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A Reflection on the Interpretation Germane to an "Act or Omission" or "Course of Conduct or Continued Practice" in terms of the 2008 Companies Act: A Critical Analysis of *Singh v The CIPC*

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Abstract

In the case of Singh v The Companies and Intellectual Property Commission *[2019] ZASCA 69, the Supreme Court of Appeal's interpretation of the provisions regulating whether "course of conduct" or "continued practice" (which was unlawful, and could prescribe), gave direction. The court also made a ruling regarding the functions of the Companies and Intellectual Property Commission (the Commission). This case is significant, because it provides clarity about the interpretation and application of the provisions of section 219(1)(a) and (b) of the 2008 Act relating to the accountability of companies and their directors. The aim of this article is to analyse the findings and the basis upon which the court a quo and the Supreme Court of Appeal came to their conclusions and how the phrases "act or omission", "course of conduct" and "continued practice" should be interpreted and applied in terms of section 219(1). The conclusion is that both the Supreme Court of Appeal and the court a quo erred in the interpretation and application of the provisions of section 219(1). Davis AJA's decision cannot be supported in so far as he ruled that section 219(1)(b) of the 2008 Act was not applicable. It appears that Basson J was correct to rule that section 219(1)(b) was applicable. However, Basson J erred by not initially interpreting the provisions of section 219(1)(a) and rather commencing with section 219(1)(b). Davis AJA, on the other hand, erred when, after establishing that section 219(1)(a) was applicable, did not continue to interpret section 219(1)(b) to address the complaint by Ralston Smith, and determine whether the wrongful/fraudulent entry did infringe upon the rights of Smith.*

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Keywords: Course of conduct; Continuing practice; Company law; Corporate law; Duties of directors; Corporate governance; act or omission.

1 INTRODUCTION

Should an individual or a director of a company continuously persists with unlawful conduct, whether it be a series of mutual illegal acts or ongoing illegal conduct, such conduct will be in contravention of the violations principle.[1] A legal person has the right to litigate in such circumstances. To render such litigation legitimate, the contravening conduct must display a continuous nature. The violations doctrine is applied in various areas of law, for instance, when equitable results are balanced against the rights of parties, comparable to delict and company law.[2]

The Companies Act 71 of 2008 (the 2008 Act) reflects the violations principle in sections 219(1) and 163. The cases selected for this article are confined to those demonstrating the principle that applies when a claim has prescribed, as well as their relevance to *Singh v The Companies and Intellectual Property Commission*.[3] In the latter case, the Supreme Court of Appeal was invited, and subsequently made potent findings on the interpretation of the provisions regulating whether "course of conduct" or "continued practice" was unlawful and could prescribe. The court also made valuable findings regarding the functions of the Companies and Intellectual Property Commission (the Commission). The case is important because it sets the tone for the interpretation and application of the provisions of section 219(1)(*a*) and (*b*) of the 2008 Act as they relate to the accountability of company directors.

Thus, the intention of this article is to analyse the findings and the basis upon which the court *a quo* and the Supreme Court of Appeal came to their determinations with regard to how the phrases "act or omission", "course of conduct" and "continued practice" should be interpreted and applied in practice in the context of the section. It is the author's opinion that both courts appear to have erred on the interpretation and application of the provisions of section 219(1) and will elaborate as follows. Part 2 sets out the facts of the case, part 3 examines the significance of the mandate of the Commission, while part 4 details the arguments on how the words in question must be interpreted *vis-à-vis* the mandate of the Commission. Part 5 presents an analytical view of the decision of the Supreme Court of Appeal with part 6 presenting observations and a conclusion.

2 FACTS OF THE CASE

The appellants launched an application to review and set aside the Commission's decision to accept and investigate a complaint to serve Singh with a summons to appear before the Commission to provide it with information regarding the Lahleni and Finishing Touch companies.[4] The court of first instance dismissed the application. It was against this order that the appellants approached the Supreme Court of Appeal.[5]

In the court *a quo* the facts are similar to those narrated in the appeal court. Therefore, only the facts from the Supreme Court of Appeal will suffice. Ostensibly, between September and November 2012, Smith and other parties had entered into an agreement to have their shares in Lahleni and Finishing Touch transferred to Singh or entities controlled by him. This was subject to various conditions, including a clause that all existing shareholders and directors other than Singh had to resign within thirty days from 3 October 2012.[6] However, a dispute arose as to whether Smith had in fact resigned as a director of both Lahleni and Finishing Touch.[7] The claim of resignation was based on a document dated 2 October 2012, purportedly signed by

1 Lin "Application of the Continuing Violations Doctrine to Environmental Law" 1994 *Ecology LQ* 723. Graham "The Continuing Violations Doctrine" 2007/8 *Gonzaga LR* 271.

2 See for example in *Off-Beat Club v Sanbonani Holiday Spa Shareblock Limited* [2017] ZACC 15 (*Sanbonani*). See other types in Peled "Rethinking the Continuing Violation Doctrine: The Application of Statutes of Limitations to Continuing Tort Claims" 2015 *Ohio Northern University LR* 343.

3 *Singh v The Companies and Intellectual Property Commission* [2019] ZASCA 69 (*Singh*). See appealed from *Singh v Companies and Intellectual Property Commission* [2018] ZAGPPHC 12.

4 *Singh* paras 4 and 10.

5 *Singh* para 5.

6 *Singh* para 6.

7 *Singh* para 7.

Smith, stating that he had consented to his resignation as director of both companies. Smith disputed the contents of this document, claiming that his signature had been fraudulently affixed to the letter of resignation, upon discovery of which, he lodged a complaint with the Commission.[8] Subsequently, Smith filed two complaints with the Commission in terms of section 168 of the 2008 Act, stating that the records of the Commission erroneously omitted his status as director of both Lahleni and Finishing Touch and that his purported resignation had been fraudulently procured. Smith submitted an affidavit and a forensic report confirming that he had not resigned as director and that his signature was a forgery.[9]

3 THE SIGNIFICANCE OF THE COMMISSION'S MANDATE

In *Singh* two issues regarding the mandate of the Commission had to be addressed, namely whether the first respondent, the Commission, had jurisdiction to investigate the third respondent, Ralston Smith's complaint that his removal as director of Lahleni (Pty) Ltd and Finishing Touch (Pty) Ltd, had been effected fraudulently[10] and second, whether it was rational or reasonable for the Commission to entertain a complaint and act on it while, at the same time, the same matter was still pending in another court.

