assist in bringing the matter to court.

98 See Feldhaus *Kinders se Konstitusionele Reg op Regsverteenwoordiging in Siviele Sake* (LLM dissertation 2010 NWU) 79 for the view that s 14 is broad enough to include assistance by a social worker. See also n 106 below.

99 S 45(1) Children's Act.

100 S 45(1)(b) Children's Act.

101 *B v S* 1995 3 SA 571 (A) 581I-582A/B where the court held that "[i]t is the child's right to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted".

102 S 14 Children's Act. See Bosman-Sadie & Corrie *A Practical Approach to the Children's Act* (2010) 30.

103 2009 2 SA 262 (D).

104 Par 20 (269G-H). This validates the view of Davel (2007) 2-24 that it should be possible for a child to apply directly to the Legal Aid Board for a legal representative in terms of s 14 Children's Act. The limitation found in s 28(1)(h) of "substantial injustice" does not apply in s 14. It would thus be possible for the child to be "assisted" by a *curator ad litem* if one of the established grounds in the South African law for the appointment of a

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state's obligation in terms of section 28(1)(h) of the Constitution if the failure to do so would otherwise result in substantial injustice.[105] The court further held that the Legal Aid Board was not constrained by a need to obtain either the consent of the child's guardian or that of any person exercising parental responsibilities and rights in relation to the child, or an order of court. [106] It is submitted that the Legal Aid Board could also have applied to the court for the appointment of a *curator ad litem* in terms of section 14 of the Children's Act.

Children are guaranteed the right to legal representation in criminal matters.[107] The right to legal representation provided for in section 28(1)(h) of the Constitution extended the scope of legal representation to civil matters and has broadened the range of proceedings affecting children.[108] The provision of section 14 of the Children's Act allows the broadest possible platform of access for children to the court, and the guarantee of legal representation entrenched in section 28(1)(h) of the Constitution ensures that where the assistance for children is required it may best be met by making provision for legal representation.

6 The Effect of Section 28(1)(h) of the Constitution

The paramountcy of the best interests of the child is entrenched in the Constitution[109] However, the Constitution does not directly address

curator ad litem are present. Du Toit 106 shares this view where she comments that it is implicit that in order to bring a matter to court a child will need the assistance of legal practitioners. See fn 43 above.

105 Par 3 (264E/F-F/G).

106 Par 4 (264F/G-G/H).

107 S 35(3) Constitution provides the right of every accused person (and this includes a child) to a fair trial and in par (*g*) the right to have a legal practitioner assigned to the accused person by the state at state expense, if substantial injustice would otherwise result. Compare further Bekink & Brand in *Introduction to Child Law in South Africa* (2000) 193 that s 28(1)(h) Constitution is an extension of s 35(3). See also Zaal & Skelton "Providing effective representation for children in a new Constitutional Era: Lawyers in the criminal and children's courts" 1998 *SAJHR* 541; De Waal, Currie & Erasmus *The Bill of Rights Handbook* (2001) 466; Kassan 36; Davel (2007) 2-20; Sloth-Nielsen 2008 *SAJHR* 500.

108 Eg *Soller v G* 2003 5 SA 430 (W); *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T); *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T); *Legal Aid Board v R* 2009 2 SA 262 (D). Compare Kassan 36-37 who draws a comparison between s 28(1)(h) Constitution, art 12(2) CRC and art 4(2) ACRWC commenting that art 12(2) does not refer to a "legal representative" but a "representative" and art 4(2) an "impartial representative" whereas s 28(1)(h) Constitution refers to a "legal representative". However, the application is broader in s 28(1)(h) with reference to "every child" irrespective of the ability of the child to communicate his or her views. See further Davel (2007); Sloth-Nielsen 2008 *SAJHR* 495-496.

109 S 28(2) providing that "[a] child's best interests are of paramount importance in every matter concerning the child".

participation of children in legal matters.[110] The inclusion therefore of section 10[111] and section 14[112] in the Children's Act has bridged this gap. The Constitution does provide for the child's right to legal representation.[113] The nexus between section 14 of the Children's Act and section 28(1)(h)[114] of the Constitution has already been referred to.[115] The application of section 28(1)(h) has elicited concerns regarding procedural problems that may present themselves.[116] However, case law has alleviated some of the procedural problems envisaged. Some of these cases are discussed below.

Soller v G[117] is the first reported case[118] that fully deals with the interpretation and application of section 28(1)(h).[119] The matter to be

110 Similar to art 12 CRC or art 4(2) ACRWC.

111 Which prescribes that "[e]very child that is of such age, maturity and stage of development as to be able to participate in any matter concerning that child, has the right to participate in an appropriate way and views expressed by the child must be given due consideration".

112 Prescribing that "[e]very child has the right to bring, and to be assisted in bringing a matter to a court, provided that matter falls within the jurisdiction of that court".

113 The interim Constitution of the Republic of South Africa, 1993 did not contain a section granting children a right to legal representation in civil matters.

114 "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."

115 Par 3 above.

116 Davel (2006) 21 refers to the following issues that need to be addressed: What is the correct procedure relating to the assignment of a legal representative; who should make the assignment, for instance, is it the State Attorney or the Legal Aid Board; can a legal representative be assigned by the High Court; what constitutes "substantial injustice"; who decides whether "substantial injustice" will otherwise result; and according to which principles will this decision be made? Du Toit 101-102 also alludes to practical issues regarding the assigning of a legal representative for a child. She identifies three main issues that need to be considered, namely circumstances under which a child is entitled to a legal representative in terms of s 28(1)(h) Constitution, the implementation of the rights envisaged in terms of s 28(1)(h) and the scope and functions of the legal representative appointed in terms of s 28(1)(h) Constitution.

117 2003 5 SA 430 (W). This case is referred to for its impact on the assignment of a legal representative to a child in terms of s 28(1)(h) Constitution. However, the first step is the right to participation which serves as a gateway to the right of the child to legal representation in civil matters as set out in s 28(1)(h) Constitution, mindful of the fact that the application of s 28(1)(h) is broader than s 10 Children's Act as it applies to every child and not only those children who are of such age, maturity and stage of development as to be able to participate in an appropriate way.

118 The question of assigning a legal representative in terms of s 28(1)(h) was previously considered in the matter of *Fitschen v Fitschen* [1997] JOL 1612 (C). The application failed due to the court finding that substantial injustice would not result because the children's views were taken into consideration in reports of the psychologists and Family Advocate.

119 Par 3 (434B/C-D); Davel (2007) 2-20; Du Toit "Children" 2009 (1) *Juta Quarterly Review* 2 1, Du Toit 103-104, 107. In *Ex parte Van Niekerk; In re*

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considered involved an application by a fifteen-year-old boy, K, for the variation of a custody (now care) order in which his custody was allocated to his mother. The court granted K the right to express his views[120] and in doing so to obtain legal representation in terms of section 28(1)(h) of the Constitution.[121] After the court ascertained that the attorney who brought the application had been struck off the roll of attorneys, Satchwell J decided that the matter warranted the assignment of a legal practitioner in terms of section 28(1)(h) and assigned an attorney on a *pro bono* basis.[122] The court explained that a legal representative did not fulfil the same role as the office of the Family Advocate[123] and elaborated on this distinction.[124] The Family Advocate is not a legal representative.

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119 *Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) the court granted an application assigning a legal representative in terms of s 28(1)(h) without discussing the application in detail, but in *Soller's* case s 28(1)(h) as well as the aim of the section was discussed in greater depth.

120 Par 7 (434G-H) where Satchwell J mentions that "few proceedings [are] of greater import to a child/young adult of K's age than those which determine the circumstances of his residence and family life, under whose authority he should live and how he should exercise the opportunity to enjoy and continue to develop a relationship with both living parents and his sibling". See also pars 44-48 (443A/B-444B/C).
Par 26 (438A/B-D/E) referring to s 28(1)(h) the court held that what is envisaged is "a 'legal practitioner' who would be an individual with knowledge of and experience of the law but also the ability to ascertain the views of a client [the child], present them with logic eloquence and argue the standpoint of the client in the face of doubt or opposition from an opposing party or a Court. Section 28(1)(h) ... [requires that] a child in civil proceedings may ... where substantial injustice would otherwise result, be given a voice. Such voice is exercised through the legal practitioner".

122 Parr 1-17.

123 The referral of a dispute between the two unmarried parents of the child regarding paternity for mediation in terms of 21(3) Children's Act; the registration of a parental responsibilities and rights agreement; input in terms of s 23(3)(a) Children's Act in the application for an order granting care of and contact with the child; an application in terms of s 28(3)(e) Children's Act for the termination, extension, suspension or restriction of parental responsibilities and rights; the preparation of a report and recommendations in terms of s 29(5)(a) Children's Act as juxtaposed with s 29(6) Children's Act regarding the appointment of a legal practitioner; involvement in major decisions involving the child in terms of s 31(1) Children's Act; involvement in terms of s 33(5)(*a*) Children's Act in the formulation of a parenting plan; involvement in the formalities of the family plan in terms of s 34(3)(b)(ii)(aa) Children's Act.

124 Par 20 (437B-C). From parr 20-29 (437B-438I/J) the court distinguishes between the functions of the Family Advocate and the s 28(1)(h) legal practitioner to represent the child. Davel (2007) 2-21 n 7 briefly refers to a number of articles that have been written on the role of the office of the Family Advocate since its establishment in 1990 in terms of the Mediation in Certain Divorce Matters Act 24 of 1987 and explains the functions of the Family Advocate (2-21/2-22). See also De Ru "The value of recommendations made by the Family Advocate and expert witnesses in determining the best interests of the child: P v P 2007 5 SA 94 (SCA)" 2008

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The court, while referring to the Convention on the Rights of the Child observed that the significance of section 28(1)(h)[125] lies in the recognition found in the Convention on the Rights of the Child[126] that the child's interests and the adult's interests will not always intersect and therefore a need exists for separate representation of the child's views.[127] K in this case wished to reside with his father and was adamant about his decision. Normally the expressed wishes of the child would only be a persuasive factor in determining the best interests of the child.[128] With *Soller v G* the court emphasised the importance of giving a child the opportunity to express his or her views and to be assisted in doing so by a legal practitioner assigned in terms of section 28(1)(h).[129]

Following on the decision in the *Van Niekerk* case, the court in *Centre for Child Law v Minister of Home Affairs* drew a distinction between a *curator ad litem* and a legal representative appointed in terms of section 28(1)(h) of the Constitution.[130] The matter concerned the placement of unaccompanied foreign children[131] with adults in the Lindela Repatriation Centre and the failure to ensure that the children were brought before a children's court as required by the Child Care Act 74 of

THRHR 698-705. De Ru concludes (705) that the importance of the decision is to be found in alerting the courts to the dangers of allowing Family Advocates and expert witnesses to take over the function of the court and the duty of the presiding officer. It may be added that the task of the court would be much easier when the child is also legally represented and the court is allowed to receive the views of the child objectively.

125 Par 8. The provision regarding "substantial injustice" in s 28(1)(h) Constitution is not mentioned in the corresponding art 12 CRC.

126 Art 12(2) CRC provides that the child be given the opportunity to be heard in any judicial and/or administrative proceedings affecting the child, either directly or through a representative or an appropriate body.

127 Par 8-10 (434-435) where Satchwell J discusses the significance of s 28(1)(h) with reference to substantial injustice and refers to Sloth-Nielsen & Van Heerden (1996 *SAJHR* 250) who voiced their concern over the lack of accommodating the child's views when a conflict of interests arises between parents and children in matters affecting children. This question has to a large degree been resolved with the provisions of ss 10 & 14 Children's Act.

128 Par 54 where the court observed that it is trite in family law that the best interests of each child is paramount in the custody and access arrangements of such child (now "care" and "contact" in terms of the Children's Act, s 1(1) definition of "care" and "contact" and subs (2). This section became operative from 2007-07-01). The wishes of the child, in the particular circumstances of the family had become the determining factor: par 56. See *McCall v McCall* 1994 3 SA 201 (C) regarding the suggested list of factors to determine the best interests of the child. S 7 Children's Act (in operation since 2007-07-01) has introduced the best interests of the child standard which is applicable in all matters covered by the Children's Act.

129 Furthermore, the importance of having a legal practitioner assisting the child highlights the need for legal assistance when the child is involved in civil litigation. This echoes the reason why s 14 needs to be linked to s 28(1)(h) Constitution.

130 2005 6 SA 50 (T).

131 See further Swart "Unaccompanied minor refugees and the protection of their socio-economic rights under human rights law" 2009 *AHRLJ* 103-128 for insight into the practical treatment of unaccompanied minor refugees in Ghana and South Africa.

1983. The court was concerned about the imminent and unlawful deportation of such children. It appeared that the children who were deported from Lindela back to their countries of origin were loaded into trucks and taken to the train station. There they were transferred onto a train, transported to their country's border, loaded back onto a truck and taken to the nearest police station in that country.[132] The court held that the way the children were treated resulted in serious infringements of the children's fundamental rights.[133]

The court at first appointed a *curator ad litem* to represent the unaccompanied foreign children. The powers and duties of the *curator ad litem* for the children were *inter alia* to investigate the circumstances and make recommendations to the court regarding their future treatment and to institute legal proceedings in the enforcement of their rights.[134] The *curator ad litem* subsequently, while reporting back to the court, successfully applied for an order in terms of section 28(1)(h) whereby the commissioner of child welfare in Krugersdorp was instructed to appoint a legal practitioner for each of the thirteen children at Dyambo Youth Centre. The legal practitioner was ordered to appear before the children's court within five days from the date of the order.[135] The court clearly distinguished between the role of a *curator ad litem* and that of a legal representative appointed in terms of s 28(1)(h).[136]

The appointment of a legal representative for the child concerned was raised *mero motu* by the court in *R v H*.[137] The mother brought an application for variation of her custody (now care) order with a view to awarding her sole custody and guardianship of the child. Judge Moosa appointed a legal representative, who was subsequently joined as second defendant, for the child after referring to the application of section

132 Par 5 (54B-C).

133 Protected in terms of ss 12, 28(1)(c), 28(1)(g), 28(2), 33, 34, 35 Constitution.

134 Par 6 (54C-E).

135 Par 13 (60I-J) where De Vos J specifically ordered in point 10 of the order that "the ninth respondent [commissioner of child welfare Krugersdorp] appoint a legal practitioner for each of the 13 foreign children presently detained at Dyambo, in terms of s 28(1)(h) of the Constitution of South Africa, 1996, if it appears that substantial injustice would otherwise result".

136 Par 23 (58B/C-C/D) where the court was informed of the children's plight and the ongoing admission of children in the repatriation centre with the appointment of a *curator ad litem*. The court (par 27 (58I)) appointed the *curator ad litem* as the children's legal representative in terms of s 28(1)(h), referring to *Soller v G* 2003 5 SA 430 (W) 438 where the task of a legal practitioner in terms of s 28(1)(h) is set out, and added that all unaccompanied children that find themselves in South Africa illegally should have a legal representative appointed to them by the State (par 29 (59C-D)). See *Martin v Road Accident Fund* 2000 2 SA 1023 (W) 1034B-C that it is sometimes undesirable for a person to be both curator and legal representative.

137 2005 6 SA 535 (C) par 6 (539G/H). The court came to this decision after reading and considering the pleadings. Also cited as *Rosen v Havenga* 2006 4 All SA 199 (C).

28(1)(h) of the Constitution and article 12 of the Convention on the Rights of the Child.[138]

7 Conclusion

Section 14 of the Children's Act entrenches the child's right to bring, and to be assisted in bringing, a matter to a court that has jurisdiction. This right referred to in section 14 is of general application and not limited to the Children's Act only. It opens the door for every child to bring a matter to a court that has jurisdiction.

It is concluded that section 14 did not remove the common law restrictions imposed on a child's capacity to litigate. A recent decision of the High Court and later the Supreme Court of Appeal[139] left the issue undecided: Four children brought an application to the High Court to protect their interests in a dispute between their parents. They were assisted by the Legal Aid Board. In the court *a quo* Schoeman J dismissed the application and the Legal Aid Board took the matter on appeal. The Supreme Court of Appeal decided that what has been placed before it is no appeal although it was presented as such. The Legal Aid Board was actually applying for a declaratory order and as the Supreme Court of Appeal has no original jurisdiction it could not hear the application.[140] In *casu* the children, aged eleven[141] and fourteen, were caught up in a dispute between their divorced parents: At first the parents lived in the same city and were able to manage their joint custody (now care) rights harmoniously. At some stage the mother wanted to relocate to another city and the children approached a Justice Centre[142] for assistance.[143] The Justice Centre brought an application for the appointment of a legal practitioner under section 28(1)(h) of the Constitution. This application was dismissed[144] and prompted the "appeal". The Supreme Court of Appeal made no order. The *obiter* remarks made no mention of section 14 of the Children's Act or the effect thereof but instead reverted to the

138 Par 6 (539I/J-540A/B) citing a number of reasons for considering such an appointment for the child: In the first place, the applicant was seeking drastic relief in the existing access arrangement, which could have serious implications for the child and her father. Secondly, the interests of the child may not be compatible with those of the custodian parent. Thirdly, there may be the need to articulate the views of the child in the proceeding in the interests of justice. Finally, separate legal representation may be in the best interests of the child.

139 *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (2011-03-29).

140 Par 1.

141 Three of the children were eleven years old.

142 The name under which the Legal Aid Board performs its functions in some regions.

143 Their mother previously considered moving abroad but abandoned those plans after an unsuccessful application to the High Court: par 9.

144 "It was taken further off course" per Nugent JA par 20. The court of first instance held the view that the duty of a legal practitioner in terms of s 28(1)(h) would have been "to advance the case of the children" while "independent judgment" was necessary.

existing "ready and simple mechanism"[145] of common law, namely a *curator ad litem*, to overcome the hurdle that "a minor is not generally competent to engage in litigation without the assistance of his or her guardian".[146]

The conclusion is reached that the effect is that the common-law rules relating to the child's capacity to litigate have not been amended. It is convincingly argued by some analysts that it could not have been the intention of legislature to amend the common-law rules relating to the *infans*' (or minor's) capacity to litigate.[147] It is suggested that section 14 was not intended to deal with the formal requirements applying to litigation by or on behalf of a child. A minor has a right of access to a court in a matter affecting the minor and children are entitled to be assisted in bringing legal matters to court.[148] However, the means through which they are to present the case are still regulated by the common law.

145 Par 12.
146 Par 11.
147 Heaton 92.
148 Bosman-Sadie & Corrie 30.

Ondernemingsredding uit die wegspringblokke: Is dit sterk genoeg?
Swart v Beagles Run Investments 25 (PTY) Ltd

(ongerapporteerde Noord Gauteng Hoë Hof saak no 26597/2011)
Ondernemingsreddingsprosedures ingevolge hoofstuk 6 van die Maatskappywet 71 van 2008

1 Inleiding

Belangegroepe vanuit die finansiële-, besigheid- en regsgeleerdheid-sektore het met afwagting asem opgehou om te sien hoe die hof die splinternuwe begrippe en prosedures in die nuwe Maatskappywet 71 van 2008 (hierna die Wet), wat op 1 Mei 2011 in werking getree het, uitlê. Een van hierdie prosedures waaroor baie sterk standpunte gehuldig is en wat weldra in meer besonderhede bespreek sal word, is die nuwe ondernemingsreddingsprosedures wat in Hoofstuk 6 van die Wet uiteengesit word. *Swart v Beagles Run Investments 25 (PTY) Ltd* is, sover vasgestel kon word, die eerste beslissing wat voor die hof gebring is ingevolge hierdie nuwe prosedure. In die doelstellings van die Wet val daar sterk klem op ondernemingsredding en hierdie proses se gees onderlê die res van die temas en oogmerke van die Wet. Hierdie gees behoort dus sekerlik in gedagte gehou te word in die uitleg van die bepalings van Hoofstuk 6.

Dr Rob Davies, Minister van Handel en Nywerheid, het op 19 April 2011 in sy 2011/2012 "*Policy statement and budget vote speech*" (www.thedti.gov.za besoek op 2011-06-14) gesê: "The new Companies Act will provide for a modern, efficient system of company regulation that will reduce red tape and hassle while making necessary regulation more effective." Hierdie Wet is reeds in 2008 deur die Staatspresident onderteken maar het eers op 1 Mei 2011 in werking getree. Cassim (red) *Contemporary company law* (2011) 2 meen dat hierdie langverwagte nuwe maatskappywetgewing "*intended to be the modern corporate law for a modern commercial world*". Een van die hooftemas van die nuwe wet is die daarstel van 'n "*corporate rescue appropriate to the needs of a modern South African economy*" (sien Cassim 782 en die Departement van Handel en Nywerheid se beleidsdokument "*South African company law for the 21st Century: Guidelines for corporate law reform*" GN 1183 van 2004-06-23; *GG* 26493 par 4.6.2).

Een van die doelstellings wat spesifiek in die aanhef van die Wet genoem is, is "om vir behoorlike redding van maatskappye in finansiële nood voorsiening te maak" (a 7(k)). Hoofstuk 6 van die Wet maak vir 'n

langverwagte, hervormde ondernemingsreddingstruktuur in die Suid-Afrikaanse maatskappyereg voorsiening en is die meganisme wat die wetgewer in gedagte gehad het om voormelde doelstelling te verwesenlik.

Verskeie belangegroepe kan baat vind by 'n kultuur van ondernemingsredding. Daarom is dit van uiterste belang dat "*a means for the preservation of ... viable commercial enterprises capable of making a useful contribution to the economic life of a country*" gevind word (Cassim 782). Aangesien hierdie die eerste saak oor 'n nuwe prosedure is, word 'n redelike omvattende agtergrond geskets voordat daar met 'n bespreking van die vonnis begin word. Hierdie saak lê die grondslag vir die nuwe ondernemingsreddingprosedure en is daarom van uiterste belang. Alle oë is op die regbank om te sien wat die hof met hierdie eerste reddingsaak gaan maak. Die vraag is of die hof die agtergrond en slaggate wat met die mislukte geregtelike bestuur geassosieer word, gaan raaksien en 'n stabiele basis vir opvolgende ondernemingsreddingsake daarstel en ef die hof 'n konserwatiewe benadering tot die nuwe proses gaan volg en veroorsaak dat dit ook 'n "buitengewone" stempel kry.

2 Geregtelike Bestuur teenoor Ondernemingsredding

Suid-Afrika was een van die eerste lande wat reeds in die Maatskappywet 46 van 1926 ondernemingsreddingsprosedures geïnkorporeer het. Hierdie prosedure, wat as geregtelike bestuur bekend gestaan het, is om verskeie redes deur die howe en akademici as 'n grootskaalse mislukking beskou. Ongeag Suid-Afrika se "*progressive initiative*" met hierdie vroeë ondernemingsreddingstelsel, het Suid-Afrika nie bygehou met ander lande in die najaging van 'n reddingskultuur nie (sien *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* [2001] 1 All SA 223 (K) 738).

