Speculum Juris

Nelson R Mandela
School of Law
University of Fort Hare

Faculty of Law
Rhodes University

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ARTICLES

NOTES AND COMMENTS

How Fragile is Constitutional Democracy in South Africa? Assessing (Aspects of) the Fourteenth Amendment Debate/ Debacle – Part 2: Suspension of the Commencement of Legislation and the Constitutional Court as Apex Court

Lourens du Plessis*
Professor, Department of Public Law, University of Stellenbosch

1. INTRODUCTORY RECAPITULATION

This is the second and last part in a series of two articles assessing the possible impact of the proposed Constitution Fourteenth Amendment Bill on constitutional democracy in South Africa. The proposed amendments are being reconsidered at the moment and will probably not be reintroduced in their original form. However, considered in their original form they provide a helpful point of contact for considering a bigger question, posed in a non-triumphalist vein, namely: *"How fragile is constitutional democracy in South Africa*?"

The present series deals with this question, referring to the three most controversial amendments and assessing, on a holistic (or contextual) and purposive (or teleological) reading of the constitutional text,[1] their possible legal effect(s). The amendments are:

(A) the insertion in the Constitution of two subsecs (165(6) and (7)) to demarcate and distinguish the judicial and administrative functions of courts, and to assign responsibility for these functions to the Chief Justice and to the Minister of Justice and Constitutional Development respectively ("Amendment A");

(B) an insertion precluding any court from hearing an application for or making an order effecting the suspension of the commencement of an Act of Parliament or a provincial Act ("Amendment B");

(C) an upward adaptation of the jurisdiction of the Constitutional Court to make it South Africa's highest or "apex" court *when the interests of justice so require* ("Amendment C").

Some conceivable implications of Amendment A (in the context of constitutional guarantees of the horizontal separation of powers or *trias politica*) were considered

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* Part 1 of this article, entitled "How Fragile is Constitutional Democracy in South Africa? Assessing (Aspects of) the Fourteenth Amendment Debate/Debacle – Part 1: Constitutional Guarantees of the Separation of Powers and the Independence of the Judiciary in South Africa" appeared in 2007 *Speculum Juris* 193.

1 That is, the Constitution of the Republic of South Africa, 1996.

in Part 1 of the series,[2] and it now remains to look at possible implications of Amendments B and C in this second and last article. Some general conclusions, pertaining to (potential effects of) all three amendments, will also be drawn.

2. AMENDMENT B: SUSPENDING THE COMMENCEMENT OF ACTS

The effect of the insertion of the proposed s 172(3) can best be assayed with reference to the place it will take in s 172 as a whole. It will therefore be helpful to quote the section with the proposed amendment (in italics) in its entirety:

> **"172 Powers of courts in constitutional matters**
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> (1) When deciding a constitutional matter within its power, a court –
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including-
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
>
> (2) (a) The Supreme Court of Appeal, *the* High Court *of South Africa* or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
>
> (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
>
> (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
>
> (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.
>
> (3) *Despite any other provision of this Constitution, no court may hear a matter dealing with the suspension of, or make an order suspending, the commencement of an Act of Parliament or a provincial Act*."

Section 172(1)(a) enjoins, in a rather activist vein, a court to strike down "law or conduct" inconsistent with the Constitution: "a court . . . *must* . . .". Paragraph (b) thereupon makes generic provision for "any order that is just and equitable". Possible overkills consequent upon a court's exercise of its potent paragraph (a) powers can thus be remedied, and two species of remedial orders are mentioned in paragraph (b), namely orders limiting the retrospective effect of a declaration of invalidity (subparagraph (i)) and orders suspending a declaration of invalidity for any period and on any conditions "to allow the competent authority to correct the defect" (subparagraph (ii)). Subparagraphs (i) and (ii), however, do not detract from the generality of "*any* order that is just and equitable" and the Constitutional Court has thus, for example, on the strength of the generic provision in s 172(1)(b), developed a remedial strategy of reading words

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2 Du Plessis 2007 *Speculum Juris* 193.

into an impugned statutory provision in order to render it constitutional and avoid its invalidation.[3]

With the exception of two sections pertaining to abstract review[4] (which will be discussed below) there is no provision in the Constitution that seems to authorise, with some degree of explicitness, any court with jurisdiction in constitutional matters to make an order suspending the commencement of original or primary[5] (parliamentary and provincial) legislation. The generic remedial provision in s 172(1)(b) could, however, be read as conferring the authority to make such an order. In the course of (what may be called) the *United Democratic Movement* ("*UDM*") saga, the Constitutional Court had ample opportunity to consider the feasibility of such a reading, or of a finding, on any other ground, that a court with constitutional jurisdiction may order suspension or postponement of the commencement of an original Act. (The *UDM* saga, it may be recalled, originated from a constitutional challenge to legislation (including two constitutional amendments) allowing any member of Parliament or a provincial legislature to renounce, during certain specific periods, membership of the party under whose banner (s)he had been elected and then join another party without losing her/his seat in the legislature concerned. In the course of this saga four cases found their way to the Constitutional Court.[6])

In *United Democratic Movement v President of the RSA (2)*,[7] the Constitutional Court intimated hesitance to come up with a conclusive answer to the question "when, if ever, a High Court may make an order suspending the coming into operation of a constitutional amendment or an Act of Parliament". Describing it as a "constitutional issue of substance" the Constitutional Court thought that:

> "The question raised is a particularly sensitive one in the light of the doctrine of the separation of powers. The legislative authority of the national sphere of government is vested in Parliament in terms of s 43 of the Constitution but the suspension of the coming into operation of a piece of legislation has the effect of defeating the will of the elected legislature and hampering its ability to exercise the legislative authority conferred upon it by the Constitution."[8]

The inconclusively answered question raises the spectre of *counter-majoritarianism* brought on by an unelected judiciary's power to thwart the legislative (and executive) will of popularly elected (and accountable) representatives. It is therefore too glib to assert, as the *GCB* does, that the proposed s 172(3) exclusion of courts' power to suspend the commencement of original

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3 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 (CC), 2000 2 SA 1 (CC) para 67; *S v Manamela* 2000 5 BCLR 491 (CC), 2000 3 SA 1 (CC) paras 52–59.

4 Ss 80(3) and 122(3).

5 As opposed to delegated or secondary legislation; for the difference, see Du Plessis *Re-Interpretation of Statutes* (2002) 37–58.

6 *United Democratic Movement v President of the RSA (1)* 2002 11 BCLR 1179 (CC), 2003 1 SA 488 (CC); *United Democratic Movement v President of the RSA (2)* 2002 11 BCLR 1213 (CC), 2003 1 SA 495 (CC); *President of the RSA v United Democratic Movement* 2002 11 BCLR 1164 (CC), 2003 1 SA 472 (CC) and *African National Congress v United Democratic Movement* 2003 1 BCLR 1 (CC).

7 2002 11 BCLR 1213 (CC), 2003 1 SA 495 (CC) para 7.

8 *United Democratic Movement v President of the RSA and Others (2)* para 7.

legislation "is a very substantial departure from the principle that a party that has demonstrated a right to the satisfaction of a court is entitled to relief consequent upon that right".[9] Such an assertion, first, demonstrates a lack of understanding of (if not a naivety about) political realities and complexities involved in law-making and, secondly, it begs the question. As will (further) appear from the discussion that follows, it has not been established – and the Constitutional Court in particular has not definitely pronounced – that it can be possible to have a demonstrable right to a court order suspending the commencement of original legislation.

The intensely dilemmatic nature of the counter-majoritarian difficulty is aptly depicted – but the difficulty itself left unresolved – by the Constitutional Court (speaking as "the Court") in *President of the RSA v United Democratic Movement*[10] (another case in the *UDM* saga):

> "One of the founding values in s 1 of the Constitution is a multi-party system of democratic government to ensure accountability, responsiveness and openness. The legislature has a very special role to play in such a democracy – it is the law-maker consisting of the duly elected representatives of all of the people. With due regard to that role and mandate, it is drastic and far-reaching for any court, directly or indirectly, to suspend the commencement or operation of an Act of Parliament and especially one amending the Constitution, which is the supreme law. On the other hand, the Constitution as the supreme law is binding on all branches of government and no less on the legislature and the executive. The Constitution requires the courts to ensure that all branches of government act within the law. The three branches of government are indeed partners in upholding the supremacy of the Constitution and the rule of law."

The court verbalises its eventual conclusion as follows:

> "Having regard to the importance of the legislature in a democracy and the deference to which it is entitled from the other branches of government, it would not be in the interests of justice for a court to interfere with its will unless it is absolutely necessary to avoid likely irreparable harm and then only in the least intrusive manner possible with due regard to the interests of others who might be affected by the impugned legislation. Where the legislation amends the Constitution and has thus achieved the special support required by the Constitution, courts should be all the more astute not to thwart the will of the legislature save in extreme cases."[11]

The conviction articulated in this latter *dictum* probably prompted the court's finding that, in the particular instance, it was unnecessary to decide whether a High Court may grant interim relief which in effect suspends the operation of national or provincial legislation. A High Court, nonetheless,

> "[h]as jurisdiction to grant interim relief designed to maintain the *status quo* or to prevent a violation of a constitutional right where legislation that is alleged to be unconstitutional in itself, or through action it is reasonably feared might cause irreparable harm of a serious nature".[12]

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9 GCB *Submissions to the Portfolio Committee on Justice and Constitutional Development: The Constitution Fourteenth Amendment Bill 2005 and the Superior Courts Bill 2003* (2006) http://www.legalbrief.co.za/filemgmt_data/files/GCB%20justice%20bills%20submissions.pdf 45.

10 2002 11 BCLR 1164 (CC), 2003 1 SA 472 (CC) para 25.

11 *President of the RSA v United Democratic Movement* para 31.

12 *Ibid*.

In yet another judgment in the *UDM* saga, *United Democratic Movement v President of the RSA (2)*,[13] the Constitutional Court demonstrated how the type of order envisaged in the last *dictum* above could be crafted. The court's *modus operandi* in doing so stands in stark contrast to the (over-)eagerness of, first, a single judge and, thereupon, a full bench of the Cape High Court, who ordered suspension of the commencement of allegedly unconstitutional amendments to the Constitution *without giving reasons*.[14] Through its actions the High Court (as court *a quo*) not only deprived the Constitutional Court (as court of appeal) of the benefit of its views on the constitutionality of the suspended legislation, but also undervalued the peculiar character of legislative authority and displayed deficient judicial deference to both *trias politica* and the exercise of *legislative policy choice*. Separation of powers doubtlessly entails independence of the judiciary, but the other side of the coin is that it also calls for judicial action (and self-restraint) mindful of the exigencies (and the peculiarity of the power) of law-making. A court need not (and dare not) *at any stage* let constitutionally defective legislation go by default. However, when the court takes the far-reaching step to bar the commencement of legislation enacted by an elected, deliberative legislative body, it owes participants in the democratic process the consideration of a judgment *with reasons* supporting its finding, first, that the legislation in question is unconstitutional and, secondly, that suspension of the commencement of such legislation is the remedy best warranted in the circumstances. The much celebrated "moral authority"[15] that lends credibility, legitimacy and strength to courts' findings may never be taken for granted, but has to be earned, time and again, through judicial behaviour actively honouring rudiments of constitutional democracy such as *trias politica* and appropriate judicial recognition of (the exercise of) legislative policy preference.

From the discussion so far, it appears that there are no conclusive arguments for or against holding that, under the Constitution as it presently stands, it is competent for a court with constitutional jurisdiction to postpone (for whatever reason) the commencement of parliamentary or provincial Acts not yet in operation. Experience during the first 13 years of constitutional democracy in South Africa has taught us that situations in which questions regarding such postponement may come up are few and far between, and up to now these questions have had to be dealt with only in the circumstances of the *UDM* saga. The intended effect of the proposed insertion of s 172(3) probably is to advance legally binding pronouncement on the issue. The *GCB*,[16] however, complains that the proposed amendment's purpose is to pre-empt a decision by the Constitutional Court on the issue of courts' power to suspend the commencement of legislation. This seems to be a somewhat clumsy way of claiming that it would have been preferable for the Constitutional Court (rather than Parliament) to cast the die on

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13 2002 11 BCLR 1213 (CC), 2003 1 SA 495 (CC) para 5.

14 *United Democratic Movement v President of the RSA (2)* para 2; *President of the RSA and Others v United Democratic Movement* paras 9–10.

15 À la *S v Mamabolo (E TV, Business Day and Freedom of Expression Institute intervening)* 2001 7 BCLR 685 (CC), 2001 3 SA 893 (CC) para 16.

16 GCB *Submissions to the Portfolio Committee on Justice and Constitutional Development: The Constitution Fourteenth Amendment Bill 2005 and the Superior Courts Bill 2003* (2006) http://www.legalbrief.co.za/filemgmt_data/files/GCB%20justice%20bills%20submissions.pdf 47.

the issue. I tend to agree with this sentiment: a definite, all-out exclusion of courts' power to suspend the commencement of legislation – though not totally out of place in terms of *trias politica* considerations – forecloses the possibility that, in really exceptional (unforeseen) circumstances, really harmful legislation may be prevented from taking effect. A case-law definition and circumscription of the far-reaching power in question could provide – probably better than a constitutional amendment could do – for the suppleness needed to deal with these rare exceptions. It must be stressed, however, that as a rule in a constitutional democracy courts should (for *trias politica* reasons) have but limited power to suspend the commencement of original or primary legislation, lest they become entangled in legislative processes in manners unbecoming to the judiciary.

The proposed s 172(3), insofar as it excludes with some measure of definiteness the power of *all* courts to suspend the commencement of original legislation, will – if adopted – give rise to an interpretive difficulty occasioned by the fact that ss 80(3) and 122(3) as they presently stand – and will apparently remain even if the Fourteenth Amendment is carried through – confer on the Constitutional Court the authority to order "that all or part of an Act . . . has no force". This can be done in the course of a process of abstract review of parliamentary (s 80) and provincial (s 122) legislation.[17] One third of the members of the National Assembly (and 20% in the case of a provincial legislature) may, after an Act had been adopted by the relevant legislative body and signed by the President (or the provincial premier), apply to the Constitutional Court for an order declaring that all or part of the Act is unconstitutional. This must happen within 30 days after the Act was signed. The Constitutional Court may, in terms of ss 80(3) and 122(3) respectively, order that all or part of an Act, subject to abstract review at the instance of members of the national or a provincial legislature, will have no force until the court has decided the application. The court may make such an order if the interests of justice so require[18] and the application has a reasonable prospect of success.[19] An order by the Constitutional Court that an Act subject to abstract review will have no force until the review application has been decided could amount to an order suspending the commencement of an Act of Parliament or a provincial Act (especially when taking into account that the Act could have been signed by the President/premier any time during a period of 30 days preceding the date on which the application for its review in terms of s 80 or 122 was first brought). Does this mean that ss 80(3) and 122(3) will be overridden by the proposed s 172(3) in instances where the Constitutional Court's order amounts to a suspension of the commencement of an Act subject to abstract review? It is stated in s 172(3), in a seemingly peremptory vein, that

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17 Ss 79(4)(b) and (5) and 121(2)(b) and (3) provide for the abstract review of parliamentary and provincial Bills by the Constitutional Court, at the instance of the President and provincial premiers respectively. The President alone is charged with the responsibility to raise concerns about the constitutionality – and no one else may therefore apply for judicial review – of a Bill at this stage of law-making (*Doctors for Life v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) 1418F–1423B). Since the two sections mentioned above envisage the review of *Bills* and not of *Acts*, that which the court is authorised to review will have no force (yet) and this obviates the need for a court order that the instrument in question has no force.

18 Ss 80(3)(a) 122(3)(a).

19 Ss 80(3)(b) 122(3)(b).

despite any other provision of the Constitution *no court* may make an order *suspending the commencement of* an Act of Parliament or a provincial Act. Literally understood, s 172(3) may therefore override ss 80(3) and 122(3), at least in certain circumstances. However, there are sound and convincing contextual and purposive arguments to exclude such an "obvious" reading. The Constitutional Court has on occasion emphasised that abstract review and "normal" constitutional review as envisaged in, for instance, s 172 are fundamentally different:

> "The power of abstract judicial review is exceptional and something quite distinct from the power, having found an enactment inconsistent with the Constitution, to strike it down and to provide appropriate consequential relief relating to its effect."[20]

Viewed against this background, it could be argued that what is sauce for the goose of s 172 review is not also sauce for the gander of abstract review, and that the proposed s 172(3) prohibition would therefore apply only in the context of the former (and not also in the context of the decidedly dissimilar latter). The words "despite any other provision of this Constitution" in the proposed s 172(3) will then have to be read narrowly as referring only to provisions relevant in the context of ordinary (s 172) constitutional review.

However, it could also be argued that there is a genus of "constitutional review" of which ordinary (s 172) review and abstract (ss 80 and 122) review are species. On this assumption, "any other provision" in s 172(3) could be read to include provisions (such as ss 80(3) and 122(3)) providing for abstract review, thereby opening the door to *lex posterior priori derogat* reasoning.[21] Section 172(3), if adopted, will be a provision enacted later in time than ss 80(3) and 122(3). In the event of an inconsistency between the former and the latter, *lex posterior* reasoning will bear out a conclusion that the former derogates from the latter to the extent of their inconsistency. But, looking more closely, this will also be an instance where a later (sweepingly) general provision will be inconsistent with an earlier (narrowly crafted) specific provision *in pari materia* – a textbook opportunity for reliance on the maxim *generalia specialibus non derogant*.[22] This maxim prescribes preference for the preservation of the earlier provision in its specificity, safeguarding it against engulfment by the later provision in its generality.

The Constitutional Court's guidelines for dealing with (apparently) conflicting provisions in the Constitution is reminiscent of *lex posterior* and *generalia specialibus* reasoning, but with the crucial factor of a time ranking out of the picture.[23] First, it is said, an attempt must be made reasonably to reconcile apparently conflicting provisions in the Constitution, and to construe them in a manner giving full effect to each.[24] Secondly, where two provisions in the

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20 *President of the RSA v United Democratic Movement* para 26 and cf also para 27.

21 Du Plessis *Re-Interpretation of Statutes* 73–74.

22 *Ibid*.

23 Cf in general *Doctors for Life v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC), 2006 6 SA 416 (CC) 1420E–1421B.