3 1 Jurisdiction of the Commission to Investigate a Matter

Regarding the issue of jurisdiction, the appellants did not phrase their argument to suggest that the Commission could not investigate a matter within its powers and in terms of the mandate conferred on it by the 2008 Act, however, they argued that the Commission could not investigate this particular matter because it had prescribed. In that case, Smith alleged that either the first appellant, Mr Singh, or persons associated with him, fraudulently filed documents with the Commission reflecting that Smith had resigned as a director.[11] After receiving the complaint, the Commission recommended that it should be investigated and Mr Singh was ordered, in his capacity as a director of Lahleni and Finishing Touch, to appear before the Commission to supply certain information about the companies. Singh failed to appear and did not comply with the request for documentation.[12] Consequently, he was subpoenaed in terms of section 220 of the 2008 Act.[13]

Davis AJA correctly concluded that the dispute between the parties was about the accuracy of company records. Thus, the investigation of the complaint was within the jurisdiction of the Commission in its capacity to ensure proper administration and good corporate governance in terms of the 2008 Act,[14] as well as the principles contained in section 195 of the Constitution, 1996.[15] Section 185 of the 2008 Act requires the Commission to be transparent, independent and impartial and to carry out its functions without fear, favour or prejudice. The Commission is mandated to investigate serious complaints,[16] such as the allegations of the fraudulent removal of a director, which is in contravention of the Act. The Commission must also establish and maintain a companies register according to the prescribed requirements.[17] The Commission's decisions must be in line with and/or ensure adherence to proper compliance

8 *Singh* para 7.
9 *Singh* para 9.
10 *Singh* para 1.
11 *Singh* para 1.
12 *Singh* para 2.
13 This was to ensure compliance with s 220 of the 2008 Act which expressly states how documents must be served to another party. The section provides that: "Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person, will have been properly served when it has been either – (a) delivered to that person; or (b) sent by registered mail to that person's last known address."
14 *Singh* para 26; *Gouws N.O. v Chapman Fund Managers (Pty) Ltd* [2020] 1 All SA 428 (GP) para 100 (*Gouws N.O.*)
15 Section 185(2)(*a*), (*b*)(i), (ii), (*c*), (*d*)(i) and (ii) of the 2008 Act. Among others, section 195 of the Constitution, 1996 provides that: (1) Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles – (a) a high standard of professional ethics must be promoted and maintained; (d) services must be provided impartially, fairly, equitably and without bias; (f) public administration must be accountable; (g) transparency must be fostered by providing the public with timely, accessible and accurate information.
16 See s 187(2)(*c*) of the 2008 Act.
17 See s 187(4) of the 2008 Act.

with the administrative provisions of the 2008 Act[18] and the Constitution, 1996. The decisions must encourage efficient, effective and the widest possible enforcement of the Act, and any other legislation listed in Schedule 4.[19] In terms of section 186 of the 2008 Act it must maintain accurate, up-to-date and relevant information concerning foreign and domestic companies. The Commission's role and its functions are important aspects of company law and lead to the more effective management of companies regarding good corporate governance. Once a complaint has been filed in writing, alleging that section 168(1) of the 2008 Act has been infringed, the Commission may initiate an investigation. It may not investigate if the complaint appears to be frivolous or vexatious.[20] If it decides to go ahead, the Commission or Panel may direct an inspector or investigator to attend to the complaint as swiftly as practicable.[21] The Commission may refuse to investigate if the facts of the complaint do not constitute grounds for remedy under the 2008 Act.[22] The Commission's decision must not result in a party suffering harm.[23] Should a party feel aggrieved by the Commission's decision, it may apply for a review,[24] which is what the appellants opted for in *Singh*.

3 2 Was the Commission's Decision to Investigate Rational or Reasonable?

Whether it was rational or reasonable for the Commission to have approved the investigation while a related matter was before another court, Davis AJA, rightly questioned which institution should enjoy primacy of the Commission's powers to investigate a complaint and perform its functions concerning accuracy of company records and private litigation. In response, the acting judge was unequivocal that as the share register is a document in which the world at large has confidence,[25] the Commission's work must enjoy primacy. When interpreting the rules guiding the Commission's work, it must be allowed to fulfil its obligations and mandate because they are in the public interest.[26] In the court *a quo* Basson J held that it would be absurd to suspend the investigative powers of the Commission in exercising its statutory duties merely because an affected party instituted proceedings in other matters relating to the Commission's investigation, regardless of whether the statutory regulator (such as the Commission) is a party to those proceedings. The judge concluded that there was no reason why a statutorily mandated investigation conducted by the Commission cannot run concurrently to proceedings instituted by a party to the investigation process.[27] The ruling of the courts against the applicants in this regard is commended and it suggests that courts must be mindful of parties that institute actions that may impair the Commission's mandate to attend to and police actions committed in contravention of the 2008 Act. Davis AJA found that it was a jurisdictional fact that the Commission was legally entitled and empowered to investigate the complaint in terms of section 169 of the 2008 Act provided it had not prescribed in terms of section 219 of the same Act.[28]

18 *Singh* para 25. Also see s 187(2)(*a*)–(*i*) of the 2008 Act which lists functions of the Commission.
19 See s 186(1)(*b*), (*d*) and (*e*). Section 186(1)(*a*) provides the objectives of the Commission as the efficient and effective registration of – (i) companies, and external companies, in terms of this Act; (ii) other juristic persons, in terms of any applicable legislation referred to in Schedule 4; and (iii) intellectual property rights, in terms of any relevant legislation.
20 In *Gouws N.O.* para 47.4, the Commission issued a certificate of non-investigation of complaint based on these terms.
21 See s 169(1)(*a*), (*b*) and (*c*) of the 2008 Act.
22 *Gouws N.O.* para 5.
23 *Gouws N.O.* para 14.
24 *Gouws N.O.* para 100.
25 *Singh* para 27.
26 *Singh* para 27.
27 *Singh* para 11.
28 *Singh* para 29.