Redes wat vir die mislukking van hierdie proses aangevoer is, sluit onder andere in dat dit tydsaam, buitensporig duur en deur die howe as 'n buitengewone proses bestempel is. (Sien Burdette "Some initial thoughts of the development of a modern and effective business rescue model for South Africa" 2004 *SA Merc LJ* 246; Olver "Judicial management: A case for law reform" 1986 *THRHR* 48; Loubser *Some comparative aspects of corporate rescue in South African company law* (LLD proefskrif 2010 UNISA) 3 ev; Loubser "The interaction between corporate rescue and labour legislation: Lessons to be drawn from the South African experience" 2005 14 *INSOL International Insolvency R* 57.

In *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* [2001] 1 All SA 223 (K) 238 het Josman R geregtelike bestuur se werking soos volg opgesom: "*A system which has barely worked since its initiation in 1926*". (Sien ook Rajak en Henning "Business Rescue for South Africa" 1999 *SALJ* 262; Kloppers "Judicial Management – A Corporate Rescue Mechanism in need of reform" 1990 *Stell LR* 417; Loubser "Judicial

Management as a business rescue procedure in South African corporate law" 2004 *SA Merc LJ* 13.)

Artikel 427 van die 1926 Maatskappywet het die vereiste bevat dat daar in 'n aansoek om geregtelike bestuur vir 'n maatskappy in nood 'n "reasonable probability" moet bestaan dat dit weer 'n suksesvolle onderneming sal word. Myns insiens het hierdie streng vereiste onder andere daartoe gelei dat 'n konserwatiewe benadering ten opsigte van besigheidsredding gevolg is en dat ondernemingsredding toe as 'n buitengewone stelsel ontwikkel het. (Sien ook *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* [2001] 1 All SA 223 (K).

Weens die vorige model se mislukking het talle in afwagting uitgesien na hoe die howe die nuwe ondernemingsreddingsprosedure oftewel "*business rescue*" gaan uitlê en implementeer. Dit is van kritiese belang dat Suid-Afrika 'n suksesvolle ondernemingsreddingstelsel ontwikkel wat geregtelike bestuur se beperkings en mislukkings uit die geheue wis.Ondernemingsredding word in artikel 128(1)(b) van die Wet omskryf as:

> verrigtinge om die rehabilitasie van 'n maatskappy wat in finansiële nood is te fasiliteer deur voorsiening te maak vir –
>
> (i) die tydelike toesig oor die maatskappy, en vir die bestuur van sy sake, bedrywighede en eiendom;
>
> (ii) 'n tydelike moratorium op die regte van eisers teen die maatskappy of ten opsigte van eiendom in sy besit; en
>
> (iii) die ontwikkeling en implementering . . . van 'n plan om die maatskappy te red deur sy sake, bedrywighede, eiendom, skuld en ander laste, en ekwiteit sodanig te herstruktureer dat die waarskynlikheid dat die maatskappy op 'n solvente grondslag sal voortbestaan gemaksimaliseer word of, indien dit vir die maatskappy onmoontlik is om voort te bestaan, sal lei tot 'n beter opbrengs vir die maatskappy se skuldeisers of aandeelhouers as wat uit die onmiddellike likwidasie van die maatskappy sou voortspruit.

Die volgende kriteria word in artikel 128(1)(f) gestel vir finansiële nood:

> (i) dit redelik onwaarskynlik is dat die maatskappy in staat sal wees om binne die onmiddellike daaropvolgende ses maande al sy skulde sal kan betaal namate dit betaalbaar raak; of
>
> (ii) dat dit redelik waarskynlik is dat die maatskappy binne die onmiddellike daaropvolgende ses maande insolvent sal raak

Dit kom voor asof die streng vereiste betreffende 'n "reasonable probability" wat vir geregtelike bestuur gestel was uitdruklik uit die Wet weggelaat is in die hoop dat dit meer geredelik toegestaan sou kon word. Meteens was "business rescue" die nuwe gonswoord op almal se lippe (sien Pile "Existing legislation is geared towards liquidating ailing companies rather that assisting them" *Financial Mail* 18 Junie 2004).

Ondernemingsredding word as 'n teenvoeter vir likwidasie gesien. In Suid-Afrika waar maatskappye betreklik maklik gelikwideer word, is dit

belangrik dat 'n alternatief vir hierdie proses, wat die land se ekonomie asook werkloosheidsyfer benadeel, so gou as moontlik suksesvol geïmplementeer word. Likwidasie het 'n bepaalde oogmerk en doel en dit is belangrik dat dit daarvoor aangewend word en nie "as a debt-collecting tool in some companies that could be saved" nie (sien Pile *Financial Mail* 18 Junie 2004). Ondernemingsredding se doel is dus eenvoudig "a reorganisation of the company to restore it to a profitable entity and avoid liquidation" (Cassim 782). Weens die feit dat ondernemingsredding juis ten doel het om 'n maatskappy wat in finansiële nood verkeer, 'n tweede asem te gee, ontstaan die vraag of die howe nie hierdie aansoek meer geredelik moet toestaan nie?

Die ondernemingsreddingpraktisyn (hierna die praktisyn) is een van die belangrike rolspelers in die ondernemingsreddingproses.. Alhoewel hierdie bespreking nie in besonderhede na die rol en funksies van die praktisyn let nie, word een van die funksies van die praktisyn kortliks uitgelig. (Sien deel B van hoofstuk 6 van die Wet vir 'n volledige uiteensetting van die funksies en aanstellingsvoorwaardes van praktisyns). Ingevolge artikel 141 moet die praktisyn so gou as moontlik na sy aanstelling die sake van die maatskappy ondersoek en bepaal of daar 'n redelike vooruitsig is om die maatskappy te red. Die praktisyn kan op enige tydstip tydens die ondernemingsreddingproses, indien hy aflei dat die maatskappy nie gered kan word nie, ingevolge artikel 141(2)(ii) by die hof aansoek doen dat die ondernemingsreddingproses beëindig word en dat die maatskappy in likwidasie geplaas word. Hierdie bevoegheid wat in artikel 141 aan die praktisyn gegee word, stel 'n tipe ondervangingsmeganisme daar, ingevolge waarvan 'n praktisyn met veronderstelde kennis en ondervinding in maatskappysake, die oomblik wanneer hy tot die besef kom dat die maatskappy nie gered kan word nie, uit ondernemingsredding gehaal kan word en in likwidasie geplaas kan word. Die diskresie is met ander woorde uit die hande van die hof geneem en na die praktisyn oorgedra. Dit word aan die hand gedoen dat hierdie 'n geldige rede is waarom die howe onder die nuwe bedeling meer geredelik 'n aansoek om ondernemingsredding behoort toe te staan.

Baie skrywers was skepties oor die moontlike verwagte sukses van hierdie nuwe prosedure wat in Hoofstuk 6 van die Wet vervat is (sien oa Braatvedt "Chapter 6 of the South African Companies Act 71 of 2008 reviewed" *Eversheds Corporate Rescue and Insolvency* Augustus 2010 elektroniese publikasie www.eversheds.co.za/publications/article/insolvency and business rescue besoek op 2011-06-14; Swanepoel "Business rescues in new act may have undesirable results" *Business Report* 11 November 2009; Fraser "You may be right – but you may be wrong, too! *Legalbrief* 19 Augustus 2010). Een van die vernaamste redes hiervoor was vanweë die feit dat Suid-Afrika 'n skuldeiser-vriendelike benadering ten aansien van skuld volg (sien Pile *Financial Mail* 18 Junie 2004). Skep die nuwe besigheidsreddingsmodel nie 'n geleentheid vir

Suid-Afrika om in die rigting van 'n meer skuldenaar-vriendelike korporatiewe insolvensiesisteem te beweeg nie?

'n Kort uiteensetting van die feite van die saak asook die hof se beslissing word vervolgens gegee, gevolg deur enkele opmerkings aangaande die beslissing

3 Feite

Swart v Beagles Run Investments 25 (Pty) Ltd is op 'n dringende grondslag in die Noord Gauteng Hoë Hof voor Makgoba R aangehoor. Uitspraak is op 30 Mei 2011 gelewer.

Swart was die enigste aandeelhouer en direkteur van Beagles Run Investment 25 (Pty) Ltd. Beagles Run het as vervoerder en handelaar in wilde diere besigheid bedryf. Die maatskappy was ook die eienaar van 'n vliegtuig en helikopter. Weens verskeie redes kon Beagles Run nie meer alle finansiële verpligtinge nakom nie. Op grond hiervan het Swart die hof op 'n dringende basis genader om die respondent ingevolge artikel 131(4)(a) onder toesig te plaas en om ondernemingsreddingprosedures aan die gang te sit.

Drie skuldeisers, naamlik Bridging Advances (Edms) Bpk, Bideasy Auctions KB en Glacis Game Breeders (Edms) Bpk het tussenbeide getree. In die aanvanklike proses was Firstrand Bank Bpk ook 'n party tot die verrigtinge, maar Glacis Game Breeders (Edms) Bpk het die eis oorgeneem, waarna Firstrand Bank Bpk nie meer 'n party was nie. Slegs Glacis Game Breeders (Edms) Bpk het die dringende aansoek gesteun. Die res van die skuldeisers het die aansoek om ondernemingsredding teengestaan en die hof versoek om 'n likwidasiebevel toe te staan.

Swart het beweer dat die maatskappy in finansiële nood verkeer het omdat dit 'n kontantvloeiprobleem ondervind het en daarom nie die skulde kon betaal soos wat dit opeisbaar geword het nie. Swart het aangevoer dat indien die maatskappy in staat gestel sou word om sy besigheid voort te sit onder ondernemingsreddingsprosedures en 'n ondernemingsreddingplan geïmplementeer kon word, die maatskappy in staat sou wees om alle skuldeisers binne 'n redelike tyd te betaal; aan die ander kant, indien die maatskappy nie die beskerming ingevolge ondernemingsredding sou kry nie, het daar geen redelike vooruitsig bestaan dat die maatskappy die skuldeisers sou kon betaal nie.

4 Beslissing

Die hof het sy uitspraak begin deur te meld dat die proses van ondernemingsredding en die ondernemingsreddingplan 'n nuwigheid in ons reg is en van die geleentheid gebruik gemaak om die relevante artikels van hoofstuk 6 van die Wet te identifiseer en te analiseer.

Die hof het die omskrywing van ondernemingsredding ingevolge artikel 128(1)(b) uiteengesit. Daarna het die hof beklemtoon dat 'n ondernemingsreddingprosedure op een van twee wyses begin kan word.

Artikel 129(1) maak daarvoor voorsiening dat die direksie van 'n maatskappy die proses kan begin deur te besluit dat die maatskappy vrywillig onder toesig geplaas word. Die ander moontlikheid is dat 'n geaffekteerde persoon ingevolge artikel 131 'n aansoek by die hof bring om die maatskappy onder gedwonge toesig te plaas. 'n Geaffekteerde persoon word ingevolge artikel 128(1)(a) omskryf as:

> (i) 'n aandeelhouer of 'n skuldeiser van die maatskappy;
>
> (ii) enige geregistreerde vakbond wat werknemers van die maatskappy verteenwoordig; en
>
> (iii) indien enige van die werknemers van die maatskappy nie deur 'n geregistreerde vakbond verteenwoordig word nie, elk van daardie werknemers of hulle onderskeie verteenwoordigers.

Dit is dus duidelik dat Bridging Advances (Edms) Bpk, Bideasy Auctions KB en Glacis Game Breeders (Edms) Bpk *locus standi* as skuldeisers ingevolge artikel 128(1)(a)(i) gehad het as geaffekteerde persone was wat hierdie aansoek kon bring.

Nadat die hof na hierdie omskrywings verwys het, het dit bepaal dat dit duidelik is dat die wetgewer met ondernemingsredding ten doel gehad het om 'n maatskappy in finansiële nood by te staan deur 'n ondernemingsreddingplan. Dit sal veroorsaak dat die maatskappy op 'n solvente basis besigheid voortsit en dat dit 'n beter opbrengs vir die maatskappy se aandeelhouers en skuldeisers inhou in teenstelling met die geval waar dit onder likwidasie geplaas word.

Volgens die hof is die feit dat die maatskappy in finansiële nood verkeer gemeensaak. Volgens Swart benodig die respondent bloot tyd om van roerende bates ontslae te raak wat die gevolg sal hê dat sy skuldeisers betaal kan word en die maatskappy besigheid kan voortsit. Derhalwe sou daar volgens die applikant geen benadeling plaasvind indien die hof ondernemingsreddingsprosedures gelas en daarmee begin word nie. Die hof het hom na die vereistes van artikel 131(4)(a) gewend om te bepaal of die hof die aansoek moes toestaan. Hierdie vereistes kan met die volgende vrae duidelik gestel word (sien a 131(4)(a)(i)–(iii)):

> (a) Is die maatskappy in finansiële nood?
>
> (b) Het die maatskappy ingevolge 'n indiensnemingsverwante geval nagelaat om enige bedrag kragtens 'n verpligting ingevolge 'n openbare regulasie of kontrak te betaal?
>
> (c) Is dit andersins billik en regverdig om so 'n bevel toe te staan weens finansiële redes en omdat daar 'n redelike vooruitsig is dat die maatskappy gered kan word?

Indien daar aan *een* van hierdie vereistes voldoen word, het die hof 'n diskresie om die bevel toe te staan. Die vraag wat dus beantwoord moet word, is of die respondent aan een van die vereistes van artikel 131(4)(a) voldoen het.

In 'n verrassende wending het die hof op die herroepe geregtelike bestuur se artikel 427 van die ou Maatskappywet 61 van 1973 gesteun toe daar besluit moes word of die aansoek toegestaan behoort te word. Die hof het klem gelê op die vereiste dat daar 'n "reasonable probabability" moes bestaan dat die maatskappy weer as 'n suksesvolle onderneming besigheid sal kan bedryf. Makgoba R beslis dat dit beteken dat die maatskappy weer besigheid ingevolge sy hoofdoelstelling sal kan bedryf wat 'n opbrengs aan aandeelhouers en skuldeisers sal oplewer. Dit moet vasgestel word uit die bewysstukke voor die hof.

Die teenstemmende skuldeisers was van mening dat Swart se aansoek om ondernemingsredding nog 'n vertragingstaktiek was om die betaling van gelde wat aan die skuldeisers verskuldig was verder uit te stel.

Nadat die hof die bewysstukke bestudeer het, het dit geblyk dat Swart nie eerlik was ten aansien van die genoemde bates en aanspreeklikheid van die maatskappy nie en dat Beagles Run hopeloos insolvent was. Die vraag voor die hof was dus of 'n ondernemingsreddingsplan soos deur die applikant versoek onder hierdie omstandighede haalbaar was.

Makgoba R het beslis dat hy in die uitoefening van sy diskresie moes bepaal of die respondent besigheid op solvente grondslag sou kan voortsit en of die toestaan van die ondernemingsredding 'n beter dividend vir skuldeisers sou beteken.

Aangesien dit gemeensaak was dat die maatskappy al vir ten minste 'n jaar lank in finansiële nood verkeer het, het die hof beslis dat die belange van die skuldeisers op stuk van sake die deurslaggewende faktor is. Op grond van die feit dat daar geen bewyse voorgelê is dat die skuldeisers van die maatskappy ingevolge ondernemingsredding-prosedures in 'n beter posisie sou verkeer as wat hulle ingevolge likwidasie sou wees nie, het die hof die aansoek met koste van die hand gewys.

5 Gevolgtrekkings

Hoofstuk 6 van die nuwe Wet stel 'n belangrike meganisme beskikbaar vir maatskappye wat in finansiële nood verkeer en wat met behulp van 'n moratorium en die implementering van 'n ondernemingsreddingsplan weer suksesvol besigheid sal kan bedryf. Die praktisyn word in 'n posisie geplaas om op grondvlak vas te stel of daar 'n redelike vooruitsig bestaan om die maatskappy te red en of dit eerder gelikwideer behoort te word. Daar is enkele positiewe en negatiewe aspekte wat uit hierdie beslissing na vore kom.

Dit is verblydend dat die hof die fundamentele beginsels wat die wetgewer ten doel gehad het en waarop ondernemingredding berus, geïdentifiseer het en die moontlike slaggate wat met sulke aansoeke gepaard kan gaan, uitgewys het. Die hof het die aandag gevestig op die volgende aspekte ten aansien van die hof se benadering tot ondernemingsredding:

(a) Ondernemingsredding is ontwerp vir 'n maatskappy wat "ekonomies lewensvatbaar" is (sien Braatvedt *Eversheds Corporate Rescue and Insolvency*). *Swart v Beaglerun* het beklemtoon dat weens die gevolgtrekking dat die maatskappy hopeloos insolvent was dit nie bereid was om die ondernemingsreddingbevel toe te staan nie. Die invoeging van die woord "rehabilitasie" by die definisie van ondernemingsredding in artikel 128(1)(b) dui daarop dat 'n moontlikheid van omkeer wel moet bestaan. In gevalle waar die maatskappy dus "terminaal" siek is en nie weer suksesvol sal kan voortbestaan nie, is belangrik om moontlike misbruik van die proses van ondernemingsredding te voorkom.

(b) Die doel van ondernemingsredding is nie noodwendig om die likwidasie van 'n maatskappy te verhoed nie, maar eerder om 'n geleentheid te skep vir die onderneming om te kan voortbestaan of om 'n beter opbrengs aan skuldeisers moontlik te maak. Hierdie oogmerk van ondernemingsredding is ook geïdentifiseer as een van die moontlike misbruike wat met ondernemingsredding geassosieer kan word. Nie net is die moontlike beter opbrengs vir skuldeisers 'n motivering vir skuldeisers as geaffekteerde persone om 'n aansoek om ondernemingsredding te bring nie, maar 'n groter kwelling is die reg van werknemers om as geaffekteerde persone 'n aansoek om ondernemingsredding te bring, aangesien hulle eise se prioriteit aansienlik verbeter in geval van ondernemingsredding as in die geval van likwidasie (sien Joubert , Van Eck en Burdette "Impact of Labour Law on South Africa's new Corporate Rescue Mechanism" Maart 2011 *International Journal of Comparative Labour Law and Industrial Relations* 65 vir 'n uiteensetting van die moontlike implikasie op die eise van werknemers se eise).

Die feit dat die hof op die ou artikel 427 van die 1973 Wet teruggeval het, word sterk bevraagteken. Die wetgewer het ingevolge die 2008 Wet spesifiek wegbeweeg van die streng "reasonable probability" toets wat in die vorige wet gestel was wat moet bestaan alvorens die hof 'n bevel om geregtelike bestuur, sal toestaan. Daar kan geargumenteer word dat die feit dat hierdie bewoording nie in die 2008 Wet oorgeneem is nie, 'n daadwerklike wegbeweeg was van die vorige streng toets is. In *Sammel and Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) het die regter die volgende *obiter* opmerking gemaak:

> Judicial management is a special or extraordinary procedure, an order for which will generally only be granted if the Court is satisfied that there is, inter alia, a "reasonably probability" that under such management the company will ultimately be able to pay its debts. (663).

By monde van Josman R in *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* 2001 (2) SA 727 (K) 740 was hierdie benadering as die riglyn gevestig vir die toestaan van 'n geregtelike bestuursbevel, alhoewel dit 'n *obiter* opmerking was.

Die hof het in *Swart v Beaglerun* 'n gulde geleentheid gehad om 'n nuwe, meer toegeeflike benadering ten opsigte van die toestaan van ondernemingsredding te vestig. So 'n benadering sou die potensiaal inhou dat ondernemingsredding nie soos in die verlede as 'n buitengewone proses beskou word nie maar een wat meer geredelik toegestaan behoort te word.

Dit word aan die hand gedoen dat die langverwagte ondernemingsreddingprosedure wel uit die wegspringblokke gekom het, maar dat dit met stampe en stote gepaard gegaan het, soos hierbo aangedui is. Die konserwatiewe benadering wat die hof gevolg het in die oorweging of die bevel toegestaan behoort te word, dui daarop die die hof nie die gesketsde agtergrond in ag geneem het nie en dat die hof nagelaat het om 'n aanvanklike sterk grondslag vir die toestaan van ondernemingsreddingbevele te lê.

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The Citizen v McBride
2011 4 SA 191 (CC)

Defamation – the defence of "fair" comment and media defendants

1 Background and Context

Over a period of some seven weeks in 2003, the Citizen newspaper published a series of articles and editorials dealing with the candidacy of Robert McBride as chief of the Ekurhuleni metro police. Two initial articles, largely factual in nature, informed readers of McBride's candidacy for the post as chief of police. It related McBride's infamous conviction of murder for the 1986 bombing of the *Why Not Restaurant* and *Magoo's Bar* on the Durban beachfront in which three women were killed and sixty-nine other people injured. It also recounted McBride's 1998 arrest and detention in Mozambique on suspicion of gun-running. The initial articles mentioned that McBride was sentenced to death for the 1986 bombing, that the sentence was later commuted and that he was ultimately granted amnesty by the Truth and Reconciliation Commission (parr 8 – 9).

The initial articles were followed by a range of editorials and articles, expressing strong views on McBride and his suitability for the post of chief of police. The subsequent articles included statements to the effect that McBride is "blatantly unsuited" to the post; that he is a "murderer" and "criminal" for having committed "cold-blooded multiple murders"; that he engaged in a "dubious flirtation with alleged gun-dealers in Mozambique"; that he "still thinks he did a great thing as a 'soldier' blowing up a civilian bar"; that he is "not contrite", a "wicked coward who obstructed the road to democracy"; and that his act was one of "human scum". (parr 10 – 17). Importantly, these later articles made no mention at all of McBride's amnesty.

McBride sued the owner, editor and columnists of the Citizen for defamation and injury to his dignity and was awarded R200 000 by the South Gauteng High Court (par 25). The Citizen appealed to the Supreme Court of Appeal, which also found against it but reduced the damages to R150 000 as it found the statement that McBride engaged in a "dubious flirtation with alleged gun dealers" in Mozambique did not bear out the meaning assigned thereto by McBride (par 26). The matter then went on appeal to the Constitutional Court.

In essence, the case turned on the defence of fair comment. In tracing the origins of this defence, its incorporation into South African law and its post-constitutional development, Cameron J confirmed the elements of the defence of fair comment to be as follows (parr 80 & 88): (a) The statements complained of must constitute comment as opposed to fact; (b) The factual allegations being commented upon must be true; (c) The facts upon which comment is expressed must be truly stated; (d) The comment must be honestly expressed, without malice; (e) The comment must relate to matters of public interest.

The elements listed in (b) and (c) above are usually grouped together by authors on the topic, but for purposes of this discussion I have separated them due to the respective attention they received in the judgment by the Constitutional Court. Each of these requirements, to a greater or lesser extent, was at issue during the course of litigation in the High Court, the SCA and the Constitutional Court. In what follows, I will seek to analyse the judgment by the Constitutional Court by dealing with each of these requirements sequentially, with reference to the facts in the *McBride* matter.