24 *Matatiele Municipality v President of the Republic of South Africa* 2006 5 BCLR 622 (CC) para 51. In *S v Rens* 1996 2 BCLR 155 (CC) 156F–G the Constitutional Court held that "[i]t was not to be assumed that provisions in the same constitution are contradictory" and

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Constitution, one general and the other specific, deal with the same subject, the general provision must ordinarily yield to the specific provision.[25]

> "The specific provision must be construed as limiting the scope of the application of the more general provision. Therefore, if a general provision is capable of more than one interpretation and one of the interpretations results in that provision applying to a special field which is dealt with by a special provision, in the absence of clear language to the contrary, the special provision must prevail should there be a conflict."[26]

Thus, applying either *lex posterior* and *generalia specialibus* reasoning or the Constitutional Court's guidelines for reconciling apparently conflicting constitutional provisions *in pari materia*, the scope of s 172(3) as general provision will have to be limited to eventualities not provided for under ss 80(3) and 122(3) as specific provisions. It follows then that the inclusion of the proposed s 172(3) in the Constitution could foreclose, in the context of ordinary constitutional review, an order by any court having the effect of suspending the commencement of an Act, but in the context of abstract review it will remain competent for the Constitutional Court to order that all or part of an Act has no force until the application for abstract review has been decided – even if this would amount to ordering suspension of the commencement of the Act. This conclusion is arrived at through *interpretation*, and more particularly *contextual* and *purposive* interpretation, invoking interpretive maxims that deal with the implied or tacit amendment of legislation and/or the Constitutional Court's interpretive guidelines for dealing with apparently conflicting constitutional provisions *in pari materia*.

An explicit exclusion of the s 80(3) and s 122(3) situations from the ambit of the proposed s 172(3) would of course have rendered the somewhat intricate interpretive reasoning described above redundant. It was probably sloppy and thoughtless drafting that resulted in the omission of any such an explicit exclusion from the proposed Fourteenth Amendment.

Lastly, the proposed s 172(3) raised for some commentators the spectre of a judiciary stripped significantly of its powers of constitutional review.[27] From the foregoing discussion it has hopefully appeared that this fear is exaggerated. Section 172(3) provides that no court has the power to hear an application for or order the suspension of the commencement of original legislation. It is uncertain whether (even without the Fourteenth Amendment) any South African court can at present indeed be said to have this power, and the constitutional jurisprudence on the matter is indecisive. At any rate, it is certain that the moment the President[28] or a Premier[29] signs a Bill it becomes *an Act*, *fully susceptible to constitutional review* (and potential invalidation) even prior to its commencement.[30]

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that "[t]he two provisions ought, if possible, to be construed in such a way as to harmonise with one another".

25 *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996* 1996 11 BCLR 1419, 1996 4 SA 1098 (CC) para 28.

26 *Doctors for Life v Speaker of the National Assembly* 1421A–B.

27 De Bruin "Staat wil howe stroop van sê oor Wette" *Die Burger* 09-01-2006.

28 Constitution s 81.

29 S 123.

30 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 BCLR 569 (CC), 2004 6 SA 505 (CC) paras 90–91; *Doctors for Life v Speaker of the National Assembly* 1423C–1424F.

The power of review is guaranteed and entrusted to an independent judiciary in the definite language of s 172(1). All things considered, s 172(3) – with weaknesses and all – has but marginal potential to impact (positively or negatively) on the independence of the courts, and ultimately on the well-being of constitutional democracy in South Africa.

3. AMENDMENT C: THE CONSTITUTIONAL COURT AS APEX COURT

It will be instructive briefly to depict the impact that the Fourteenth Amendment could have on the geography of ss 167 and 168 of the Constitution as they presently stand, in order to afford the Constitutional Court the status of (an) apex court. In verbatim quotations below proposed deletions from the provisions as they presently stand will be struck through and proposed insertions will be italicised.

> **"167 Constitutional Court**
> . . .
> (3) The Constitutional Court –
> (a) is the highest court *of the Republic; and*
> (b) may decide –
> (i) *constitutional matters* –
> (aa) *on appeal*;
> (bb) *directly, in accordance with subsection (6); or*
> (cc) *referred to it as contemplated in section 172(2)(c) or in terms of an Act of Parliament; and*
> (ii) *any other matter, if the Constitutional Court grants leave to appeal that matter on the grounds that the interests of justice require that the matter be decided by the Constitutional Court.*

Subsection (4) proceeds to enumerate the matters in which the Constitutional Court has exclusive jurisdiction so as

> "to preserve the comity between the judicial branch of government, on the one hand, and the legislative and executive branches of government, on the other, by ensuring that only the highest Court in constitutional matters intrudes into the domains of the principal legislative and executive organs of State",[31]

whereupon subsec (5) provides as follows:

> "(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, High Court *of South Africa*, or a court of similar status, before that order has any force."

Subsection (6) then follows, providing for (the possibility of) direct access and direct appeal to the Constitutional Court, while subsec (7) explains that a constitutional matter "includes any issue involving the interpretation, protection or enforcement of the Constitution". Subsection (8) concludes s 167 with the assertion that it is the Constitutional Court who makes the final decision whether a matter is a constitutional matter.

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31 *President of the Republic of South Africa v South African Rugby Football Union* 1999 2 BCLR 175 (CC), 1999 2 SA 14 (CC) para 29.

According to s 168(3), the Supreme Court of Appeal is the final court of appeal in any matter where the Constitutional Court has refused leave to appeal. The SCA may furthermore decide appeals in any matter arising from the High Court of South Africa or a court of a similar status, and may decide only appeals, issues connected with appeals; and any other matter that may be referred to it in circumstances defined by an Act of Parliament.

Questions concerning an ideal court structure (and the most desirable hierarchy of courts) in South Africa could give rise to protracted debate, and some South African jurists commenting on the Fourteenth Amendment availed themselves of the opportunity to deal with such questions at some length.[32] However, the manner and tone in which proposed adjustments to the hierarchy of South African courts (only at the very highest level) is brought up in the Fourteenth Amendment makes it doubtful that the proposed amendments as such could have a decided (positive or negative) impact on the well-being of constitutional democracy in South Africa. The proposed amendments seem to be of a more (interim) strategic rather than a (permanent) structural nature, and any court implementing them, especially the Constitutional Court, would do well to proceed with circumspection and self-restraint. The statement – in the amended version of s 167(3)(a) – that the Constitutional Court is the highest court, pertains (according to the amended s 167(3)(b)(i)) to constitutional matters, as has been the case since the inception of the court, and to "any other matter" (on appeal) but then with the significant qualification that leave to appeal in such a matter may only be granted if the interests of justice require that the matter be decided by the Constitutional Court. The Constitutional Court's impact (and to some extent also status) as apex court will thus depend on how (broadly or narrowly) it construes the concept "interest of justice" (s 167(3)(b)(ii)).

Presently the Constitutional Court can, as a court of final instance, entertain appeals only in constitutional matters, but experience has shown,[33] to an increasing extent, that the distinction between "constitutional' and "other" matters has become very artificial and, indeed, blurred.

4. CONCLUDING OBSERVATIONS

Measured consideration of the possible effects of Amendments A to C bear out the fair conclusion that the hullabaloo they occasioned in segments of the legal profession and among (opposition) politicians, can by no stretch of the imagination be held up as an indication of their intensity as threat to the rudiments of constitutional democracy in South Africa. Read purposively and in the context of the Constitution as a whole, their impact on the functional separation of judicial and executive authority could be but minimal, and they are furthermore not intrinsically capable of thwarting the independence of the judiciary to the extent that many expert legal commentators – including some respected emeritus judges[34] – have feared and have vociferously proclaimed.

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32 Cf Lewis "Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa" 2005 *SAJHR* 509–524.

33 In cases such as *Phoebus Apollo Aviation v Minister of Safety and Security* 2003 1 BCLR 14 (CC), 2003 2 SA 34 (CC), and, more recently, *K v Minister of Safety and Security* 2005 9 BCLR 835 (CC), 2005 6 SA 419 (CC). Cf the discussion of Lewis 2005 *SAJHR* 513–519.

34 For information in this regard, see General Council of the Bar of South Africa *Submissions to the Portfolio Committee on Justice and Constitutional Development: The Constitution*

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- Amendment A's most tangible, practical effect will probably be to determine the eventual choice of a model of court governance decisively, ruling out – as viable options – both decidedly (i) judicial self-governance and (ii) executive hetero-governance, and paving the way for some form of (iii) decidedly integrated (judicial and executive) co-governance which, at any rate and also under the Constitution as it presently stands, seems to be a prudent first (and feasible) choice.
- Amendment B which, as practical experience has shown, pertains to cases that rarely occur, could unduly delay the undoing of palpably – or *prima facie*[35] – unconstitutional national and provincial Bills as well as Acts that are not in operation yet, but the moment such Bills and Acts commence as full-fledged (and fully operative) original legislation, the proposed Amendment will no longer be able to impede (let alone prevent) their invalidation if they are found to be unconstitutional. Acts of Parliament and of the provincial legislatures at any rate become "legislation", fully subject to constitutional review, the moment the President or Premiers have assented to and signed them.
- Amendment C leaves it to the Constitutional Court to flesh out the practical meaning and effects of the prudently open-ended "interests of justice" criterion to determine in which instances the said forum will entertain particular (kinds of) cases functioning as an apex court.

Interested parties with passable legal reading skills can associate with the foregoing conclusions simply because they are not the upshot of any extravagant or untoward construction of the proposed amendments (envisaged to be) embedded in the Constitution as a whole. These selfsame conclusions, however, also query the need for most of the proposed amendments, and especially A and B. An eventual reorganisation and restructuring of "the judicial authority of the Republic",[36] could be achieved with much more modest amendments to the Constitution. Examples of such amendments are:

– Amendment C which, restrictively construed, could function as a sensible update (and adaptation) of the present jurisdiction of the Constitutional Court as highest court *only* in "constitutional matters";[37]
– the amendments proposed to convert the various high courts into a single High Court of South Africa, and
– smaller amendments in connection with (certain) judicial appointments.[38]

For the rest, a generally acceptable and constitutionally tenable restructuring and rationalisation of the courts and court structures (and the administration of justice in general) can be achieved through ordinary legislation.

Fourteenth Amendment Bill 2005 and the Superior Courts Bill 2003 (2006) 3 (or General Council of the Bar of South Africa "Abbreviated submissions to the Portfolio Committee on Justice and Constitutional Development on behalf of the General Council of the Bar of South Africa" August 2006 *Advocate* 25).

35 To use the more guarded adjectival qualification of the General Council of the Bar of South Africa *Submissions to the Portfolio Committee on Justice and Constitutional Development: The Constitution Fourteenth Amendment Bill 2005 and the Superior Courts Bill 2003* (2006) 45.

36 To use the specific terminology of s 165(1) of the Constitution.

37 S 167(2)(a) of the Constitution.

38 This possibility was not considered in the preceding discussion – hence the tentative vein in which I raise the possibility of (smaller) constitutional amendments in this regard.

In the "debacle-like" debate on the Fourteenth Amendment, with the judiciary, the legal profession, some academics and the official opposition in Parliament, on the one hand, pitched against the Ministry of Justice as "government incarnate", on the other, there has not been much room for (and in some instances no tolerance of) level-headed commentary and deliberation on a by and large poorly devised Constitution Fourteenth Amendment Bill. Amendments A and B are particularly ill-conceived, not only because provisions of this sort are not necessary in the South African Constitution, but also because they hold the dubious distinction of being ineffectual irrespective of whether they were well-intended or emerged from a nefarious yearning to clip judicial wings.

All the debating (or is it "debacle-ing"?) stakeholders just mentioned, do have a duty to stand up and be counted when the independence – and by that very token integrity – of the judiciary stands to be compromised, and senior jurists in South Africa (including judges) indeed traded their characteristic composure and self-restraint for aberrant vociferousness when the Fourteenth Amendment hell broke loose. This brings me to a second and final set of conclusions about the judiciary's participation in the debate on the desirability of the proposed amendments.

It is problematic for judicial officers to participate in public debates on proposed constitutional amendments whose full force and impact will ultimately depend on how they, "the courts", will construe them (should the occasion arise). However, judges who participate in such debates and maintain that ("clearly") open-ended amending provisions, in the context of the justiciable constitution in which they might eventually occur, will inevitably occasion an interpretive result most (likely) at odds with the good that the Constitution seeks to promote, and most (likely) conducive to the mischief it endeavours to suppress, are not only unduly alarmist, but they also mistrust their own interpretive aptitude (and attitude) – and their ability to act, in their official capacity, as vigilant guardians of constitutional democracy.

Public spectacles involving "legal issues" and requiring judicial action in a most immediate way seem to be on the increase, and this emphasises the need for an exposure of the judiciary and its performance to public curiosity (and scrutiny). Judicial officers can no longer play their political cards close to their chest. But then, in showing their political hand (as in the Fourteenth Amendment debate), how close may judicial officers come to revealing their political loyalties as defined in ideological or even party political terms?

Like with many other issues, judicial officers also walk a rather tight rope in this regard. On the one hand, the political opposition (and political minorities) should have adequate reason freely to entrust the upholding and enforcement of their constitutional rights to the courts – no matter how unpopular or counter-majoritarian such a move may seem to be in particular circumstances. On the other hand, the courts may not become the "natural ally" of *just* (or mainly) the opposition, consistently ready to challenge government when political means and mechanisms at the opposition's disposal seem to have left them in the lurch.

In the Fourteenth Amendment debate (so far) judges have relied too little on their (often newly acquired) interpretive skills as decision-making jurists in a constitutional democracy to assess the potential effects of the proposed constitutional amendments, thereby coming awkwardly close to aligning themselves with the official (political) opposition in the production of hot air. In the course

of the *UDM* saga,[39] when a real minority opposition party gallantly challenged constitutional amendments that actually threatened to turn our constitutional democracy into a prostitutional democracy, the official opposition smugly agreed to these amendments (opposed only by the smallest among the opposition parties) and the Constitutional Court put its stamp of constitutional approval on them.[40] There has been a deafening (judicial) silence since on the threat that these amendments posed (and unfortunately still pose) to the peculiar model of proportional representation which we in South Africa have chosen for our particular brand of constitutional democracy, namely *proportional* representation. The unsurprising inference to draw from the comparison of these two situations is that judges – like politicians – are just human. Fortunately, there are many other instances in which our courts – and the Constitutional Court in particular – did far better than in the *UDM* cases. For purposes of the present contribution these have just not held the centre of the stage.

39 See Part 2 of this article above.

40 Cf in this regard the case of the *United Democratic Movement v President of the RSA and Others (1)* 2002 11 BCLR 1179 (CC), 2003 1 SA 488 (CC).

Effective Remedies and Obedience to Court Orders Central to the Rule of Law: An Examination of the Judicial Approach

Wandisile Mandlana*
Candidate Attorney, Bowman Gilfillan Inc

1. INTRODUCTION

The need for effective remedies to protect constitutionally guaranteed rights and enforce constitutional duties has long been recognised in our law. There is no better way to express the importance of remedies in the rights discourse than through the words of Centlivres CJ in *Minister of the Interior & Another v Harris*,[1] where he stated:

> "[T]o call the rights entrenched in the Constitution constitutional guarantees and at the same time to deny to the holders of those rights any remedy in law would be to reduce the safeguards enshrined in s 152 to nothing. There can to my mind be no doubt that the authors of the Constitution intended that those rights should be enforceable by the Courts of law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. *Ubi jus, ibi remedium*."[2]

The above principle was reiterated in a post-1994 case, namely *East London Transitional Local Council v Member of Executive Council of the Province of the Eastern Cape for Health*.[3] In this case the court held that if the rights of the successful litigants cannot be enforced then the process of taking disputes to court for adjudication would be rendered meaningless.[4] More recently, the rationale behind the enforcement of court orders was explained by Patel J in *Hardy Ventures CC v Tshwane Metropolitan Municipality*.[5] In this case, Patel J held:

> "[T]he respondent failed to adhere to the imperatives of good governance and sound administration admonished by the Constitution. If organs of state undermine those principles, then there is an ever-pervading risk of generating inefficiency and unfairness, and consequently lapsing into a bureaucratic culture which is inimical

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* B Juris LLB (Fort Hare) LLM (Natal Pietermaritzburg). Formerly Lecturer in Law, Rhodes University. This is a revised version of a paper presented at the University of Fort Hare Conference on Law and Transformative Justice in Post-Apartheid South Africa held in East London from 4–6 October 2006.

1 1952 4 SA 769 (A). It is important to note that the constitution referred to in the judgment is not the Constitution of the Republic of South Africa, 1996. The importance of referring to this Constitution lies in the fact that it shows that for a very long time South African law has recognised the need for effective remedies.

2 780H–781.

3 2000 4 All SA 443 (Ck).

4 449g (per Jafta J).

5 2004 1 SA 199 (T).

> to the Constitutional ethos. Professionalism, efficiency, fairness, accountability, transparency and accessibility are discrete values of ensuring cost-effective governance and administration. Erratic administration often results in arbitrariness and undermines qualitative administration in a democratic state."[6]

What was central in this judgment is the principle that the state is not above the law and is, as such, obliged to observe court orders. It is clear in the judgment that a failure by the state to observe court orders is a recipe for anarchy.

Simply put, a situation where an aggrieved party – for example, a person whose right to lawful, reasonable and procedurally fair administrative action is infringed – would have no remedy in law to correct this infringement is unimaginable. The advent of constitutional democracy in South Africa has ensured that this absurdity is avoided because the Constitution[7] invests the courts with powers to develop and forge new remedies for the protection of constitutional rights and the enforcement of constitutional duties. Over the past 13 years the judiciary has been developing new and innovative remedies to protect constitutional rights. This is exemplified by a number of judgments which exhibit imaginative judicial decision-making. For example, where the courts find that the traditional once-off intervention will not be an appropriate remedy, the courts have tended to grant some innovative remedies like structural and supervisory orders.[8] Academic legal commentary on our law of remedies, especially these newly-developed remedies, has been appearing in droves.[9] But the recent developments contained in the judgment of Conradie JA in *Jayiya v Member of the Executive Council for Welfare, Eastern Cape*;[10] Nugent JA in *Member of the Executive Council: Welfare v Kate*;[11] and Froneman J in *Magidimisi NO v Premier of Eastern Cape*,[12] necessitates a re-examination of the role of the judiciary in forging new remedies to protect constitutional rights.

In view of the foregoing, the general purpose of this paper is to examine the effect of the *Jayiya* and *Kate* judgments on the quest for effective remedies to protect constitutional rights and to promote an accountable, responsive and transparent public administration. This paper will critically examine what the courts have done in discharging their duty to fashion new remedies. The main

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6 Para 11.

7 Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution).

8 For example, see *Treatment Action Campaign v Minister of Health* 2002 4 BCLR 356 (T) and *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* 2001 2 SA 609 (E).