Therefore, neither the decision taken by the Commission nor the act itself to investigate the complaint was irrational or unreasonable. Davis AJA, recognising the purposes of the 2008 Act enshrined in section 7, held that within the Commission's mandate, the crisp issue which the Commission had to pay attention to, was the role that it had to play considering the link between section 7(*b*)(iii) read with section 185(2) of the 2008 Act. Section 7(*b*)(iii) provides for the development of the South African economy by encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation. It is submitted that this statement emphasises the considerable duty placed on the Commission that, in executing its mandate to function and investigate matters related to the proper administration of the 2008 Act, it must be mindful of the impact that its decisions would have on the rights of those against whom complaints are laid and the complainants themselves. In other words, the principle of *audi alteram partem* would have to rule with respect to the rights of both parties, before a decision is taken. This is central to achieving the broader purpose of the 2008 Act, which is to promote good corporate governance and protect investments within the Republic of South Africa. But also, the Commission must balance the rights of those interested in, or with an interest in the company. The case of *Gouws N.O.* illustrates this point when Makhubele J based the infringement of and the harm to the rights of the applicants on the Commission's decision to refuse registration of the company's special resolution of 2010. Thus, to him, the applicants should have opted for a review of the Commission's decision instead of the route they took.[29]

4 WAS THE COMPLAINT TIME-BARRED?

After having established that the Commission had an obligation to investigate a complaint related to the functions and registers of companies, the salient question remained whether the complaint in *Singh* was time-barred.[30]

The appellants contended that in terms of section 219(1)(*a*) of the 2008 Act, the complaint had been lodged more than three years after the alleged act, which was the cause of the complaint, had been committed. Therefore, the complaint should no longer have been investigated because it had prescribed.[31] An affirmative response by the Supreme Court of Appeal would confirm that the Commission lacked jurisdiction to investigate the complaint.[32]

Davis AJA first referred to section 219(1) of the 2008 Act, which provides that a complaint in terms of the 2008 Act may not be initiated by, or made to the Commission or the Panel, more than three years after:

> (a) the act or omission that is the cause of the complaint; or
> (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.[33]

The first part contains two requirements that must be met for an application to constitute a legally valid complaint. First, it must be established whether there was an act or omission that gave rise to the complaint. Then, it must be determined whether three years had elapsed since the act or omission took place. Should that be the case, then section 219(1) prohibits the initiation of a complaint by the Commission or Panel. Second, the section prohibits the registering of a complaint to the Commission or Panel. Part two determines that a complaint may not be initiated by, or made to, the Commission or the Panel, more than three years after the date on which the conduct or practice ceased. Thus, section 219(1) sets out two criteria which must be met to ascertain whether a complaint may be initiated or entertained by the Commission or the Panel: "the period after that act or omission" which would be the subject of the complaint and "the period after which the course of conduct or continuing practice", which would be the subject of a complaint that has ceased.

Therefore, it must be established whether any act or omission took place, whether it was continuous, so as to be interpreted as falling within the categories of course of conduct, or continuing practice, and when it took place.

It should be noted that similar regulatory frameworks are contained in statutes of countries

29 *Gouws N.O.* para 101.
30 *Singh* para 12.
31 *Singh* para 3.
32 *Singh* para 13.
33 Section 219(1)(*a*) and (*b*) of the 2008 Act.

around the world. For example, section 7 of the UK Human Rights Act 1998 (UK Act) provides the victim of an unlawful act with the right to approach a court.[34] Section 7(5)(*a*) and (*b*) of that Act provides that the application must be brought before the end of:

> the period of one year beginning with the date on which the act complained of took place, or such longer period as the court or tribunal considers equitable having regard to all the circumstances, subject to any rule imposing a stricter time limit in relation to the procedure in question.[35]

Under the UK Act, it must first be established whether an act took place, but contrary to the 2008 Act, it would have to be established whether the claim was brought before the end of a one-year period that would start with the date on which the act took place.[36] Thus, the questions to be asked would be, whether the act was committed by a regulatory body, whether it was unlawful and when it took place?[37]

4 1 Decision of the Court *A Quo*

In the court *a quo* Basson J dismissed the application. He viewed the complaint as based on a "course of conduct or continuing practice" within the meaning of section 219(1)(*b*) of the 2008 Act.[38] Responding to the question/argument presented by the applicants, the judge held that the application was based on paragraph 219(1)(*b*) because the Commission had an obligation in terms of section 187(4) of the 2008 Act, not only to establish, but also to maintain the companies register in the prescribed manner. This meant that the "continued accuracy" of the companies' register was and is the Commission's responsibility as part of its prerogative to keep the register up to date. Should the Commission discover that the companies register was not accurate and/or reflects a fraudulent entry, the Commission has a "continuing responsibility" to correct that entry irrespective of whether it is discovered after the three-year period has lapsed. If the record reflects a fraudulent and/or an inaccurate entry and it has not been corrected, the records maintained by the Commission could not be deemed accurate.[39]

4 2 Decision of the Supreme Court of Appeal

In the Supreme Court, counsel for the appellants maintained the same argument as in the court *a quo*.[40] They also went so far as to state that the records of the company, which continued to reflect that Smith was not a director, was an omission constituting a continuous practice. Thus, counsel submitted that an incorrect insertion into the records of a company amounted to a single act, thereby suggesting that this single act should not be interpreted by the court as continuous. Thus, according to counsel for the appellants, the words "continuing practice" were inapplicable in this case.[41] Davis AJA, in analysing the argument presented by the appellant's counsel, disagreed with the line of interpretation presented to the court. He referred to the words "continued practice" as were explained in the *dictum* of Wallis AJ in *Makate v Vodacom Ltd*.[42] As to whether a "continuing practice" which was wrong could prescribe, Wallis AJ stated the test as follows:

> In the case of a continuing wrong there can be no question of prescription even though the wrong arises from a single act long in the past. The reason, which may appear somewhat artificial, but which is well established, is said to be that while the original wrongful act may have occurred at a past time the wrong itself continues for so long as it is not abated.[43]

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34 Also see *O'Connor v Bar Standards Board* [2017] UKSC 78 para 14 (*O'Connor*), on appeal from [2016] EWCA Civ 775.
35 *O'Connor* para 14.
36 *O'Connor* para 14.
37 In other countries, like the United States of America, the legislative framework which limits a person's right to make a claim is termed as Statutes of Limitations. See Peled *Ohio Northern University LR* 343. In South Africa such statutes can be related to the Prescription Act 68 of 1969 even though some statutes provide separate limitations to that provided in the Prescription Act.
38 *Singh* para 15.
39 *Singh* para 15.
40 *Singh* para 15.
41 *Singh* para 16.
42 *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) para 192 (*Makate*).
43 *Makate* para 192. Also see other cases which accept the description of a continuing wrong as one which still is

Having this test in mind, Davis AJA was of the opinion that if the arguments submitted were to be given effect to, their meaning was that even if the Commission were to discover a fraudulent entry some three years later after the fraud had been perpetuated, then, on that basis, the Commission would be powerless to effect a change.[44] Notwithstanding the fact that Davis AJA set out the interpretative meaning to be ascribed to the words "continuing practice", he did not agree that a proper interpretation of section 219(1)(*b*) of the 2008 Act was a matter that the court had to address and must be resolved on the basis of Basson J's decision in the court *a quo*. To the contrary, Davis AJA held that it seemed unnecessary to decide the issue on the basis of a "continuing practice", as section 219(1)(*a*) was more applicable than section 219(1)(*b*) in which the phrases "course of conduct" or "continuing practice" are scribed.[45] Davis AJA held that section 219(1)(*a*) of the 2008 Act refers to "an act or an omission"[46] either of which was applicable in the case. On how "act or omission" must be construed, Davis AJA agreed with the court *a quo*, that the Commission had an obligation to maintain an accurate register of companies. This obligation was not frozen in time as was argued by the appellants' counsel. If it were, the Commission would be compelled to work knowingly with inaccurate information, even in situations where it became aware that a record was tainted by fraudulent activity. Keeping the above-mentioned test in mind, it is quite obvious that a fraudulent act or omission cannot and must not be condoned because it may have occurred in the past, as it would have remained relevant, especially if it had continued unabated.

However, according to Davis AJA, the responsibility to correct company records should not be placed solely on the Commission. According to the acting judge, the Commission is enjoined to maintain accurate records and effect the necessary corrections, the failure of which amounts either to misrepresentation or an omission to correct the false entry,[47] by the company and not by the Commission. The acting judge held that:

> In summary, when s 219(1)(*a*) of the Act employs the words 'the act or omission' the purpose thereof is to impose an obligation not to misrepresent the accuracy of the records or to omit to ensure that they are corrected. Thus, if the records of the company reflect incorrect information, there is an obligation on officers of the company to ensure that the inaccuracy is cured. Thus, the failure to ensure that the record is maintained accurately constitutes either an act or an omission which falls within the scope of s 219(1)(*a*). Thus, if there is a complaint that the records of a company are inaccurate, that constitutes a complaint that there has been an act or omission which in terms of s 219(1)(*a*) constitutes the cause of the complaint. The failure to cure the inaccuracy or to draw it to the attention of the Commission constitutes a discrete act which is not frozen in time, which was the appellants' argument in respect of prescription.[48]

in the course of being committed and is not to be located wholly in a single past action in *Barnett v Minister of Land Affairs* 2007 (6) SA 131 (SCA) paras 20–21 (*Barnett*); and *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) 330H–331G (*Slomowitz*).

44 *Singh* para 15.

45 *Singh* para 18.

46 In the judgment the phrases appear as "an act for an omission". I think the judge meant to insert "or" in the place of "for" so that the words could read "an act or an omission". Thus, in this article the word "or" is inserted to replace "for".

47 *Singh* para 18.

48 *Singh* para 18.

In effect, the judge stated that "act or omission" constitutes an instruction to company officers that they should not deliberately mislead or cause the Commission to be misled as to who the directors of that company were or as to the information contained in company registers. Where such misrepresentation occurred, it remained the responsibility of those managing the companies to rectify it. An investigation of the complaint would substantiate whether the act or omission was deliberately fraudulent or otherwise. Should the act or omission have been proven fraudulent it would remain so until brought to the attention of the Commission.[49]

5 ANALYSIS OF THE JUDGMENT OF THE SUPREME COURT OF APPEAL

Three salient deductions may be made from Davis AJA's ruling. First, where fraud has been detected or an inaccurate entry made in a company's register, the obligation to rectify such, remains the responsibility of the officers of that company. Second, while the fraudulent act or omission or inaccuracy is not remedied, it does not prescribe and continues unabated. Third, this would be so because the failure to cure or to draw the attention of the Commission to the act, omission or inaccuracy constitutes a discrete act and continues because it is not frozen in time.