2 Comment *Versus* Fact

Whether a statement amounts to an expression of opinion or a statement of fact has been the pivot on which many a defamation case has hinged (see cases cited in Brand *LAWSA* (ed Joubert) 7 (2005) (par 253). This was incidentally also the case in the first judgment that "firmly authenticated" the defence of fair comment in South African law (par 81), *Crawford v Albu* 1917 AD 102.

In the *McBride* matter this issue did not arise except insofar as the defendants sought to introduce the distinction in argument before the SCA as an alternative argument to the one asserting that McBride is a "murderer" as a matter of fact. Whether or not a person remains a murderer and may accurately be branded as such after having received amnesty was central to the issues before the court. The alternative argument before the SCA went something like this: If the court finds that McBride is no longer a murderer by virtue of having received amnesty, then the Citizen's description of him as a "murderer" constitute a statement of opinion, based on the facts leading to McBride's conviction on several charges of murder. In other words, that McBride may still be viewed as a murderer as a matter of opinion notwithstanding his

amnesty. (*The Citizen 1978 (Pty) Ltd v McBride* 2010 4 SA 148 (SCA) par 37).

This argument was rejected by the SCA as not having been pleaded, and was abandoned before the Constitutional Court (par 35), thus removing any substantial comment *versus* fact debate in this matter

3 Comment must be Based on Facts which are True

The requirement that in order to qualify as fair comment the facts upon which comment is expressed must be true, required a detailed examination of the effect of the Promotion of National Unity and Reconciliation Act 34 of 1995 (TRC Act) and in particular section 20(10) thereof. This section provides (as summarised by Cameron J) (par 1) that:

> once a person convicted of an offence with a political objective has been granted amnesty, any entry or record of the conviction shall be deemed to be expunged from all official documents and – 'the conviction shall for all purposes, including the application of any Act of Parliament or other law, be deemed not to have taken place.'

McBride successfully contended before the court *a quo* and the SCA that this means he is as a fact no longer a murderer and cannot accurately be branded as such and therefore that any comment expressed on the basis that he is a murderer or criminal fails to be protected for lack of being based on facts which are true (parr 22 – 28).

In finally deciding the issue the Constitutional Court found (in a majority judgment delivered by Cameron J with Brand AJ, Froneman J, Nkabinde J and Yacoob J concurring) that "truth-telling … lay at the base of the moral and operational structure" of the TRC Act (par 55) and that "(t)he statute's aim was national reconciliation, premised on the disclosure of the truth" (par 59). Cameron J confirmed the minority finding by Mthiyane JA in the SCA that "the chief function of the deeming provision in section 20(10) is to secure efficient expungement of all official documents and records … [which] entitles the grantee to full civic status" (par 64). He held that the moral absolution McBride sought from the TRC Act "lay beyond the legal benefits the statute afforded perpetrators … and … beyond the lawgiver's powers" (par 68). In short, Cameron J held that a murderer is someone who wrongfully and intentionally killed another and is not dependent on a finding of guilt by a court of law (par 70). Consequently, the court found that the expungement of a criminal record for murder through a process of amnesty does not expunge the deed itself, nor does it "stifle the language that may accurately describe the events that led to the conviction … [or] … the terms that may be truthfully applied to the facts" (par 72).

The inevitable result of this line of reasoning is that it is true that McBride is a murderer and thus that the comment expressed by the Citizen was indeed based on facts which are true.

In a separate, but concurring judgment (on this point) Ngcobo CJ found that although describing McBride as a "murderer" is factually true, it alone is a half-truth "and thus untrue" unless amnesty is also mentioned (par 173). Ngcobo CJ reached this conclusion after considering the "special place" amnesty occupies in our constitutional democracy, which renders the fact of amnesty an indispensable part of the truth (par 163 - 167). However, after considering the references to amnesty in the initial articles, Ngcobo CJ found that the statement that McBride was a murderer was indeed "accurately stated" (par 189).

4 Facts Must Be Truly Stated

Having crossed that hurdle, the Citizen was faced with the compelling argument that the defence of fair comment must fail due to the newspaper's failure to accurately state all the facts upon which it expressed its opinions in each and every publication on the issue. Recall that the issue of amnesty was only raised in the two initial articles, followed by a series of seven articles over a period of some seven weeks, containing a vicious attack on McBride's character, without a single mention of his amnesty whatsoever.

It may be useful at this juncture to recall one of the earliest statements on this point by then Chief Justice Innes in the matter of *Roos v Stent and Pretoria Printing Works* 1909 TS 988:

> there must surely be a placing before the reader of the facts commented upon, before a plea of fair comment can operate at all. I do not want to be misunderstood upon this point; I do not desire to say that in all cases the facts must be set out verbatim and in full; but in my opinion there must be some reference in the article which indicates clearly what facts are being commented upon. If there is no such reference, then the comment rests merely upon the writer's own authority (999 - 1000).

The reason for having to adequately state the facts upon which an opinion is expressed is to enable the average reader to judge for himself whether the opinion is warranted or not (*Roos supra* 1010). This dictum was developed in subsequent cases, for example *Crawford v Albu* 1917 AD 102 where the court assumed readers to be aware of certain notorious facts even though they were not expressly set out in the newspaper report at the time (126 – 127). Also in *Johnston v Beckett and Another* 1992 1 SA 762 (A) the court accepted that facts may be incorporated by reference and need not always be expressly stated (774G *et seq*). These cases were however of little assistance to the Citizen in the SCA where the majority of the court relied on a decision by the House of Lords in *Telnikoff v Matusevich* (1992 2 AC 343 (HL) – see par 42 SCA) where the court refused to have regard to a previous publication on the basis that "a substantial number of persons" may not have read the preceding article, or if they had "did not have its contents in mind" when reading the subsequent publication (par 42 SCA). The result was that the SCA assessed each of the Citizen's articles "as if read by the reasonable reader in isolation from others that did not mention amnesty" (par 31).

The Constitutional Court showed much more faith in the fictitious average reader's interest in and knowledge of current affairs. Cameron J recognised that "[m]ost South Africans interested or in touch with current affairs would have been aware that McBride had been granted amnesty" and that newspaper readers "tend to show interest in current affairs" (par 92). He distinguished the *Telnikoff* case on the basis of the "public notoriety" of McBride's deed and amnesty (par 94 n111). Besides, he found, "the Citizen … reminded its readers that McBride received amnesty" in the initial articles (par 93). But most importantly, in relying on decisions of the European Court of Human Justice and the Supreme Court of the United Kingdom, Cameron J expressed the view that it is "wrong to assume that newspaper readers read articles in isolation" especially when (as in the Citizen's case) the articles were "closely linked in time … and theme … to a current controversy" (par 94 - 95).

By attributing a higher level of knowledge of current affairs to the fictitious average reader and compelling courts to assess comment in the press in the wider context of the newspaper's coverage as a whole, significant leeway is created for media defendants to justify the publication of defamatory comment in the course of a campaign or ongoing public debate.

5 Comment Must Be "Fair"

The requirement that comment must be "fair" was probably one of the most controversial issues in the case, with three different approaches adopted by Cameron J (for the majority), Ngcobo CJ (separate judgment) and Mogoeng J (minority judgment). The cause for this dissent was the particularly harsh and offensive manner in which the Citizen criticised McBride and the difficulty of reconciling such comment with the constitutional right to human dignity. Few cases could better have tested the resolve of the court to look beyond the nature of the comment to the underlying principle, namely the right to hold and express such comment.

Neethling (*Law of Personality* (2005) 158) summarises the common law requirements for "fairness" as follows:

> the comment must meet two qualifications, one objective and the other subjective: First, viewed objectively, the comment must be *relevant* to the facts involved; and second, viewed subjectively, the comment must convey the *honest* and *bona fide* opinion of the defendant. If the defendant can prove that his comment fulfils these two qualifications, it will be held to be fair (or reasonable) no matter how critical, exaggerated, biased, ill-considered or unbalanced it is. [footnotes omitted]

Cameron J reiterated the common law approach in that the content of the comment was not the issue. He was at pains to point out that the word "fair" does not mean the comment must be "just, equitable, reasonable, level-headed and balanced" (par 82) and held that criticism will be protected "even if extreme, unjust, unbalanced, exaggerated and

prejudiced, so long as it expresses an honestly-held opinion, without malice, on a matter of public interest on facts that are true" (par 83). Cameron J accordingly preferred the name "protected comment" to "fair comment" (par 84) and concluded this line of reasoning with the crisp statement: "The courts cannot prescribe what people may or should say" (par 86).

In considering whether the constitutional right to dignity renders the Citizen's comment "unfair" Cameron J noted that political debate in South Africa has always been robust (par 99) and, if anything, has "become more heated and intense since the advent of democracy" (par 100). It is good for democracy, he said, that "open and vigorous discussion on public affairs" should "maximally" be allowed (par 100). Turning to the epithets employed by the Citizen in criticizing McBride, he described them as "ungenerous … distasteful … abrasive, challenging and confrontational" (par 101 – 102) but immediately qualified his view by stating: "But my opinion is not the issue" (par 102).

As to malice, a factor which if proven would negate the "fairness" of comment, Cameron J found no evidence that the Citizen's was actuated by any motive other than "stoking public debate" (par 108). Ngcobo CJ supported this finding, although stating that the "language and tone" in the articles "comes very close to justifying an inference of malice" (par 195).

Ngcobo CJ however parted ways with Cameron J on the meaning of the word "fair", finding that "(b)y insisting that a comment must be fair, the common law demands that comment be fair having regard to the right to human dignity" (par 157). This approach, he said, "underscores the proposition that freedom of expression does not enjoy a superior status to other rights" (par 157) and is "consistent with the need to respect and protect dignity" (par 158). Although Ngcobo ultimately agrees with the majority that the defence of fair comment succeeds, his judgment on this point implies that the content of the comment, insofar as it impacts on another's dignity, is indeed relevant in considering its "fairness". Having stated this as a general principle is assessing comment, the chief justice's failure to then apply it squarely on the facts renders its application somewhat uncertain.

Mogoeng J in his minority judgment makes no secret of the fact that he supports the judicial sanctioning of views based on considerations of good taste. After bemoaning the decline in "values and moral standards which once characterised and defined the very nature of [the] … substantial majority of … citizens", when language was used "in moderation" and "courteous interaction" was at the order of the day, he reminded us of the biblical injunction that one should do unto others as one would have them do unto you (par 218). Mogoeng J then identified a "new culture" which has "taken root" and continues to "cancerously eat at *botho*" (par 219) and even hints at a racist agenda on the part of the Citizen (par 232 and 241). In what Mogoeng J terms "constitutionally

acceptable bounds" he declares it "impermissible" to use the truth revealed in the amnesty process to "insult, demonise and run down the dignity" of those who confessed (par 220). As exceptions to this "rule" Mogoeng J lists remarks made "in the heat of the moment", "in jest" or the somewhat obscure "where … strong language is essential for the effective communication of the message" (par 222). He concludes that freedom of expression must be exercised with "due deference" to the pursuit of national unity and reconciliation (par 233). Mogoeng J finally proceeds to criticise reliance by South African courts on foreign law emanating from countries which do not "share the same history and experience with us" and whose decisions "leave very little of the right to human dignity" (par 243). In the result, Mogoeng would have found for McBride in all respects (par 245).

6 Comment Must Concern Matters of Public Interest

The final leg of the defence of fair comment ultimately presented little difficulty for the majority of the court. Yet this is deceiving, for the public interest requirement holds a crucial key to the judgment as a whole. All else aside, the fact remained that McBride's deeds took place some seventeen years prior to the Citizen's reportage. Although McBride's amnesty was barely two years old at the time, the bulk of the Citizen's comments were based on the acts for which he received amnesty and not his amnesty itself. These acts were committed nearly two decades prior and under very different circumstances. The question that persistently hovered over the case was whether, despite amnesty, McBride's conviction for murder can "indefinitely be flung in his face" and whether he may be called "a murderer 'forever and a day'"(par 79). This question of course holds much wider implications for the many who committed criminal acts with political motives for which they later received amnesty, and the general public debate around the case often focused on the potential damage to national unity should the media be allowed to unrelentingly rake up the past.

The court *a quo* found that because of amnesty, McBride's past conviction is irrelevant to any debate as to his suitability as chief of police (par 22). Ponnan JA in the SCA alluded to this issue when he stated that "[t]he grant of amnesty to [McBride] heralded the promise of his reintegration into South African Society. To continue branding him as a criminal and murderer runs counter to that promise" (SCA par 93). In his minority judgment in the Constitutional Court Mogoeng J termed the Citizen's campaign as "raking up the past which serves no real public interest" (par 235).

Cameron J for the majority dealt with this issue briefly and decisively: "The law of defamation requires at the outset that an issue be a matter of public interest before any defamatory allegations may be made of another. This inhibits indefinite re-conjuring of past issues" (par 79). In support of this rule Cameron cited the judgment in *Khumalo v Holomisa* 2002 5 SA 401 (CC) which held that "past mistakes should not be raked

up after a long period of time has lapsed" (par 79 n 84). On the facts, Cameron found that McBride was granted amnesty only two years before the issue of his candidacy for the post of chief of police arose and that the "meaning and effect of amnesty in relation to a significant public appointment was thus the issue". He concluded that "[t]his was not raking up the past, but determining … (the) meaning (of amnesty) in relation to a very current issue" (par 109).

7 Conclusion

The court unanimously found that the Citizen's statement that McBride was not contrite constituted actionable defamation, whether or not viewed as a statement of fact or comment (par 113 – 122), and in the result awarded him R50 000 in damages (par 129). As to statements relating to McBride's "flirtation with alleged gun dealers in Mozambique" the majority of the court found on the evidence that it does not bear the meaning McBride assigned thereto on the pleadings. Ngcobo CJ and Mogoeng J arrived at a different conclusion in this regard, but that is neither here nor there.

A final issue in relation to the relief granted by the court deserves mention. Shortly before judgment was handed down, the court issued directions inviting the parties to submit argument on whether an apology would constitute an appropriate remedy, should the court find against the Citizen on any issue (par 130). This invitation coincided with the Constitutional Court judgment in the matter of Le *Roux v Dey* (2001 3 SA 274 (CC)) where the court found that ordering a defendant in a defamation action to unconditionally apologise to the plaintiff may in certain circumstances constitute appropriate relief (see par 202). Clearly the court was considering the possibility of ordering the Citizen to apologise to McBride for the "not contrite" statement, but stopped short of doing so mainly because McBride himself indicated that he considered an apology inappropriate for several reasons (parr 133 – 134). Cameron concluded that "the question of an apology where a media defendant has defamed another must wait for another day" (par 134). The *Le Roux* and *McBride* judgments constitute clear signposts that the Constitutional Court is willing to explore a more prominent role for apologies in the law of defamation, whether as a defence to an action or as a remedy to a wronged plaintiff.

In all, the judgment in this matter constitutes an unequivocal endorsement of the common law relating to protected comment and demonstrates liberal support for the voicing of divergent opinions in South Africa. Cameron's finding that newspaper articles cannot be assessed in isolation from a wider context is particularly important. The Constitutional Court's new approach to apologies is an exciting and encouraging development in media law. But these findings must be contrasted with the views expressed by Mogoeng J in his minority judgment, which are most disturbing from a freedom of expression perspective. For once one allows judicial discretion to determine the

lawfulness of comments on the basis of good taste, one falls into a quagmire of uncertainty. Allow me to repeat the principle voiced by the majority of the court in this regard, which would hopefully become a mantra: "The courts cannot prescribe what people may or should say" (par 86).

Postcript

The author of this note acted as the attorney of record for the Citizen and related parties in the court *a quo*, the Supreme Court of Appeal and the Constitutional Court. However, this note is not based on privileged knowledge of the case or documents made available to the author, nor does it represent the views of any of the parties or their legal advisors, nor should the views set out in this note be attributed to anybody but the author. It is nothing more than an academic discussion of the case by an individual commentator.

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Ackermans Ltd v Commissioner for South African Revenue Service, Pep Store (SA) Ltd v Commissioner for South African Revenue Service 2011 1 SA 1 (SCA)

The deductibility of contingent liabilities taken over in the sale of a going concern

1 Introduction

It is prudent to appreciate the accounting practices employed by an entity where commercial agreements are drafted for and on behalf of that entity. The financial reports of an entity are commonly used in the determination of the purchase price of a sale agreement but the subsequent tax liability resulting from the agreement must be independently evaluated and anticipated.

This note aims to provide an analysis of the judgments of the Tax Court and the Supreme Court of Appeal in the matters of *Ackermans / Pep Stores v CSARS* (Reported as *A Co Limited v Commissioner for the South African Revenue Service* 12323 [2009] ZATC 5; 12324) [2009] ZATC 3 and *Ackermans Ltd v Commissioner for South African Revenue Service, Pep Store (SA) Ltd v Commissioner for South African Revenue Service* 2011 1 SA 1 (SCA) respectively). The focus of the analysis relates to the meaning and treatment of contingent liabilities in accounting practice as compared with the deductibility of those liabilities in terms of

section 11(a) read with section 23(g) (the general deductions formula) of the Income Tax Act 58 of 1962 ("the ITA"). Accounting practice dictates that a future obligation be recorded at its present value in financial reports but an anticipated obligation will not qualify as a deduction in terms of the general deductions formula due to the specific requirements therefore in the ITA.

2 The Factual Background and Salient Features of the Case

2 1 The Tax Court Judgment

Willis, J delivered judgment on 14 May 2009 in the South Gauteng Tax Court on two connected matters with analogous issues. Both cases focused on the tax-deductibility of particular amounts following upon the sale of businesses as going concerns (*A Co Limited v CSARS supra* par 1). On 1 March 2004, the appellants, which were referred to as A Co Limited and B Co Limited (together referred to as "the taxpayers"), sold their retail clothing businesses as going concerns to X Co, being Pepkor Limited ("Pepkor") (*A Co Limited v CSARS supra* par 1). The businesses were sold by way of substantially the same written sale agreement and principles. The two companies formed part of the same group of companies and the facts relating to Ackermans were argued by agreement with the order subsequently applying to both matters (*A Co Limited v CSARS supra* par 1).

This sale included the business assets, the liabilities and the contracts at the effective date for an amount equal to the sum of R800,000,000 together with the rand value of the liabilities ("the purchase price"). "Liabilities" were defined in the agreement to mean "all of the liabilities arising in connection with the business, in respect of any period prior to the effective date, ..." (*A Co Limited v CSARS supra* par [2]). The purchase price was allocated to the business assets with reference to immovable property, plant, machinery, equipment, vehicles, trade debtors, intercompany loans, other loans and inventory valued at "the net book value as reflected in the Effective Date Management Accounts", cash and cash equivalents valued at "the face value as reflected in the Effective Date Management accounts"; trademarks valued at "the market value determined by the seller as at the effective date and goodwill comprised 'the balance'". Pepkor was substituted in all employment contracts in existence immediately before the effective date. (See s 197 Labour Relations Act 66 of 1995). Pepkor discharged its contractual obligations in terms of the agreement and took transfer of the businesses.

Ackermans initially claimed a deduction in the amount of R23,017,959 from its taxable income in terms of the general deductions formula of the ITA (*A Co Limited v CSARS supra* par 17). The claimed deduction, comprising of three underlying contingent liabilities, was later amended to reflect long-term bonuses, post-retirement medical aid liabilities and a full repairing lease comprising approximately R17,000,000 (*A Co Limited v CSARS supra* par 18). Ackermans claimed

that the purchase price was effectively reduced by "expenditure ... incurred" within the meaning of section 11(a) of the ITA, as it removed the anticipated or contingent revenue expenses and was therefore generally of a revenue nature (*Ackermans v CSARS supra* parr 5 & 21).

The Commissioner issued an additional assessment for the 2004 year of assessment of Ackermans in which the deductions claimed were disallowed on the basis that they did not constitute expenditure; expenditure actually incurred or expenditure incurred in the production of income. The deductions, if they were expenditures, were also disallowed as being of a capital nature and not incurred for the purpose of trade. The Commissioner further regarded the deductions as prohibited in terms of section 23(e), (f) and (g) of the ITA (*A Co Limited v CSARS supra* par 19).

Ackermans, in response, argued that it had not claimed the contingent liabilities as a deduction but rather that it "paid" Pepkor R311,692,717 to be relieved of its liabilities and to generate income of R1,1 billion and not R800 million (*A Co Limited v CSARS supra* parr 29 & 31). Ackermans alleged that it made certain accounting provisions upon the sale of its business, which comprised the aggregate of the provisions for the three underlying contingent liabilities (*A Co Limited v CSARS supra* par 18). It is not in dispute that these contingent liabilities would have ordinarily been deductible, in terms of the general deductions formula, at the time when they were incurred by the taxpayers and thus became unconditional, had the amalgamation not happened (*Nasionale Pers Bpk v KBI* 1986 3 SA 549 (A) 564B-D). The contingent liabilities were eventually paid by Pepkor after the liabilities were assumed by Pepkor in terms of the sale agreement (*Ackermans v CSARS supra* par 4).

The Tax Court held that as "the amount claimed by the taxpayer as a deduction consisted of merely conditional liabilities in respect of which there was no obligation to effect payment ... [and] therefore no expenditure relating thereto could possibly have been incurred" (*A Co Limited v CSARS supra* par 30). The court accordingly confirmed the assessment of the Commissioner under appeal (*A Co Limited v CSARS supra* par 40).

2 2 The Supreme Court of Appeal Judgment

Cloete JA delivered the unanimous judgment (Navsa, Cachalia, Mhlantla And Bosielo JJA concurring) in the Supreme Court of Appeal (on 2010-10-01) in an appeal by the taxpayers, now referred to as Ackermans Limited ("Ackermans") and Pep Stores SA Limited ("Pep Stores") (together referred to as "the taxpayers"), against the decision of the South Gauteng Tax Court. The court confirmed the facts as set out by the Tax Court (*Ackermans v CSARS supra* par 1 to 6).

This court found that "expenditure incurred" means the undertaking of an obligation to pay or the actual incurring of a liability (*Ackermans v CSARS supra* par [7]). The valuation of the net asset value of the business

(the assets less the liabilities) dictated the purchase price (*Ackermans v CSARS supra* par [10]). This mechanism employed in the agreement of sale, resulting in the journal entries, was intended to facilitate the sale, as the purchaser would normally discharge the liabilities, in these kinds of transactions. The journal entries relied on by the appellants therefore do not equate to expenditure actually incurred (*Ackermans v CSARS supra* par [10]). The result is thus that Ackermans merely freed itself of liabilities by accepting a lesser purchase price than it would have received had it retained the liabilities (*Ackermans v CSARS supra* par 11). The court also noted that Ackermans had decided to abandon any reliance on set-off, as set-off comes into operation when two parties are mutually indebted to each other, and both debts are liquidated and fully due (*Ackermans v CSARS supra* par 8).