9 See, eg, Ross "Executive disregard of court orders: Enforcing judgements against the State" 2006 *SALJ* 744; Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic Era* (PhD Thesis, Rhodes University, 2002) 517–539; Okpaluba "Extraordinary remedies for breach of fundamental rights: Recent developments" 2002 *SAPL* 98; Okpaluba "Of 'Forging new tools' and 'Shaping innovative remedies': Unconstitutionality of legislative omissions in the new South Africa" 2001 *Stell LR* 462; Plasket "Protecting the public purse: Appropriate relief and costs order against officials" 2000 *SALJ* 151; and Trengove "Judicial remedies for violations of socio-economic rights" http://www.chr.up.ac.za/centre_projects/socio/esrvol1no4.html#5 (accessed 03-10-2006).

10 2004 2 SA 611 (SCA).

11 2006 4 SA 478 (SCA).

12 2006 JOL 17274 (Ck).

focus will be to examine critically whether the committal of a functionary of an organ of state for failure to do something ordered by the court (contempt of court) is an unjust, inequitable and improper relief. The need to consider this question is justified by judicial uncertainty created by the *Jayiya* judgment. This uncertainty is further exacerbated by the *Kate* judgment, in which Nugent JA merely accepted that what Conradie JA said about contempt of court in *Jayiya* were "tentative statements" and thus required no further attention by the court in *Kate*.[13] Further justification of the need to pursue this topic subsists in the fact that, on 30 August 2007, the Constitutional Court heard an application for confirmation of constitutional invalidity of s 3 of the State Liability Act – which suggests that there is no finality on this subject.[14]

2 CONSTITUTIONAL MANDATE TO FASHION NEW REMEDIES

It is a fundamental principle of our common law that for courts to be effective, their authority must be both recognised and enforceable. The Constitution has codified this common-law principle and has significantly increased the authority of the courts to protect people against injustices. It has done so in a myriad of provisions. For example, s 2 of the Constitution states that the "Constitution is the supreme law of the land and law or conduct inconsistent with it is invalid, and the obligation imposed by it must be fulfilled". This means constitutional compatibility is the only lodestar in the courts' duty to protect human rights.

Moving to the issue of remedies and courts' powers, s 38 of the Constitution provides that whenever a fundamental right has been violated or threatened, the court may grant any *appropriate relief*.[15] The meaning of *appropriate relief* is well articulated in a number of post-1994 judgments. For example, in *Fose v Minister of Safety and Security*,[16] the court held:

> "*Appropriate relief* will in essence be the relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of all-important rights."[17]

In *Hoffmann v South African Airways*,[18] Ngcobo J echoed these sentiments and held:

> "The determination of *appropriate relief*, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second; to deter future violations; third, to make an order that can be complied with; fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and nature of the

13 Para 21.
14 See *Nyathi v Member of the Executive Council for the Department of Health, Gauteng* CCT19/07. Judgment had been reserved and had not been handed down at the time of writing.
15 My emphasis.
16 1997 7 BCLR 851 (CC).
17 862E–F (para 19) per Ackermann J.
18 2000 11 BCLR 1211 (CC).

> infringement will provide guidance to *appropriate relief* in the particular case, therefore, in determining appropriate relief, we must carefully analyse the nature of the constitutional infringement and strike effectively at its source."[19]

In *Naptosa v Minister of Education, Western Cape*,[20] Conradie J (as he then was) held that "appropriate remedy" means a remedy which would settle the rights of the parties in a sufficiently precise manner.[21]

From the above three cases it is very clear that it is impossible to lay down a rule about what could constitute appropriate relief. This is because remedies are value laden and an appropriate relief is context-specific. Simply put, for a remedy to be regarded as appropriate, it must be fair and just in the circumstances of the particular case; it must be suitable to the case in question, vindicate the Constitution and act as a deterrent against further violation of right enshrined in the Bill of Rights.[22] There is no doubt in my mind that committing functionaries of the state for contempt of court meets these criteria. It must, however, be mentioned that honourable Conradie JA doubts that contempt of court may deter state functionaries from further violating human rights.

Another important constitutional provision that has bolstered the courts' powers to protect human rights is s 165 of the Constitution. Section 165 provides that orders issued by courts of law bind all persons, including organs of state. The organs of state are required to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. The importance of this duty was highlighted in *De Lange v Smuts NO*,[23] where the court held:

> "In a constitutional democratic State, which ours now certainly is, and under the rule of law (to the extent that this principle is not entirely subsumed under the concept of the constitutional State) citizens as well as non-citizens are entitled to rely upon the State for the protection and enforcement of their rights. The State therefore assumes the obligation of assisting such persons to enforce their rights, including the enforcement of their civil claims against debtors."[24]

Therefore the state, like any other person, is obliged to respect court orders because a deliberate non-compliance or disobedience of a court order by the state through its functionaries would negatively impact upon the dignity and effectiveness of the courts. Such an undesirable conduct on the part of the state would be a source of anarchy and lead to disorder.

Another important provision in this regard is s 172 of the Constitution, which empowers courts to make any order that is just and equitable.[25] Section 173 of the Constitution states that the Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own processes, and to develop the common law, taking into account the interests of justice. In summary, a court's choice of remedy in any case where a fundamental right has been violated or threatened is determined only by what is just, equitable

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19 1227F–G (para 45).
20 2001 2 SA 112 (C).
21 125I.
22 See *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC) para 38.
23 1998 3 SA 785 (CC).
24 Para 31 per Ackermann J.
25 See s 172(1)(b) of the Constitution.

and appropriate. This constitutional power has been carried over to the Promotion of Administrative Justice Act (PAJA).[26] Section 8 of PAJA allows a court or tribunal to grant "any order that is just and equitable", including a number of remedies that are specifically listed in the section. The consequence of the Constitution's open-ended approach to remedies has been to impose a duty on the courts to fashion new remedies to secure the protection and enforcement of these constitutionally guaranteed rights. In view of this, we proceed to examine what the courts have done to discharge this obligation.

3 NEW REMEDIES: THE MARCH FORWARD

During the last 13 years, the judiciary has been developing new remedies that will effectively deal with the infringement of human rights. As mentioned above, the judiciary's power to develop new remedies is drawn from the Constitution. Through imaginative judicial decision-making a number of relatively new remedies have been developed. However, I will comment only on two of these new remedies, namely (a) supervisory jurisdiction and (b) costs orders and contempt of court. The choice of the two remedies aims to show two ends of the spectrum in the courts' approach to granting remedies. On the one hand, the use of supervisory jurisdiction[27] represents the courts' resolve to expand the horizon of constitutional remedies to protect constitutional rights effectively. On the other hand, the courts' indecisiveness with regard to contempt of court as an appropriate remedy where the state disregards a judgment can be viewed as a failure on the part of the courts to innovate and develop new remedies. In the discussion below an in-depth analysis of the two selected remedies is presented and an attempt is made to recommend an appropriate approach to constitutional remedies.

3 1 Supervisory jurisdiction

As far as traditional remedies were concerned, the court only made an order once and for all. If the order was not complied with, the aggrieved party was able either to execute or to proceed against the defaulting party for contempt. The widespread violation of socio-economic rights has proved more often than not that a single judicial intervention is not always sufficient to put a stop to the violation of rights and to prevent its recurrence in future. Construed in this context, it is obvious why the courts have had to develop supervisory jurisdiction and structural interdict remedies.[28] The courts could not abdicate their responsibility to people's rights simply because the conventional remedies are not suited to prevent a recurrence of violations of human rights. Trengove[29] explains that the supervisory jurisdiction consists of five main features, namely:

- The court issues an order which identifies the violation and defines the reform that has to be brought about in terms of the objectives to be achieved by it. For

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26 3 of 2000.

27 Supervisory jurisdiction is a judge-made remedy aimed at providing effective relief where traditional remedies like interdicts or declaratory orders could not effectively protect the infringed or threatened constitutional right.

28 For a detailed discussion of this remedy and other remedies see Plasket *The Fundamental Right to Just Administrative Action* 523–539.

29 Trengove fn 9 above.

example, in *Treatment Action Campaign v Minister of Health*,[30] the applicants approached the court for orders that would have the effect of forcing the state to expand its limited programme to prevent mother-to-child transmission (MTCT) of HIV/AIDS. Botha J held that the state's failure to make the drug Nevirapine available to pregnant women and new-born children except at 18 pilot sites was an infringement of the right of access to health care. He ordered the respondents, *inter alia*, "to plan an effective comprehensive national programme to prevent or reduce mother-to-child transmission of HIV, including the provision of voluntary counselling and testing, and where appropriate, Nevirapine or other appropriate medicine, and formula milk for feeding, which programme must provide for its progressive implementation to the whole of the Republic, and to implement it in a reasonable manner".[31]

- The court calls upon the responsible organ of state/state functionary to present it with a plan of reform which would put an end to the violation of the right in question.
- The defendant's plan is presented to the court for its scrutiny. The plaintiff and all other interested parties are given an opportunity to comment on the plan and an opportunity to advance alternative suggestions.
- The court finalises the plan of reform in the light of all the submissions made to it.
- The court issues an order directing the defendant to implement the finalised plan. Its order directs the defendant to report back to the court on the implementation of the plan after the period allowed for implementation or, where appropriate, after each of the deadlines set for achievement of the pre-determined milestones. For example, in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government*,[32] Froneman J issued an order that, *inter alia*, directed the Welfare Department to give notice to members of the class to present themselves at times and places specified for purposes of reinstating deserving beneficiaries, to reinstate those who were deserving and to give reasons for refusing to reinstate to unsuccessful members of the class, and required that the Department "report to this Court and to the Legal Resources Centre on 5 April 2002 on the progress it has made with the implementation of this Order".[33] For another example, one could see the *Treatment Action Campaign* case, where Botha J ordered each respondent to file reports, by a specified day, in which they would set out, under oath, what they had done to implement the plan and what further steps would be to taken implement the order, and when each such step would be taken.[34]
- When the matter returns to court, the defendant is called to account for its implementation of the plan. The plaintiffs, the court monitor and all other interested parties are also heard.

In summary, under supervisory jurisdiction the court remains responsible for the ultimate protection of the victims and the enforcement of their constitutional

30 2002 4 BCLR 356 (T).
31 397E–F.
32 2001 2 SA 609 (E).
33 Order dated 20 March 2002.
34 387G.

rights. It is clear that this remedy works well when the organ of state which the order is made against co-operates in its implementation. But what happens if the organ of state does not co-operate? Put differently, are public functionaries amenable to committal for contempt of court? The next section focuses on providing an answer to this question.

3 2 Constitutional damages, court orders and contempt of court

It is disturbing to observe that government departments are increasingly disobeying the rule of law. Disobedience of court orders by state departments is more frustrating, especially if one notes that organs of state are by law required to assist and protect the courts and to ensure their independence, impartiality, dignity, accessibility and effectiveness.[35] Contrary to the popular belief that the recalcitrant organs of state reside only in the Eastern Cape, a thorough perusal of legal literature reveals that this is a country-wide phenomenon.[36] It is this problem that has re-ignited the debate on whether committal of a state functionary for contempt of court is competent following upon the non-payment of a judgment debt.

There is a long line of judicial authority which suggests that committal for contempt is not appropriate in instances of judgments sounding in money, especially where the state is the judgment debtor. This proposition of law appears to be supported by the view that not every court order can be enforced by committal for contempt. Similar views were echoed by Milne J in *Cape Times Ltd v Union Trades Directorates (Pty) Ltd*,[37] where he expressed himself as follows:

> "There are, of course, orders of court the breach of which is not intended to be visited by way of attachment and fine or imprisonment as, for example, the kind of order encountered everyday whereby an unsuccessful litigant is, in the ordinary way, ordered to pay costs of his opponent, in such a case the successful party is left to other modes of execution. Generally speaking, punishment by way of fine or imprisonment for civil contempt of an order of court made in civil proceedings is only imposed where it is inherent in the order made that compliance with it can be enforced only by means of such punishment."[38]

The above view is further supported by Baker J in *BJBS Contractors (Pty) Ltd v Lategan*,[39] where he held:

> "I am satisfied that in our modern common law the courts will not order committal to gaol for contempt of an order to pay an ordinary commercial judgment debt in instalments. Applying this conclusion to the two applications presently before the Court, it becomes clear that, as both are based upon orders to pay commercial debt in instalments, both must fail, the remedy sought being not available to applicants."[40]

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35 S 165(4) of the Constitution.

36 See, eg, *Lombard v Minister van Verdediging* 2001 JOL 8362 (T); *Magadlela v Minister of Home Affairs* 2001 JDR 0019 (Tk); and *Federation of Governing Bodies of South African Schools (Gauteng) v Member of the Executive Council of Education, Province of Gauteng* TPD 22 February 2001 (case no A246/2000, unreported).

37 1956 1 SA 105 (N).

38 120C–E.

39 1975 2 SA 590 (C).

40 599E.

To summarise, our common law has never accepted that an order *ad pecuniam solvendam* may be enforced by means of committal for contempt. The only exception was where the order was for the payment of maintenance. The common-law position above is further supported by the provisions of s 3 of the State Liability Act,[41] which prohibits the issue of process for attachment or execution or like process against state property. It must be pointed out that s 3 of the State Liability Act is in conflict with s 165(5) of the Constitution which provides that an order of the court binds all persons to whom it applies. On the one hand s 165(5) of the Constitution provides that court orders bind all persons and the state alike, while on the other hand, s 3 of State Liability Act prohibits execution or like process against the state. In effect, a successful litigant against the state in money disputes is left with a paper order especially if the state does not comply with the order. This is because the litigant cannot execute against state property, and under the common law committal for contempt is not appropriate in instances of judgments sounding in money. In view of this, there is much doubt about the constitutionality of s 3 of the State Liability Act – a matter currently receiving the attention of the Constitutional Court in *Nyathi v Member of the Executive Council for the Department of Health, Gauteng*.

The argument that committal for contempt is not appropriate in instances of judgments sounding in money, especially where the state is the judgment debtor was tested in *Mjeni v Minister of Health and Welfare, Eastern Cape*.[42] In *Mjeni*, Jafta J held that there is no authority in law not to commit a state functionary for contempt of court, and this includes the situation where the state is the judgment debtor. The common law position that failure to comply with a court order to pay a debt is not contemptuous is based on the view that there are other remedies which are available to the successful litigant, such as attachment and execution against property. But s 3 of the State Liability Act does not allow attachment or execution of state property to satisfy a money judgment. If the court grants a money judgment against the state and the state does not comply with the order, the successful litigant would be left with a hollow judgment.

It is in view of the foregoing that Jafta J in *Mjeni* held that the decisions in *Cape Times* and *BJBS Contractors* are no authority for the proposition that a state functionary cannot be committed for contempt of court where it failed to obey a court order sounding in money. Jafta J's decision was based on the view that none of the aforesaid decisions (*Cape Times* and *BJBS Contractors*) dealt with a situation involving the state as the judgment debtor.[43] He further held that the state is bound to comply with orders of the court and it has a duty to honour them.[44] With regard to the common-law distinction between an order *ad pecuniam solvendam* and an order *ad factum praestandum*, he held that this distinction regarding contempt of court proceedings would not, in his view, make sense in cases where the state is the judgment debtor in the light of provisions of the State Liability Act. As Jafta J put it,

> "it would simply mean that the judgment creditor cannot enforce the judgement in the event of failure to pay whereas his counterpart would be able to do so against

41 20 of 1957.
42 2000 4 SA 446 (Tk).
43 451G.
44 452B.

> judgment debtors who are private persons. Effectively, it would mean those who sue the state run the risk of obtaining hollow and enforceable judgments. The state could just ignore such judgments with complete impunity".[45]

A similar position was also adopted in *East London Transitional Local Council v MEC for Health, Eastern Cape*.[46] What emerges from these two cases is that before a court could dismiss the appropriateness of a particular relief it must consider whether litigants have effective alternative remedies.

Just when we were hoping that the developments in *Mjeni* and *East London Transitional Local Council* would ensure accountability in public administration, and enforcement and maximum protection of human rights, the *Jayiya* judgment came into play and overruled them. In *Jayiya*, the court was asked to determine a question of law, namely whether committal of a state functionary for contempt of court was competent following upon non-payment of a judgment debt.[47] Conradie JA's answer to the question of law before the court was a resounding "no". He held:

> "[T]he State Liability Act outlaws the 'attachment' of the nominal defendant or respondent in proceedings against a government department. There is nothing that any evolution of the common law can do about that. Moreover, the common law must evolve in a principled way. One of the fundamental tenets of the common law is that of legality: it cannot evolve in such a way as to (retrospectively) create a new crime or extend the limits of an existing one. This is what the decisions in the Eastern Cape appear to have done. Contempt of court, even civil contempt of court, is a criminal offence. The way our common law has developed, it can be committed only by deliberately and *mala fide* ignoring orders of Court *ad factum praestandum*; it cannot by judicial extension be made to embrace orders *ad pecuniam solvendam.* Not even the Legislature can make conduct retrospectively punishable. The Constitution forbids it. An accused's right to a fair trial includes, in s 35(3)(l), the right 'not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted'."[48]

In short, Conradie JA found that committal of a state functionary for contempt of court was not competent upon non-payment of judgment debt.[49] With due respect, this finding is flawed in two respects. In the first instance, the court did not incisively probe the question before it. If it had, it would have considered whether committal for contempt of court in the given circumstances was an "appropriate relief",[50] or whether it was a "just and equitable" order.[51] Had it considered these questions, it is my submission that it is likely that it would have come to a different conclusion.

Secondly, the court did not consider the fact that availability of an alternative remedy to the litigant is a relevant factor to consider in determining the appropriateness of a remedy. If it did, it would probably not have declared a contempt

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45 453J–454A.
46 2000 4 All SA 443 (Ck).
47 It is important to note that the court did not only deal with the contempt of court question, it also dealt with other issues which are technical in nature (eg citation of nominal respondents) and discussion of such issues fall outside the scope of this paper.
48 Para 18. References in the quote have been omitted.
49 Para 22.
50 See s 38 of the Constitution.
51 See s 172(1)(b) of the Constitution.

of court order to be inappropriate, because where the state disobeys a money judgment order there is no other alternative remedy available to the litigant.[52]

Simply put, the Supreme Court of Appeal in *Jayiya* failed to innovate in order to protect fundamental rights effectively. The end result would be that courts would be forced to watch helplessly while a dysfunctional and unrepentant administration continues to abuse its powers at the expense of large numbers of poor people.