Davis AJA's statement regarding whose responsibility it was to maintain the accuracy of the records and register of a company, is not in dispute. In fact, consistent with what was said in *Gihwala v Grancy Property Ltd*[50] by Wallis JA, his approach to the matter was correct. The judge in the latter case held the two directors (Gihwala and Manala) liable and declared them delinquent[51] as they failed to ensure that the share register of their company properly reflected the registered shareholders.[52]

It may be argued that the approach adopted by the courts in the *Singh, Gihwala* and *Makate* cases relating to who must be responsible for the upkeep of a company's register, will promote accountability amongst company directors, as set out in section 7 of the 2008 Act. But it is also obvious that the Commission cannot be in a position to know whether the records of a particular company reflect accuracy. Only the directors or officers of a particular company would have first-hand information regarding the details of its register. Hence, a complaint about the inaccuracy of the records of a company would constitute an act or omission in terms of section 219(1)(*a*) of the 2008 Act. It may, however, be argued that the Commission could only be in a position to know whether the records were inaccurate if it had undertaken due diligence by inspecting the records of all companies, depending on its capacity at the time. Should incapacity be argued, it must be established whether it could have been the result of

49 The comments made by Davis AJA seem to be fortified by the wording of the provisions of s221 of the 2008 Act. Section 221 refers to the "proof of facts". Section 221(1) provides that in any proceedings in terms of this Act, if it is proved that a false statement, entry or record or false information appears in or on a book, document, plan, drawing or computer storage medium, the person who kept that item must be presumed to have made the statement, entry, record or information, unless the contrary is proved. This statement supports what Davis AJA held that directors of a company must take the responsibility to ensure that the records of a register of that company is accurate as they are the persons who would be in a better position to know what the books of that company reflects as the persons who would have scribed such entries, and not the Commission. Further, s 221(2) provides that: "a statement, entry or record, or information, in or on any book, document, plan, drawing or computer storage medium is admissible in evidence as an admission of the facts in or on it by the person who appears to have made, entered, recorded or stored it unless it is proved that that person did not make, enter, record or store it." This section complements s 221(1) in that that register in which it appears that directors of that company made an entry shall be admissible in evidence as proof that the directors of that company made the entry unless the directors prove otherwise. From these it would be reasonable to make an inference that if Smith's signature and name were submitted to the Commission on the basis that he had resigned, then the person who submitted that entry and kept it in the company's books and failed to correct such to the Commission, can be said that that person wanted the world to believe that the fraudulent entry was correctly made even though that was not the case.

50 *Gihwala v Grancy Property Ltd* [2016] ZASCA 35 (*Gihwala*).

51 *Gihwala* paras 134, 135–136 and 137.

52 In a later case in *The Cape Law Society v Gihwala* [2019] ZAWCHC 1; [2019] 2 All SA 84 (WCC) para 99, Sher J summed up what the wrongful conduct of the directors were likened to. Sher J likened the misconduct of the directors in that case to a "serious flaw in character and a fundamental lack of integrity". A material aggravating feature would be where a person persists with an unconscionable lie knowing it to be so. That persistency with the lie would reflect on the gross dishonesty of that person. Yet, if one is to conduct the business of another, honesty and integrity are fundamental as qualities for a person. On the importance of honesty and integrity see *The Cape Law Society v Gihwala* para 99; *General Council of the Bar of SA v Geach* 2013 (2) SA 52 (SCA) para 87. Certainly, such an instance would be relevant in a case such as *Singh* where fraud has been alleged and the director in question is found liable.

its own doing, or financial constraints beyond its control.

It is submitted that the first deduction made at the beginning of this part, is that Davis AJA's decision seems consistent with section 219(1)(*a*), whilst the second and the third deductions are consistent with section 219(1)(*b*). On the basis of the second and third deductions, Davis AJA's decision cannot be supported in so far as he ruled that section 219(1)(*b*) of the 2008 Act was not applicable, as Basson J had decided in the court *a quo*. It appears that Basson J was correct to rule that section 219(1)(*b*) was applicable. On the one hand, Basson J erred by not commencing the interpretation with section 219(1)(*a*). On the other, Davis AJA erred where, after establishing that section 219(1)(*a*) was applicable, he did not continue with the interpretation of section 219(1)(*b*), so as to address the complaint by Smith, and to determine whether the wrongful/fraudulent entry complained of, continued to infringe upon the rights of Smith. Thus, it is the author's opinion that both the Supreme Court of Appeal and the court *a quo* erred with respect to the interpretation and application of both provisions of section 219(1). The cases discussed below support this view. In fact, one may submit that the second deduction corresponds to the question posed earlier, namely: was there an act or omission, whose continuous character could be interpreted in the context of a "course of conduct" or "continuing practice", and when did the act or omission cease? If the act or omission would not be frozen in time but would continue unabated as long as the officers of that company have not cured it or brought it to the attention of the Commission, then the fraudulent act or omission could be interpreted as being within the range of a "course of conduct" or "continuing practice" which had not ceased. The words "course" and "continuing" suggest a persisted or an unabated period or continuing operation of something.[53] Thus, if the act or omission complained of had stopped after three years, then the investigation of the act or omission could not have been initiated by the Commission or Panel, but if made within three years, it would have passed legal muster.

The second and third deductions made from Davis AJA's decision appear congruent with what the court said in *Makate*, as was cited earlier. Wallis AJ said[54] that in the case of a "continuing wrong" there can be no question of prescription. This would be so despite the fact that the wrong could have arisen from a single act in the distant past. The reason, as Davis AJA confirmed, which may appear somewhat artificial, but well established, is that "*while the original wrongful act may have occurred in a time past the wrong itself continues for so long as it was not abated.*"[55] It would seem that the reason why the legislature phrased the words in question as "course of conduct" or "continuing practice", was in anticipation of a situation where the act or omission would continue to be injurious, and thus, in the process, the same act or omission would continue to contravene the provisions of the 2008 Act. It would therefore make sense to empower the Commission to investigate and correct a wrong at any such time as the Commission became aware of the fraudulent act, omission or wrong.