The Supreme Court further found that Ackermans incurred no actual liability to Pepkor in terms of the sale agreement and the manner in which the purchase price was discharged by Pepkor did not result in the discharge of any obligation owed by Ackermans to Pepkor. The argument of the taxpayers accordingly failed (see in general Rudnicki "Salient Features of a Sale-of-Business Transaction" 2010 *Business Tax & Company Law Quarterly* 24). There was, as a result, no need for the SCA to consider the further requirements of the general deductions formula. The appeals were dismissed, with costs, including the costs of two counsel (*Ackermans v CSARS supra* par 12).

3 The True Effect of the Transaction and the Analysis of Its Consequences

The true nature and effect of the sale agreement, however, in reality amounted to the transfer of the businesses of the taxpayers to Pepkor as going concerns in accordance with the amalgamation provisions of the ITA (s 44(1)(a) & (b) ITA). The sale agreement provided for a purchase price in "the amount equal to the sum of R800 million" and "the rand amount of the liabilities" (*Ackermans v CSARS supra* par 3). This purchase price, as a result, amounted to R1,111,692,717, being the R800 million plus the liabilities of R311,692,717. The purchase price was, based on this formulation, reduced to provide for Pepkor assuming the liabilities of Ackermans. No actual amount was therefore physically paid for Pepkor to assume the liabilities.

Ackermans, as a result, only received approximately R800 million from the transaction with the balance of the purchase price being deducted from the amount due to Ackermans for Pepkor assuming the contingent liabilities. The agreement could have been structured for Ackermans to receive the full purchase price and only thereafter would Ackermans have been obliged to pay an amount equal to the amount of the contingent liabilities to Pepkor. It was, however, practical and convenient to structure the sale agreement to incorporate set-off as the requisite reciprocal obligations existed between the parties in terms of the sale agreement (see Kruger "The Sale of a Business, The Assumption

of Liabilities in Part Settlement of the Purchase Price and the VAT Implications where the Corporate Rules Apply" 2010 *Business Tax & Company Law Quarterly* 21). The substance of the agreements accordingly intended for the taxpayers to pay to Pepkor an amount in consideration for its assuming the contingent liabilities. This was, however, not explicitly stated and the Supreme Court found that set-off did not apply and it was held that the taxpayers did not incur the amount for purposes of the general deductions formula.

The legal effect of set-off is that it takes the place of payment of a debt and the debt is *ipso jure* lessened on both parties proportionally (See in general *Joint Municipal Pension Fund (Transvaal) v Pretoria Municipal Pension Fund* [1969] 2 All SA 121 (T) and *Harrismith Board of Executors* v *Odendaal* 1923 AD 530 539). The structure of payment of the purchase price in the sale agreement was therefore intended to achieve the effect of set-off and was drafted in a practical manner and in accordance with the generally accepted accounting practice of valuing a business. Set-off can therefore be said to have occurred as Ackermans received a release from its future contingent liabilities.

4 The Conflicting Purpose of Tax Law and Accounting Practice

Accounting practice informs the drafting of financial reports and this is not always congruent with the objectives of tax law. Ackermans was registered as a limited company in terms of the Companies Act 61 of 1973 applicable at the time and which, inter alia, required (s 285A) the preparation of annual financial statements in accordance with South African Generally Accepted Accounting Practice ("SA GAAP"). The current Companies Act 71 of 2008 now require that certain categories of profit companies prepare their financial statements to be consistent with International Financial Reporting Standards ("IFRS") (s 29 (1) & (5)).

Financial statements are, in general, intended to show the true and fair view of, or present fairly information regarding the financial position, performance and changes in financial position of an entity (par 46 of the Framework for the Preparation and Presentation of Financial Statements; Steinbank *et al A Students Guide to International Financial Reporting* (2009) 6). The principal qualitative characteristics and appropriate accounting standards normally result in financial statements that convey, what is generally understood, as a true and fair view of, or as presenting fairly such information. Tax law, however, focuses only on those transactions for which provision is made in tax legislation (*Caltex Oil (SA) Ltd v Commissioner for Inland Revenue* 37 SACT 1 14). The calculation of taxable income is, as a result, an artificial concept based on tax legislation and the calculation of accounting profit will differ from taxable income as the basis for their calculations, definitions and objects thereof often vary.

4 1 Financial Statements from an Accounting Perspective

SA GAAP is approved and adopted by the International Accounting Standards Committee Board (http://www.ifrs.com/ accessed on 2011-11-17). SA GAAP includes both a Framework for the Preparation and Presentation of Financial Statements ("the Framework") as well as individual accounting standards, which provide specific guidance on accounting practice. IFRS are published by the International Accounting Standards Board. The IFRS Framework provides an overriding requirement for information that is useful in making economic decisions. SA GAAP recommends the accounting treatment to be applied to material account balances and classes of transactions contained in the accounting records of an entity and ultimately reported in financial statements (par 30 of the Framework).

The Framework, as approved for issue by the Accounting Practices Board, inter alia, "sets out the concepts that underlie the preparation and presentation of financial statements for external users" (par 1(f) Framework). It defines the components of financial statements, and contains a definition of a liability (par 49(b) Framework). A liability is defined as a present obligation of the enterprise arising from past events, the settlement of which is expected to result in an outflow from the enterprise of resources embodying economic benefits. An essential characteristic of a liability is that the enterprise has a present obligation (par 60 Framework). An obligation is a duty or responsibility to act or perform in a certain way. Obligations may be legally enforceable because of a binding contract or statutory requirement but may also arise from normal business practice, custom and a desire to maintain good business relations or act in an equitable manner. A distinction must be drawn between a present obligation and a future commitment. A decision by an enterprise to acquire assets in the future alone does amount to a present obligation. An obligation typically arises only when the asset is delivered or the enterprise enters into an irrevocable agreement to acquire that asset (par 61 Framework).

In casu, the liabilities recorded in the Annexures to the Sale Agreement include Bonus, Long-term Medical Expenses and Lease. The accounting standards included in SA GAAP applicable in this matter are *IAS 19 (AC 116) Employee Benefits* and *IAS 37 (AC 130) Provisions, Contingent Liabilities and Contingent Assets*. These meet the criteria for definition as liability as each represents a present obligation arising from a past event that will result in the outflow of future economic benefits. The bonus represents the present value of a future obligation, discounted for the time value of money, of an amount payable to current employees at a date in the future further than 12 months, the obligation for which arises out of a constructive obligation (the past event) set by the expectation created in the minds of such employees based on precedent of historical payments of such amounts, or by the inclusion of the obligation in a contract of employment. The provision for post-retirement medical benefits represents the present value of a future obligation, determined

with reference to actuarial calculations, discounted for the time value of money, of an amount payable in respect of post-retirement medical benefits of current employees. The outflow of future economic benefits relates to the bonus occurring at the time that such bonuses are paid or at a time when the obligation to pay these bonuses are passed to another and the outflow for provision for post-retirement medical benefits resulting at the time that such bonuses are paid or at a time when the obligation to pay these bonuses is passed to another.

4 2 The Income Tax Act Provisions

A deduction in terms of South African tax legislation is determined with reference to section 11(a) of the ITA, which stipulate that there shall be allowed as deductions from the income of a person expenditure (an outflow resulting from a voluntary action of the taxpayer (*Port Elizabeth Electric Tramway supra)* and losses (an involuntary deprivation suffered by the loser (*Joffe & Co (Pty) Ltd supra* 360)) actually incurred in the production of the income for the purpose of determining the taxable income derived by any person from carrying on any trade as defined in section 1 of the ITA, provided such expenditure and losses are not of a capital nature (See *Port Elizabeth Electric Tramway Co Ltd v CIR supra)*. Actually incurred requires an "undertaking of an obligation to pay" or the "actual incurring of a liability". (See in general van Coller "The Premier, the Member of Cabinet and the Commissioner: An Evaluation of Income Tax Case No 1873" 2011 *SA Merc LJ* 116). The expenditure or loss must have been actually incurred between a taxpayer and a third party, in the year of assessment under consideration (See *Sub-Nigel Ltd v CIR* 1948 4 SA 580 (A)) and must be deducted in the year in which it is incurred (unless provided for elsewhere in the ITA). The expenditure or loss does not have to be necessarily incurred but has to be actually incurred for the purposes of trade (*Port Elizabeth Electric Tramway supra; Caltex Oil (SA) Ltd v SIR* 1975 1 SA 665 (A)*)*. The actual payment date of the expense or loss so incurred has no bearing on the deductibility thereof as this would be determined by the date on which the expense or loss arises or at the time that the taxpayer becomes liable for payment thereof (*Caltex Oil (SA) Ltd v SIR supra and Edgars Stores Ltd v CIR* 1988 3 SA 876 A). A deductible liability must thus be "actual in the sense that it is real, it exists, it is not contingent" (*ITC 1587* 1995 57 SATC 97).

Section 1(a) must be read and interpreted with the provisions of section 23(g) of the ITA, which prohibits the deduction of any moneys claimed as a deduction from income derived from trade to the extent to which such moneys were not laid out or expended for the purposes of trade (See *Oosthuizen v Standard Credit Corporation Limited* 1993 3 SA 891 (A)). This limits the application of the general deduction formula by prohibiting the deduction of any amounts claimed as a deduction from income not incurred for the purpose of or in connection with profit-making activities (*ITC 1466* 1990 52 SATC 25).

4 3 Binding Class Ruling

SARS has subsequently issued a Binding Class Ruling (029 issued on 2011-05-10 in accordance with s 76R ITA, valid for five years as from 2010-12-24) regarding sections 11(a), 23(a) and 23E relating to the deductibility of contingent liabilities disposed of and taken over when buying the assets and liabilities of another entity within the same group of companies. This ruling is intended to promote consistency and certainty in the interpretation and application of questions regarding the deductibility of contingent liabilities taken over, when buying the assets and liabilities of another company within the same group of companies under section 44 of the ITA. The ruling confirms that the purchasing party will be entitled to deduct expenditure actually incurred which relates to contingent obligations under the general deductions formula, provided that section 23E is complied with in respect of leave pay. The seller will not, however, be entitled to a deduction of the contingent obligations transferred to the buyer, notwithstanding any reduction of the purchase price, arising from the purchaser assuming such contingent obligations.

5 Conclusion

The parties to this sale agreement in reality determined the purchase price with reference to the financial reports of the taxpayers. For the purposes of compliance with the accounting standards and the true and fair presentation of the financial statements of the entity, liabilities are therefore raised, and related expenditure is accounted for. This valuation of a going concern makes the assumption that the business will continue as a going concern for the foreseeable future. The accounting standards thus seek to fairly present this assumption by recording and accounting for the present value of these future obligations where the future payment of these obligations is probable and measurable, and where the economic resources from which the obligation will be settled are funded by the growth in the resources in the current reporting period, thus matching the portion of the future expenditure incurred in the current year with the resources created in the current year. The resulting charge against net accounting profit is a fair presentation of this transaction, and the resulting liability is a fair presentation of the amount that will need to be settled at a future date.

The accounting treatment of a contingent liability will accordingly reflect the present value, at the end of a reporting period, of an obligation arising from a past event that will result in the outflow of economic benefits. A deduction claimed in terms of the general deductions formula in the ITA must, however, meet the requirements in the general deductions formula of the ITA. This will specifically require the expense or loss to have been actually incurred in the year of assessment in which it is claimed. A purchaser will therefore only be entitled to deduct expenditure actually incurred in respect of any contingent liabilities assumed. A seller will, likewise, not be entitled to a deduction of the contingent liabilities transferred to the purchaser despite any reduction in the purchase price of the business arising from the purchaser's

assumption of the contingent liabilities. The expenditure must first be actually incurred in order to qualify for the deduction of those liabilities. This requires an undertaking of an obligation to pay or an actual incurring of a liability before a taxpayer will be able to claim any deduction of any contingent liabilities in terms of the general deductions formula.

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Wesbank v Deon Winston Papier and the National Credit Regulator

(unreported Western Cape High Court case no 14256/10 (WCC))
Termination of debt review in terms of section 86(10) of the National Credit Act 34 of 2005

1 Introduction

The National Credit Act 34 of 2005 (NCA) comes to the rescue of consumers who are over-indebted (s 79) and/or to whom reckless credit (s 80) has been granted by affording them the opportunity to obtain debt relief *inter alia* by voluntarily applying for debt review in terms of section 86 of the NCA with a view to eventually obtain restructuring of their credit agreement debt by agreement (s 86(8)(a)) or court order (s 86(7)(c)). The debt review procedure, which is conducted by a debt counsellor, is set out in section 86 of the NCA read with regulation 24 made thereunder. Provision is made in section 86(10) of the NCA for termination of a debt review in the following terms:

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

As remarked by Blignaut J in *Mercedes Benz South Africa v Dunga* (2011 1 SA 374 (WCC)hereafter "the *Dunga* matter") the NCA is by now notorious for its lack of clarity (17) and this is especially so on the topic of termination of debt review in terms of section 86(10) of the NCA. A considerable number of dissenting judgments on the topic were delivered during 2010 adding to the confusion. Two main views are discernable from these judgments: View one, as espoused by Kathree-

Setiloane AJ in *Taxi Securitisation v Kruger* (*Standard Bank of SA Ltd v Kruger; Standard Bank of SA Ltd v Pretorius* (2010) JOL 25356 (GSJ), hereinafter "the *Kruger* matter") and later in *SA Securitisation (Pty) Limited v Matlala* (2010) JOL 26095 (GSJ) hereinafter "the *Matlala* matter"), is that once a debt counsellor has referred a proposal for debt restructuring in terms of section 86(8)(b) or 86(7)(c) of the NCA to the magistrate's court, termination of the debt review in accordance with section 86(10) is no longer competent. View two, as espoused by Kemp J in *Taxi Securitisation v Nako* ((2010) JOL 25653 (E) hereafter "the *Nako* matter") and by Eksteen J in *Firstrand Bank Ltd v Evans* (unreported case no 1693/2010 (ECC) Port Elizabeth hereafter "the *Evans* matter"). Eksteen J delivered a similar judgment a few days later in *Firstrand Bank Ltd v Collett* (2010 6 SA 351 (ECG)) which entails that termination of debt review in accordance with section 86(10) is competent even after referral of the proposal to a magistrate's court until just before the magistrate's court makes an order in terms of section 87 of the NCA.

2 Brief Overview of the Mail Debate Relating to Termination of Debt Review

The debate regarding the cut-off time for termination of debt review in terms of section 86(10) of the NCA, was sparked by the judgment of Kathree-Setiloane AJ in the *Kruger* matter. In this matter it was held that in those instances where a debt counsellor has lodged an application to a magistrate's court for purposes of debt re-structuring within sixty days from the date on which the consumer has applied for debt review, the credit provider may not terminate the debt review in terms of section 86(10) despite the fact that the application for re-structuring has not been heard by the court within the aforesaid sixty days. The court premised its judgment on the view that termination in terms of section 86 is only competent in respect of the actual debt review process that is conducted by the debt counsellor in accordance with section 86 and that the referral to court in terms of section 86(8)(b) for a hearing falls outside the ambit of such termination as it is done in accordance with section 87 of the NCA (parr 13 & 14). The court also referred to section 129(2) of the NCA which provides that section 129(1), which *inter alia* requires a section 86(10) notice to be delivered prior to enforcement, does not apply to a credit agreement that is subject to a debt re-structuring order or to proceedings in a court that could result in such an order and indicated that a referral by a debt counsellor falls in the latter category, thus indicating that a notice to terminate in terms of section 86(10) would be incompetent once a debt counsellor has made such a referral (par 26). Kathree-Setiloane AJ further stated (par 15):

> I am of the view that any contrary interpretation in terms of which a credit provider would be entitled to terminate the debt review process after a period of 60 days, despite it having been referred to a magistrate's court, would lead to an absurdity in that any delay by any party to such application, any delay occasioned at the instance of the court or even any delay due to unforeseen circumstances would deprive the consumer of the opportunity to have that matter properly determined by that court.

In the *Nako* matter, the Eastern Cape High Court espoused a different view by holding that section 129(2) does not preclude a credit provider from instituting legal proceedings where a debt counsellor has referred a matter to the magistrate's court, which proceedings could result in a debt re-structuring order. The court held that section 129(2) merely renders the provision of a notice recommending a consumer to refer a matter to a debt counsellor redundant, as the matter has already been referred to a debt counsellor (10).

Kemp AJ further criticised *Kruger* by stating that section 87 is dependent on a proposal in terms of section 86 and to argue that the words "that is being reviewed in terms of this section" in section 86(10) refer only to a debt review by a debt counsellor loses sight of this fact. He referred to section 86(11) which provides as follows:

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

Consequently Kemp AJ held that the argument as put forward in *Kruger* also loses sight of the protection provided by section 86(11) and specifically the words "hearing the matter" contained therein.

According to Kemp AJ it would have been unnecessary to include the words "hearing the matter" in section 86(11), if the judge in *Kruger* was correct, as these words refer to a matter pending before the magistrate's court and on *Kruger*'s construction there would have been no matter before it in terms of section 86(10)(par 43). Thus Kemp AJ was of the opinion that the court referred to in section 86(11) is the court before which the debt restructuring proposal is serving.

Subsequent to *Nako*, the issue of termination of debt review in terms of section 86(10) was considered again by Kathree-Setiloane AJ in the *Matlala* matter in which she disagreed with the interpretation of Kemp AJ in *Nako* of "hearing the matter" as mentioned in section 86(11). She indicated that in her opinion these words refer to the court in which the credit agreement is being enforced and not the court to which the debt review has been referred in terms of section 87 of the NCA (par 9). According to her, Kemp AJ misunderstood section 129 and failed to give proper consideration to section 129(2) of the NCA (par 13). She further referred to *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) where it was stated that a debt re-structuring referral by a debt counsellor has to be made by means of an application in terms of magistrate's court rule 55 and that service of such referral must be done in accordance with magistrate's court rule 9. She then concluded that service, and not merely issuing, of a referral on the credit provider would constitute a referral to the magistrate's court in terms of section 86(8)(b) or 86(7)(c) (14).

In the *Evans* matter where Eksteen J considered the conflicting judgements by Kathree-Setiloane AJ and Kemp AJ, he indicated that the role of the debt counsellor conducting a debt review in terms of section 86 is not completed by mere reference of his or her debt re-structuring recommendation to the magistrate's court, but that the debt review process that is regulated by section 86 continues until the magistrate's court makes an order in terms of section 87 (Eksteen J relied on *National Credit Regulator v Nedbank Ltd supra* for the latter opinion). He was consequently of the opinion that the credit provider's right to terminate a debt review in terms of section 86(10) continues until the magistrate's court has made an order in terms of section 87 (18 and 19). In support of his opinion Eksteen J referred to section 86(11) and the words "the magistrate's court hearing the matter" and interpreted it, based on similar terminology employed in section 86(8)(b), to be a reference to the magistrate's court to which the matter has been referred for a hearing in terms of section 86(8)(b) (par 25). He remarked that the jurisdiction provided for in section 86(11) is specifically restricted to a magistrate's court and that it is only the magistrate's court which conducts a hearing and provides judicial oversight over the debt review process that would have before it all the information the consumer was required to provide in terms of regulation 24 and which is required in order to exercise a discretion as to whether the debt review should resume (parr 26 to 29). Accordingly the consumer is not prejudiced by the right of the credit provider to terminate a debt review in terms of section 86(10) as the consumer's rights are fully protected by section 86(11). Eksteen J, however, remarked that a credit provider does not have a *carte blanche* to terminate a debt review in terms of section 86(10) and that such termination would be inappropriate where the referral to the magistrate's court is prosecuted with due efficacy (par 30).

A plethora of diverging judgments currently exist on the topic. From the case law, it becomes clear that two major concerns underlie the problematic issue of termination of debt review. On the one hand, there is the need to protect consumers by affording them appropriate debt relief and to avoid situations where *mala fide* credit providers terminate debt reviews which are pursued by consumers in good faith and with due efficacy whilst often attempting to effect payments in accordance with their repayment proposal pending the outcome of the debt review. On the other hand, there is however also the need to recognise the rights of credit providers to enforce credit agreements and obtain repossession of their security especially in those instances where the credit provider has co-operated in the debt review in good faith but where the debt review process is abused by *mala fide* consumers who fail to make any payments, make ridiculous repayment proposals and continue to use the credit provider's ever-depreciating security whilst securing a payment holiday for themselves without the slightest intention to abide by the NCA's objective of "… eventual satisfaction of all responsible consumer obligations under credit agreements." (s 3(i)).

Due to the mounting confusion regarding termination of debt review and undesirable side effects thereof, the judge president of the Western Cape High Court instructed a full bench consisting of Traverso, Griesel and Dlodlo JJ to consider the issue of the cut-off time for termination of debt review in the recent matter of *Wesbank Ltd v Papier* (hereinafter "the *Papier* case").

The National Credit Regulator (hereafter "NCR") applied for and was granted leave to intervene as *amicus curiae* (par 2). The judgment was delivered by Griesel J.

3 Facts and Judgement

In March 2007 the plaintiff and defendant entered into a lease agreement in respect of a 2003 Mazda 6 motor vehicle. The total commitment was payable by way of an "initial rental" of R13,157.89 followed by 53 instalments of R2,772.90 and a final instalment in September 2011 (par 3). The defendant encountered financial problems and on 29 September 2009, he applied for debt review in terms of section 86(1) of the NCA. On 2 October 2009, the debt counsellor informed all credit providers and credit bureaux, by means of Form 17.1 that the consumer had applied for debt review. A further notice, confirming the successful outcome of the application for debt review, the defendant's over-indebtedness and that the debt obligations were in the process of restructuring, was forwarded to credit providers on 30 October 2009. This notice was combined with a debt-restructuring proposal, offering an amount of R5,300.00 to be *pro rata* distributed to creditors. *In casu*, monthly instalments of R1,762.44 as an alternative to R2,772.90, were tabled (par 4).

Having received no response from the plaintiff, the defendant proceeded with monthly instalments in the proposed amount (par 5). On 12 March 2010 the debt counsellor set the matter down at the Vrendenburg magistrate's court for a debt restructuring hearing on 11 June 2010. The defendant and his spouse were cited as applicants and the various creditors, including the plaintiff, as respondents. The court pointed out that the heading to the application was somewhat misleading as it stated "Notice of Motion: Application by consumer to court for debt review in terms of section 86(10) and 86(11) of the National Credit Act 34 of 2005". The court remarked that from the relief sought it was clear that the intention was a proposal for re-arrangement under section 86(7)(c)(ii). The applicants sought amongst others, an order to be declared over-indebted as contemplated in section 79, an order for debt restructuring in accordance with the annexed proposal and an order for credit providers, who had terminated the debt review, to resume the review in terms of section 86(11) (6).

However, on 4 June 2010 (exactly one week prior to the date for which the debt restructuring hearing was set), the plaintiffs' attorneys delivered a notice of termination by registered mail to the consumer, the debt

counsellor as well as the NCR. The notice pointed out that the consumer was in default and that the agreement was in arrears for more than 20 business days. It demanded immediate payment of the arrears, in the alternative, voluntary surrender of the vehicle in terms of section 127, failing which the plaintiff intended to cancel the agreement and commence with enforcement proceedings (par 7).