The *Jayiya* judgment had the potential to downplay the imaginative decision-making in the Eastern Cape division of the High Court, which was aimed at ensuring compliance with court orders by government. Interestingly, it did not discourage the Eastern Cape courts to march forward in their quest for effective remedies. This is evidenced by the recent judgment of Froneman J in *Kate v MEC, Department of Welfare, Eastern Cape*.[53] In this case, the applicant submitted that the unreasonable delay in considering her application had deprived her constitutional right to receive a social grant during that period, and for that delay she sought to be recompensed by an order for damages. She *inter alia* sought an order compelling the respondent to pay her the outstanding amount of her grant when it was approved, and interest on arrears.

In considering the application, the court had to consider the judgment in *Jayiya*, as the respondents relied on this judgment as authority for the proposition that under PAJA they cannot be ordered to back-pay her and pay her interest on arrears. Froneman J found the judgment in *Jayiya* not to be binding authority on the issue whether the applicants were entitled to remedial relief in the form of back-pay and interest, as he observed that Conradie JA came to this conclusion without the benefit of argument and his statements in this regard were thus "brief" and "tentative".[54] He accordingly ordered that the respondent pay the applicant the interest and outstanding social grant which accrued to her. At the centre of his judgment was the finding that:

> "All courts, including the High Court, are enjoined by the Constitution to uphold the rights of all, to ensure compliance with constitutional values, and to do so by granting 'appropriate relief', 'just and equitable orders', Section 172(1) and by developing the common law 'taking into account the interests of justice'."[55]

On appeal, in *MEC for the Department of Welfare, Eastern Cape v Kate*,[56] the only issue that remained before the court was whether Kate was entitled to "constitutional damages", especially the interest that was awarded by the court *a quo*.[57] The applicant's counsel submitted that Kate had delictual remedies that could sufficiently compensate for any loss that was caused to her by the failure of the administration to perform its constitutional duties and that in those

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52 This is because s 3 of the State Liability Act 20 of 1957 shields the state from remedies like attachment and execution and these remedies are available to the plaintiff where the defendant is not the state.

53 2005 1 SA 141 (SE).

54 Para 20.

55 Para 16. References omitted.

56 2006 4 SA 478 (SCA). Note that this paper is confined to the matter which was properly before the court, namely, entitlement to the award of constitutional damages. All other issues that arose and were canvassed in the judgment are outside the scope of this paper.

57 Para 17.

circumstances a remedy of constitutional damages is not required.[58] In this regard, the court held:

> "No doubt, the infusion of constitutional normative values into delictual principles itself plays a role in protecting constitutional rights, albeit indirectly. And, no doubt, delictual principles are capable of being extended to encompass State liability for the breach of constitutional obligations. But the relief that is permitted by s 38 of the Constitution is not a remedy of last resort, to be looked to only when there is no alternative – and indirect – means of asserting and vindicating constitutional rights. While that possibility is a consideration to be borne in mind in determining whether to grant or to withhold a direct s 38 remedy, it is by no means decisive, for there will be cases in which the direct assertion and vindication of constitutional rights are required. Where that is so, the further question is what form of remedy would be appropriate to remedy the breach. In my view, the breach in the present case warrants being vindicated directly, for two reasons in particular. First, I see no reason why a direct breach of a substantive constitutional right (as opposed to merely a deviation from a constitutionally normative standard) should be remedied indirectly. Secondly, the endemic breach of the rights that are now in issue justifies – indeed, it calls out for – the clear assertion of their independent existence."[59]

The court accordingly found that the only appropriate remedy in the circumstances was to award constitutional damages to compensate Kate for the breach of her right.[60] The court had no difficulty to grant constitutional damages, as there was a precedent for this sort of remedy in the Supreme Court of Appeal.[61]

On the question whether committal of a state functionary for contempt of court was competent following non-payment of judgment money debt, Nugent JA refused the invitation by the court *a quo* to consider this issue. His reasoning was that the matter was not material to the case that was before them and felt that to consider the issue would add to the non-binding statements made in *Jayiya* and *Kate* in the court *a quo* and would exacerbate the uncertainty.[62] He nonetheless emphasised that "there ought to be no doubt that a public official who is ordered by a court to do or refrain from doing a particular act and fails to do so is liable to be committed for contempt in accordance with the ordinary rules".[63]

The issue of government departments not obeying court orders also arose in *Magidimisi NO v Premier of Eastern Cape*.[64] In *Magidimisi* the respondents failed in their constitutional and statutory duties to ensure that the province made payment to the applicant and others of the sums the province had been ordered to

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58 Para 26.

59 Para 27.

60 Para 33. Note that the court also considered the suitability and effectiveness of *mandamus* remedy.

61 See *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) para 43, where Harms JA said, "the Courts should not be overawed by practical problems. They should 'attempt to synchronise the real world with the ideal construct of a constitutional world' and they have a duty to mould an order that will provide effective relief to those affected by a constitutional breach". The award of monetary damages for a constitutional breach was endorsed by the Constitutional Court in *President of the Republic of South Africa v Modderklip Boerdery* 2005 5 SA 3 (CC).

62 Para 19.

63 Para 32.

64 2006 JOL 17274 (Ck).

pay by the court. The respondents failed to explain why the applicant and others like him had been deprived in that manner of their right to social assistance. As a result, the applicants sought an order that the respondents take all administrative and other steps necessary to ensure that the provincial government complied with the court orders to the extent that it had not already done so.[65]

It should be noted that at the time the applicants brought their application it was common cause that the province had, in a number of instances, not complied with court orders to pay successful litigants, and as such the applicants sought a further innovative order to deal with this problem. They prayed for an order to the effect that respondents be ordered not only to take all the steps necessary to ensure payment of the sums owing by the province to the applicants, but also to report to the court the manner and extent of their compliance. If they failed to do this the applicants sought leave to approach that court again for further relief.[66] The envisaged relief sought was described by the counsel for the applicants as a "*mandamus* with a wrinkle", and counsel for the respondents called it a structural interdict. Whatever the proper legal pigeonhole may be for this kind of order, it was clear that the applicants would ask for the committal of respondents for contempt of court if they did not comply with the part of the order that the applicants were presently seeking.

The court found the order sought by the applicants appropriate and *inter alia* ordered the respondents to comply with the other orders the court had granted. It also ordered that the applicants be given leave to supplement their notice of motion and founding affidavit within 14 days after the expiry of the period of 21 days referred to in the order, and to enrol the new application on reasonable notice to the respondents, for a further hearing on and determination of such further relief as the applicants might then seek.[67]

Watching the developments in the field, it appears that the threat of committal for contempt caused the respondents to fulfil their constitutional and statutory obligations to comply with court orders made against them. This is because, after the expiry of 21 days, the applicants did not enrol any other application. Simply put, the threat of committal for contempt of court caused the respondents to act with due diligence and to comply with the court orders. This goes to show that contempt of court may be an appropriate remedy under certain circumstances, because it is a flexible remedy. It does not always lead to a prison term sentence or a fine. The respondent (in civil contempt) may just be called to show cause why she should not be held to be in contempt of the previous order.[68] If her explanation is plausible, such a person would not be committed to prison. In short, contempt of court proceedings are not arbitrary; the respondent will be given an opportunity to be heard and to defend itself.

Beside the fact that committal for contempt of court may be an appropriate relief or a just and equitable order, contempt of court is important in its own right. For example, as Lord Woolf stated in *M v Home Office*,[69] when finding an

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65 Para 19.
66 Para 29.
67 *Ibid.*
68 See *Eveleth v Minister of Home Affairs and Another* 2004 11 BCLR 1223 (T).
69 1993 3 All ER 537 (HL).

organ of state to be in contempt of court, the primary objective of such an exercise is to vindicate the rule of law. Similar sentiments were echoed in a recent South African case,[70] where De Vos J stated that the purpose of civil contempt proceedings is two-fold: first, "it is the imposition of a penalty in order to vindicate the honour of the court consequent upon the disregard of its order; and, secondly, it is meant to compel compliance".[71] The court in *Victoria Park Ratepayers' Association v Greyvenouw CC*[72] adopted a similar approach. Here, Plasket AJ (as he then was) held that contempt of court serves an important purpose, namely, to protect the rights of everyone to a fair trial, to maintain public confidence in the judicial arm of government, and to uphold the integrity of orders of courts.[73] Therefore, before one can dismiss contempt of court as an appropriate relief or a just and equitable order, one must pay regard to the purpose and object of contempt of court.

4 CONCLUSION

From the foregoing it is clear that the rule of law is *inter alia* premised on private citizens and the state alike obeying court orders. Fortunately, the Constitution contains a number of provisions aimed at ensuring that court orders are complied with.[74] As I have shown above, some courts have not been shy to tap into this arsenal of powers. By using these powers, some courts have ensured that it is crystal clear that committal of a state functionary for contempt is competent following upon non-compliance with a court order. To avoid any confusion, the applicants should ensure that they cite the correct parties because the court can only properly commit to prison that official who is responsible for the government's failure to comply with a court order. Despite all the endeavours, our law of remedies is still not completely coherent. For example, in *Magidimisi*, the applicants had to apply for an anticipatory order aimed at ensuring that the court's decision was complied with. In view of the confusion which reigned at the time, they were not certain the anticipated order would be granted. An ideal situation would be where the court makes an order and it is complied with and, where there is non-compliance, the aggrieved party can apply for another remedy which is guaranteed to be granted if the requirements of such remedy are satisfied. It is submitted that our law of remedies must be developed in this direction. Section 3 of the State Liability Act is a stumbling block in achieving this goal. However, it does not appear that this state of affairs will persist for much longer.[75]

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70 *Laubscher v Laubscher* 2004 4 SA 350 (T).
71 Para 8. References omitted from the quote.
72 2004 3 All SA 623 (SE).
73 Para 15.
74 See, eg, ss 1(c) 2 7(1) and (2) 8(1) 165(1) 165(3)–(5) of the Constitution.
75 As mentioned in the introduction, the Constitutional Court has on 30 August 2007 heard an application for confirmation of the constitutional invalidity of this section. We shall await the court's decision with much anticipation.

Through Rose Coloured Glasses: Gender[1] Stereotyping in the South African Courts

L Wildenboer
Lecturer in the Department of Jurisprudence, University of South Africa

> "Gender equality can only be achieved by undermining the power of gender stereotypes embedded within the gender hierarchy."[2]

1. INTRODUCTION

Men are from Mars and women are from Venus,[3] right? This argument is in accordance with the traditional perception that boys prefer the colour blue and to play aggressively and competitively with cars, whereas girls prefer the colour pink and to play with dolls in a way that simulate the role of motherhood that they will (probably) fulfil later in their lives. In later life, this translates into the perception that men are rough and rugged, excel at sports and conduct business aggressively, while women are soft and gentle, are good at interior decorating and prefer to stay at home to raise their children. Furthermore, this is not only the perception of the general public, but has been the subject of much academic writing and debate. Although this is a general perception, it is nevertheless a dangerous one. The reasons for this will become clear by the end of this paper.

To illustrate the nature and impact of gender stereotyping, this article briefly looks at the expression of the differentiation between genders within feminist theory, as expounded by the so-called difference theories of Carol Gilligan and Catharine MacKinnon.[4] This is followed by an explanation of what is meant by

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1 It is (or should be) well-known that the term "sex" refers to biological differences, whereas "gender" refers to behaviour and preconceived ideas of behaviour ascribed to persons based on masculinity or femininity. O'Donovan "Legal construction of sex and gender" in Barnett *Sourcebook on Feminist Jurisprudence* (1997) 171; Nicholson "Gender" in Jaggar and Young (eds) *A Companion to Feminist Philosophy* (1998) 289–291. Surprisingly very little has been written about these concepts and it is not the purpose of this article to revisit these arguments. Rather, it should merely be noted that for purposes of this article, the term "sex(es)" refers to the differences between males and females, whereas the term "gender" refers to the differences between men (or how a man is supposed to be, ie masculinity) and women (or how a woman is supposed to be, ie femininity).

2 Kroeze "Gender discrimination in South African jurisprudence: An exercise in confusion" 2005 *Speculum Juris* 202 213.

3 Gray *Men are from Mars, Women are from Venus: A Practical Guide for Improving Communication and Getting what you want in your Relationships* (1992).

4 At this point it is should be mentioned that there are some differences of opinion regarding the categories into which certain feminists are supposed to fall. In this case, for example, Weisberg "New approaches to equality and difference: Introduction" in Weisberg (ed) *Feminist Legal Theory Foundations* (1993) 211 214–215 views MacKinnon not as an equal treatment or special treatment feminist, but rather considers her theories as a third alternative to both these groups.

stereotyping and the role it plays in society. Against this background, the prevalence of gender stereotyping in South African courts is then discussed. The discussion focuses specifically on the question whether gender stereotyping is still encountered in the courts despite the new constitutional dispensation. For this purpose, a few examples of court cases dating from the early twentieth century are contrasted with a few much more recent examples.

2 THE DIFFERENCE THEORY

So-called "difference feminists" represent one side of the sameness/difference debate within feminist theory. On the one hand, "sameness feminism" basically contends that there are no differences between men and women; that neither is inferior or superior to the other and, therefore, that men and women should be treated equally in all respects. Sameness is therefore regarded as a necessary precondition for equality. On the other hand, the difference feminists hold that one cannot overlook or deny that there are indeed differences between men and women. They further argue that because of the differences, women should have different rights to address the historical inequality between the genders.[5] Alternatively, the legal system should be reformed to be more accommodating towards women. Therefore, these differences should be taken into consideration when deciding on the treatment required in each instance.[6] Carol Gilligan and Catharine MacKinnon are both proponents of the difference approach.

During the early 1980s, Gilligan published her well-known book in this regard.[7] She undertook a study of the way in which boys and girls approach the topic of morality. She also concluded that a person's sex role determines that person's behaviour.[8] She proposed that the voices of men and women speak of different truths and that these truths are the result of the gender role portrayed by the person involved.[9] According to Gilligan, a man's construction of a moral problem is based on an ethic of separation, truth, fairness, rights and rules, whereas a woman's construction is based on an ethic of interdependence, attachment, care and responsibility.[10] In other words, whereas men define themselves in terms of rationality and independence, women define themselves in terms of nurturance and relationships.[11]

MacKinnon's views differ from those of Gilligan in one important aspect. Although MacKinnon concedes that there are differences between men and

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5 Albertyn "Feminism and the law" in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 303 explains this as follows: "Here equality requires all persons to be treated with equal humanity and as having equal moral worth, even if this entails a practical legal strategy of differentiation."

6 For an example of an argument for equal treatment with regard to the pregnancy debate, see Williams "Equality's riddle: Pregnancy and the equal treatment/special treatment debate" in Weisberg *Feminist Legal Theory Foundations* 128. For an example of an argument for special treatment with regard to the pregnancy debate, see Krieger and Cooney "The Miller-Wohl controversy: Equal treatment, positive action and the meaning of women's equality" in Weisberg 156.

7 Gilligan *In a Different Voice Psychological Theory and Women's Development* (1993).

8 *Idem* 14.

9 *Idem* 156.

10 *Idem* 73 149 156 161 166.

11 *Idem* 159–160 164.

women, she contends that these differences originate from the subordination of women by men, otherwise known as the dominance theory.[12] MacKinnon refers to "women's social relegation to inferiority as a gender" and the "systematic relegation of an entire group of people to a condition of inferiority [attributed] to their nature".[13] She argues that these differences are not biological or evolutionary, but are in fact political and based on power relations and male supremacy.[14] For her, sex discrimination will only be something of the past when women, as a group, are no longer subordinated to men as a group.

At this point it should be noted that both Gilligan and MacKinnon refer to "sex" roles or "sex" discrimination. However, as explained above,[15] for purposes of this article it is assumed that they actually referred to "gender".

3 WHAT IS STEREOTYPING?

3 1 Some general comments on (gender) stereotyping

Before evaluating the theories of Gilligan and MacKinnon, it is important first to clarify exactly what is meant by stereotyping. For example, Schneider's[16] definition proposes that "stereotypes are qualities perceived to be associated with particular groups or categories of people."[17] When this definition is applied to gender stereotyping, it is then defined as qualities perceived to be associated with a particular individual based exclusively on the gender of that person.

It has been suggested[18] that gender stereotypes are based on general perceptions regarding characteristics of both men and women. In terms of these perceptions, men have traits reminiscent of qualities of action and instrumentality, also known as agentic qualities. On the other hand, women are perceived to have traits reminiscent of qualities relating to emotional expressiveness and concern with relationships, also known as communal qualities. One of the reasons[19] advanced for this differentiation has to do with general status and power relations. According to this latter argument, agentic and communal qualities are not unique to gender stereotypes. Instead, agentic qualities are typically ascribed to

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12 MacKinnon "Difference and dominance: On sex discrimination" in Cudd & Andreasen (eds) *Feminist Theory: A Philosophical Anthology* (2005) 392.

13 MacKinnon 397.

14 MacKinnon 397–398.

15 See fn 1.

16 Schneider *The Psychology of Stereotyping* (2004) 24.

17 For a variety of definitions as well as a critical evaluation thereof, see Schneider 16–24. In a gender context, Swart distinguishes between stereotyping and male-identification. She defines "stereotyping" as describing "a group of people on the basis of a shared trait and [assigning] positive or (more usually) negative characteristics to people who share that particular trait", whereas male-identification "is the tendency of judges to see things the way a male litigant would, to the exclusion of other perspectives, especially those of women". See Swart "The Carfininan (*sic*!) curse: The attitudes of South African judges towards women between 1900 and 1920" 2003 *SALJ* 540 542.

18 Schneider 438–439. Also see the table at 438 suggesting specific traits associated with either males or females. Schneider 439 uses the terms "agentic" and "communal" to refer to traits stereotypic of males and females respectively.

19 Other factors which have an influence on gender stereotyping include religion, age, socio-economic status, education, ingroup/outgroup status, as well as the current mood or recent experiences of the person perpetuating the stereotype (see Schneider 325 446–447).

groups with higher status, whereas communal qualities are typically paternalistically ascribed to groups with a lower status. In this sense, the communal qualities indicate a lack of competence-related traits by the group and instead compensates by ascribing qualities of warmth to that group.[20] In other words, certain traits ascribed to a person of the feminine gender are not necessarily based on reality, but on the perceived lower status of the group of which that person is a member.[21]

Most people associate stereotyping with anti-social behaviour. They see stereotypes as rigid, unfair, negative generalisations, (mostly) inaccurate and usually held by persons with certain prejudices and created by a prejudiced culture.[22] Although this may be true in some cases, the trend nowadays is not to view all stereotypes in the same way. The reason for this is that it is now recognised that stereotyping is a normal cognitive process for humans, and not only is it considered to be normal, it is also recognised as a survival skill.[23] Everyone uses generalisations and stereotypes daily to order their lives, to save time and, in general, to make their lives easier.[24] Generalisations are used because there is neither the time nor the capacity to examine and assess from scratch everything and everyone encountered daily. Stereotypes make it possible to categorise people and objects, with the purpose of guiding reactions and interactions.