Principles and the test to be observed in cases like *Singh* are trite, especially where the complaint concerned the prescription of debts. However, the salient factor to be considered is that Smith, in addition to the complaint lodged, challenged the fact that his right as a director in the companies had been fraudulently arrogated without his knowledge. Hence, the arrogation had a bearing upon the constitutional rights of Smith as a legal person. Thus, the *Makate* case demonstrates an approach to interpretation of statutory provisions that resonates with the interpretation that had to be addressed by the court *a quo* and the Supreme Court in *Singh*. However, both courts did not seem to have taken this route. They simply interpreted the provisions without properly locating the right which Smith sought to protect. The courts failed to find that by being stripped of that right, Smith would not be in a legal position to exercise it to participate in the affairs of the companies by way of voting. In *Makate v Vodacom Ltd*[56] the Constitutional Court had to determine two issues. One was whether the applicant's claim had prescribed.[57] The Constitutional Court, before delving into the interpretation of the provisions in question, first clarified the approach that courts were required to adopt under the new

53 *StockCo Ltd v Gibson* [2012] NZCA 330; (2012) 11 NZ CLC 98–010 para 51. For an extensive discussion of the context in which the term is normally used see in Bidie "The Nature and Extent of the Obligation Imposed on the Board of Directors of a Company in Respect of the Solvency and Liquidity Test Under Section 4 of the Companies Act 71 of 2008" 2019 *Journal of Corporate and Commercial Law & Practice* 59.

54 *Makate* para 192.

55 *Singh* para 53, citing *Barnett* paras 20–21.

56 *Makate* para 192.

57 *Makate* paras 31–32.

Constitutional order when the Bill of Rights had been infringed. It reasoned that if the sections under consideration in *Makate* were to be proven to limit the right of the applicant's access to court, then their interpretation had to correspond with section 39(2) of the Constitution, 1996,[58] as the right to access to court was a basic Constitutional right. Jafta J held that if the provision being interpreted implicates or affects rights in terms of the Bill of Rights, then the obligation in section 39(2) will automatically be activated and need not be argued in court.[59] A court would, however, be duty-bound to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question.[60] Since the implementation of the 1996 Constitution, every court is bound to interpret legislation in terms of the Constitution.[61] Section 39(2) of the Constitution prescribes a mandatory constitutional canon of statutory interpretation.[62] Section 39(2) fashions into South African law a new and mandatory rule of interpretation.[63] Thus, it is submitted that courts in the lower divisions would do justice to the rights of claimants if they were to adopt this route without being constantly reminded by the appellate court.

Nevertheless, one of the relevant cases to the issue which arose in *Singh* is *Todi v MEC for the Provincial Government of North-West: Health and Another*.[64] In this case the plaintiff instituted action six years after the incident had occurred. Hendricks J's ruling whether that matter had prescribed, set the principles/test, which has become well-recognised in the context of prescription, namely that of a continuous wrong. In accordance with this concept, there is a distinction between a single, completed wrongful act, with or without continuing injurious effects, for instance, a blow against the head once, and a wrong being committed continuously. While the former gives rise to a single debt, a continuous wrong results in a series of debts arising from moment to moment, as long as the wrongful conduct persists.[65] In *Slomowitz v Vereeniging Town Council* the court accepted the description of a continuous wrong as one which was still in the process of being committed, as opposed to one having ceased. Further, the court also accepted that the wrongful conduct of the defendants, relied upon by the government, was to be classified as a continuous wrong, as opposed to a single wrongful act. On the contrary, the defendants mainly relied on the decision in *Radebe v Government of the Republic of South Africa*.[66] However, the court did not agree with their association of the facts in *Slomowitz* with those in *Radebe*, as the facts were distinguishable. What was claimed in *Radebe* was the setting aside of an alleged wrong, which was an expropriation of land by the government and the consequent transfer of immovable property. Ruling in the context of a continuous act, the court held that a dispossession of ownership, based on a single act of expropriation, did not constitute a continuous wrong. Besides, since the single wrongful act relied upon, had occurred more than three years ago, the claim had prescribed. The tone adopted by the court regarding this point, suggested that had the wrongful act not been a single act which wholly happened in the past, it would have accepted the argument that the wrongful act was a continuous wrong. In *Slomowitz* the government's claim was not for the setting aside of a single act of deprivation of possession which happened wholly in the past, but effectively for an order terminating wrongful conduct which was still ongoing, depriving it of the possession of its property.

In the recent case of *Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Limited*[67] the Constitutional Court had to decide whether the applicants' claim in terms of section 252 of the Companies Act 61 of 1973 had prescribed. The applicants averred that their claim had not prescribed on two grounds: first, because the claim for relief was for the articles of association to be compliant with the law. The relief sought could not be construed as a debt for purposes of the Prescription Act, as such was incapable of prescribing under the 1973 Act; second, the

58 *Makate* para 32.
59 *Makate* para 90.
60 *Makate* paras 88.
61 *Makate* para 87; *Investigative Directorate; Serious Economic Offences v Hyundai Motor Distributions (Pty) Ltd In re: Hyundai Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) para 21.
62 *Makate* para 87; *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC) para 43.
63 In *Fraser*, the role of s 39(2) was explained. *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC) para 43 (*Fraser*).
64 *Todi v MEC for the Provincial Government of North-West: Health* [2012] ZANWHC 42 (*Todi*).
65 *Todi* para 7; *Barnett* para 20. *Slomowitz* 330H–331G; *Mbuyisa v Minister of Police, Transkei* 1995 (2) SA 362 (Tk); and *Unilever Bestfoods Robertsons (Pty) Ltd v Soomar* 2007 (2) SA 347 (SCA) para 15.
66 *Radebe v Government of the Republic of South Africa* 1995 (3) SA 787 (N) 803D–804G.
67 *Sanbonani.*

relief sought constituted a continuing wrong and therefore was incapable of prescribing.[68] Mhlantla J, delivering the majority judgment, refused to address the second relief sought on the basis that his ruling in the first relief sought was not a debt.[69]

Froneman J, for the minority judgment, differed with the ruling of the majority on whether the claim constituted debt and held that the claim was indeed a debt and according to him, the appeal would have succeeded.[70] His view was that the majority judgment should have recognised claims made by the appellants as debts in the form of an obligation owed to them by the company in question.[71] The assertions made by the appellants were that the articles of association of the company:

1. did not set out the rights of shareholders as was required by section 65(2) of the Companies Act, but instead left it to the discretion of the developer;
2. did not define the number of shares in each block as it was required in terms of the Share Block Control Act, but left it in the hands of the developer; and
3. are void for vagueness because Shareblock could not compel the developer to define the shares which would form part of share blocks and what rights would accrue thereto.[72]