The application under consideration was consequently instituted on 29 June 2010. The plaintiff *inter alia* alleged that the debt review had been terminated by delivery of the section 86(10) notice, that 60 business days have elapsed since the application for debt review and that the defendant was in default on the date of the said notice (par 8). The court quoted the following further allegations as contained in the plaintiff's particulars of claim (par 8):

> 12.5 The agreement is therefore not subject to pending debt review as contemplated in s 86 of the NCA as:
>
> 12.5.1The defendant has not surrendered the vehicle to the plaintiff as contemplated in s 127 of the NCA;
>
> 12.5.2There is no matter arising under the agreement and pending before the National Credit Tribunal that could result in an order affecting the issues to be determined by the court.
>
> 13 The matter is not before a Debt Counsellor, Alternative Dispute Resolution Agent, Consumer Court or the Ombud with jurisdiction.
>
> 13.1 The defendant has not:
>
> 13.1.1agreed to a proposal made in terms of s129(1)(a) of the NCA or acted in good faith in fulfilment of such agreement as no such agreement has been reached;
>
> 13.1.2complied with an agreed plan as contemplated in s129(1)(a) of the NCA as no such plan has been agreed; or
>
> 13.1.3brought the payments under the credit agreement up to date, as contemplated in s129(1)(a) of the NCA.
>
> 13.2 More than 10 business days have passed since the delivery of the above notices in terms of s86(10) of the NCA;
>
> 13.3 The defendant has been default [*sic*] under the agreement for more than 20 business days.

The orders relevant to the application for summary judgment were confirmation of cancellation of the agreement and delivery of the vehicle with costs (par 9).

In his opposing papers, the defendant drew attention to the debt review process and the subsequent application issued on 12 March 2010 that was set down for hearing on 11 June 2010. The defendant emphasised the fact that the debt review application has been issued prior to the plaintiff's summons (par 10) and further drew the court's attention to the provisions as contained in section 86(11). He stated that

he would argue for re-instatement of the debt review in terms thereof (par 11).

The court formulated the question for consideration as follows (par 12):

> [W]hether it is competent for a credit provider to terminate a debt review process in terms of s 86(10) after an application has been lodged with a magistrate's court for an order restructuring a consumer's debts as envisaged in s 86(7)(c) of the Act but before an order has been made in terms of s 87(1).

The court remarked that the Act has drastically changed the traditional legal debt collection procedures in line with its aims. It referred to the aim to "promote a fair and non-discriminatory marketplace for access to consumer credit" and the aim "to protect consumers", amongst others by "addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations". According to the court, the credit provider's right to enforce a credit agreement where a consumer is in default is limited in line with these aims (par 13).

Griesel J found it ironic that a piece of legislation with such admirable intentions became a "fertile ground for litigation" as described by Kemp AJ in the *Nako* matter (par 14).

The court referred to the particular relevance of Chapter 4, headed "Consumer Credit Policy" for the present matter and specifically part D which introduces the concepts of "over-indebtedness and reckless credit" and which provides for the re-scheduling of debt under such circumstances. With reference to the *Dunga* matter, the court stated that the object of chapter 4 part D is to "provide protection and assistance to an over-indebted consumer in an environment that encourages participation in good faith by both parties". It referred to the mechanisms contained in sections 85 to 88, consisting of debt review and debt re-arrangement (par 15).

The court quoted section 86(10) and noted that the subsection contains no limitation on the credit provider's right to terminate the debt review, except for two jurisdictional requirements, namely that the consumer must be in default under the agreement and that 60 business days must have elapsed since the application for debt review. Griesel J remarked that it is common cause that *in casu*, these requirements as well as the 10 business day "limbo period" following delivery of the section 86(10) notice, as required by section 130(1), have been met before summons was issued. The plaintiff, following a literal interpretation, submitted that enforcement is competent as the above requirements have been met (par 17).

The plaintiff relied on a line of case law (*Firstrand Bank Ltd v Evans* (unreported case no 1693/2010 (ECC)) hereafter "the *Evans* matter",

Firstrand Bank v Seyffert 2010 6 SA 429 (GSJ), as well as the *Collett* and *Nako* matters), of particular importance the *Evans* matter where Eksteen J decided that the credit provider's right to terminate a debt review continues until the magistrate's court has made an order in terms of section 87 (par 18). The court pointed out that a different view, namely that it is not competent to terminate a debt review in terms of section 86(10) once the matter has been referred to the magistrate's court, was however taken by a number of diverging decisions (*Standard Bank of South Africa Limited v Pretorius* 2010 (4) SA 635 (GSJ), *Changing Tides 17 (Pty) Ltd NO v Erasmus and another, Changing tides 17 (Pty) Ltd NO v Cleophas and another; Changing Tides 17 (Pty) Ltd v Frederick and another* (2010) JOL 25358 (WCC) , *Wesbank v Martin* unreported case no 13564/2010 (WCC) as well as the *Kruger* and *Matlala* matters) (par 19). The court stated that it would be an excessively burdensome and wearisome task to analyse and discuss the reasoning in each of these judgments. It however joined the ranks of the latter line of judgements and then proceeded to set out the reasons for the decision (par 20).

Griesel J remarked that although the wording of section 86(10) seems clear and unambiguous, a contextual approach as opposed to a literal interpretation is favoured (parr 21 & 22). It referred to a judgment by Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (2004 4 SA 490 (CC)) which stated that (par 21):

> The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. Recently, In *Thoroughbred Breeders' Association v Price Waterhouse*, [2001 (4) SA 551 (SCA)] the SCA has reminded us that:
>
> "The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning".

Griesel J held that, if context is considered, it is clear that a literal approach to section 86(10), read in isolation, would lead to a "blinkered" approach, which in turn could readily lead to the wrong answer. He remarked that the provisions are merely one aspect of a detailed process described in the heading to section 86 as "Application for debt review". The court then proceeded to briefly set out the debt review process in the following terms (par 22): A consumer applies to be declared over-indebted "in the prescribed manner and form" to a debt counsellor (s 86(1)), whereafter the debt counsellor informs all credit bureaux and relevant credit providers of the application (s 86(4)(b)). The consumer and each credit provider must now "participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement" (s 86(5)(b)). The debt counsellor must make a determination of over-indebtedness within 30 business days (s 86(6)(a) read with reg 24(6)).

In the event that the consumer is found not to be over-indebted, the debt counsellor issues a "letter of rejection" (s 86(7)(a) read with reg 25), *inter alia* advising the consumer of the right to approach the court within

20 business days for an order contemplated in section 86(7)(c) (s 86(9) read with reg 25(5)).

If the consumer is however found to be over-indebted, the procedure contained in section 86(7)(c) must be followed in that the debt counsellor may issue a proposal to the magistrate's court recommending an order that *inter alia* the consumer's debts be re-arranged (s 86(7)(c)(ii)) (par 24).

The court stated that section 86(7)(c) sets in motion the "debt re-arrangement by court" as opposed to the "voluntary re-arrangement" under section 86(8)(a). It remarked that, unlike the position under section 86(9), where a time period is set, neither the Act nor the regulations provide for a time period within which the proposal must be issued to court under section 86(7)(c). The court stated that if one however considers the context, the position becomes clear. It refers to the determination of over-indebtedness that must take place within 30 business days (reg 24(6)) and if a consumer is found not to be over-indebted, such consumer must be advised of the right to approach the court within 20 business days (reg 25(5)). Based on these provisions, the court concluded that the 60 business day period referred to in section 86(10) was introduced with the above timeframe in mind. It allows adequate time to approach the court for relief in terms of section 87 (par 25).

The court noted that once a debt re-arrangement order has been granted, a credit provider may not commence enforcement proceedings (s 130(4)(e)), but asked what the situation would be where the re-arrangement order has been applied for but not yet granted, which is the question under consideration *in casu*. With reference to the 50 business day period (from date of application to a debt counsellor) that a consumer has to approach the court in terms of section 87, the court stated that it could never have been the intention of the legislature that the balance of the process (including a hearing before and a re-arrangement by a magistrate's court) should be finalised within the remaining ten business days. Griesel J commented that such a situation would be unattainable in the majority of cases. He referred with approval to the matter of *Dunga* where Blignault J stated that (par 26):

> Experience has shown that the typical debt review takes longer than 60 business days, often much longer, before it results in an order by the Magistrate's Court in terms of section 87. By terminating the debt review after 60 business days the credit provider may be able to derail the entire debt review process by way of a single unilateral act, regardless of the reasonableness of the conduct of the consumer or his own conduct.

In light of the above, the court observed that even where the consumer meticulously follows the correct procedure, there would be a vast number of matters that will not be finalised by a section 87 order prior to the lapse of the 60 business day period (27). It consequently stated that on the plaintiff's literal interpretation, a credit provider would be entitled "to derail the entire debt review process" in each matter where the 60

business day period has lapsed before a re-arrangement order was granted (par 28).

The court further considered the evidence as put forward by the NCR where instances of credit providers following the literal interpretation and thereby circumventing and undermining the debt review process were tabled. According to the NCR, some credit providers terminate the process in terms of section 86(10) as a matter of course as soon as the 60 business days have expired. Such terminations apparently take place despite indications by the debt counsellor that the debt review application was successful; or where the consumer makes regular payments in line with the proposal forwarded to credit providers; or where a hearing in terms of section 87 for the debt review application was already set. The NCR alleged that some credit providers even go so far as postponing the hearing in the magistrate's court and directly thereafter terminate the debt review in terms of section 86(10), followed by a summons and an application for summary judgment. The court remarked that on the plaintiff's interpretation, credit providers are entitled to terminate the debt review process even in instances where the consumer and debt counsellor have done all in their power to call upon and employ the debt review provisions (par 29).

Griesel J agreed with the NCR that such conduct by credit providers is inconsistent with the NCA and stated that it is a strong pointer that a literal interpretive approach should not be followed. If a literal interpretation was to be followed it would be "counter-productive" and contrary to the purpose of the NCA if it allows for a debt review to be unilaterally terminated at the exact moment when a consumer needs the protection of the NCA the most. The court stated that "[i]t would be like providing the consumer with an umbrella and then snatching it back the moment it starts raining". The court commented that the literal approach meant that only those fortunate consumers, applying for a debt review at a favourable time and in an efficient jurisdiction without a backlog would succeed in obtaining the relief as intended by the Act (par 30). The court was of the view that the literal approach *in casu,* overlooked the fact that the application for debt review was successful at the debt counsellor and that it may therefore also find favour with the magistrate (par 31). It further stated that the plaintiff's interpretation pays no attention to the fact that the magistrate's court before which the debt review application was pending has become "seized" with the matter. It is therefore significant, so the argument goes, that section 86(10) does not mention the magistrate or parties to the pending application to be notified of the termination. Therefore, an untenable situation may occur that a presiding officer, may be in the process of preparing a judgment, unaware that the matter has been "unilaterally and extra-judicially [sic] terminated" by the provision of a simple notice in terms of section 86(10). The court pointed out that, on the literal interpretation, an existing judicial process becomes dependent on the simple sending of a

notice between parties, which is an absurd result and could never have been the intention of the legislature (par 32).

The court refers to another strange result, as pointed out by the NCR, that occurs when the literal interpretation is favoured, namely that by allowing for a termination of a pending matter, premature enforcement in the High Court is encouraged. This will predictably result in higher litigation costs at the expense of those who can least afford it as is the case in the matter before the court (par 33).

The court decided that, in applying a purposive approach and taking cognisance of the context in which the relevant provisions appear, a proper interpretation of section 86 is that the consumer is protected against enforcement proceedings where a re-arrangement order has been granted by a magistrate under section 87, but also where proceedings which could result in such an order are pending. Therefore, it was decided that delivery of a section 86(10) notice is not competent once the steps referred to in sections 86(7)(c), 86(8) or 86(9) have been taken. The court remarked that this barrier would no longer exist once a magistrate's court has dismissed the application or the application has been withdrawn or abandoned (par 34).

In the matter before the court, the credit provider purported to terminate the debt review one week prior to the date for which the hearing was scheduled and based on the reasoning of the court above, such termination was invalid. Therefore, so Griesel J continued, the parties should return to the magistrate's court before which the hearing was pending in order to pursue their rights and remedies in terms of the credit agreement. The court pointed out that the plaintiff will have adequate opportunity to state its case at such time (par 35).

The court granted an order where the application for summary judgment was stayed, pending a final determination of the debt review and that it should resume in the magistrate's court for Vredenburg. The clerk of the court was further directed to set the matter down for hearing at the earliest date available and costs of the application stood over.

4 Critical Evaluation

Debt-stressed consumers everywhere have welcomed the judgment of the full bench of the Western Cape High Court with open arms (See for instance the report by H Wasserman entitled "Court strikes blow for indebted" at http://www.fin24.com/Money/Money-Clinic/Court-strikes-blow-for-indebted-20110202 (accessed on 2011-02-02)). Clearly the facts of the *Papier* case were so glaringly against Wesbank that it is probable that even those courts who were in favour of termination of debt review after referral of a debt restructuring proposal would in this specific instance have found in the consumer's favour. It should be noted that the court simply held that termination of debt review once a debt restructuring proposal has been referred to court, is not competent. It did

not attach any conditions to its ruling on this issue. Thus the judgment cannot be construed as "authorising" termination of a debt review after referral of a debt restructuring proposal because the credit provider acted in good faith and duly complied with his debt review duties whilst the consumer for instance has not been making any payments or the restructuring application was set down months into the future.

As remarked by Griesel J, it would indeed have been an unduly onerous and tedious task to analyse and discuss individually the reasoning in each of the "ever-growing number of judgments on the topic" (par 20). Without derogating the judgment, the result whereof is agreed with by the authors, it is submitted that probing into the main cases espousing the two different views as set out above, might have strengthened the court's judgment and have eliminated the possibility of the issue regarding the cut-off time for termination of debt review from being taken on appeal and perpetuating the wave of uncertainty on this issue. In short, some elaboration on the most important cases in the debate might have served to cement the notion of legal certainty regarding the cut-off date for termination of debt review, especially since it appears that the spotlight in this matter was basically exclusively on the protection of the consumer, largely as a result of the assistance rendered by the NCR in its capacity as *amicus curiae*.

It is agreed with the court's remark that it is clear that, although the provisions of section 86(10) appear, on the face thereof, clear and unambiguous, a literal interpretation of the provisions of section 86(10), read in isolation, would amount to a "blinkered approach" (par 22) that could easily lead to the wrong answer. When interpreting the NCA it is imperative to take into account the purposes of the NCA as set out in section 3 thereof (s 2) and indeed the whole context of the Act in order to conclude on the intention of the legislature where there is doubt regarding the scope and extent of a specific provision. From section 3 it is clear that the Act is *inter alia* aimed at addressing and preventing over-indebtedness of consumers and providing mechanisms for resolving over-indebtedness based on the principle of (eventual) satisfaction of all responsible financial obligations (s 3(g)). However, this is not the sole purpose of the NCA and should not blind one to the fact that these processes are often abused by consumers and not only by credit providers, as seems to be the impression created in the *Papier* judgment.

The court indeed superficially referred to the "whole" debt review process as set out in section 86. However it did not consider other sections of the Act, such as sections 86(11) and 130(1)(a) and its interaction with section 86(10) which might have provided further grounds supporting the courts eventual conclusion. Whereas it is agreed that one should not have a "blinkered approach" to section 86(10), it is submitted that a proper contextual approach to termination of debt review would have been well served by an analysis of section 86(11) and section 130(1)(a) and their role in the debt review process.

The court considered the period of 60 business days mentioned in section 86(10) and its interrelation with the 20 business day time frame (Reg 25(5)) within which the consumer must approach the court after rejection of the application of debt review by the debt counsellor, (par 25). The court favoured the view expressed by Binns Ward J in *Wesbank Ltd v Martin* (14) by concluding that the time period in section 86(1) was introduced with the 20 day time frame in mind. The court stated that (par 26):

> Given the fact that a consumer has a period of 50 business days [being the 30 business days allowed for the assessment by the debt counsellor as per reg 86(6) and a further 20 business days to approach the court as per reg25(5)], calculated from the date of his application to the debt counsellor, within which to 'approach' the magistrate's court for an order in terms of s 87, it could never have been contemplated that the rest of the process - including a hearing before the magistrate and a rearrangement order in terms of s 87 - should all be finalised within the remaining ten business days.

It is submitted that the reasoning of the court lies at the root of the argument in favour of the date of referral of a matter to court as cut–off date for termination of debt review. For purposes of interpretation it can be accepted that the legislature is aware of other legislation that might impact on the legislation that it has drafted and it can thus be accepted, that within the context of termination of debt review and enforcement of credit agreements, it was aware of time frames pertaining to court procedures, as well as of the fact that a debt counsellor or consumer who refers a matter to court has no control over the court roll or the state of congestion thereof and would not be in a position to ensure that a debt restructuring matter is disposed of within 60 business days from the date on which the consumer first applied for debt review. In this regard it is submitted that the maxim *Lex non cogit ad impossibilia* might be relevant as it is inconceivable that the legislature could have intended to force a consumer or debt counsellor to comply with a procedure within a time frame that, in most instances, would make it impossible to achieve the objective of completing a debt review and obtaining a court ordered restructuring. (See also the *Dunga* matter (par 26) as cited in par 25 of the *Papier* judgment). As Griesel AJ succinctly put it (par 27):

> It follows that, even if the consumer does everything 'by the book', there will inevitably be a large number of cases where the period of 60 days will have elapsed without an order as contemplated by s 87 having been obtained.

Although the court did not elaborate on exactly what is meant by the term "referral" it is submitted that the view espoused in the *Matlala* case, namely that a "referral" occurs only once the application for debt restructuring has been served on the consumer and relevant credit providers (par 14), is correct and should be applied. If the moment of service of the debt restructuring application is not regarded as constituting a referral for purposes of termination of debt review in terms of section 86(10), it could have the effect that a consumer would be able to ward off termination of debt review by merely issuing the rule 55 application, but thereafter failing to serve it and to prosecute it to finality,

thus securing an indefinite moratorium on debt enforcement. Furthermore it is submitted that to regard the moment of issue of such a referral as the definitive moment at which the referral is regarded to be made, would create legal uncertainty as it cannot be expected of the credit provider to take notice of a process at a stage when he is not actually notified of such step having been taken by means of proper service of the rule 55 application.

With regards to the view regarding the cut-off date for termination as espoused in the *Nako-* and *Evans-* cases, the court pointed out that it would entitle the credit provider unilaterally "to derail the whole debt review process". It is submitted that although termination of a debt review in respect of a credit agreement has the effect of "slicing" that specific agreement out of the debt review process and that technically the review can still proceed in respect of the remaining agreements, the practical effect of such a termination is very often to bring the whole debt review process to a halt because of the cost impact that the enforcement might have on the consumer's distressed budget.

Evidently, the fact that the NCR joined the court proceedings as *amicus curiae,* outlining various instances of abuse (many of them glaringly unfair and undoubtedly contrary to the spirit of the NCA) of the debt review process, also added value in filling the court in on how dire the position regarding debt review terminations and the apparent abuse of the process by certain credit providers is. However, it should be noted that the mere fact that a debt counsellor informs a credit provider that a consumer's application for debt review, in the absence of a referral done in accordance with rule 55 and served in terms of magistrate's court Rule 9, will not constitute a bar against termination in terms of section 86(10). Indeed it can be agreed with the court that many of the instances of abuse listed by the NCR are inconsistent with the Act and provide strong indicators against a literal interpretation of section 86(10). The "umbrella" remark actually very vividly illustrates this point and there is merit in the court's observations that this approach would mean that only those consumers fortunate enough to apply for debt review at a favourable time or in a jurisdiction without a long backlog will succeed in having their debts re-arranged by the magistrate's court. However, sight should not be lost of the many credit providers who are also out in the credit rain without umbrellas. (See the judgment in *Firstrand Bank Ltd v Mvelase* [2010] JOL 26418 (KZP) decided on 2010-10-26) where the court favoured a more balanced approach to termination of debt review. It is submitted that a consideration by the court of the "good faith" requirement laid down in section 86(5) of the NCA and the fact that it applies to both credit providers and consumers, might have added to a perceivably more balanced approach to termination of debt review. (See also the *Dunga* matter where Blignaut J read an implied provision into s 86(10) to the effect that a debt review can only be terminated if the credit provider acts in good faith.)

A very important point that is made by the court relates to the fact that section 86(10) only requires notice to the consumer, debt counsellor and NCR and not the court thus justifying the inference that the legislature did not intend that once a court was seized with a debt restructuring matter

(ie after it was referred (duly served)) such process could unilaterally be terminated by a credit provider. It is indeed inconceivable that the legislature could have intended to go against the grain of fixed principles of civil procedure by providing that an existing judicial process could become contingent upon the mere sending of a letter between private parties, without any notification to the court which is seized with the matter.

The court decided that the corollary to the fact that enforcement is not possible while proceedings for a debt re-arrangement order is pending, is that delivery of a notice of termination is also "not competent once any of the steps referred to in sections 86(7)(c), 86(8) or 86(9) have been taken." It then continued that: "[o]bviously this impediment will cease to exist, once a magistrate's court has dismissed the application for re-arrangement or the application has been withdrawn or abandoned."

It is agreed, as stated above, that the initiation of enforcement proceedings is not competent whilst proceedings that could result in a debt-restructuring order is pending (s 129(2)) and therefore delivery of a section 86(10) notice is not competent. However, once the "barrier" to enforcement has been removed in that the pending matter has come to an end, eg due thereto that the application for debt restructuring is dismissed by the court, it is submitted that a section 86(10) notice is not necessary and that the credit provider may immediately commence enforcement proceedings by issuing and serving summons. The reason for this submission lies in the wording of section 88(3) that provides that:

> [s]ubject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until:
>
> (a) The consumer is in default under the credit agreement, and
>
> (b) one of the following has occurred:
>
> (i) an event contemplated in section 88(1)(a) to (c); or
>
> (ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.

The events referred to in section 88(3)(b)(i), are listed in section 88(1)(a) to (c):

> (a) the debt counsellor rejects the application and the prescribed time for direct filing in terms of section 86(9) has expired without the consumer having so applied;
>
> (b) the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application; or
>
> (c) a court having made an order or the consumer or credit providers having made an agreement re-arranging the consumer's obligations, all the consumer's obligations under the credit agreements as re-arranged are

> fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement.

If one reads section 88(3) in context it is clear that the words "subject to section 86(10)" does not apply where the consumer is in default and the court has either determined that the consumer is not over-indebted or has rejected the debt restructuring proposal or the application altogether as no debt review exists and therefore the process by which the section 86(10) notice can be terminated no longer exists. Under these circumstances, a credit provider may thus immediately proceed to issue and serve summons (See *Firstrand Bank Ltd v Fillis and another* 2010 6 SA 565 (ECP)).