However, stereotypes can be dangerous and unfair. That is why the new understanding is that the focus should not be on the accuracy or not of stereotypes, but on how these stereotypes influence reactions to and dealings with, especially, other people (as compared to objects). In other words, the emphasis has moved from the question of the putative accuracy of stereotypes to the question of the consequences of stereotypes.[25] To put it more simply, a stereotype *per se* is not a bad thing; what makes it bad is the discrimination or prejudice caused by that stereotype. Although everyone has stereotypes about certain things or certain groups, these stereotypes become harmful when it influences our actions towards a person or group. A good example is the shift from gender stereotypes as

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20 Schneider 439, and authority cited there.

21 It has been suggested that (gender) stereotypes are, in truth, stereotypes about roles, and not about genders. According to this theory, the qualities assigned to a group reflect the position of that group in society (see Eagly *Sex Differences in Social Behavior: A Social-Role Interpretation* (1987) referred to by Schneider 447). For example, the trait of nurturing is usually assigned to women because it is usually women who occupy nurturing positions such as nurses or teachers or even motherhood. However, these positions are often the only acceptable positions for women to be in.

22 Schneider 8, 562.

23 Schneider 8.

24 Schneider 562–563. Schneider 3 explains this by using several examples. One example includes the stereotype a person holds that bears are dangerous. This stereotype enables a person to know to avoid bears, and if meeting a bear, to know how to react. Even though the chances of the average person meeting a real live bear are slim and even though not all bears are necessarily dangerous, this knowledge could help save a person's life. However, not all stereotypes are this basic, nor are they useful in the same way. For example, stereotypes concerning breeds of dogs are useful when thinking about acquiring a new dog, and stereotypes concerning retailers are useful when deciding where to go when one needs to find a specific item. Schneider 562–563 also mentions the stereotypes that politicians hold when campaigning for votes and the stereotype that a medical doctor has of a patient with sinus problems when diagnosing sinus problems.

25 Schneider 337.

descriptive to *prescriptive*.[26] In other words, when the purpose of a gender stereotype is no longer merely that of categorisation, but is also viewed as a prerequisite. This point can be illustrated by the example of the gender stereotype that boys are better at mathematics than girls. This stereotype becomes harmful when it is no longer considered a mere generalisation, but is upheld as a guideline for (or even the reason why) boys should be granted an advantage in receiving an education in mathematics, and/or be viewed as more appointable than girls. Such a shift means that the perpetuating of a gender stereotype is no longer only useful or practical, but also harmful, because it aims to maintain the *status quo*[27] and to entrench privileges.[28]

3 2 Difference feminism and gender stereotyping

Lawyers, upon studying the abovementioned arguments by psychologists, would find such ideas familiar. It is because one finds an echo of the theories of feminists like Gilligan and MacKinnon within these arguments. Not only are Gilligan's theories echoed in the agentic and communal qualities assigned to gender groups, but MacKinnon's dominance theory can also be compared to the arguments regarding traits ascribed to groups with lower status.

The problem with the theories of Gilligan and MacKinnon is that, in their attempt to address gender discrimination, they revert to gender stereotyping. This can, in itself, be the cause of gender discrimination.

In her attempt to give value to the different voice of women, Gilligan stereotypes all women as caring, nurturing and interdependent. Gilligan's purpose with this stereotype is to illustrate that men's way of doing, namely through rationality, individuality and emotional detachment, is not the only acceptable path. She aims to demonstrate that women's way of doing, although different, is not only acceptable, but it also adds a whole new dimension to the traditional way in which things have been done. Although Gilligan's motive is commendable, her reasoning must be criticised, because she fails to take into account that not all women fit this stereotype. She assumes that all women are and want to be caring, nurturing and interdependent, and that all men are (and want to be) rational, individualistic and emotionally detached. She fails to realise that not all men speak with one voice and that not all women speak with another voice. In short, the voice that Gilligan ascribes to all women becomes prescriptive, because she ignores the millions of other voices[29] that do not fit this stereotype.

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26 Schneider 443–444.

27 Stereotypes are used to reinforce the *status quo*, from which the powerful usually benefits (see Schneider 370).

28 This point is illustrated by the position in Roman-Dutch law with regard to excluding women from the legal profession. Innes ACJ says of the Roman-Dutch law in this regard that "it certainly did not place men and women in a position of equality. It went out of its way to protect women, but it protected them as being the weaker vessels, and subject to natural and legal disabilities." He goes on to say that privileges that were accorded to women "were devised because women were considered to be less capable than men of engaging in and transacting business affairs" (*Incorporated Law Society v Wookey* 1912 AD 623 633). These are classic examples of discrimination against a group of people based on generalisations and stereotyping.

29 Gilligan 126 herself admits that at least one of the studies used in formulating her gender stereotypes was not representative and that the women who took part in the survey were not selected to represent a larger population.

Similarly, MacKinnon's arguments, although not without merit, must also be criticised for reverting to stereotypes. Since MacKinnon is in essence also a difference feminist, the same criticism levelled against Gilligan above is applicable to her. Moreover, MacKinnon's arguments are based on the assumption that all women are subordinated by men. She negates the fact that some women, although perhaps in the minority, have positions of power and are not dependent on men. Instead, she chooses to see all women to be under the control of a patriarchal system where they are subjected to the whims of male supremacy. Although this is, unfortunately, still true for many women, stereotyping *all* women in this way is not only factually incorrect, but also diminishes and belittles the status of those women who have, against the odds, succeeded in rising above a patriarchal system.[30] This stereotype is harmful because it affirms existing prejudices and nullifies the few advances that have been made in this regard in the past few decades.

4 GENDER STEREOTYPING BY SOUTH AFRICAN COURTS

Although descriptive gender stereotyping is therefore not negative *per se*, prescriptive gender stereotyping may be harmful since it entrenches privileges and prejudices. In a legal context this translates into the statement that any gender stereotypes perpetuated by lawgivers should be identified in order to end the vicious circle created by perceptions about gender in society and the stereotypes based on those perceptions. Although it should make for an interesting study to investigate the position of the South African legislature in this regard,[31] this paper investigates only the situation in South African courts.

To achieve this purpose, a few examples of judgments dating from the early twentieth century are critically analysed with regard to gender comments made by the court. These cases are then compared to recent judgments dating from after the implementation of the interim and final Constitutions. The purpose is not to focus on a specific gender stereotype, nor is it to concentrate on any one judgment in detail. Rather, the emphasis is on gender stereotypes in general as expressed in various judgments, and the impact it has had on the treatment of the individuals and, eventually, the groups involved.

4 1 Early twentieth-century cases

Swart[32] draws attention to a few cases heard in South African courts during the early years of the last century in which the judges displayed gender stereotypical thinking. Two of the cases dealt with applications by women to be admitted to register their articles of clerkship. Swart points out that at least one of these applications was dismissed based on the authority of Voet in this regard. Voet reiterated the position held in Roman law, namely that women could not practise as attorneys, because of the behaviour of two women, Carfinia and Calphurnia.[33]

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30 See in general Orr, Rorich and Dowling (eds) *Buttons and Breakfasts: The Wits Wonderwoman Book* (2006).

31 Eg, Kroeze 2005 *Speculum Juris* 211 points out that most South African legislation is sex-neutral, but not all are gender-neutral.

32 Swart 2003 *SALJ* 540.

33 Swart 2003 *SALJ* 540 fn 1, 541.

Swart then continues to describe the actions of these two women that so offended the courts. She writes:

> "Carfinia 'vexed the soul of some too nervous praetor with her pleading'[34] and Calphurnia, pleading before the Senate, lost her case and in an act of extreme contempt of court, turned her back to the judges, lifted her robes and displayed her derriere. Women were therefore excluded entirely from rendering any court or public service on account of their temperament. It seems as if, by their actions, these two women (like Eve) tainted all their sisters."[35]

This example from history illustrates not only classical stereotyping in action,[36] but also the way in which stereotyping is sometimes used to discriminate unfairly against certain individuals because they are members of a particular group.

For instance, this specific stereotype reached across continents and almost two millennia to influence the lives of at least two women in the South African legal system. In *Schlesing v Incorporated Law Society*[37] the Transvaal Supreme Court held that the court could not depart from the practice of not admitting women as attorneys, despite the wording of s 10 of the Interpretation of Laws Proclamation,[38] which stated that "words of the masculine gender shall include females" unless the contrary intention appears.

However, even worse are the subtle hints throughout the judgment of the judge's personal opinions in this regard. First, counsel for the applicant addressed the court with a very lengthy argument on why his client should be admitted to register her articles of clerkship. However, the judge failed to call upon counsel for the respondent to present its counterargument and summarily dismissed the argument by referring the issue to the legislature.[39] In other words, the court did not even hear the arguments of both parties before coming to a conclusion. A second and more subtle indication is evident where the judge discusses authority cited by counsel to support its argument that the applicant should be admitted to register her articles of clerkship. The only such authority is dismissed by the judge on legal grounds, but not before commenting on the "writer [who] seems to think that women may be capable of being admitted as attorneys . . ".[40]

The second case discussed by Swart is that of *Wookey.* In the court *a quo*[41] the Cape Provincial Division ruled that the applicant be admitted to register her articles of clerkship, because of the absence of rules of positive law.[42] The court also investigated the common law in this regard, referring *inter alia* to the

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34 This is a quote from the judgement of De Villiers JP in *Wookey*'s case 641.

35 Swart 2003 *SALJ* 540 fn 1.

36 Refer to the definitions of stereotyping and gender stereotyping in part 3 1 above.

37 1909 TS 363.

38 Act 15 of 1902.

39 *Schlesing*'s case 363. This approach has also been used by our current Constitutional Court in cases where the court was not willing to directly address controversial issues, such as the constitutionality of prostitution in *S v Jordan* 2002 6 SA 642 (CC).

40 *Schlesing*'s case 365.

41 *Wookey v Incorporated Law Society* 1912 CPD 263.

42 The court held that the prohibition of admitting women to practise as attorneys and advocates does not have its origins in positive law, but in the practice of the Court of Holland of admitting only men to appear before it (*Wookey*'s case (C) 270).

position of Voet as mentioned above, and found that the real ground for the prohibition is not based on the interpretation of legal rules, but on gender.[43] The Cape Provincial Division was therefore prepared to look past tradition and the practice of centuries in its purpose of delivering justice. Unfortunately, the Appellate Division was not.

On appeal, the Appellate Division overturned the decision of the court *a quo* and held that women could not be allowed to register their articles of clerkship. The court based its decision on the argument that the word "persons" cannot be interpreted to include women.[44] The court disagreed with the view of the court *a quo* that the common-law position was not based on rules of positive law, but, at the most, on a rule applied in practice.[45] However, although the court could itself not find a single statutory provision to this effect,[46] this did not deter them from forcing the argument. The court concluded that the position was a "consequence of the general position which women occupied under Roman-Dutch jurisprudence".[47] In other words, in the absence of legislation in this regard, the court discarded a rule of practice as the basis for the exclusion of women from the legal profession,[48] and instead cited the centuries-old tradition of inequality of the genders as the reason for such exclusion.

This argument, however, is not convincing at all. If the legal position was not based on practice, how could tradition be a substitute? This would imply that there is a difference between "practice" and "tradition". However, it could be argued that "practice" develops from and because of "tradition". And yet, the discrepancies do not end there. De Villiers JP stated that certain categories of restrictions pertaining to the admission of persons to the profession of attorneys or advocates were no longer relevant and therefore "undoubtedly obsolete".[49] However, after considering the question whether this should imply that the prohibition based on gender be lifted, he simply concluded that the answer must be in the negative and gave the example of Carfania (*sic*) as a reason.[50] The court further stated that amendments of this nature should be addressed by the legislature and not by the courts.[51]

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43 *Wookey*'s case (C) 267–268. It should be noted that the court did not use the term "gender". The court phrased it as follows: "Here, therefore, we have the real ground for the prohibition against women acting as advocates, and even the ostensible reason is not that the office of an advocate is a public office, but that the work is that of a man."

44 *Wookey*'s case (AD) 634 640 641–642.

45 *Wookey*'s case (AD) 633. The court speculated that even if there existed no legislation in this regard, it is expected that a practice "observed by the Courts of South Africa and their predecessors for 400 years would require a Rule of Court duly promulgated to change it". Innes ACJ then gave his personal opinion when he stated: "I do not think it was a mere rule of practice."

46 *Wookey*'s case (AD) 633.

47 *Ibid*. Also see *Wookey*'s case (AD) 637 639 641.

48 See the reasoning of the court referred to in fn 45 above.

49 *Wookey*'s case (AD) 641. De Villiers JP gave the example of a blind (male) person who should not be prohibited from joining the profession merely on the ground of his disability. The judge also referred to the restrictions of race or religion.

50 *Wookey*'s case (AD) 641.

51 *Wookey*'s case (AD) 640. Swart 2003 *SALJ* 550 notes that it took the legislature 11 years to respond to this challenge before it eventually enacted The Women Legal Practitioners Act 7 of 1923.

When reading these cases, it should be kept in mind that these decisions date from a period much different from the present. Women did not then have the freedoms or rights that they have now[52] and society functioned according to different rules.[53] It might be expected that gender stereotyping is now a thing of the past, especially since the Constitution[54] expressly forbids unfair discrimination on the basis of both sex and gender. Moreover, the Constitution also requires of the South African courts to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation or developing the common or customary law.[55] Sadly, this has not happened. Gender stereotyping is alive and well in the South African courts, as will be illustrated below.

4 2 Into the constitutional era

Despite the explicit prohibition of unfair discrimination on the grounds of sex and/or gender in the final Constitution, the South African courts, including the Constitutional Court, have on some occasions been guilty of gender stereotyping. A few examples of such cases are now discussed.

4 2 1 Harksen v Lane[56]

Harksen v Lane concerned the constitutionality of certain sections of the Insolvency Act.[57] Of particular concern is s 21, which provides that in the event of the insolvency of a person, the estate of the solvent spouse[58] of that person shall vest in the Master until such time as the solvent spouse has complied with the *onus* of proving that the property falls into one of the categories mentioned in s 21(2).[59] Only then may the Master release the property and return it to the solvent spouse. The majority judgment by Goldstone J held that the section was not unconstitutional on the basis of the argument that the purpose of the provision is to keep property that belongs to the insolvent estate in the insolvent estate and to prevent collusion.[60] This in itself seems to be a reasonable justification for the judgment.

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52 Eg, white South African women only received the right to vote in 1930 and black South African women had to wait until 1994 for this right.

53 Eg, in *O'Brien v Keal* 1910 TPD 707 the Transvaal Provincial Division held that spectacles required by the wife of the defendant could not be considered household necessaries. This meant that in terms of the rules with regard to marital power of that time, her husband could not be expected to pay for the spectacles. The reason the court gave is even more interesting. The court found that the sight of the women in question was not so bad that she could not see to carry out her household duties! (*O'Brien*'s case 710).

54 Constitution of the Republic of South Africa, 1996 s 9(3).

55 S 39(2).

56 1998 1 SA 300 (CC).

57 24 of 1936.

58 Although the Act does not specify that this provision is only applicable to persons married out of community of property, this should be the logical implication. Persons married in community of property have one joint estate only with the exception of property which falls into one of a few limited categories. For a detailed discussion of these exceptions, see Church "Marriage" in Joubert (ed) *LAWSA* 2 ed (2006) para 70. In other words, the insolvency of one of the spouses will automatically have the effect of insolvency of the joint estate of both spouses.

59 In terms of s 21(13) of the Insolvency Act the term "spouse" includes not only a husband and wife in a valid marriage, but also a husband and wife married in terms of custom or any other law as well as a man and woman living together as a married couple.

60 *Harksen*'s case paras 36 37.

It is only when reading the two minority judgments of O'Regan and Sachs JJ, that the flaw in this argument of the majority judgment becomes apparent.[61] O'Regan agrees that the purpose of s 21 is an important one.[62] However, after comparing this provision with similar provisions in other legal systems,[63] she comes to the conclusion that it is possible to achieve the same purpose through other mechanisms and without the same level of prejudice to the solvent spouse.[64] O'Regan J also points out that s 21 fails to protect the insolvent estate from persons, other than the solvent spouse, who may or may not be in a similarly questionable relationship with the insolvent, such as other close family members, personal friends or business associates.[65]

The question one may well ask is why the South African legislature has chosen this drastic measure if there are other less invasive ways of preventing collusion and protecting the insolvent estate. The answer can be found in the minority judgment of Sachs J. He states:

> "[The] reach [of section 21] is too narrow in respect of the classes of persons affected and too wide in relation to the members of the group selected and the range of property which automatically vests to be considered purely as a pragmatic device to deal with collusion of spouses or confusion of goods. Its underlying premise is that one business mind is at work within the marriage, not two. This stems from and reinforces a stereotypical view of the marriage relationship which, in the light of the new constitutional values, is demeaning to both spouses."[66]

In other words, the reasoning behind s 21 reflects the stereotypical and outdated view that spouses (read "wives") cannot have separate estates because they cannot have separate careers and finances. Goldstone J himself slips down this slippery slope of stereotyping when he refers to the position of women in society.[67] He assumes that the purpose of s 21 is to keep insolvent husbands from withholding assets from the insolvent estate by donating it to or colluding with their wives. Although he acknowledges that the position of women in society has changed and that more women have become economically active and earn their own income,[68] he fails to see that this is precisely the reason why s 21, dating

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61 Madala J and Mokgoro J concurred in the judgment of O'Regan J.

62 *Harksen*'s case para 112.

63 Namely those of the United Kingdom, Canada, Australia, New Zealand and Germany. For a full discussion of the legal position in each jurisdiction, see *Harksen*'s case paras 106–110. The judge mentions that the Netherlands is the only jurisdiction where an equivalent of the South African s 21 is in effect (*Harksen*'s case para 110).

64 *Harksen*'s case paras 111 112.

65 *Harksen*'s case para 104. Also see the judgment of Sachs J (*Harksen*'s case para 121).

66 *Harksen*'s case para 121. Elsewhere he says that "[b]eing trapped in a stereotyped and outdated view of marriage inhibits the capacity for self-realisation of the spouses, affects the quality of their relationship with each other as free and equal persons within the union, and encourages society to look at them not as 'a couple' made up of two persons with independent personalities and shared lives, but as 'a couple' in which each loses his or her individual existence" (*Harksen*'s case para 125). He concludes that "the *raison d'être* of the legislation is a blunderbuss application of the stereotype and not a fine-tuned satisfaction of the claims" (*Harksen*'s case para 123).