Thus, the claim was for the amendment of certain clauses in the articles of association and for the Registrar of Companies to take note and register the articles of Shareblock in their amended form. This was the context in which the respondents applied for prescription under the Prescription Act.[73] Froneman J phrased the preliminary point he had to address as:

> What does this amount to other than a claim that Shareblock unlawfully registered the articles and that it owes a legal obligation to the wronged shareholders to correct the defect? It is a claim for: something owed or due: something (as, money, goods or service) which one person is under an obligation to pay or render to another; a liability or obligation to pay or render something; the condition of being so obligated, in terms of the dictionary definition of 'debt' approved and adopted in *Makate*.[74]

Froneman J accepted that, and seemingly leaning towards how a single act must be interpreted, as well as Davis AJA's interpretation on how section 219(1)(*a*) of the 2008 Act was to be construed, to the extent that the applicants wanted past wrongs to be invalidated, as the claim had prescribed:[75]

> but the remedying of present and future wrongs may not have prescribed. This is so because it is not only the invalid act that may constitute the wrong, but that act causally related to resultant harm.[76]

It is submitted that the latter part of Froneman J's judgment was how section 219(1)(*a*) and (*b*) of the 2008 Act should be interpreted. It confirms that there must be an act or omission. But to establish liability as a result of that act or omission, the act or omission must be wrongful, which will result, or causally connect it, to the ensuing harm suffered by the other person. Thus, the question Froneman J posed, as it was mentioned in *Todi*, was whether the alleged invalid registration and allocation was:

> a single, completed wrongful act – with or without continuing injurious effects, such as a blow against the head – on the one hand, and a continuous wrong in the course of being committed, on the other. While the former gives rise to a single debt, the approach with regard to a continuous wrong is essentially that it results in a series of debts arising from moment to moment, as long as the wrongful conduct endures.[77]

68 *Sanbonani* para 45.
69 *Sanbonani* paras 48–49 and 54.
70 *Sanbonani* paras 95–97.
71 *Sanbonani* paras 57–97.
72 *Sanbonani* para 85.
73 *Sanbonani* para 86.
74 *Sanbonani* para 87.
75 This submission by Froneman J seems to be consonant with what Lord Lloyd-Jones said in *O'Connor* para 31, that "I would, however, suggest that it may, in certain circumstances, be necessary to guard against reliance on a failure to reverse an out-of-time decision which would have the potential to subvert the limitation scheme of the Act."
76 *Sanbonani* para 91.
77 Sanbonani para 9, citing *Barnett* para 20.

So, Froneman J accepted the formulation by Brand JA in *Barnett*, that the act for it to fall within the purview of being a continuous wrong, it must not be to set aside a single act of deprivation that happened wholly in the past. But the principle must be to seek an order terminating wrongful conduct, as in *Singh*, which was still in the process of depriving a person of his property.[78] Clearly, this principle is consistent with what occurred in *Singh* and what was required by Smith against both Singh and the companies. In the case of *O'Connor v Bar Standards Board* the Supreme Court had to decide on an allegation pertaining to section 7(5)(*a*) of the UK Act. One of the issues was whether the disciplinary proceedings brought by the Bar Standards Board (BSB) against the appellant were to be considered a series of discrete acts or a single continuing act for the purposes of section 6(1)(*a*) of the UK Act.[79] Arguments submitted by the appellant were that the BSB infringed her rights by prosecuting her on an ongoing basis. The BSB could have halted the prosecution by not submitting evidence at any time, but it argued that the decision to refer the applicant to a disciplinary tribunal, even if indirectly discriminatory, was a once-off act with potentially continuing consequences rather than a continuing violation.[80] It was submitted that the case was one of alleged indirect discrimination and that any subsequent unlawfulness did not automatically continue for as long as the prosecution continued.[81] Lord Lloyd-Jones first accepted that the word "act" included "the failure to act" as section 6(6) of the UK Act defines.[82] Thereafter, His Lordship gave an interpretation of the words "the date on which the act complained of took place" as apt to address a single event.[83] His Lordship held that that provision should not be read narrowly as there could be many situations in which the conduct giving rise to an infringement of a Convention right would not be an instantaneous act, but a course of conduct. Thus, the words of section 7(5)(*a*) should be interpreted to apply to a continuing act of alleged incompatibility.[84] The primary provision in section 7(5)(*a*) must provide an effective and workable rule for situations where the infringement arises from a course of conduct.[85] After considering the opinions of their Lordships in *Somerville v Scottish Ministers*,[86] a case in which no finding was made on the matter, Lord Lloyd-Jones considered that the alleged infringement of Convention rights by the applicant arose from a single continuous course of conduct. This was because, although disciplinary proceedings brought by the BSB necessarily involve a series of steps, the essence of the complaint made was not about each of those steps. The complaint involved the whole process from "the initiation" as well as the "pursuit of the proceedings" to the conclusion of the action. In this way, the process constitutes "the entirety of the course of conduct" as opposed to being interpreted as component steps.[87] As an example, His Lordship mentioned that a prosecution is a single process in which the prosecutor takes many steps. He opined that it could not have been the intention of UK legislature that each step should be an act to which the one-year limitation period would apply.[88] Thus, Lord Lloyd-Jones agreed with Lord Hope in *Somerville* that, in the context of the UK Act, time starts from the date when the continuing act ceased, and not when it had begun.

Lord Lloyd-Jones went on to consider when that continuing act ceased,[89] by first having regard to the nature of the regulatory scheme and the precise features of the conduct

78 *Sanbonani* para 93; *Barnett* para 21.

79 *O'Connor* paras 10 and 22. Section 6(1) of the 1998 Act provides that: "It is unlawful for a public authority to act in a way which is incompatible with a Convention right." In subsection (6) it defines "An act" as the failure to act. Section 6(1)(a) of the ECHR provides that: "In a determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

80 *O'Connor* para 26.