A final remark relates to the court's reference to the various practical problems experienced by consumers as well as allegations of credit providers abusing the process as tabled by the NCR. Even though the Act has the protection of consumers at its very core, it should be noted that section 3(d) mentions, as one of the measures of protecting consumers, the promotion of "equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers". As indicated, the court, aided by the intervention of the NCR as *amicus curiae*, thoroughly considered unscrupulous practices by credit providers and the grossly unfair and absurd results that terminations after referrals to the magistrate's court have in practice, all of which the authors are in agreement with, but did not consider the various abuses of the debt review process by consumers and debt counsellors that credit providers are exposed to in many instances. It is often the consumers and debt counsellors who display a lack of good faith during the debt review process by delaying the process and by placing matters well into the future even though the court roll in a specific court is not necessarily excessively congested. The consumer in the mean time is enjoying the luxury of a payment holiday and thus not even attempting to make any payment in terms of what is often a repayment proposal that is not even viable.

5 Conclusion

As the judgment was delivered in the Western Cape High Court, it merely has persuasive as opposed to binding effect in other jurisdictions. It can be expected that certain other jurisdictions would follow suit whilst others may not. The probability also exists that the judgment may be perceived as too one-sided and in favour of consumers, given that the court did not deal with the flip side of the debt review coin, namely the abuse of the process by consumers and debt counsellors to the detriment of credit providers.

Although the court, having held that the termination of the debt review in terms of section 86(10) was not competent where the matter has already been referred to court and thus deemed it not necessary to deal with the provisions of section 86(11), it is submitted that a proper reflection on the debt review challenges facing both consumers and credit providers and the scope and application of section 86(11) to act as

a probable mechanism affording protection to both parties, might have led to a more balanced approach on the issue of termination of debt review.

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Minister for Justice and Constitutional Development v Tshishonga 2009 9 BLLR 862 (LAC)

Just and equitable compensation for non-patrimonial loss

1 Introduction

Section 23(1) of the Constitution of the Republic of South Africa 1996 guarantees a fundamental right in respect of labour relations by providing that "everyone has the right to fair labour practices". The Labour Relations Act 66 of 1995 (hereinafter "the LRA") gives effect to the right to fair labour practices in that employees have the right not to be unfairly dismissed or subjected to unfair labour practices. Section 193 of the LRA provides for remedies when an employee is unfairly dismissed. Reinstatement or re-employment is the primary remedy in cases of unfair dismissal except where the provisions of section 192(3) of the LRA apply, in which case reinstatement cannot be ordered by the labour court or an arbitrator. When an employee wishes not to be reinstated or re-employed, or the circumstances surrounding the dismissal would make the continued employment relationship intolerable, or it is not reasonably practicable to reinstate or re-employ the employee or the reason for dismissal is that it is only procedurally unfair, compensation would be the most appropriate remedy (s 193(2) LRA).

Under the 1956 labour dispensation, the Labour Relations Act 28 of 1956 granted the industrial court "an unfettered discretion" with regard to compensation in unfair dismissal cases. The amounts granted by the court on a case-by-case basis differed drastically (Grogan *Workplace Law* (2009) 177). The 2002 amendments to the LRA did away with the distinction between substantively and procedurally unfair dismissals but retained the ceiling of 24 months' compensation for automatically unfair dismissals (*ibid*) and 12 months' compensation for all other unfair dismissals. Section 194(1) provides:

> The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

The questions that arise are: When will compensation be "just and equitable" and how will the courts and arbitrators apply their discretion in order to determine "just and equitable" compensation.

2 Facts

The respondent, a deputy director-general, had made serious allegations to the media about his former employer, a former Minister of Justice and Constitutional Development. He was immediately suspended and subjected to a disciplinary inquiry. The chairperson of the disciplinary tribunal found that the information divulged to the media was a protected disclosure as defined in the Protected Disclosures Act 26 of 2000 (hereinafter "the PDA"). It was also found that there was no basis on which the respondent could be disciplined and that the respondent's suspension and disciplinary enquiry therefore qualified as occupational detriments as defined in section 1 of the PDA. The court a quo in *Tshishonga v Minister of Justice and Constitutional Development* [2007] 4 BLLR 327 (LC) posed an important question, namely whether disclosures to the media about impropriety in the workplace are protected under the PDA. The Labour Court awarded an amount equal to 12 months' remuneration to the plaintiff. The appellant submitted that the maximum award permitted by legislation should be made only in exceptional circumstances and that the award in this case was excessive. Although the court in *Tshishonga* held that an employee who suffers an "occupational detriment" is in a position similar to one who is victimised or discriminated against and that compensation awards for discrimination are therefore guidelines for these claims, it must be stressed that in the case of an unfair labour practice the employee would be entitled to a maximum of 12 months' compensation and in the case of automatically unfair dismissal to a maximum of 24 months' compensation. The compensation of 24 months is different from cases where the employer did not prove that the reason for dismissal was a fair reason related to the employee's conduct, capacity or the employer's operational requirements or because the employer did not follow a fair procedure or both. In these instances the compensation must be "just and equitable" but not more than the equivalent of 12 months' remuneration. On appeal in *Minister for Justice and Constitutional Development v Tshishonga* [2009] 9 BLLR 862 (LAC) the Labour Appeal Court was faced with the question what is just and equitable in circumstances where the compensation is for non-patrimonial loss.

3 Decision and Discussion

3 1 Compensation

Section 194 of the LRA sets out "how compensation must be calculated in different circumstances, not ... when and why compensation must be awarded" (Cohen "Exercising a Judicial Discretion – Awarding Compensation for Unfair Dismissals" 2003 *ILJ* 739). *Amalgamated Beverages Industries v Jonker (Pty) Ltd* 1993 *ILJ* 1232 (LAC) and *Alert Employment Personnel (Pty) Ltd v Leech* 1993 *ILJ* 655 (LAC) are relevant with regard to compensation although they were decided before the enactment of the LRA. In the *Amalgamated Beverages Industries* case the court held that compensation in its ordinary meaning comprises the payment of a sum of money to the injured to "make good a loss resulting from an unfair labour practice" (1256g). A claim for compensation for an unfair labour practice is "more akin to a delictual claim than a claim based on breach of contract" (*Alert Employment supra* 661c). Mischke ("Calculating compensation for unfair dismissal: Quantifying just and equitable compensation" 2005 *Contemporary Labour Law* 24) is of the view that:

> Compensation has its origin in the LRA, damages in common law, arise in respect of a delict (an unlawful act) or breach of contract. Statutory compensation is subject to an upper limit in terms of s 194 of the LRA; this limit does not apply in the case of common law damages. While common law damages usually relate to proven patrimonial loss in the context of breach of contract or a delict, statutory compensation is solace payment to the employee for an infringement of the employee's right not to be unfairly dismissed. As much as compensation in terms of s 194 may resemble damages, it is clear that an important distinction between the two forms of legal redress remains.

Before its amendment section 194(1) of the LRA dealt with the awarding of compensation in case of procedurally unfair dismissals while section 194(2) dealt with the awarding of compensation in case of substantively unfair dismissals. Factors taken into account in the calculation of the amount awarded in terms of procedurally unfair dismissals were very different from the factors taken into consideration when calculating the amount awarded for a substantive unfair dismissal (Cohen 2003 *ILJ* 740). Case law and precedents governing the interpretation of section 194(1) before its amendment were not binding on cases regarding section 194(2) and it was therefore difficult to calculate an award for a substantively unfair dismissal (*HM Liebowitz (Pty) Ltd t/a The Auto Industrial Centre Group of Companies v Fernandes* 2002 *ILJ* 278 (LAC)). The amended section 194(1) now provides for the compensation of an employee for "either a procedurally unfair dismissal or a substantively unfair dismissal or both" but in calculating the amount the factors to be considered will still "vary according to whether the dismissal is substantively or procedurally unfair or both" (Cohen 2003 *ILJ* 741). Various factors can be taken into account when a court has to decide whether an employer should pay compensation. These factors are (a) the nature of the dismissal (whether it was automatically unfair); (b) whether

the dismissal is substantively or procedurally unfair or both; (c) the nature and extent of the deviation from the procedural requirements when a dismissal is procedurally unfair; (d) whether the employee was guilty of misconduct insofar as the reason for dismissal is misconduct (see also *Transnet Ltd v CCMA* 2008 *ILJ* 1289 (LC) where the court stated that the "offensive nature" of the misconduct of an employee must play a role in the quantum of compensation awarded (1300a) and that even when there are procedural irregularities, if the offence was of a "reprehensible nature", compensation would be inappropriate (1301a)); (e) the consequences for the parties when compensation is awarded and when it is not; (f) the need to provide a remedy where a wrong has been committed; (g) the impact of the conduct of the employee upon the employer or the business of the employer insofar as the employee may have done something wrong which gave rise to his dismissal but where it was not sufficient to warrant dismissal and the conduct by either party that undermines or promotes any objects of the LRA, for example, effective dispute resolution of disputes (*Kemp t/a Centralmed v Rawlins* 2009 *ILJ* 2677 (LAC) 2687f–2688e). It must also be noted that in calculating the amount to be awarded as a result of procedural unfairness, the court in *Chothia v Hall Longmore & Co (Pty) Ltd* [1997] 6 BLLR 739 (LC)) held that "compensation" in section 194(1) should be given its ordinary meaning, namely "the value, estimated in money, of something lost" (745a–c). However, the court in *National Union of Metalworkers of SA v Precious Metal Chains (Pty) Ltd* [1997] 8 BLLR 1068 (LC)) held that where an employee is entitled to compensation due to a procedurally unfair dismissal, such employee "does not have to prove his or her losses" (1073j–1075j). It must, however, be stressed that compensation in terms of the LRA is not the same as damages in terms of the law of delict but that several principles apply equally. The principle in *Johnson & Johnson (Pty) Ltd v CWU* 1999 *ILJ* 89 (LAC) "remains instructive despite the fact that the decision was based on the repealed s 194(2) of the LRA" because "it clarifies the difficulty and confusion that sometimes arise about the distinction between compensation in terms of the LRA and damages under the law of contract or delict" (*Viney v Barnard Jacobs Mellet Securities (Pty) Ltd* 2008 *ILJ* 1564 (LC) 1576j–1577a).

3 2 *Solatium*

The Labour Appeal Court in *Tshishonga* was faced with the question as to what is "just and equitable" in circumstances where the compensation is for non-patrimonial loss. The court stated that assistance can be gained from the *actio iniuriarum* in terms of which a *solatium* is granted (par 18). *Solatium* can be described as an amount of solace money paid to a plaintiff by a defendant for the impairment of the personality interest of the plaintiff, (Neethling, Potgieter & Visser *Law of Delict* (2010) 251). The *actio iniuriarum*, the action instituted for the intentional infringement of a personality right, is used to "recover damages in the form of satisfaction" (Neethling, Potgieter and Visser *Neethling's Law of Personality* (2005) 59). The *actio iniuriarum* further has "the object of

effecting retribution for the injustice sustained by the plaintiff and of satisfying him for the feeling of injustice, injury and suffering which he (actually or presumably) sustained as a result of the defendant's conduct". For defamation, a form of *iniuria*, the award of damages as *solatium* is determined to "effect the reparation for the lowering of the plaintiff's esteem in the community" (Neethling, Potgieter & Visser *Law of Delict* 251). A person's *fama* or good name is the respect and status that he or she enjoys in society and the community and therefore any action that reduces a person's status in society or the community infringes on his or her good name and is an *iniuria*. For a person to claim damages for *iniuria* in the form of defamation, the infringement of his or her right to his or her good name, which injured his or her status, good name or reputation, must have been intentional (Neethling, Potgieter & Visser *Law of Delict* 331). *Solatium* further has no "fixed content" and can, amongst others, take on the meaning of "penance, retribution, reparation for an insulting act, or balm poured on a plaintiff's inflamed emotions or feelings of outrage at having to suffer an injustice" (Neethling, Potgieter and Visser *Neethling's Law of Personality* 59). In instances of defamation, the awarding of a *solatium* can be seen as having a penal function as it is not used only to right a wrong (Neethling, Potgieter & Visser, *Law of Delict* 251). It has been held that the primary object of the *actio iniuriarum* is to punish the defendant (*Masawi v Chabata* 1991 4 SA 764 (ZH) 772). It should, however, be mentioned that the *actio iniuriarum* covers a broad spectrum of rights being infringed upon and is not limited to an action in respect of defamation (*Viljoen v Nketoana Local Municipality* 2003 *ILJ* 437 (LC) 447a). Both *solatium* awarded under the *actio iniuriarum* and compensation awarded in terms of section 194(1) of the LRA deal with the awarding of an amount of money following the infringement of a right and it can further be concluded that in principle there is no difference between the two (*Viljoen v Nketoana Local Municipality* 2003 *ILJ* 437 (LC) 447c–d). The court in *Tshishonga* added that in cases of *solatium* "the award is, subject to one exception of a non-patrimonial nature, and is in satisfaction of the person who has suffered an attack on their dignity and reputation or an onslaught on their humanity" (par 18).

3 3 Quantum

In the case of a procedurally unfair dismissal, the objective of compensation is a *solatium* to compensate for the loss of the employee's right to a fair hearing or procedure prior to dismissal and not necessarily the actual losses suffered by the employee as a result of the dismissal (*Johnson & Johnson (Pty) Ltd v CWU supra* par 37). The court further held that "compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss" (par 41). Before the LRA came into force the situation was drastically different and it was imperative for a plaintiff to show proof of actual or patrimonial loss in order to receive an award for compensation (Cohen 2003 *ILJ* 742). In *Lorentzen v Sanachem (Pty) Ltd* 1999 *ILJ* 1811 (LC) the court held that "to weigh up patrimonial loss against a *solatium*

is illogical" (par 25). According to the court, *solatium* for the loss of the right has a punitive element in that the employer must "pay a fixed penalty for causing that loss" and in "the normal course a legal wrong done by one person to another deserves some form of redress" (*Johnson & Johnson* (Pty) Ltd v CWU *supra* par 41). Following the decision in the *Johnson & Johnson* case, the court in *Viljoen v Nketoana Local Municipality* 2003 *ILJ* 437 (LC) held that compensation awarded in terms of section 194(1) of the LRA includes both a penal element and an element of solace (446g). The court stated that it is "not an award of damages in the contractual sense, but rather a combination of *solatium* for the employee and punishment against an employer" (446g). The court followed the opinion held by Burchell (*Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 435) that "an award for damages under the *action injuriarum*, serves two broad purposes: vindication of the plaintiff's personality and providing him or her with a *solatium* (or solace) for wounded feelings" (446h–447a). In *Swart v Mr Video (Pty) Ltd* [1997] BLLR 249 (CCMA) the court held that compensation may in some sense be described as punitive because the arbitrator or Labour Court has a discretion, for example in cases of unfair discrimination, to apply a stronger sanction (253a). In *Market Toyota v Field* [2000] 583 BLLR 588 (LC) the court held that there is nothing wrong with distinguishing between the compensation awarded in terms of section 194(1) of the LRA and that awarded in section 194(3). Compensation awarded in terms of section 194(1) is punitive in nature in the form of a *solatium* whereas the section 194(3) compensation is given for something lost (par 8).

In general there is no "fixed formula" by which the calculation of the amount of *solatium* is done and the courts assess matters according to what is "right and fair" (Neethling, Potgieter & Visser *Law of Delict* 251; Neethling, Potgieter & Visser *Neethling's Law of Personality* 59). It can, however, be said that even without any "fixed formula", important elements in calculating the compensation to be paid include the seriousness of the defamation, the nature and extent of the publication, the plaintiff's reputation as well as the motives and conduct of the defendant (*Mogale v Seima* 2008 5 SA 637 (SCA) 642c–h). Awards of *solatium* by South African courts have been quite conservative. An action for defamation is seen as a way in which a plaintiff can vindicate his reputation, and that it is thus not "a road to riches" (*Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 590e). The amount of *solatium* awarded may not be insignificant. This point is emphasised in *Ramakulukusha v Commander, Venda National Force* 1989 2 SA 813 (V) where the court stated that when awarding damages, the court is tasked with the duty of "upholding the liberty, safety and dignity of the individual" (847c). In order not to jeopardise the confidence employers have in the courts, the award must also not be so high as to appear "arbitrary and unmotivated" (*Alert Employment Personnel (Pty) Ltd v Leech* 1993 *ILJ* 655 (LAC) 661a). In *Tshishonga* the court stated that in cases of *solatium* the award is subject to one exception of a non-patrimonial nature, and "is in satisfaction of the

person who has suffered an attack on their dignity and reputation or an onslaught on their humanity" (par 18). The court added that the exception is for the amount relating to the costs of R177,000 which were incurred by the respondent when he had to defend himself and are patrimonial in nature. The court stated that the respondent must be compensated for the R177,000 because he had to defend himself "against the wholly unwarranted onslaught launched against him" (par 19). It furthermore held that the following factors could be taken into account when quantifying compensation (par 16): (i) the embarrassment and humiliation the respondent had suffered by being summarily removed from his post without any reason given and thereafter being subjected to a suspension and subsequent disciplinary hearing, (ii) being called a "dunderhead" by the Minister of Justice on national television and being rapped over the knuckles for poor work performance (which was not true), (iii) gross humiliation by being moved to a position which was non-existent at the time and being thereafter for long periods without any work or without work instructions, (iv) the undisputed evidence of the respondent that, because of all the humiliation, victimisation and harassment by the appellant, he had to receive trauma counselling as a result of the way in which he was treated after the disclosures had been made to the media, (v) the employment of an attorney to defend him at the disciplinary hearing (where he was found not guilty) which cost him R177,000 to protect his interests and rights at the inquiry, to mention only a few.

In calculating the award of damages in cases of defamation and keeping in mind the penal function of damages in cases of defamation, the courts can consider aggravating and extenuating circumstances (Neethling, Potgieter & Visser *Law of Delict* 251). In *GA Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1 the court found that patrimonial damage can be claimed with the *actio iniuriarum*. However, this order was wrong as there was no claim for *solatium* for the infringement of the personality right and only patrimonial damages were claimed, and the *iniuria* occurred with the infringement of a personality right (7). In such instances the Aquilian action should be instituted to claim damages for patrimonial damage where such damage was caused by an *iniuria* (Neethling, Potgieter & Visser *Law of Delict* 322). In *Chemical Energy Paper Printing Wood and Allied Workers Union v Glass and Aluminium 2000 CC* 2002 *ILJ* 696 (LAC) the court also ruled that the awarding of compensation should have a "punitive element". The court further stated that the dismissal should "be dealt with in a manner that gives due weight to the seriousness of the unfairness to which the employee so dismissed has been subjected" (709a–c**)**. This is a far cry from the view expressed in *Ferodo (Pty) Ltd v De Ruiter* 1993 *ILJ* 974 (LAC) where the court stated that the compensation should not be calculated to "punish the party". In *Amalgamated Beverages Industries v Jonker supra*, following *Ferodo (Pty) Ltd v De Ruiter supra*, it was also stated that South African courts in following English law should award compensation which is "reasonable and fair" and that it should not be calculated to "punish the party". In

Ferodo (Pty) Ltd v De Ruiter (*supra* 981c–d) the court disagreed with the view that an employee should be compensated for injured feelings or for humiliation and injury of his pride. The court held that the correct approach is that of the English law, which entails that an "unfairly dismissed employee is to be compensated for the financial loss caused by the decision to dismiss him". The court further followed the opinion of Landman (*Compensatory Orders in the Industrial Court Labour Law Briefs vol 4 no 2* (1990) 9) that according to the common law, courts should not award compensation "for mere mental distress" following breach of contract unless "the mental distress results in some other loss" (980b–e). In *Christian v Colliers Properties* 2005 *ILJ* 234 (LC), which *inter alia* dealt with the awarding of damages in terms of section 50(1) of the Employment Equity Act 55 of 1998, the court ruled that when awarding damages the court should consider various factors, including "to redress the wrong caused by the infringement, the deterrence of future violations, the dispensation of justice which is fair to all those who might be affected" (240f–g). The court in *Christian v Colliers Properties supra* referred to *Alexander v Home Office* 1988 IRLR 190 (CA) where it was held that in awarding damages for compensation in instances of unfair discrimination, the "the object of an award for unlawful racial discrimination is restitution" and that it is impossible to define restitution and that "the answer must depend on the good sense of the judge and the assessors". In *Tshishonga* the court held that "a far more significant sum should be awarded as compensation for the indignity suffered, the extent of the publication of attack on the respondent (publication being on national television) and the persistent, egregious nature of the attacks upon the respondent which have been triggered because he had acted in the national interest" (par 22). The court awarded Tshishonga R277,000 in compensation (R100,000 for suffering the indignity and R177,000 in respect of costs incurred in his defence) as well as all his legal costs (parr 22–23).

In terms of section 194(1) the amount of compensation should be "just and equitable". When awarding compensation, the court or arbitrator must use its discretion and take guidance from the purposes of the Act together with the Constitution in order to calculate the amount fairly (*Victor and Picardi Rebel* 2005 *ILJ* 2469 (CCMA)). In *Transnet Ltd v Commission for Conciliation, Mediation and Arbitration* 2008 *ILJ* 1289 (LC) 1300d–e the court noted that section 194(1) applies in circumstances where compensation is awarded for a procedurally unfair dismissal and held that "the compensation must be 'just and equitable' in all circumstances". In calculating the compensation, the court will be required to make a "rational assessment of facts that are relevant and have been properly tendered in evidence" (Brassey *Employment and Labour Law vol 3* (1999) A8:73; Cohen 2003 *ILJ* 741). The "fact of whether or not an aggrieved dismissed employee has improved or sustained his employment prospects in consequence of the unfair dismissal" is also an important factor to be taken into account when calculating the amount of compensation (*Northern Province Local*

Government Association v CCMA 2001 *ILJ* 1173 (LC) par 60). Another factor the court may consider to be relevant in the calculation of damages is "whether or if at all the employee secured alternative employment or whether or not the employee was offered an alternative employment as well as whether or not the employee has secured any other income" (*Whitehead v Woolworths (Pty) Ltd* 1999 *ILJ* 2133 (LC) 2136g). In the *Johnson & Johnson* case the court held with regard to the previous section 194 that:

> [t]he nature of an employee's right to compensation under s 194(1) also implies that the discretion *not* to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress (always taking into account the provisions of s 194(1)), or where the employer's ability and willingness to make that redress is frustrated by the conduct of the employee (par 41).

The court in *Kemp t/a Centralmed v Rawlins* (*supra*) stressed the fact that the provisions of section 193(1) of the LRA does not give the Labour Court or an arbitrator "the kind of power which would enable it or him to grant or refuse an order of compensation on identical facts as it or he sees fit" (2689a). The court further stated that the word "discretion" is not a true or narrow discretion but a wide discretion because the question is "whether or not it is to award or not award compensation that would better serve the requirements of fairness in the matter" (2691g–i). The court further held that when it is decided to award or order payment of compensation in terms of section 193(1)(c), section 194(1) becomes relevant because it sets out the parameters for the amount of compensation that may be granted or determined (2696e–g). An employer therefore does not obtain a vested right to the section 193(1)(c) remedy but only has a right to be considered for that remedy (2697c).