67 *Harksen*'s case para 58. When Goldstone J interprets the purpose of s 21 at the time of the promulgation of the Insolvency Act, he apparently assumes that the section had only the protection of women in mind, because he then goes on to describe the changing position of women in society since then.

68 *Harksen*'s case para 58.

from 1936, is no longer relevant in a changing society and does indeed contradict the new constitutional values.

4 2 2 Two cases dealing with state liability for crimes committed against civilians

In two recent cases the courts had to deal with state liability for crimes committed against civilians. In *Van Eeden v Minister of Safety and Security*[69] the plaintiff instituted a claim for delictual damages against the Minister of Safety and Security for failure to protect her from crime. She had been sexually assaulted, raped and robbed by a known serial rapist who had escaped from police custody. Similarly, in *K v Minister of Safety and Security*,[70] the plaintiff instituted a claim for delictual damages against the Minister. She had been raped by three uniformed and on-duty policemen after accepting a lift home from them when she found herself without transport in the early hours of the morning. In both cases the Minister was found liable according to the principles of the law of delict. This in itself is not problematic and it is not the purpose of this paper to discuss the substantive law principles applied.

However, what is worth mentioning is not what the courts in fact discussed, but what the courts omitted when deciding these cases. Both cases dealt with gender crimes. This is so because in both cases the plaintiffs were rape victims. In the case of rape it does not matter who the victim is; instead all victims of rape are forced into the role of (or otherwise degraded to)[71] a person of the feminine gender.[72] It is submitted that in cases where the victims of a particular type of crime are gender specific, that crime be referred to as a "gender crime". However, despite the nature of these crimes *in casu*, neither judgment specifically addressed gender issues.

In both cases it was emphasised that the police has a duty to protect the public,[73] but in *Van Eeden*'s case the court added that the police (as an agency of the state) is responsible to "protect the public in general and *women in particular* against the invasion of their fundamental rights by perpetrators of violent crime" (emphasis added).[74] The question arises why the court found it necessary to single out women. It could be argued that it implies that the court rates women's security as more important than that of men. Another reason could be that the court holds the view that the state has an extra liability towards women. A

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69 2003 1 SA 389 (SCA).

70 2005 6 SA 419 (CC). It should be noted that this case is sometimes referred to as *NK v Minister of Safety and Security*. See for example the electronic copy of the case on the website of the Constitutional Court, available at http://www.concourt.gov.za/site/kern.html (accessed 01-12-2006).

71 Eg, in the absence of women, as in a prison set-up, the men who are raped or sodomised are popularly referred to by the rapist as "my bitch". The term "bitch" is considered a derogatory word when referring to a woman. (See in general Wurtzel *Bitch* (1999).)

72 In the recent case of *S v Masiya* 2006 JOL 18020 (T) the Constitutional Court refused to extend the common-law definition of "rape" to include male victims. However, the court did extend the definition to include acts of non-consensual anal penetration of female victims.

73 *Van Eeden*'s case 398A–D; *K*'s case paras 18 48 52.

74 *Van Eeden*'s case 398D. This viewpoint was reiterated in *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 62.

further explanation could be that the court sees women in more need of protection than men. Of course, this latter possibility reminds of the stereotypical perception that women are the weaker sex and are constantly in need of protection.[75] This makes one wonder if the outcome of the two cases would have been similar if the plaintiffs had been children, or gay men,[76] or heavily-built, rugby-playing men. The point is that, although the court was able to decide the case purely by the application of substantive law rules, the court still felt it necessary to raise this obscure and unnecessary point.[77] If the court felt such a need, why did it then not deal with the case as a gender issue? After all, both cases involved gender-related crimes. One gets the impression that the court tiptoes around the gender issue and instead sticks to the safer route of substantive (private) law. This is of course not a new phenomenon – it has been done before. One just wishes that if our courts are so concerned with gender issues, they should have the courage to address it head-on.

4 2 3 President of the Republic of South Africa v Hugo[78]

In *Hugo*'s case, the Constitutional Court was asked to decide on the constitutionality of a Presidential Act. In terms of the latter document, the President and the two Executive Deputy Presidents had granted special remission[79] of sentences to certain categories of prisoners. One of the categories included all mothers in prison on a specified date and with children under the age of 12 years.[80] The respondent applied to the Constitutional Court to declare the Presidential Act invalid on the basis that it violated the equality clause in the Bill of Rights by discriminating unfairly on the grounds of sex or gender. The respondent argued that the Presidential Act discriminated against him on the grounds of sex and gender, because he would have qualified for release had it not been for the fact that he was the father, and not the mother, of a 12-year-old boy.

The majority of the court, per Goldstone J, found that the Presidential Act did not discriminate unfairly.[81] The court made the observation that it would be unfair to use the "generalisation that women bear a greater proportion of the burdens of child rearing for justifying treatment" that deprived women of

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75 Frug *Postmodern Legal Feminism* (1992) 129 133–134 argues that legal rules permit the terrorisation of the female body and that consequently female bodies are "bodies in terror" because they have learned to "scurry, to cringe and to submit".

76 This example, of course, also falls within the category of a gender issue. Gay men are generally perceived as feminine and therefore traits usually ascribed to women are also sometimes popularly ascribed to gay men.

77 At this point it may be of interest to mention that the judgment in *K*'s case was delivered by O'Regan J. She did not raise the issue of the special protection afforded to women, although she did refer to the point as raised in *Carmichele*'s case.

78 1997 4 SA 1 (CC).

79 The Presidential Act itself, as well as the Constitutional Court, used the term "remission" (*Hugo*'s case para 2 fn 3). However, in terms of Allen (ed) *The Concise Oxford Dictionary of Current English* 8 ed (1990), "remission" refers to "the reduction of a prison sentence *on account of good behaviour*" (emphasis added). *In casu*, the release of the categories of prisoners was determined by the Presidential Act. The good behaviour or otherwise of the prisoners was not a deciding factor. It therefore follows that the use of the term "remission" is incorrect and should have been replaced with "release".

80 *Hugo*'s case para 6.

81 *Hugo*'s case para 52.

benefits or imposed disadvantages upon them.[82] Yet, despite its acknowledgement of the consequences of gender stereotyping, the court still found that the Presidential Act was not inconsistent with the Constitution. In coming to its decision, the court took into account various factors, namely the argument that identical treatment should not be insisted upon when the aim is to achieve equality for everyone;[83] the argument that a presidential pardon is a privilege and not a right[84] and the fact that the Presidential Act did not prohibit male prisoners from applying for release on an individual basis.[85] However, it could be argued that the main reason behind the court's decision had to do with the concerns about crime in South Africa. In fact, the court states explicitly that male prisoners outnumber female prisoners and accepts the arguments of the applicant that the release of fathers on the same basis as mothers would have led to a public outcry.[86] However, while all of these reasons may or may not signify important aspects to be taken into account, it is submitted that they do not constitute justification for discrimination on the grounds of sex and gender.

Much has been said about the importance of the values of human dignity and equality as the cornerstones of the final Constitution.[87] It is not the purpose of this paper to reiterate these opinions. Suffice it to say that no factor, however important or relevant, should prevent the South African courts from upholding the core values of human dignity and equality. It is therefore submitted that the minority judgment of Kriegler J expresses the correct view. Kriegler J makes the point that one of the ways in which human dignity is accorded, is by protecting the basic choices people make about their own identities. He goes on to say that the stereotype *in casu*, namely that women are the primary caregivers, is harmful in that it prevents men and women from making these decisions about their own identities.[88] Kriegler J further explains the harmfulness of the stereotype. He points out that this specific stereotype is a root cause of women's inequality in society, and that it is a "feature of the patriarchy" that is sought to be overturned by the Constitution.[89] He also states that not only is this stereotype harmful to women, but also to men in that men must continue to accept their secondary role in the care of their children.[90] He holds that the provisions in the Constitution prohibiting sex and gender discrimination were designed to "undermine and not to perpetuate [such] patterns of discrimination . . .".[91]

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82 *Hugo*'s case para 39.
83 *Hugo*'s case para 41. Also see the minority judgment of O'Regan J (*Hugo*'s case para 112).
84 *Hugo*'s case para 47.
85 *Ibid*. Also see the minority judgment of Mokgoro J (*Hugo*'s case para 106).
86 *Hugo*'s case para 46. In their dissenting judgments, both Didcott J and Mokgoro J also refer to the crime problem as a factor to be taken into account (see *Hugo*'s case paras 29 and 106 respectively). See the minority judgment of Kriegler J for criticism of the arguments regarding crime and administration of justice (*Hugo*'s case para 72).
87 Eg, see in general *Hugo*'s case; *S v Makwanyane* 1995 3 SA 391 (CC); Kroeze "Doing things with values: The role of constitutional values in constitutional interpretation" 2001 *Stellenbosch LR* 265.
88 *Hugo*'s case para 80.
89 *Ibid*.
90 *Hugo*'s case para 83. Also see the minority judgments of Mokgoro J (*Hugo*'s case para 92) and O'Regan J (*Hugo*'s case para 114).
91 *Hugo*'s case para 80. Mokgoro J also states that the equality clause provides the opportunity to move away from gender stereotyping (*Hugo*'s case para 93).

Kriegler J also deals with another matter that is appropriate to this discussion. He questions the appropriateness of applying an inherently objectionable generalisation (read "stereotype") for the benefit of a particular group of women prisoners. He argues firstly that the applicant did not intend to benefit either women generally, or the released mothers in particular. In fact, the applicant expressly argued that the purpose of the Presidential Act was not to benefit women, but to ease the hardship of children who had been "deprived of the nurturing and care [of] their mothers".[92] Secondly, Kriegler J points out that the benefit *in casu* was not to women in general, but to child minders (who are presumed to be women). And even though this has the consequence of benefiting a few women, this is not a justification for the continuation of prescriptive social roles.[93]

4 2 4 S v Jordan[94]

Jordan's case dealt with the question of whether or not the statutory crimes of sex for reward[95] and brothel keeping are unconstitutional.[96] In its majority judgment the Constitutional Court held that the criminalisation of sex for reward is not inconsistent with the Constitution and failed to consider the criminalisation of brothel keeping.[97] The majority judgment was delivered by Ngcobo J. Ngcobo J argued that the provision dealing with the criminalisation of sex for reward did not discriminate unfairly on the grounds of gender because the provision applies to male and female prostitutes and is therefore gender-neutral.[98] Ngcobo J further found that the provision pursues an important and legitimate constitutional purpose,[99] namely the prohibition of commercial sex and that, for this reason, the

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92 *Hugo*'s case paras 36, 37.

93 *Hugo*'s case paras 81–83.

94 For purposes of this paper, all abbreviated references to *Jordan*'s case will refer to the decision of the Constitutional Court, unless indicated otherwise.

95 It should be noted that s 20(1)(aA) of the Sexual Offences Act 23 of 1957 refers to the crime of "sex for reward". However, throughout the judgment, the court uses both the terms "sex for reward" and "prostitution" interchangeably. O'Regan and Sachs JJ raises the question of whether "sex for reward" should be interpreted to include activities ordinarily understood as prostitution, or whether it should also be interpreted to include other activities. They come to the conclusion that the narrow interpretation should apply, namely that the term "sex for reward" only refers to prostitution (*Jordan*'s case paras 47–50. Also see the decision of the court *a quo* for a contrary view – *S v Jordan* 2002 1 SA 797 (T) 800H–I). For this reason the terms "sex for reward" and "prostitution" will be used interchangeably throughout this paper.

96 Prostitution is a statutory crime in terms of s 20(1)(aA) of the Sexual Offences Act, which provides that "[a]ny person who [. . .] has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward [. . .] shall be guilty of an offence". The provisions regarding brothel keeping that were before the court, are ss 2, 3(b) and 3(c) of the Sexual Offences Act. S 2 provides that "[a]ny person who keeps a brothel shall be guilty of an offence." S 3 lists the persons who are deemed to keep a brothel. S 3(b) defines a brothel keeper as "any person who manages or assists in the management of any brothel" and s 3(c) adds "any person who knowingly receives the whole or any share of any moneys taken in a brothel".

97 *Jordan*'s case para 33.

98 *Jordan*'s case para 9.

99 Also see the minority judgment of O'Regan and Sachs JJ also refer to the "control of commercial sex" as an important and legitimate constitutional purpose (*Jordan*'s case para 114). It is an open question as to how and why the court came to this conclusion. It is

continued on next page

provision is constitutionally valid as it punishes both the prostitute and the customer.[100] He went on to say that the practice of prosecuting only the prostitute and not the customer may point to a flaw in the application of the law but does not establish a constitutional defect.[101]

It is contended that these arguments are incorrect because the court fails to take into account the fact that prostitution is a gender crime.[102] It is submitted that gender is an inherent feature of prostitution. This is so because the person offering sex for reward is either a woman or assumes the role of a person of the feminine gender.[103] Prostitution is not usually associated with masculinity. This can be illustrated by the fact that men are never derogatively referred to as "whores", whereas women are often insulted in this way when doing something contrary to what is expected of them in terms of existing gender stereotypes.[104] It therefore makes no difference whether the crime of sex for reward is applicable to male or female prostitutes. Although the provision in question refers to "any person" who engages in sex for reward, it is clear from a gender point of view that in practice it refers to "women" or "persons of the feminine gender". Moreover, it is not an excuse to point out that theoretically the customers of prostitutes are liable for prosecution if, in practice, they are seldom punished for partaking (and supplying the demand for) an act which is obviously considered by the court to be abhorrent.[105] Neither prostitution, nor the criminalisation thereof, can ever be described as gender-neutral.[106]

Furthermore, it is troubling to read the views regarding the stigma attached to prostitutes as expressed in the majority judgment. The court assumes that the public perception holds that the prostitute is "more to blame" than the customer, and that society assigns stigma to the prostitute by virtue of the conduct in which she engages.[107] Firstly, it is submitted that this point is of no value to the issue at hand. It is an *obiter* remark that does not contribute to the main arguments

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unclear where the Constitution provides either explicitly or implicitly for the outlawing of commercial sex.

100 *Jordan*'s case para 15.

101 *Jordan*'s case para 19. For a different view, see the minority judgment of O'Regan and Sachs JJ (*Jordan*'s case paras 43–46). It is also worth mentioning that O'Regan and Sachs JJ states that certain academics accept that s 20(1)(aA) of the Sexual Offences Act criminalises only the conduct of the prostitute, and not that of the customer. They also point out that they were not aware of a single case of a prosecution against a customer since 1988 (*Jordan*'s case paras 41 42 and authority cited there).

102 See part 4 2 2 above for an explanation of the term "gender crime".

103 O'Regan and Sachs JJ, in their minority judgment, points out that prostitutes are "overwhelmingly" female and their customers are "overwhelmingly" male. They consider this as sufficient grounds to declare that s 20(1)(aA) of the Sexual Offences Act discriminates indirectly on the grounds of sex (*Jordan*'s case para 59).

104 Kroeze "Sin and *Simulacra*: Some comments on the *Jordan* case" 2003 *TSAR* 558. For a discussion of the underlying meaning of the term "whore", see Dworkin "Pornography: Men possessing women" in Barnett *Sourcebook on Feminist Jurisprudence* (1997) 443 444; Dworkin "Whores" in Barnett *Feminist Jurisprudence* 445 445–446.

105 O'Regan and Sachs JJ argue that this differential treatment of the prostitute and the customer stems from the "defect in our justice system which hold (*sic*) women to one standard of conduct and men to another" (*Jordan*'s case para 67).

106 *Contra Jordan*'s case para 17.

107 *Jordan*'s case para 16.

expressed by the court. Secondly, the court gives no reasons for this assumption. The court does not state whether this was a matter raised by one of the parties, nor does the court offer any substantiations for this assumption.[108] This raises the question why the court felt the need to put on record this value judgment. The impression is created that the remark reflects personal opinions rather than constitutional values. Such a situation is, of course, to be avoided in all judgments and especially in those judgments dealing with controversial and/or morality matters.

The minority judgment was delivered by O'Regan and Sachs JJ. They found that the provision criminalising sex for reward is inconsistent with the Constitution and invalid. They held that the provision unjustifiably infringed on the equality clause on the basis that only prostitutes, and not the customers, are prosecuted. They maintained that this reinforces "patterns of gender inequality and illegitimate double standards relating to male and female sexuality".[109] O'Regan and Sachs JJ further argued that the provision prohibiting sex for reward did not unjustifiably infringe on the constitutional rights to economic activity,[110] human dignity,[111] freedom of the person[112] and privacy.[113] Nor did they find that that the statutory provisions criminalising brothel keeping was unconstitutional.[114] However, it is not the purpose of this paper to discuss the minority judgment in detail – this has been done elsewhere.[115] Rather, the comments regarding gender stereotyping made in the minority judgment is of relevance here.

O'Regan and Sachs JJ mentioned two gender stereotypes. The first related to their view that prosecuting only the prostitute and not the customer characterises the prostitute (usually a woman) as the primary offender, while the customer (usually a man) is only seen as an accomplice or co-conspirator. They argued that this entrenches the gender stereotype that the woman is fallen, while the man is "at best virile, at worst weak".[116] They stated that the perpetuation of this gender stereotype is against the values promoted by the Constitution. Therefore, unlike the majority judgment, the minority judgment was not blind to the fact that prostitution is a gender-related act. O'Regan and Sachs JJ looked beyond the mere black letter law in question and instead took into account reality and the effect of the law on the lives of people in this regard. They recognised that

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108 It could be that these comments of the court are in response to comments made in the minority judgment (see *Jordan*'s case paras 64–68).

109 Paras 95–97.

110 Para 56.

111 Para 74.

112 Para 75.

113 Para 94.

114 Para 120.

115 See, eg, Carpenter "Of prostitutes, pimps and patrons – some still more equal than others?" 2004 *SA Public Law* 231 233–247; Gaum "Turning tricks: A brief history of the regulation and prohibition of prostitution in South Africa" 2003 *Stellenbosch LR* 319 333–335; Jivan and Perumal "'Let's talk about sex, baby' – but not in the Constitutional Court: Some comments on the gendered nature of legal reasoning in the *Jordan* case" 2004 *SACJ* 368; Krüger "Sex work from a feminist perspective: A visit to the *Jordan* case" 2004 *SAJHR* 138 146–149; Kroeze 2003 *TSAR* 562.

116 *Jordan*'s case paras 63–65.

however gender-neutral the provision in question might seem, in reality it was based on age-old perceptions about the roles of men and women in society.