81 *O'Connor* para 26.

82 *O'Connor* para 13.

83 *O'Connor* para 23.

84 *O'Connor* para 23.

85 *O'Connor* para 25.

86 *Somerville v Scottish Ministers* [2007] UKHL 44; [2007] 1 WLR 2734.

87 *O'Connor* para 29.

88 The Lord also stated that, were it otherwise, a prosecution which lasted longer than a year could not be relied on in its entirety as a basis of complaint unless proceedings were commenced before the conclusion of the disciplinary proceedings or relief were granted under s 7(5)*(b)* by a court. In such cases a claimant would be placed in the difficult position of having to bring a human rights claim within one year of the commencement of what might be lengthy proceedings, without knowing the outcome which might be very material to that claim. *O'Connor* para 29.

89 *O'Connor* para 32.

complained of,[90] and concluded that he was led to believe that the actions of the BSB should be regarded as part of a single act.[91] His Lordship allowed the appeal on the consideration that the BSB's "bringing of and pursuing" the disciplinary proceedings was, for purposes of section 7(5)(*a*) of the UK Act, a single continuing act, which continued until an appeal in the Inns Court.[92]

At this juncture, it is worth noting that both Basson J at the court *a quo* and Davis AJA at the SCA did not consider the relevant and applicable standards of judgment. In both courts and based on the facts, no arguments were made inviting the courts to also determine whether or not Smith's alleged fraudulent procurement of his signature displayed an inappropriate standard of conduct by Singh as a director of the companies. It would appear that this was the reason why both the court *a quo* and the SCA did not venture into discussing the standard of judgment required to establish liability. Had the courts been invited to make that determination, the standard of judgment would have had to be based on the standard of conduct expected of company directors under sections 76(3) and (4) of the 2008 Act. In *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd*[93] Rogers J held that those provisions determine the standard of judgment and/or duties expected of directors. Thus, it is submitted that the standard must be whether a director exercised such care as may be reasonably expected of a person carrying out his/her duties as another director having the general knowledge, skill and experience of that director. In line with this submission, directors must ensure that a company's register does not reflect a wrongful entry, or where such an entry exists, take steps to bring it to the attention of the Commission. Also, the standard of conduct does not allow for wrongful entries in the company register by directors or other parties under any circumstances.

6 OBSERVATIONS AND CONCLUSION

From the foregoing analysis of the cases, it would seem that the provisions of section 219(1)(*a*) and (*b*) could be read separately, as confirmed by Davis AJA in *Singh*. However, this would only be possible to the extent that the wrongful act causing harm was a random act constrained by time. But once such a wrongful and harmful act or omission affects the rights of the other party in the present as well as the future, as Froneman J held and as Smith endorsed in *Singh*, then the provisions must be read together.

In the context of this article, an examination of the cases confirms that there must first be an act or omission. Once it has been established that an act or omission had occurred relating to an entry in a company register, it must further be established whether that act or omission was a single act or omission frozen in time, or whether it was an open-ended continuous act or omission. During such examination, it should be recalled that section 219(1)(*a*) and (*b*) do not expressly stipulate an act or omission as unlawful, wrongful or fraudulent. When however, fraud is alleged, as was the case in *Singh*, it must be established whether the act was single or continuous, as was the case in *O'Connor*. In the case of a proven wrongful and harmful single act or omission, liability would only be possible if the claim had not prescribed. However, where the wrongful and harmful act or omission has been proved to be single and continuous, then the period of continuation would have to be taken into account. Once this has been established, then Singh would be held accountable for having allowed a particular wrongful and harmful act or omission to persist even though that director knew or ought to have known that it was fraudulent or wrong. In this regard, the principles established in both *Gihwala* cases referred to earlier, would be authoritative.

Thus, the conclusion reached, is that a wrongful and harmful act or omission which has been fraudulently procured and which continuously infringes upon the rights of another, as was alleged in *Singh,* does not prescribe as long as the infringement persists. As a matter of principle, in an instance where a company director causes deliberate harm, that director's injurious conduct does not become exonerated through prescription. Because equity and fairness must be taken into account under the 2008 Act, the conduct of such director would not be sustainable in law. On the other hand, an interpretation suggesting that prescription must be withheld in such a situation would be indicative of the intention of the legislature to

90 *O'Connor* para 34.

91 This the Lord did after cumulatively considering the features of the process followed when a disciplinary hearing has been set before the Tribunal. *O'Connor* paras 35–36.

92 *O'Connor* para 39.

93 *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* 2014 (5) SA 179 (WCC) paras 76–80 (*Visser*).

hold company directors accountable for their improper and fraudulent conduct, and would strengthen efforts undertaken to improve corporate governance.

On the basis of the preceding analysis it is reiterated that the decision of Davis AJA cannot be supported, as he erred in concluding that only the provisions of section 219(1)(*a*) applied to the facts in *Singh*, and not those of section 219(1)(*b*) as well. On the same basis Basson J's decision in the court *a quo* was erroneous when he omitted to consider and apply section 219(1)(*a*). It is evident that the decisions of both Basson J and Davis AJA in *Singh* are at variance with how the judgments referred to in this article, reflect the relevant statutory provisions in a situation where a single and continuously wrongful and harmful act or omission manifests. Contrary to the position taken by Davis AJA in *Singh*, the surveyed case law is not at odds with whether an act of the type in *Singh* constitutes continuous conduct and how it must be interpreted and assessed. Collectively, they affirm that where, as was alleged in *Singh*, a director wrongfully and wilfully made a fraudulent entry in a company's register, that director's conduct would remain wrongful and fraudulent until the wrongful and harmful act or omission has been corrected. Thus, cases such as those examined above confirm what was said in *NK obo ZK v MEC for Health, Gauteng*,[94] that adherence [by courts] to the principles underlying consistency, predictability and reliability when interpreting statutory provisions, intrinsically strengthens the rule of law.

94 *NK obo ZK v MEC for Health, Gauteng* [2018] ZASCA 13 para 13.