Regarding the question whether the amount of compensation should also be punitive, the court in *Mogale v Seima* (*supra* 641g) followed the decision in *Esselen v Argus Printing and Publishing Co Ltd* 1992 3 SA 764 (T) 771g–i. The court in the *Mogale* case held that awarding of compensation should not be punitive in that in the civil courts, damages are awarded to console a plaintiff for his "wounded feelings" and not to "penalise or to deter the defendant for his wrongdoing, nor to deter people from doing what the defendant has done". It also held that "punishment and deterrence are functions of the criminal law, not the law of delict" (641h–j). In *Hoffmann v South African Airways* 2000 *ILJ* 2357 (CC) the court held that:

> The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of a constitutional right; second, to deter future violations, third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore,

> in determining the appropriate relief, 'we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source' (par 45).

The spirit of the *Hofmann* case was carried on by the court in *Viney v Barnard Jacobs Mellet Securities* (*supra)* where it emphasised that when considering the term "just and equitable" compensation one must balance the interests of both the dismissed employee and the employer (1577h). An additional factor that needs to be considered is the infringement of the constitutionally protected rights of the plaintiff. The courts will thus give effect to the norms of the Bill of Rights in determining the "degree of 'aggravated' damages required to compensate the injured individual, rather than resort to an unacceptable award of 'punitive' damages to punish the defendant for what he or she has done" (Burchell *The Modern Actio Injuriarum* 436).

4 Concluding Remarks

The employee in *Tshishonga* was subjected to an "occupational detriment" by being suspended because he blew the whistle by making a "protected disclosure" in terms of the PDA. A potential whistle-blower faces a difficult choice in that he or she either reports the misconduct and takes the risk of potential retaliation from his or her employer or keeps quiet and retains his or her job (Mendelsohn "Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing" 2009 *Washington University Global Studies LR* 723). Due to the fact that this is a very important responsibility that is placed on such a person, the court must be severe in exercising its discretion when determining what is "just and equitable" compensation. When looking at the remedies for suffering an occupational detriment, the purpose of compensation is to provide redress for patrimonial and non-patrimonial losses. When determining the amount of compensation that is reasonable, fair and equitable, particular criteria must be taken into account. To reach the remedy stage means that the applicant must successfully prove that he had made a protected disclosure and that he was subjected to an "occupational detriment" (*Tshishonga v Minister of Justice and Constitutional Development* [2007] 4 BLLR 327 (LC) 375e–f). The actual amount to be awarded in cases of *solatium* is discretionary and there is "no tariff to which recourse can be made" (par 20). This illustrates the reintroduction of a judicial discretion when awards are made for compensation in labour law cases. When applying their discretion, the court or arbitrator must also take into consideration the factors illustrated in *Kemp t/a Centralmed v Rawlins* (*supra*). The fact that a far more significant sum of compensation was awarded in *Tshishonga* for the indignity suffered illustrates that employers cannot simply subject employees to unfair labour practices or unfairly dismiss them. Although

cases are individual in nature this case hopefully provided some guidelines (as discussed earlier under par 3 3), especially in cases dealing with *solatium* and where compensation also has a non-patrimonial component.

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Like Pontius Pilate of old, the Constitutional Court washed its hands of my human dignity: A critical review of *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC)

1 Introduction

On 8 April 2011, the Constitutional Court, through Cameron J, decided by a majority of five to three, that publications made by *The Citizen* newspaper, which referred to Robert McBride as a murderer, amongst other things – despite successfully applying for amnesty from the Truth and Reconciliation Commission (TRC) – were protected by fair comment. This was a successful appeal by *The Citizen,* an erstwhile editor and two journalists against a controversial judgment of the Supreme Court of Appeal, which found that reference to McBride as a murderer had been rendered false by virtue of the amnesty granted to him by the TRC (*The Citizen 1978 (Pty) Ltd v McBride* 2010 4 SA 148 (SCA) par 33). This meant that any such reference to him could no longer be justified either by the defence of true publication or by fair comment, as the basis for the defence had since been rendered false. The events that gave rise to this appeal are well documented and have become trite. To summarise, McBride, acting as an operative of the African National Congress (ANC), carried out a car bomb attack outside the Magoo's Bar and Why Not Restaurant on the Durban beachfront on 1986-06-14 (*The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC) par 3). Sixty-nine people were injured and three young women were killed in the explosion. McBride was subsequently convicted and sentenced to death for multiple murders. However he was reprieved and released in 1991 and 1992, respectively. In 1997 McBride applied for amnesty in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995, (TRC Act), which was granted in 2001. Sometime in 2003 reports surfaced in *The Citizen* newspaper that McBride was a front runner to take a post as

a police chief of one of South Africa's largest municipalities, the Ekurhuleni Metro. These rumours were subsequently confirmed when McBride was appointed into that position, despite initial denials by the government.

The appeal before the Constitutional Court centred around three statements which had appeared in a series of articles published by *The Citizen* over a period of two months (par 137). Central to the appeal was the statement that McBride was "a murderer" and "a criminal". Here, the court had to determine if it was fair to still refer to a person who had been convicted of murder during the struggle against apartheid as a "criminal" and a "murderer", despite him successfully applying for amnesty. The first statement raised two issues: (1) whether McBride's amnesty was expressly stated; and most controversially, (2) whether *The Citizen*'s comment could be said to be based on true facts, in view of the amnesty granted to McBride (par 161). In essence, this was about the effect of amnesty on the law of defamation (see par 2), that is, a determination of the role the amnesty process plays in achieving the balance between freedom of expression on one hand, and the value of human dignity, on the other. The second issue centred on the assertion that McBride was not contrite, but was instead proud of having killed civilians during the struggle against apartheid. The dispute further revolved around the statement that McBride had "dubious flirtations" with alleged gun dealers in Mozambique. In all these the appellants relied on fair comment as a defence to escape liability (parr 137, 154, 234). McBride also entered a cross-appeal against the reduction of his damages by the SCA, after finding that reference to his alleged involvement with gun dealers in Mozambique was found to be not defamatory.

In the Constitutional Court, the majority (with Ngcobo CJ, Khampepe & Mogoeng JJ dissenting) held that the first and third statements were protected as fair comment. Ngcobo CJ (with Khampepe J concurring) agreed with the majority decision that the first statement was protected by the defence of fair comment, albeit for different reasons (par 138). The Chief Justice, however, concurred with Mogoeng J that the third statement was not protected by law (parr 138, 237). However, the court was unanimous that the second statement could not be protected by the defence of fair comment (parr 121, 138), with Mogoeng J going as far as finding the statement to be malicious (par 236). *The Citizen* had raised the defence of fair comment in relation to each of these statements. This case note is a critical review of the Constitutional Court judgment. In particular, it takes issue with the majority's interpretation of section 20(10) of the TRC Act, in relation to the defence of fair comment and the constitutional value of human dignity. At the same time, the note attempts to show why Mogoeng J's opinion is legally sound and preferable.

2 The Defence of Fair Comment

The requisites for a successful claim for defamation are trite in our law. Once the plaintiff has proved that there was publication of a defamatory matter which referred to the plaintiff, intention and wrongfulness (as well as causation) will be presumed. The defendant must then prove that it has a valid defence that excludes, amongst other things, wrongfulness. This includes fair comment, which was argued by *The Citizen*. In the Constitutional Court, *The Citizen*'s defence was refined to strictly fair comment, given the confusion that seemed to have arisen from the SCA judgment, where the court was caught between the defence of truth and public interest publication and that of fair comment (par 35), as well as comment on the effect of amnesty (par 30). While still relying on the fair comment defence, *The Citizen* sought to use its reference that McBride was "a murderer", as the true basis upon which their comment that McBride was not suitable for appointment as police chief rested (par 35). However, closer examination of this argument reveals that the appellants were still commenting on the effect of amnesty granted to McBride. It is considered here whether the court was correct in upholding the defence of fair comment.

Cameron J (writing for the majority) considered that to call this defence "fair comment" was misleading (par 82). He even went on to refer to it as "protected comment" (see parr 82 - 84). However Ngcobo CJ disagreed with him in the following terms (par 158):

> In my view, the requirement of fair comment is consistent with the need to respect and protect dignity. It maintains a delicate balance between the need to protect the right of everyone, including the press, to freedom of expression and the need to respect human dignity. This is the balance that the Constitution requires be struck. I do not, therefore, share the view expressed by Cameron J that the word "fair" is misleading. It must now be understood in the light of our Constitution, in particular the foundational values of human dignity and freedom upon which our constitutional democracy rests and the need to strike a balance between ensuring that freedom of expression is not stifled and insisting on the need to respect and protect human dignity.

The author shares the Chief Justice's sentiments. There is nothing wrong with referring to this defence as "fair comment". Renaming the defence, as Cameron J suggests, may inflict unwarranted violence on the common law of defamation – whereas there is a healthy co-existence between the common law and the Constitution, as clearly indicated by Ngcobo CJ (par 158).

As early as 1917, the requirements for a successful defence of fair comment were categorically laid down in the case of *Crawford v Albu* 1917 AD 102 114 and later adopted in the case of *Marais v Richard* 1981 1 SA 1157 (A) 1167F (parr 80, 155, 159; see also *The Citizen v McBride* (2010 4 SA 148 (SCA) par 66; Buthelezi "As a matter of fact: But whose fact? *The Citizen v McBride"* 2011 *De Jure* 179). There are four requirements: (a) the defamatory statements are comment or opinion and not of fact; (b) the comments relate to a matter of public interest;

(c) the factual allegations being commented upon are true; and (d) the statements are fair. These are discussed below, with special attention paid to those elements that have bearing on the decision that should have been reached in the current case.

2 1 The Defamatory Statements are Comment and Not of Fact

To succeed in his defence, the defendant needs to have been expressing an opinion rather than asserting a statement of facts (see Buthelezi 2010 *De Jure* 179 189). He must be understood to be doing such by an ordinary and reasonable reader (*Marais v Richard* 1981 1 SA 1157 (A); *The Citizen v McBride* 2010 4 SA 148 (SCA) parr 40, 67; Buthelezi 2010 *De Jure* 179 184). However, at times there can be a very thin line between a statement of truth and an opinion. This, to a large extent, will also depend on the content of the allegation, the context of the statement, and the unique circumstances known to the reasonable reader (*The Citizen v McBride* supra par 40). Undoubtedly, where there have been a series of publications, as with the present case, this could require that these be considered collectively. In the light of all the circumstances (and considering all the articles together), I agree that *The Citizen* expressed an opinion on McBride's suitability for the post of Chief of Police of the Ekurhuleni Metropolitan Municipality. Hence, the three statements in contention, would have been (or should be) understood by a reasonable reader as bases for The Citizen's opinion on why McBride was not suitable.

2 2 The Comments Relate to a Matter of Public Interest

Another requirement for a successful fair comment defence is that the defendant should be expressing his opinion on a matter of public interest. This means that one must be airing a view or opinion on a matter that concerns the public, or a matter in which the public has an interest (Burchell *Personality Rights and Freedom of expression: The Modern Actio Injuriarum* (1998) 274-275). It is trite that any matter concerning the conduct of public figures, political and state institutions, the administration of justice, to name a few, is a matter of public interest (Burchell 283; Buthelezi 2010 *De Jure* 179 187). It is also submitted that matters of public interest would include any newsworthy information or even that which will contribute to public debate or that would help the public formulate an opinion (see par 141; *Khumalo v Holomisa* 2002 5 SA 401 (CC) par 21). It should be noted, however, that this requirement differs from that of the defence of truth, which requires that the public derive some benefit from the published statements (see Buthelezi 2010 *De Jure* 179 183). Buthelezi also suggests that this requirement perhaps should require that this element be brought in line with the one in the defence of truth and public benefit, by requiring that the comment be made *in the public interest*, as opposed to only showing that one commented *on a matter of public interest* (Buthelezi 2010 *De Jure* 179 187). Ngcobo CJ too alludes to this view by twice referring to the fair

comment defence as "fair comment in the public interest" (parr 154, 160). Thus in this matter *The Citizen's* statements amounted to a comment in a matter of public interest. Firstly, McBride, as a politician is a public figure. Second, he is newsworthy character, as he has always been surrounded by controversy. Most importantly *The Citizen* published statements in relation to the McBride's pending appointment as a senior public office bearer. Therefore, the appellants' defence for fair comment could not be faltered under this requirement.

2 3 Comment Base upon True Factual Allegations

For logical reasons I have elected to deal with this requirement for the fair comment defence and the requirement that the comment should be fair last, as they were, in my opinion, central to the issues in this case. The requirement that a comment must be based on true factual allegations means that the publication will only enjoy protection if it has true factual bases. It implies that the comment should "rest upon a firm foundation" and "be clearly distinguishable from that foundation" (par 155). This "firm foundation" refers to "the facts expressly stated or clearly indicated and admitted or proved to be true" (par 155). However, the facts only need to be substantially true rather than absolutely true, or true in all respects (Burchell272; Buthelezi 2010 *De Jure* 179 185). Moreover, as shown above, these facts should be expressly stated or clearly indicated and admitted, or (if not admitted) proved to be true (see also par 155). Thus failure to comply with any of these requirements will result in the loss of protection (parr 155, 184). This is an important requirement of the defence, since the defendant is not required to "justify his comment but only to prove that it has a true foundation" (parr 83, 156).

Ngcobo CJ held that when amnesty had been obtained, that fact should also be mentioned for the defence of fair comment to succeed (par 170). Failure to mention amnesty would amount to "a half-truth and [would] thus be untrue" (par 173). However, this does not necessarily mean that each article should contain this fact, even where the statements complained of were part of a series of articles (as in the present case). In such a case, they should not be considered in isolation from each other, as a reasonable reader would regard each article as part of a series (parr 92, 174, 187, 231). I share this view. In this case, the requirement that the facts should be expressly stated or clearly indicated and admitted or proved to be true was satisfied. I concur with Cameron J, that McBride's amnesty had become public knowledge (par 92). Therefore, contrary to Ngcobo CJ's view, reference to this fact was no longer necessary (par 184), and the statement that McBride was a murderer was accurately stated (par 187). It was also argued for McBride that the appellants' defence lacked a true foundation as the respondent had obtained amnesty. I concur with the majority opinion that the effect of amnesty is not intended to render as false acts the commission of which is an historic fact (parr 96, 97, 166; Buthelezi 2010 *De Jure* 179 185). Hence, their defence for fair comment did not also lack true foundation.

However, in my view, neither this aspect of the element of the defence nor the one mentioned earlier was central to the issues before the court. What was key, I submit, is whether it was still fair (under the next element of the defence, with specific reference to the elements of relevance and reasonableness) to keep on referring to a recipient of amnesty as "a criminal". Thus, I do not entirely share the emphatic conclusion reached by Cameron J that: "Mr McBride had committed murder, and was thus a murderer ... "(par 97). Surprisingly, after making his decision, Cameron J stated that it does not mean that "Mr McBride's conviction for murder can indefinitely be flung in his face" (par 79). However, this is not to say that past deeds in respect of which amnesty was granted are not to be mentioned, but they should be mentioned with due regard to public interest (see par 170).

2 4 The Statements are Fair

Lastly, to succeed, the appellants needed to justify their published statements as fair. To satisfy this requirement the statement must be honest or *bona fide*, relevant and not actuated by malice (parr 81, 156). The opinion is fair if it is an opinion that "a fair person, however extreme, might honestly hold, even if the views are "extravagant, exaggerated, or even prejudiced" (parr 81, 156). It will be fair comment speaking it objectively qualifies "as an honest [and] genuine ... expression of opinion relevant to the facts upon which it was based, and not disclosing malice" (par 81). The defendant need not necessarily have to justify the comment, but he or she must satisfy the court that it is "fair" (par 156). In essence, the comment is fair if it meets the requirement of honesty/ genuineness, relevance and lack of malice. These are determined objectively, save for the element of malice, which is assessed subjectively (Burchell 278; Buthelezi 2010 *De Jure* 179 186). Relevance means that the opinion be relevant to the matter commented upon or to the facts upon which it is based (parr 157, 103). Malice, meanwhile, denotes abuse of the right and renders a statement which would otherwise have been lawful, wrongful and unprotected (see par 105). Mogoeng J, quoting Joubert JA in *May v Udwin* (1981 1 SA 1 (A) 19A-B), had this to say regarding malice (par 239):

> In my opinion *Voet's* criterion must be accepted as being consistent with the position where a judicial officer, under the guise of performing his judicial functions, has been actuated by *personal spite*, *ill will*, *improper motive*, *unlawful motive* (*ongeoorloofdeoogmerk of motief*) or *ulterior motive*, that is to say, by *malice*, in his publication of the defamatory matter in order to expose the defamed person to odium, or ill will, and disgrace.

It is submitted that the process of establishing malice inadvertently involves interrogating the statements and their purpose (see also par 231). I also submit that whether the statements complained of were fair or not, is the determining factor in this matter. The "fairness" of the comment is determined in terms of the general legal criterion of reasonableness, taking into account the constitutional values and norms setting boundaries for what is protected as "fair" (par 84; see also

Cameron J's interpreted version of parr 1168C-D of *Marais v Richard* 1981 1 SA 1157 (A) in n 99). Cameron J states that "the fundamental norm must be the local legal convictions" that determines what is fair (*ibid*). I concur entirely with this analysis. This is especially important given the main issue in this case. Further, it is my submission that in order to do justice *in casu*, appellants' statements should be considered both individually and collectively. This will ensure that they are understood within their context. Such a view was also held by Mogoeng J (par 231). Lending support to this view is the general approach adopted by the majority when determining whether *The Citizen* clearly expressed the basis for fair comment on the main issue before the court (par 90). The majority considered the statements as a series of one continuous publication in view of the period of their publication. For this reason and for practical purposes the following section interrogates this element of the defence in respect of each statement.

(a) "Lack of Contrition"

Mogoeng J was of the view that by *The Citizen* touted the untrue statement that McBride "lacked contrition" as a true fact to support their opinion that McBride was not suitable for heading any metropolitan police force (par 236). I submit that this view is reasonable. Whatever the case may be regarding the true nature of this statement, the court was unanimous that it was not protected. As the court stated, there is ample evidence to the contrary, both in the TRC report and a statement by McBride's lawyer (parr 21, 92). I also submit that the fact that McBride voluntarily opted to seek amnesty, despite his reprieve and release in 1991 and 1992, respectively should also tip the probabilities in his favour tip (par 3). This should have been sufficient to indicate McBride's remorsefulness. Thus, *The Citizen*'s statement in this regard is unfair. It also does not pass the test in 2.3 above as it lacked a true foundation. Hence, whether this statement was a comment or an assertion of true facts, I concur with the court that it was not protected by fair comment defence.

(b) "Flirting with Gun-Runners" in Mozambique

The main contention regarding the statement that McBride had "dubious flirtations with alleged gun dealers in Mozambique" centred on its interpretation (parr 123, 199). The majority of the court did not agree with McBride's interpretation that, within the context, the statement meant that he was involved in criminal activities in Mozambique (parr 124, 125). Instead, the majority of judges shared the same sentiments as the SCA, that the statement should be understood to mean that "in addition to the fact that [McBride] committed murder, the episode clouded his candidacy for police chief" (par 126). I disagree that, taken within context, the "flirting with gun-runners" statement should not be understood to mean that McBride cannot be trusted as he is a criminal who gets involved in criminal activities. In my opinion, a reasonable conclusion in the circumstances is Mogoeng J's assertion that the appellants used this statement to reinforce the view that McBride is an

unrepentant "dangerous criminal" who was not fit to be entrusted with the position he aspired to (parr 226, 227). Ngcobo CJ is also in agreement with Mogoeng J that this is the imputation that a reasonable reader would attach on the statement at issue (parr 199 to 201). Mogoeng J is also, in my opinion, correct that this statement should be regarded as having a cumulative effect on deciding the whole issue of appellants' liability (par 231). Indeed, all three statements in contention, and the series of the articles published by *The Citizen*, should not be regarded as separate from one another, but must be considered collectively. In fact, this view is unwittingly supported by Cameron J's own analysis of the meaning of this statement (par 126). Nevertheless this statement was relevant, for the appointment of McBride to a public office as the police chief for the Ekurhuleni Metropolitan Municipality was a matter of public interest (parr 108, 109; Buthelezi 2010 *De Jure* 179 186).

However, as Ngcobo CJ held, the question was whether the facts regarding this matter were accurately stated (par 202), and whether a true foundation was laid for the defence of fair comment. I concur with the Chief Justice that the appellants did not fully state facts about the arrest, the release and the subsequent quashing of the charges against the respondent, by the Supreme Court of Mozambique (par 202). The appellants did not publish anything about the press conference at OR Tambo International Airport, where the latter fact was explained (par 203). I disagree with the stance that Cameron J alluded to that the appellants' failure to ascertain the statement's accuracy is excusable or that they should be given the benefit of doubt (par 127). Such failure belies the appellants' claim for a desire to carry out their public duty of contributing in the fight against crime (see par 239). In fact, this failure borders on *dolus eventualis* (see also *MN v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 5 SA 250 (CC) at par 64). Thus, in my opinion, Ngcobo CJ and Mogoeng J were correct in finding for McBride in this regard (parr 203, 237). At worst, this statement could be viewed as malicious as Mogoeng J found (par 237), or at least it evidenced gross recklessness on the part of the appellants. I therefore submit that Mogoeng J's analysis of the statement about lack of contrition, applies with the same force in this statement (par 236). Further, as Mogoeng J stated, this was also a reckless violation of section 4.3 of the South African Press Code, which states that "[c]omment by the press ... shall take fair account of all available facts which are material to the matter commented upon" (see footnote 32 under par 236, Mogoeng J's dissenting judgment).

Moreover, as stated in *Khumalo v Holomisa supra*, the media have a heavy and noble responsibility placed on them. They are constitutionally obligated "to act with ... integrity and responsibility" (*Khumalo v Holomisa supra*par 24). This duty binds the media to report accurately (see also *Brümmer v Minister for Social Development* 2009 6 SA 323 (CC) par 63). It is not difficult to understand why this is an integral part of media reporting. "[T]hey are, inevitably, extremely powerful institutions in a democracy ..." (*Khumalo v Holomisa supra* par 24). It is submitted

that if left unchecked such power could destroy human dignity, thereby imperilling one of the goals of the South African Constitution, namely, bringing about a republic founded on the value of human dignity (par 143). Therefore, the court, in my opinion, erred in dismissing McBride's cross-appeal. The statement is a half truth and, contrary to the majority's view, carries a defamatory meaning. Alternatively, I submit that the majority should have at least regarded the statement as having a bearing on inferring malice on the part of the appellants as it was made to bolster the main allegation that McBride was a murderer and a criminal owing to the bombing incident.