Despite O'Regan and Sachs JJ's refreshing outlook on the gender stereotype regarding the double standard pertaining to male and female sexuality,[117] they do not entertain the same enlightened views on the gender stereotype regarding a woman's place within society. In their arguments regarding the infringement of the provision prohibiting sex for reward on the right to privacy, O'Regan and Sachs JJ remarked on the character of prostitution. They observed that prostitution is "indiscriminate and loveless" and that the prostitute "empties the sex act of much of its private and intimate character". They then went further and stated that the prostitute "is not nurturing relationships or taking life-affirming decisions about birth, marriage or family; she is making money".[118] Throughout this whole argument the court constantly referred to the prostitute in the feminine gender. These comments indicate a tendency towards the traditional gender stereotype that portrays women as nurturers; stay-at-home mothers whose main and only concern is with regard to their marriages, children and families.[119] Although the court found that the provision in question infringes on the right to privacy (but not unjustifiably so), comments such as these imply a reluctance on the side of the court to assist prostitutes because they are women who dared to venture outside the boundaries of this gender stereotype.[120] Such views are surely not in line with the constitutional values of gender and sex equality.

From the above discussion it is clear that the courts still perpetuate certain gender stereotypes despite the implementation of the Bill of Rights. These include stereotypes regarding women's careers and financial affairs,[121] their sexuality,[122] as well as the stereotypes portraying women as victims[123] and as primary caregivers.[124] Moreover, it is submitted that in all these cases these stereotypes have prevented courts from delivering justice within the spirit, purport and objects of the Bill of Rights.[125]

5 CONCLUSION

This paper has shown that gender stereotyping is natural. However, it could have unfair and dangerous consequences when such stereotypes are held as prescriptive rather than descriptive. This is evident from the theories expounded by difference feminists such as Gilligan and MacKinnon. Unfortunately, the portrayal of gender stereotypes as prescriptive is also discernable in certain judgments of the South African courts. Such a tendency can be expected, but not excused, in cases heard almost a hundred years ago. However, it is disturbing to note that gender stereotyping is still present in more recent decisions, despite the advent of the new constitutional dispensation. It is submitted that in the cases

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117 Para 67.
118 Para 83.
119 This view corresponds with the views of Carol Gilligan as described in part 2 of this paper.
120 Kroeze 2003 *TSAR* 562.
121 *Harksen*'s case.
122 *Jordan*'s case.
123 *Van Eeden*'s and *K*'s cases.
124 *Hugo*'s case.
125 Constitution of the Republic of South Africa, 1996 s 39(2).

discussed the courts turned a natural descriptive idea into a prescriptive and offensive idea.

It has been said that "[l]aw and gender are not two separate, unrelated systems". Instead, "[e]ach is constitutive of and defined by the other".[126] This statement implies that law and gender influences the perceptions of the other. In the past the law was a tool in discriminating against persons because of their gender. In theory, this situation has changed with the implementation of the final Constitution. As already mentioned, the Bill of Rights explicitly prohibits unfair discrimination on the grounds of gender or sex. In practice, however, this change has not been as forthcoming as one would hope, mostly because of the perpetuation of gender stereotypes.

126 Greenberg "Introduction to Postmodern Legal Feminism" in Frug *Postmodern Legal Feminism* ix xxiii.

A DNA Criminal Intelligence Database for South Africa: Opening the Debate

Lirieka Meintjes-van der Walt
Adjunct Professor of Law, University of Fort Hare

1. INTRODUCTION

The use of DNA in identification, at times called DNA profiling or typing, is the result of its unique characteristics. DNA is a complex molecule containing the genetic code of humans. About 99,9% of the DNA molecule found within human cells is identical between any two persons. The remaining 0,1% is specific to the individual.[1]

DNA is a chemical deoxyribonucleic acid, consisting of modular components called nucleotides that are connected in a linear sequence. Each nucleotide contains one of four bases, namely adenine, cytosine, guanine and thymine. These bases are usually referred to by their initials A, C, G and T. Each DNA molecule consists of two complementary strands with each adenine on one strand paired with thymine on the other, and each guanine with cytosine. The structure of the molecule and therefore the information that it contains varies from person to person.

Forensic analysis usually involves analysis of nuclear DNA, which is inherited from both parents in random combinations. The DNA sequence from any two people will be the same at many points along the DNA molecule, but the overall nuclear DNA sequence of each person is unique, except for identical twins, who have identical DNA.

DNA profiles are created from sections of non-coding DNA found within bodily samples such as blood, semen, hair, skin, urine, bone marrow and cells found in saliva, sweat and tears.[2] The forensic analysis of DNA usually involves comparisons between two bodily samples to determine the likelihood that they came from the same person. Because the structure of DNA is inherited, the DNA of close relatives is more similar than that of distant relatives or unrelated people.

For the purposes of this article it is important to make a distinction between the biological *sample* and the DNA *profile*. When a biological sample is obtained, a small amount of that sample is analysed. The analysis in South Africa is limited to 10 locations or *loci* that yield patterns or genotypes. These genotypes are expressed as a set of numbers and are then entered into the current database. Police DNA forensic analysts will then determine whether the biological trace evidence at the crime scene or on the victim matches that of the suspect.

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1 With the exception of identical twins. See Kaye and Sensabaugh "Reference Guide on DNA Evidence" in Federal Judicial Center (ed) *Reference Manual on Scientific Evidence* (2000) 485 491–492.

2 ARW Jackson and JM Jackson *Forensic Science* (2004) 130.

At present the forensic index of crime scene profiles permits case-to-case matches between those profiles and the profiles of arrested persons. In addition, there is also a population database of anonymous DNA genotypes (of the four major population groups) which is used to determine the probability that a DNA sample picked at random would match a crime-scene sample.

2 DNA DATABASES AND/OR DATABANKS

The development and use of DNA profiling in most jurisdictions has followed a common course: from case-by-case use where there is a known suspect to the establishment of DNA databases which contain collections of genetic profiles derived from biological samples lawfully collected from widening categories of individuals.[3]

DNA or genetic databases have been defined as "collections of genetic sequence in formation, or of human tissue from which such information might be derived, that are or could be linked to named individuals".[4] This definition is wide enough to include the genetic information as well as the biological sample (blood, saliva and other bodily fluid). It has become common to refer to a collection of biological samples as DNA databanks.

In the case of particularly the violent crimes such as murder and rape, investigators are usually able to collect evidence from the scene of crime and the victim in order, in broad terms, to trace a "profile" of the perpetrator. In addition, once the perpetrator has been apprehended, then material and objects from the victim and crime scene and biological samples and fingerprints that may be taken from that person are obtained for evidentiary purposes. Evidence and information of this type have been routinely preserved and retained by law enforcement agencies for a number of reasons, including:

(a) to link together different crimes on the basis of the correspondence of marks or stains left at the scene;

(b) to assist law enforcement agencies to identify the perpetrator of a current crime;

(c) to enable those who have previously been convicted of an offence to be readily identified and re-captured in the event that they re-offend, so that recidivism is reduced;

(d) to preclude the use of false or assumed identities and thus to ensure that an offender's previous crimes are taken into account when sentence is being considered in respect of a further offence.

The use of DNA Intelligence Databases has been heralded as a powerful tool in the fight against crime. In South Africa, plagued by the high incidence of murder and sexual offences, the establishment of a complete DNA database of those convicted of serious crimes has found great support.[5]

In considering the establishment of a DNA database for South Africa it is important to determine what classes of DNA profiles would make up the database.

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3 Martin, Schmitter and Schneider "A brief history of the formation of DNA databases in forensic science within Europe" 2001 *Forensic Sci Int* 225–231.

4 See House of Lords Select Committee on Science and Technology *Human Genetic Databases: Challenges and Opportunities* HL Paper 57 (20 March 2001) para 3.3.

5 www.dnaproject.co.za (accessed 24-07-2007).

This requires one to consider the establishment of a repository of forensic DNA profiles generated from biological samples, which can be electronically stored for comparison with casework evidence profiles – in other words, those generated from biological material found at the scene of the crime. In addition, the use, storage and retention of the original biological samples are also issues that must be considered.

There are three kinds of DNA databases. One kind provides the allele frequencies that are used in calculations to estimate profile frequencies and match probabilities. Such population databases are drawn from anonymous "convenience" samples and are separated based on race of the donors, since allele frequencies and match probabilities for different profiles may differ between ethnic groups. The second kind of database contains the profiles of known persons such as victims or arrested persons. A third kind of database would be one that contains profiles of anonymous persons such as profiles from crime scenes and from unknown victims.

Until now it has been the practice that the form of data on offenders which have been retained have been fingerprint records and photographs together with other vital statistics such as height and eye colour. The storage of genetic material and information derived from such material, however, differs from the above conventional methods in a number of ways. DNA itself holds infinitely more information than fingerprints, such as predictive health information and biological relationships with other persons. Before tackling these issues and in consequence of the differing considerations which attach to the collection, storage and use of genetic information, it might be sensible first to try to state clearly the advantages of profiling and the subsequent storing of these profiles on a database.

3 THE PERCEIVED ADVANTAGES OF DNA DATABASES

The storage of DNA profiles on a database is considered to be particularly useful as an intelligence tool in combating current, as well as future, crime by:

(a) identifying links between crimes, such as for example stains left at scenes of crime by serial offenders;

(b) allowing for the rapid exclusion from the ambit of investigation of suspects who are already on a database and whose profiles do not match the current material;

(c) facilitating "cold hits", which is where a stain is matched with a profile of the person on the database who was not a suspect.

Thus, where a stain is recovered from a scene of crime, a comparison of the profile generated from the stain with profiles on a database of convicted offenders enables the investigating authorities to identify relatively quickly if any of those individuals can be implicated in the current investigation. It follows therefore that if an investigation can be concentrated on a primary suspect from the outset, the net need not be cast too widely and in consequence resources which would otherwise have to be expended on time-consuming door-to-door investigation may not be required.

A further advantage to the storage of DNA profiles is that some criminals may desist from criminal activity for fear of detection through comparison and exchange of such data.

A recent advance in using DNA databasing as an intelligence tool is that of familial searching.[6] Familial searching provides information to criminal investigations in circumstances where a full DNA profile has been obtained from a crime scene or a victim, but it does not match any profiles held on the forensic intelligence database. A familial search is premised on the fact that DNA profiles of those who are related to each other are more likely to contain similarities than those of two unrelated individuals. If the DNA profiles of individuals who are the parent or child of the offender or any of the offender's siblings are contained on the database, this could help in tracking down the suspect. In the United Kingdom familial searches have contributed to the progress of 148 historically unsolved cases; 34 individuals have been matched to crime stains and four individuals have been charged as a direct result of the advances.[7]

As of March 2006 the UK "National DNA Database" (NDNAD) contained 3.4 million criminal justice profiles and 271 903 profiles derived from crime scenes.[8] There have been various statistical representations advanced to illustrate the effectiveness of the NDNAD, such as:

(a) the NDNAD provides the police with approximately 1 000 "cold hits" on a weekly basis – in other words, the potential sources of 1 000 profiles taken from crime scenes are identified through database searches; [9]

(b) as of 31 March 2006 the crime-to-subject match rate was 52%;

(c) as of January 2001 there were around 182 612 matches reported from the database;[10]

(d) the Home Office and the Forensic Science Service claim that in a typical month the Database links suspects to 30 murders, 45 rapes and 3 200 motor vehicle, property and drug crimes;[11]

(e) in 2004 to 2005 each crime detected with DNA led to 0,8 other crimes being exposed, and the Home Office estimated that 50% of detections led to convictions – 25% of these resulted in custodial sentences and each custodial sentence prevented a further 7,8 crimes being committed.[12]

It is evident from the above that the storage of DNA profiles on a database has been extremely effective in combating crime.

In the context of South Africa the cost-effectiveness of implementing DNA databasing in the fight against crime is a very real issue that needs careful consideration. Is the game worth the candle? In Austria DNA profiling has been

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6 Bieber, Brenner and Lager "Finding criminals through DNA of their relatives" 2006 *Science* 1315–1316.

7 See "DNA technology to progress more cold cases" http://www.forensic/gov.uk/forensic_t/inside/news/list_press_release.php?case=31 (accessed 26-07-2007).

8 http://www.homeoffice.gov.uk/documents/DNA-report2005-06.pdf?view=binary (accessed 25-07-2007).

9 Williams and Johnson "Inclusiveness, effectiveness and intrusiveness: Issues in the developing uses of DNA profiling in support of criminal investigations" 2006 *Journal of Law, Medicine & Ethics* 243.

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*

found to be the most cost-effective investigative tool.[13] In the USA it has been indicated that the national DNA system is very cost-effective.[14] The Department of Justice has allocated $84 million towards the initiative Advancing Justice Through DNA Technology. It is estimated that an average DNA case costs $2 000 in laboratory costs, analytical time and supplies. In Canada, it has been estimated that the running costs of a DNA database are C$10 million.[15]

Were DNA databasing to be seen as a priority, the question is whether the South African system will be able to cope?[16] Technologically, South Africa has the wherewithal to cope. The first fully automated system for high volume forensic DNA analysis in South Africa became operational in Tshwane.[17]

The experience in the USA has, however, shown that specific money has to be allocated to deal with the backlog in cases awaiting DNA testing. Ultimately it is a question of priorities and deciding what the most cost-effective ways to combat crime are.

4 PERCEIVED PERILS OF DNA DATABASING

There are countervailing considerations and concerns entailed in profiling and the creation of a database.[18] Where comprehensive legislation is considered to form the basis of an intelligence DNA database to fight crime, it should be weighed against the perceived dangers to fundamental rights that forensic use of genetic information can present.

The question that then needs to be asked should be: why is genetic information particularly sensitive? The United Kingdom's Human Genetics Commission (HGC),[19] in its review of the use of personal genetic information, identified several factors which might seem to distinguish genetic information from other forms of information such as fingerprinting as follows:

(a) the almost uniquely identifying nature of some genetic information, including its capacity to confirm, deny or reveal family relationships;
(b) the fact that genetic information could be obtained from a very small amount of material (such as skin, saliva, a blood splatter or hair), possibly secured without the consent of a person;
(c) the predictive power of some genetic information, especially the predictive power across generations of certain rare genetic diseases;
(d) the fact that genetic information may be used for purposes other than those for which it was originally collected;
(e) the interest which some genetic information has for others, including relatives who might be affected by it themselves as well as insurers and employers;

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13 www.nicc.fgov. be/Download.aspx? ID=1382 (accessed 07-01-2008).
14 "National DNA database is well-worth taxpayers' investment" *USA Today* 12-01-2005.
15 "Canada takes DNA Database lead" http://www.wired.com/print/science/discoveries/news/2000/07/37406 (accessed 14-01-2008).
16 http://www.dnaproject.co.za/content/index.php?id=1 (accessed 14-01-2008).
17 http://www.dnaproject.co.za/content/content.ph.p?type=article&section=20&id=13 (accessed 14-01-2008).
18 Staley *The Police National DNA Database: Balancing Crime Detection, Human Rights and Privacy.* A Report for GeneWatch UK, January 2005.
19 *Inside Information: Balancing Interests in the Use of Personal Genetic Data* (2002) Department of Health, London.

(f) the importance that genetic information may have for establishing susceptibility both to rare inherited diseases and the effectiveness of some treatment; and

(g) a further relevant factor is that of the stability of DNA, which can be recovered from stored specimens or even archaeological material after many years.

Genetic information can range from non-sensitive to sensitive. The different types of genetic information may be summarised as falling into the following categories:

1. the genotype, which at a fundamental level provides details of DNA or protein that is inherited from both parents;
2. the phenotype, which is the observable outcome in terms of physical or physiological characteristics, such as ethnicity and colour;[20]
3. family information, which shows the pattern of inheritance of different phenotypes.

In 1991, the Federal Bureau of Investigation (FBI) prepared *Legislative Guidelines for DNA Databases* to assist states in their efforts to enact DNA database statutes. In addition to the stated purpose of achieving uniformity among the various state DNA laws, provisions were "suggested to address privacy and civil liberties concerns". Specific provisions were recommended to protect citizens' rights to privacy and other civil liberties:[21]

> "1. Only DNA records that directly relate to the identification of individuals should be collected and stored. The information contained in the DNA records should not be collected or stored for the purpose of obtaining information about physical characteristics, traits or predisposition for disease, and should not serve any purpose other than to facilitate personal identification of an offender;
> 2. Personal information stored in the state DNA database system should be limited to the data necessary to generate investigative leads and support statistical interpretation of test results."

Any legislation providing for the establishment of a DNA database is of little significance unless the South African Police Service (SAPS) is entitled to obtain samples from which profiles may be generated. If the decision is taken to compile a database of DNA profiles, then legislation conferring appropriate sampling powers will need to be enacted. Before proposing new legislation that would be constitutionally permissible it is important to examine the existing law in relation to taking bodily samples.

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20 The adaptation of the DNA legislation in the Netherlands in 2003 for instance involved the introduction of the possibility of using DNA-testing to determine externally visible properties of unknown donors of crime scene stains when all other investigative tools have not led to a suspect. The law presently only allows gender and ethnic origin as properties which can be tested. The results of the test are not taken up in any DNA-database. Their only purpose is to help the police find a suspect more quickly by limiting the number of possible suspects on the basis of their likely appearance. After a possible suspect has been identified, a "normal" DNA-test is used to confirm that the crime scene may originate from the suspect. See Van der Beek "Evolution of the Dutch DNA-law" *Der Kriminalist* (2004) 293.

21 Herkenham "Retention of offender DNA samples necessary to ensure and monitor quality of forensic DNA efforts: Appropriate safeguards exist to protect the DNA from misuse" 2006 *Journal of Law, Medicine and Ethics* 380–384.

5 BY WHOSE AUTHORITY SHOULD DNA BE TAKEN?

Currently, s 37 of the Criminal Procedure Act ("CPA") 51 of 1977 provides for the taking of the necessary steps by police officials in order to ascertain whether the body of an arrested person has "any mark, characteristic or distinguishing feature or shows any condition or appearance".[22] Du Toit *et al*[23] state that the complexity of s 37 "makes serious inroads upon the bodily integrity of an accused but these inroads should be seen in the light of the fact that the ascertainment of bodily features and 'prints' of an accused *often forms an essential component of the investigation of crime and is in many respects a pre-requisite for the effective administration of any criminal justice system, including the proper adjudication of a criminal trial*" (my emphasis).