(c) A "Murderer" and a "Criminal" in Spite of Amnesty

The court was unanimous that amnesty granted in terms of the TRC Act does not render as false the commission of an act for which amnesty was granted. However, the court was divided on the effect of the amnesty process. Interestingly, Cameron J (for the majority) and Mogoeng J, in a dissenting judgment, reached different conclusions here although they used the *AZAPO* case to explain the effect of amnesty on its recipients. Cameron J concluded that amnesty in the TRC process was a means to an end – a statutory mechanism that was created to uncover the truth (par 51). For him, it seems that the main objective of the TRC was about helping victims of gross human rights violations (survivors and the dependants of the dead) – to "discover what did in truth happen to their loved ones" (par 51). According to the justice, amnesty was "an incentive used to encourage perpetrators to disclose the whole truth" (par 51). On the other hand, for Mogoeng J, the TRC process was more than about the telling of truth. Instead it was about the pursuit of a two-pronged constitutional objective, namely: "to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past … " (par 211). He quotes Mahomed DP in the same AZAPO case (par 209):

> It was wisely appreciated by those involved in the preceding negotiations that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity … It might be necessary in crucial areas to close the book on that past.

For Mogoeng J, the discovery of truth or truth-telling was secondary or subsidiary to the main purpose of the TRC process (par 211). Mogoeng J traces this objective (as envisaged in the amnesty) to the epilogue in the interim Constitution of the Republic of South Africa 200 of 1993. He said (par 210):

> It follows from the epilogue that our political leaders committed the nation to the pursuit of a future founded on peaceful co-existence, recognition of human rights, national unity, reconciliation of the people of South Africa and reconstruction of society. It dawned on them that this dream could only become a reality if black and white South Africans, who had been at war with each other, would embrace "a need for understanding but not for vengeance,

> a need for reparation but not for retaliation, a need for ubuntu but not for victimisation."

This view is equally shared by Ngcobo CJ who held that "amnesty was adopted in order to advance reconciliation and nation building or reconstruction" (parr 163, 164). As the Chief Justice put it, it meant that: "[the recipient's] conviction may no longer, in law, be used against him or her. But the facts upon which his or her conviction rested are not obliterated; they are historical facts" (par 166). I fully endorse this analysis of the minority. The amnesty was primarily intended to promote reconciliation and nation building. Hence, I disagree with the view entertained by the majority that the central theme of the TRC process was the quest for disclosure of the truth. This view is narrow in its focus, as it seems elevate to the interests of the victims above the national interest envisaged in the epilogue just mentioned above. In my opinion, this error is reflected in the final conclusion reached by the majority, which was largely motivated by the need of the victims and their relatives to talk openly about their past suffering (parr 45, 46, 76, 78). Instead, the notion that "truth-telling was but one of the key instruments through which objectives of a fundamental nature were to be achieved" is in my opinion the correct one (par 211). In fact, as Mogoeng J correctly held, "... this truth was supposed to be used as the brick and mortar for laying a firm foundation for enduring peace, national unity and reconciliation. Amnesty was, so to speak, designed to help level the playing field and enable all South Africans to make a new beginning" (par 215).

Furthermore, the majority of the court relied on the decision in *Du Toit v Minister for Safety and Security and Another* (2009 (6) SA 128 (CC)) (*Du Toit),* in their assessment of the effect of amnesty on its recipient (par 60). I concur with the decision reached in *Du Toit*. However, I further submit that the case of Du Toit is distinguishable from the present one. Du Toit sought reinstatement at work, owing to his amnesty, whereas McBride was seeking affirmation of his human dignity. Du Toit would only have been in the same footing as McBride if he were to be denied new employment from the police service on the basis of the offences for which amnesty was granted. Put differently, the *Du Toit* case was about a retrospective remedy, whereas McBride was seeking a proactive relief. Hence, *Du Toit* could not have been central in disposing of the issues in the *McBride* case. Also, in their analysis of the effect of the TRC process, to some degree the majority seem to be suggesting this same view (parr 60, 74, 75).

It is also my submission that the pivotal question in this case was about the relevance of the appellants' comment to the question of McBride's suitability for appointment in a public office. Cameron J deemed that the appellants' statement was not an unnecessary raking of McBride's past (par 98). According to Cameron J, regardless that the bombing took place seventeen years prior, the statement was relevant since McBride's amnesty was granted "only two years before the issue of his candidacy as police chief arose in 2003"(par 109). Mogoeng J on the other hand, regarded the length of time between McBride's amnesty and

his appointment as irrelevant (par 220). I am generally in agreement with the majority that the branding of McBride a murderer and criminal may be *prima facie* relevant, in view of the nature of the position he aspired for. However, in view of the objectives of the TRC Act, I submit that such raking of McBride's past is rendered irrelevant. Instead I share Mogoeng J's view that what should have made the difference is not time space between amnesty and the appointment of McBride as police chief, but: "[t]he age of the violation, the granting of amnesty, the political background and underlying purpose of amnesty, coupled with the absence of any genuine public interest being advanced by the branding ..." (par 220). McBride, by virtue of amnesty, was now free to be integrated into the society. Notwithstanding, *The Citizen*, contrary to the advancement of reconciliation and reconstruction published the statement in contention (par 107). Put differently, would it have been relevant in 1994 to oppose the election, into the Presidency, of former state president Mandela (who had been released from prison four years before becoming a state president, for having been imprisoned for serious crimes committed 27 years earlier under the apartheid regime), branding him a "criminal" and "seditionist"? I submit that, within the South African context, it would neither have been relevant nor fair nor reasonable. In many respects, McBride was in a similar position. In fact, McBride was in an even better position, as he was granted amnesty, in addition to his reprieve and subsequent release.

Moreover, a publication actuated by malice is unfair and unprotected by the fair comment defence. Whereas Mogoeng J categorically concludes there was malice on the part of *The Citizen* (parr 231, 237), McBride's argument that there was malice on the newspaper's part was rejected by the majority (par 111) and Ngcobo CJ (par 197). How Cameron J could not infer malice from "ungenerous and distasteful" tone of statements and the "vengeful, and distasteful" "murderer" and "criminal" epithets, is a mystery (parr 101, 102). In the justice's own words malice "indicates the abuse of right" (par 105). Granted the appellants were constitutionally entitled to express their opinion. However, in my view, they went beyond the exercise of their constitutional right and pursued a vengeful agenda against McBride (parr 101, 102, 207). As Mogoeng J held, they embarked on a "character assassination" against McBride (see parr 231, 233). Their "agenda" is evident when one takes a holistic view of the articles that the appellants published. I share the view of Mogoeng J, who stated (par 232) that:

> Anyone genuinely driven by a civic duty to prevent the subversion of metropolitan security, consequent upon the appointment of a Metro Police Chief who is disqualified for the job, would have checked the facts before the articles were published. Surprisingly, the Citizen chose not to undertake this simple verification exercise to satisfy itself whether (i) Mr McBride ever expressed contrition for what he did and (ii) the arrest and failure to prosecute Mr McBride for his alleged association with alleged gun dealers were fully explained before, at the time of or after the quashing of charges against Mr McBride by the Supreme Court of Mozambique, or at the press

> conference at the airport which has since become known as OR Tambo International, and whether information in this regard was available. This conduct lines up with the Citizen's apparent determination to depict Mr McBride as being amongst the dregs of humanity. And this level of bitterness evinces a desperate effort to crush Mr McBride for some deliberately withheld reason, somehow linked to the bombing, under the guise of an honest attempt to merely oppose his appointment by reason of his alleged unsuitability.

Granted, this conclusion was with reference to 'contrition'. However, I submit that it was also relevant in determining malice, in general, on *The Citizen*'s part of (see also parr 187, 188). As Mogoeng J also asserted, the "criminal" branding was used to support the appellants' personal attacks on McBride, despite the appellants' failure to verify the records about the arrest and withdrawal of the charges against him in Mozambique (par 232). Further, while Ngcobo CJ did not infer malice on the appellants' part, when he dealt with the statement about McBride's "lack of contrition" he tacitly supports Mogoeng J's conclusion. Therein, the Chief Justice regarded personal attack on McBride as calculated to stigmatise him (par 195). I submit that had the Chief Justice considered all the statements jointly, when ascertaining their fairness, he too would have found "malice" (see par 161). This approach was also unwittingly supported by the majority of the court when dealing with the main issue. They viewed the appellants' articles collectively (par 91). Moreover, Mogoeng J regards *The Citizen*'s likening of McBride to notorious criminals such as Mr Barend Strydom and Mr Clive Derby-Lewis and an article referring to him as "Bomber McBride" as telling (par 230). The justice calls these "an outward manifestation of a well-orchestrated character assassination mission" (par 230). I submit that Mogoeng J's analysis in this regard is almost irrefutable (par 231 - 233). I am mindful that the law would protect one's views however "extravagant, exaggerated, or even prejudiced" they might be (parr 81, 156). I submit nonetheless that, *in casu*, the appellants' articles subsequent to the first one amounted to an abuse of the right to freedom of expression. Hence, while may have been expressing an honestly held opinion, their view was malicious due to lies and half truths. This honesty would have been vitiated by this personal attack perpetuated against the respondent. Consequently appellants should not have been protected by the defence of fair comment. McBride was therefore entitled to full protection by the law.

Furthermore, as stated earlier, whether a comment is fair is assessed in terms of the general legal criterion of reasonableness, taking into account the constitutional values and norms setting boundaries for what is protected as "fair" (par 84). I submit that *The Citizen's* main statement does not pass this test of reasonableness, for the same reason stated above, under relevance. Also, already stated above, constitutional values and norms set boundaries for what is protected as "fair comment" (par 84). The next section considers these constitutional values and norms in some detail.

4 Constitutional Values

Three constitutional values are considered in this section, namely, free speech, human dignity and reconciliation and reconstruction or nation building as encapsulated under amnesty. The first two constitutional values are considered together as they are traditionally the two competing values present in the law of defamation (par 140).

4 1 Freedom of Expression versus Human Dignity

The protection of the freedom of expression was the main argument advanced against finding for McBride. It was argued that such an order could muzzle media freedom and free speech in general, and more specifically, in respect of victims of gross human rights violations. By its nature, the law of defamation is about striking the balance between the two often conflicting rights, namely, freedom of expression and right to dignity (par 140). Ngcobo CJ approached the main issue from this perspective. On the one hand, he used *Khumalo v Holomisa* (*supra*) to highlight the importance of freedom of expression and the value of human dignity, on the other (parr 141, 146). After highlighting how freedom of expression is "integral to a democratic society", the Chief Justice went on to state that "without [the freedom of expression], the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled" (par 141). At the same time, the judge also expressed the following view on human dignity (par 146):

> The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual ...

Despite there being no hierarchy of rights, human dignity is all-encompassing and permeates every other right in the Constitution (see parr 147, 148). Unlike in the case of freedom of expression, the South African Constitution regards human dignity "not only [as] a human right that is given constitutional recognition ... but also as a fundamental value upon which the legitimacy of the sovereign state is based ..." (par 143). Therefore, "failure to uphold that value is both a violation of a constitutional right and a threat to a bedrock principle that underpins the legitimacy of the state" (ibid). The words of Ngcobo CJ quoted from *Dawood* (*Dawood and Another v Minister of Home Affairs*; *Shalabi and Another v Minister of Home Affairs*; *Thomas and Another v Minister of Affairs* 2000 (3) SA 936 (CC) at par 35) underscore importance of dignity (par 145). The Chief justice, as stated in this regard: "... The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings" (*ibid*). Elsewhere, Ngcobo CJ referred to freedom of

expression as "a foundational value of our constitutional democracy" (par 170)). Mogoeng J, meanwhile, stressed the need to strike a balance between the exercise of one's freedom of expression, on the one hand, and the dignity of others, on the other. The judge stated: "... freedom of expression is not so much in the vitriol as it is in the clear and logical articulation of one's viewpoint without trumping the intrinsic worth of others ..." (par 223). Consequently, freedom of expression may not be elevated above the constitutional value of human dignity, as did the majority *in casu*. Instead, it should be exercised within the permissible constitutional limits (see Mogoeng J at par 221). Hence, I am in harmony with the view that natural persons, especially victims and their relatives, should be allowed to express themselves without undue restriction of their right to freedom of expression. However, the media in particular, have a responsibility to lead South Africa into reconciliation, instead of taking the country backwards to hatred and revenge (see parr 168 & 210).

4 2 Amnesty

As stated in the introduction, the issues that gave rise to McBride's court action centred on the effect of amnesty on its recipient. The majority in the present judgment did not pronounce much on the role of the amnesty in the law of defamation (see par 79). In contrast, both Ngcobo CJ and Mogoeng J gave much attention to the role of amnesty in the law of defamation, within the South African context. The Chief Justice states the following (par 171):

> Also indispensible to creating and maintaining our constitutional democracy, however, is the reconciliation and reconstruction process this nation embarked upon with the establishment of the Truth and Reconciliation Commission (TRC). Reconciliation and reconstruction are the twin pillars on which our transition from a deeply divided past to a future founded on the recognition of universal human rights, democracy, and peaceful co-existence firmly rest. When the Constitution was adopted, all the provisions relating to amnesty contained in the [interim] Constitution under the heading of 'National Unity and Reconciliation were retained. This underscores the importance of reconciliation and reconstruction to our democracy. The values of reconciliation and reconstruction are constitutionally protected and, to my mind, they are worthy of protection by this Court. Just as freedom of expression does not automatically trump the value of human dignity, the value this country places on reconciliation and reconstruction must enter into the balance when weighing freedom of expression against the value of human dignity, in the context of a defamation claim in which fair comment is pleaded as a defence.

Two points stand out from this passage, namely: "reconciliation and reconstruction" (inherent in amnesty) are constitutional values, and as such they are worthy of legal protection by the courts, including the Constitutional Court. Equally significant are the concluding remarks by Ngcobo CJ that the value South Africa's democracy places on the constitutional value of reconciliation and reconstruction needs to be considered when the court is deciding on the balance between human dignity and freedom of expression (par 171). According to the Chief

Justice, this is an essential requirement when assessing the defence of fair comment where amnesty had been granted by the TRC (par 171). A similar view is shared by Mogoeng J, who asserted that people should be allowed to express themselves, but "without trumping the intrinsic worth of others" (par 223). According to Ngcobo CJ, any reference "to past deeds in respect of conduct for which amnesty has been granted must therefore be made within constitutional limits" (par 269). Doubtless this puts the value of amnesty into perspective. Indeed, where fair comment defence is pleaded against the backdrop of amnesty, freedom of expression has to be balanced against the constitutional value of reconciliation and reconstruction (or nation building), in addition to the value of human dignity. This was echoed by Mogoeng J when he asserted that "[f]reedom of expression is a right to be exercised with due deference to, among others, the pursuit of national unity and reconciliation" (par 233). Accordingly, *in casu,* the court needed to strike this balance to establish if *The Citizen*'s statements were indeed within the said constitutional value of reconciliation and reconstruction, or in pursuit of national unity and reconciliation. This is well illustrated by the approach taken by Mogoeng J. The justice said that liability of *The Citizen* had to be determined, *inter alia*, within the context of the objective of the amnesty process (par 208). Yet, the majority erred in discharging their duty for various reasons that are considered in the final section of this note. Closely related to the issue of amnesty, is the proper interpretation of section 20(10) of the TRC Act. The following section explores this issue.

5 The Reconciliation Act

A proper interpretation of section 20(10) of the TRC Act was also at the centre of the dispute in question. McBride consistently argued that it obliterated his criminal record, with the effect that any reference to his past deeds would be rendered false. This view was upheld by the majority of the SCA judges (SCA par 33). However, this view was vehemently opposed by the appellants. They argued that this would amount to muzzling freedom of expression (CC parr 102 & 60). Were McBride's view to be accepted by the court, it would mean that the appellants would not be able to rely on the defence of fair comment, as their defence would lack a true foundation (see par 155). The meaning of this section has been repeatedly canvassed by both courts (see par 49). In order to understand the section within its context, section 20(7) and (10) are set out below:

> (7)(a) No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence ...
>
> (10) Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or

> records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public.

The expressions "deemed to be expunged" and "the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place …", in section 20(10), must be understood in the light of section 20(7) of the TRC Act. Section 20(7) exonerates the recipient of amnesty from criminal and civil liability in respect of an act for which amnesty was granted. I concur with Cameron J that this section was never intended "to undo the past to a limitless degree" and that "past factual events cannot be undone" (par 52). However, within the context of the epilogue found in the Constitution, section 20(10) deals with future accountability. Within this context the subsection means that anyone who successful applied for amnesty would not be held accountable in respect of the actions for which they obtained amnesty (Buthelezi 2010 *De Jure* 179 182). As Mogoeng J correctly puts it, "amnesty (as evident from s 20(10)) was intended to enable all South Africans to make a new beginning" (par 215). It is thus submitted that when applied to the law of defamation (and the defence of fair comment), section 20(10) should be understood to mean amnesty renders past acts irrelevant, such that the defendant may no longer rely on fair comment to escape liability for defamation. In other words, amnesty should be regarded a retroactive justification of the conduct of the recipient of amnesty. To that end, any person in McBride's position would no longer be regarded as a criminal by virtue of amnesty, as held by the SCA (par 33). However, contrary to the SCA findings, that is not to say that amnesty granting renders reference to past acts as false (par 33). Such a view was correctly rejected by the majority in the present case (par 60). Instead, I submit, amnesty should be regarded as rendering the defence of fair comment unsustainable for lack of relevance, as opposed to lack of true foundational basis. This view is preferable to the one advanced by McBride and upheld by the majority in the SCA. Alternatively, amnesty should impact on the question of reasonableness, such that it is would be unreasonable to continue holding the recipient of amnesty accountable, as statements in *The Citizen* did.

Also, I generally concur with Cameron J's assessment of the benefits that accrue to a person as a result of being the recipient of amnesty. This includes the view that "[e]xpungement entitles the grantee of amnesty to full civic status" (par 64). However, I respectfully disagree with the Justice Cameron's criticism of the SCA's appraisal of the protection sought by McBride in courts (par 66 CC; par 91 SCA). In my opinion, the SCA was correct in its view on the effect of amnesty obtained in terms of the TRC Act. This view is found in the following words of Cameron J (par 66):

> In understanding the implications of Mr McBride's argument, it is significant that the Supreme Court of Appeal held that the intention of the Act was that perpetrators' offences could no longer "be held against them", and that Mr

> McBride could no longer be "branded a criminal". On this approach, the object of the statute was to enable perpetrators to "rid themselves of the stigma and moral opprobrium of their deeds", so that "branding" became impermissible, with the result that Mr McBride would no longer be "obliged to continue wearing the mantle of a criminal or murderer".

I submit that this is not merely a literal interpretation of section 20(10) of the Reconciliation Act, but that it is a proper understanding of the effect of amnesty. A literal view would be one that regards amnesty as having the effect of obliterating the act from historical record, such that any reference to the acts committed are false. *In casu*, what McBride was seeking was protection or affirmation of his dignity, as guaranteed under the Constitution. To use Cameron J's own assessment, McBride was asking for the court to affirm his dignity as a South African citizen, whose "full civil status" has been guaranteed by amnesty (par 64). This is in harmony with the SCA's assessment, albeit incorrectly reaching a conclusion that amnesty renders reference to one's past false. Disturbingly, the Constitutional Court denied the affirmation of McBride's dignity. Paradoxically, Cameron J asserted that "[his] opinion [was] not the issue" (par 102). In my view, the judge's opinion was indeed the issue. Ironically, when "stripping McBride of his dignity", Cameron J stated that it did not mean that "Mr McBride's conviction for murder can indefinitely be flung in his face" (par 79). The pressing question is: when would this reference to his conviction stop, if the Constitutional Court, being the custodian of our constitutional values, could not give McBride protection? The justice went on to suggest that defamation law would protect him through the condition that "the issue should be a matter of public interest, before any defamatory allegations may be accorded legal protection" (par 79). I respectfully disagree with Cameron J when he seems to suggest that McBride's benefit should be limited to his appointment as a police chief (par 63), and that he is therefore not entitled to the protection of his human dignity. After all, McBride's situation was unique in that he was not in need of amnesty, as he had already been out of prison for some five years when he had applied for amnesty. In my opinion, what Cameron J did was to wash his hands off the fundamental right to human dignity, as did the ancient Roman governor, Pontius Pilate, when he handed Jesus over to the mob to be impaled, despite pronouncing him innocent (Matthew 27:24-31). I submit that reconciliation and nation building is a matter of public interest, which was violated when McBride was branded as a "murderer and a criminal", despite amnesty. Granted, in an attempt to assert his human dignity, McBride relied heavily on the erroneous findings of the SCA. However, it is significant that he did raise malice (or abuse of a right by) on the part of *The Citizen*.

6 Conclusion

Clearly, amnesty does not render the commission of past acts false (par 96, 166). However amnesty is a constitutional value that should be considered, where it is relevant, for the purposes of fair comment defence (par 171). Also, s 20 of the Reconciliation Act does not mean that

events that occurred prior to the constitutional era are obliterated from historical records. Nevertheless, the final decision of the Constitutional Court is jurisprudentially inappropriate and, in my opinion, it is unconstitutional. Firstly, it elevates freedom of expression above anything else, even the value that the Constitution places on human dignity and individual self-worth, especially for those whose dignity was trumped in the past (see par 233). Secondly, it allows for vengeance to be perpetuated by the media against those they hate - for whatever reason. It takes the country backwards, as the court did not properly apply its mind to other constitutional values, especially the value of reconciliation and reconstruction. How this could have been done is well illustrated by Mogoeng J and to some extent by Ngcobo CJ. Instead, the majority allowed themselves to be sidetracked by the linguistics of s20 of the TRC Act, and by the judgment in *Du Toit* (*supra*), rather than focussing on the values of nation building, (see parr 34, 56 - 60). Granted, McBride was partly to blame for the linguistic error, as he did not vigorously argue his case on the basis that *The Citizen*'s statements were not protected by fair comment. The Respondent attempted to defend the erroneous interpretation of the SCA that amnesty rendered them false. In my opinion, as his main argument before the CC, McBride's should have vigorously challenged the Appellants' statements as a malicious abuse of its right to freedom of expression. In an alternative approach, McBride could have challenged the relevance and/or reasonableness of raking his past by virtue of the primary objective of the constitutional value of amnesty, which sought to ensure a new beginning for its recipients. It was also an error to determine the main issue on the basis of *Du Toit* (*supra*), instead of delving deeply enough into the case of *AZAPO* (*supra*), as did Mogoeng J. Had they done so, they would not have missed the two-fold objective of amnesty, namely reconciliation and reconstruction and not truth-telling, as correctly concluded Ngcobo CJ and Mogoeng J. Also, the main issue did not rest on whether the defence is truthfully founded, but on the fairness of the statements, with due regard to: (1) the honesty or genuineness of the opinion; (2) the relevance of the opinion; or (3) absence of malice. Therefore, in my view, the seven judges of the Constitutional Court erred regarding the main issue. Save for Ngcobo CJ and Khampepe J (to some extent), Mogoeng J's analysis of the law, the issues and the conclusion are preferable as jurisprudentially sound and factually reasonable.

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