Section 37 also empowers police officials to take an accused's fingerprints, palm prints or footprints.[24] Section 225(2) of the CPA provides that evidence of such characteristics will not be inadmissible by reason only that they were not taken in accordance with the provisions of s 37. However, s 37 does not empower police officials to take any blood samples; these may only be taken by a registered medical practitioner or a registered nurse.[25] Section 37(1)(c) and 37(2)(a) give a medical practitioner or a nurse the right to take a blood sample.[26]

An overview of cases that deal with sample-taking in terms of s 37 of Act 51 of 1977	
Case	**Principle**
S v Binta 1993 2 SACR 553 (C)	• Dealt with s 37(1)(a) • Ackerman J: "The common law principle '*nemo tenetur se ipsum accusare (prodere)*' does not apply to the ascertaining of bodily features or the taking of blood samples in general and in particular not to such acts as are performed in terms of s 37(1) or (2) of the Criminal Procedure Act. A distinction is drawn between being obliged to make a statement against interest and furnishing 'real' evidence."

22 Criminal Procedure Act 51 of 1977 s 37(1). In *Levack v The Regional Magistrate, Wynberg* 1999 2 SACR 151 (C) it was held that s 37(1)(c) included voice samples as part of the category of marks, characteristics or distinguishing features of the body. This decision was confirmed on appeal (see *Levack v The Regional Magistrate, Wynberg & another* 2003 1 SACR 187 (SCA)), where the SCA held that refusal to co-operate by the accused would be treated as contempt of court.

23 Du Toit *et al Commentary on the Criminal Procedure Act* Service 33 (2004) 3-1. See also *S v Orrie* 2004 1 SACR 162 (C) para 15.

24 Criminal Procedure Act 51 of 1977 s 37(1)(a).

25 S 37(1)(c) and 37(2)(a). See also s 113 of the Firearms Control Amendment Act 43 of 2003. Du Toit *et al Commentary on the Criminal Procedure Act* (1987) (1999 update) submit that South African courts will probably not admit evidence of the results of a blood sample taken by a police official personally.

26 S 212(11) facilitates the prosecution's task of proving that syringes for drawing blood and receptacles for storing blood were at the time of their use free from any substance or contamination which would materially affect the result of the analysis.

An overview of cases that deal with sample-taking in terms of s 37 of Act 51 of 1977	
Case	**Principle**
S v Huma (2) 1995 2 SACR 411 (W)	• Claassen J held that the taking of fingerprints did not constitute testimonial evidence by the accused and was not in breach of his privilege against self-incrimination.
S v Maphumulo 1996 2 SACR 84 (N)	• Section 37(1): "taking of the accuseds' fingerprints, whether it be voluntarily given by them, or taken under compulsion in terms of the empowerment thereto provided in s 37(1), would not constitute evidence given by the accused in the form of testimony emanating from them, and as such would not violate their rights as contained in s 25(2)(c) or 25(3)(d) of the Constitution. Nor does it appear to be a violation of the accuseds' rights as contained in s 10 [right to dignity] of the Constitution."
Minister of Safety & Security v Gaqa 2002 1 SACR 654 (C)	• Dealt with s 36(1) of the Constitution and s 37(1)(c) of the CPA. • Desai J ordered the surgical removal of a bullet from an arrestee for the purpose of ballistic tests.
Minister of Safety & Security & another v Xaba 2003 2 SA 703 (D)	• Southwood AJ had to deal with an application authorising the surgical removal of a bullet from a suspect. The judge held that s 37(2)(a) did not contemplate the removal of a bullet under general anaesthetic. • Held that s 37(2)(a) refers to limited surgery associated with the taking of a blood sample. He held that *Gaqa* incorrectly decided that the matter should be left to legislature.
S v Orrie 2004 1 SACR 162 (C)	• Bozalek J held that blood samples "have long been . . . a vital tool in the administration of the criminal justice system".
Levack v Regional Magistrate, Wynberg 2003 1 SACR 187 (SCA)	• Cameron JA: "There is no difference in principle between the visibly discernible physical traits and features of an accused and those that under law can be extracted from him through syringe and vial or through the compelled provision of a voice sample. In neither case is the accused required to provide evidence of a testimonial or communicative nature, and in neither case is any constitutional right violated."

It is not necessary that blood samples be taken for DNA purposes. Less invasive samples such as a buccal (mouth) swab can be used.

Although no specific legislation was set up for the National DNA Database in the United Kingdom, various pieces of legislation in England and Wales[27] have supported the establishment and use thereof. Rooted hair and mouth swabs have been classified as non-intimate samples. Non-intimate samples can be taken without consent from any individual arrested for a recordable offence,[28] irrespective of whether the sample is relevant to the crime being investigated.

In Scotland, the power to obtain DNA samples without consent at the point of arrest has been in force since 1995. In 2003 the Criminal Justice (Scotland) Act was amended to authorise police constables to take DNA samples at the point of arrest without, as was the practice, obtaining the authority from a higher ranking officer.

In the USA 43 states, the Federal Government and the military have the authority to collect DNA samples from all felony offenders.[29]

6 FROM WHOM SHOULD DNA SAMPLES BE TAKEN?

Section 37 of the CPA is the enabling statutory provision in South Africa which determines from whom DNA samples should be taken. However, it limits the impact that a DNA database may have on offender detection. Section 37 stipulates that samples can only be taken from *arrested* suspects, but not from *convicted* offenders. In effect this means that currently a database search in South Africa would not be able to detect the profile of a recidivist.[30] In contrast, since 1989, when Virginia became the first state to pass a law mandating the collection of DNA from certain convicted offenders, all 50 states in the USA have provided for the collection of DNA from convicted offenders.

It is also in the interests of justice that legislation should make provision for circumstances such as those occurring where there is a refusal to provide a DNA sample. In some states it is a crime for an accused to refuse to submit a biological sample to the authorities for DNA testing,[31] in other states statutes permit the use of force to collect biological samples.[32] Where individuals have argued that the collection of DNA blood samples violated their religious beliefs, the courts have rejected such arguments.[33]

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27 Police and Criminal Evidence Act 1984; Criminal Justice and Public Order Act 1994; Criminal Evidence Act 1997; Criminal Justice and Police Act 2001; Criminal Justice Act 2003; Serious Organised Crime and Police Act 2005.

28 Largely any offence for which a person may receive a sentence of imprisonment, is a recordable offence. See National Police Records (Recordable Offences) Regulations 2000 as amended. Even ticket touting at football matches are considered a recordable offence! See The National Police Records (Recordable Offences) (Amendment) Regulations 2007.

29 Herkenham 2006 *Journal of Law, Medicine and Ethics* 380–384.

30 South Africa does not yet have the enabling legislation, although we have the technical know-how, to use a DNA database optimally in crime detection. In fact the sophisticated equipment that exists is currently under-utilised.

31 States (crime to refuse): Alabama (AL), Alaska (AK), California (CA), Idaho (ID), Illinois (IL), Massachusetts (MA), Michigan (MI), New Hampshire (NH).

32 States permitting force: Arkansas (AR), California (CA), Colorado (CO), Florida (FL), Iowa (IA), Massachusetts (MA), Montana (MT), New Hampshire (NH), Pennsylvania (PA), Texas (TX), Utah (UT), Vermont (VT), Wyoming (WY).

33 *Schaffer v Saffle* 148 F 3rd 1180 (10th Cir 1998); *Ryncarz v Eikenberry* 824 F Supp 1493 (ED Wash 1993).

The majority of states require samples to be collected from convicted juveniles.[34] Recently, Congress passed the DNA Fingerprint Act of 2005 expanding inclusion criteria for DNA databases to all those arrested for certain federal offences and from detainees in the case of non-US citizens.

7 HOW SHOULD DNA BIOLOGICAL SAMPLES BE TAKEN?

It is apparent from an overview of United States state legislation with regard to DNA databases that the DNA sample collection procedures and laboratory protocols are prescribed in great detail.[35] Under the laws of California a DNA sample may be tested for HIV if the sample has come into contact with the skin of the official working with the sample.[36] The California Penal Code art 296.2 also makes provision for the replacement of unusable DNA samples.

8 HOW SHOULD DNA BIOLOGICAL SAMPLES BE STORED AND FOR HOW LONG?

According to Genewatch UK Report, countries such as Belgium, Germany, the Netherlands and Norway destroy biological samples once the analysis has been completed,[37] while in Austria, England and Wales, Denmark, Finland, Hungary, Slovenia and Switzerland duplicate samples are stored.[38]

Where biological samples are retained, it becomes possible for profiles to be upgraded as new technology is developed, and disputes regarding sample processing and laboratory standards can be resolved by allowing re-testing. It is in the area of predicting changes to DNA profiling that concerns many human rights groups.[39] Predicting eye colour,[40] ethnicity, skin colour, hair colour, age,[41] health and behavioural traits are some of the issues that civil liberty groups are concerned about. There has been research into finding DNA sequences that can predict ethnicity[42] and trying to find the frequency of the usual 10 STRs to determine different ethnic groups.[43]

Familial testing poses the very real danger that genetic relationships, hitherto unknown to an individual, can be exposed. In this regard the realisation that, for example, someone else is your biological father as opposed to the person you have always considered to be your father can have dire consequences for family units. Results from DNA profiling could also reinforce racial prejudice. This is

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34 Palmer *Encyclopaedia of DNA and the United States Criminal Justice System* (2004) 66.

35 *Ibid.*

36 See Staley *The Police National DNA Database: Balancing Crime Detection, Human Rights and Privacy.* A Report for GeneWatch UK, January 2005. See also California Health and Safety Code 121056.

37 Staley *op cit* 28.

38 *Ibid.*

39 *DNA Fingerprinting and Civil Liberties Project* American Society of Law, Medicine and Ethics http://www.aslme.org/dna_04/description.php (accessed 08-07-2007).

40 Sturm and Frudakis "Eye colour: portals into pigmentation genes and ancestry" 2004 *Trends Genetic* 327–332.

41 Jackson and Jackson *Forensic Science* 130.

42 Anathaswamy "Under the Skin" (2002) 20(4) *New Scientist* 34–37.

43 Lowe, Urquhart, Foreman, Evett "Inferring ethnic origin by means of an STR profile" 2001 *Forensic Science International* 17–22.

illustrated by a hypothetical example using the USA as an example. If research were to be conducted in the United States to determine whether there are genetic links to criminal behaviour, it would in all probability find that the genes influencing skin colour have an impact on criminal behaviour. This would, however, be erroneous. Just because the majority of convicted persons in the USA are Africa-American, this correlation cannot be held to prove that the gene for skin colour also influences criminal behaviour.[44]

In the United Kingdom the retention of profiles of the unconvicted and uncharged has led to criticism.[45] In *R v Chief Constable of South Yorkshire (ex parte S and Marper*) the parties appealed against a decision to retain their fingerprints and DNA samples after criminal charges were dismissed. It was argued that this was a breach of article 8 (right to respect for private and family life) and article 14 (prohibition of discrimination) of the European Convention on Human Rights Act 1998. Both the Court of Appeal[46] and the House of Lords[47] dismissed the appeals, holding that although there was a breach of article 8(1), this was proportionate and justified under article 8(2), and that there was no breach of article 14. The case has been referred to the European Court of Human Rights.

There are jurisdictions where an individual's profile is removed from the database if he or she is not charged or is acquitted. In England and Wales it has been shown that of the 181 000 DNA profiles that are on the NDNAD, but would have been removed from the database prior to the enactment of the Criminal Justice and Police Act 2001, 8 251 have been linked to crime-scene samples related to 13 709 offences.[48] Norway, Finland and Austria also keep profiles of convicted offenders permanently.

In some countries DNA profiles of convicted offenders are removed after a period of time (this could vary from five to twenty years), while the profiles of those acquitted and against whom criminal charges are withdrawn, are removed.

9 HOW SHOULD THE INFORMATION CONTAINED IN DNA PROFILES BE PROTECTED?

Depending on the jurisdiction, legislation usually stipulates for which exclusive purposes samples and profiles may be used. This usually coincides with purposes which relate to prevention and detection of crime, investigation and prosecution of crimes, judicial proceedings or the identification of deceased persons. Legislation also regulates the consequences of unlawful disclosure of DNA information. In addition in many cases provision is also made for immunity for custodians from liability.

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44 Staley *op cit* 37.

45 Liberty's response to the Nuffield Council on Bioethics Consultations: see *Forensic Use of Bioinformation: Ethical Issues* (2007) 1–12.

46 (2003) 1 Cr App R 16 247.

47 2004 4 All ER 193 (HL).

48 "The National DNA Database" Parliamentary Office of Science and Technology, February 2006 3.

10 WITH THE ADVENT OF FAMILIAL SEARCHING HOW SHOULD INNOCENT RELATIVES BE PROTECTED FROM INVASIONS OF PRIVACY?

The United Kingdom Parliament's Seventh Report on National DNA Databases recognises that familial searching carries with it ethical and human rights implications, and makes the following observations:

> "There are several fundamental problems. A genetic link between individuals might be previously unknown by one or both parties and police investigations may make such information known to them for the first time (and, as a by-product, may reveal the absence of genetic links which participants assumed to have existed – estimates of the non-paternity rate in the UK vary between 5 and 20%). There is also the question of whether the use of an individual's databased DNA in this way violates existing promises of privacy and confidentiality made when genetic material was originally collected. Furthermore, the implicit assumptions made about criminality and relatedness may also be problematic. We are concerned that the introduction of familial searching has occurred in the absence of any Parliamentary debate about the merits of the approach and its ethical implications."

Lazer and Bieber[49] note that familial searching could result in citizens being tracked merely by virtue of the fact that they are related to someone whose DNA has been found at the scene of a crime. Sir Alec Jeffreys, father of DNA profiling cautions that familial searching could lead to false matches especially where the markers/loci in question are prevalent in a population.[50] A possible safeguard that he mentions is increasing the number of DNA markers used.[51] In the UK, where familial searching now forms part of criminal investigation, its use is limited to finding perpetrators of serious offences, such as murder and serious sexual assault. [52]

11 CONCLUSION

This discussion has set out to open the debate regarding establishing a DNA Criminal Intelligence Database for South Africa. The issues are wide-ranging and have far-reaching implications. Benefits of DNA profiling include speedy perpetrator identification; confident exclusion of innocent suspects, investigation cost reduction, the possible deterrent effect on potential or recidivist offenders and, finally, the corresponding increase in confidence of the public in policing and the criminal justice process. Problems and concerns arising from DNA databases include possible breaches of privacy that can be caused by the storage and future use of biological samples and breach of the civil rights of innocent citizens in the course of familial testing. Other jurisdictions have had to grapple with these controversial questions. Even in these comparator countries it is apparent that there is an ongoing tension between the advantages of DNA databases on the one hand, and privacy rights of individuals on the other hand. South Africa is lagging far behind other jurisdictions in exploiting the potential power of DNA for making offender identification possible through automated profile

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49 Lazer and Bieber "Guilty by association?" at http://www.ksg.harvard.edu/news/opeds/2004 /Lazer_guilt_by_association_new_scien (accessed 17-09-2007).

50 Bhattacharya "Killer convicted thanks to relative's DNA" http://media.newscientist.com/article.ns?id=dn4908&print=true (accessed 17-09-2007).

51 *Ibid.*

52 *Ibid.*

comparisons in a national criminal intelligence DNA database. Internationally, these databases have been created by appropriate legislation. In legislating for the establishment of a national DNA database, the following issues will have to be addressed:

- under what circumstances should the police be authorised to obtain DNA samples from suspects without consent and with force if necessary;
- from whom may DNA samples be taken;
- what are the offences and circumstances that would justify sampling;
- what criteria should be met for inclusion of DNA profiles in DNA databases;
- what should be the legitimate uses of samples and profiles;
- when and under which circumstances should samples and profiles be kept after investigations have been completed;
- how long should samples and profiles be kept;
- who should "own", manage and govern the DNA database;
- should other organs of state or organisations have access to the samples or profiles;
- what quality assurance protocols should be in place.

Collection of an Arrear Advance Made under the Repealed Land Bank Act

Michelle Kelly-Louw

Associate Professor in the Department of Mercantile Law, School of Law, College of Law and Justice, University of South Africa

1. INTRODUCTION

Since the middle of 2002 the majority of High Courts held the view that the special debt collecting procedure set out in s 33 of the current Land and Agricultural Development Bank Act of 2002[1] also applied to arrear advances that were made by the Land and Agricultural Development Bank of South Africa[2] under the repealed Land Bank Act of 1944[3] and before the 2002 Act came into operation on 10 June 2002 (ie "old advances").[4] However, the Cape Provincial Division was one court that held a contrary view.[5] So it was clear that there existed two conflicting views in the High Courts. Then at the end of May 2006, the Supreme Court of Appeal in *Land and Agricultural Development Bank of South Africa t/a Land Bank v The Master of the High Court*[6] finally brought an end to this debate, when it ruled that the view of the Cape Provincial Division, the court *a quo*, was in fact correct.

In this contribution attention is first given to *FirstRand Bank Ltd v Master of the High Court*,[7] the most recent case that has endorsed the majority view of the High Courts. In the second place, the Supreme Court of Appeal's decision in *Land Bank v The Master*[8] to overturn the majority view and to endorse the judgment of the court *a quo*[9] is also analysed in more detail. Lastly, the effect that the judgment of the Supreme Court of Appeal has on the collection of old arrear Land Bank advances is also discussed.

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1 15 of 2002 (hereafter "the 2002 Act").

2 I shall refer to the Land and Agricultural Development Bank of South Africa as "the Land Bank" or "the Bank".

3 13 of 1944 (hereafter "the 1944 Act").

4 See *Die Land- en Landbou-ontwikkelingsbank van Suid-Afrika v Cloete Murray NO* (TPD, 27 October 2003, case no 27258/2003, unreported); *Land and Agricultural Development Bank of SA t/a The Land Bank v Venter NO* 2004 2 All SA 314 (O); *The Land and Agricultural Development Bank of South Africa v De Villiers* (ECD, case no 693/2004, unreported); and *FirstRand Bank Ltd v Master of the High Court* 2006 JOL 17192 (T). For a discussion of the latter case see Kelly-Louw "The Land Bank – Out with the old and in with the new!" 2006 *Juta's Business Law* 69.

5 See *Land and Agricultural Development Bank of South Africa t/a Land Bank v The Master* 2005 4 SA 81 (C) (hereinafter cited as "*Land Bank v The Master* (C)").

6 2006 SCA 68 RSA (hereinafter cited as "*Land Bank v The Master* (SCA)").

7 2006 JOL 17192 (T) (hereinafter cited as "*FirstRand Bank v Master*").

8 See *Land Bank v The Master* (SCA).

9 See *Land Bank v The Master* (C).

2 THE SPECIAL DEBT-COLLECTION PROCEDURES IN THE 1944 AND 2002 ACTS

2 1 Special remedies set out in the 1944 Act

In order to follow the discussion here one also needs to closely look at the special debt collecting procedures that are set out under the 1944 and 2002 Land Bank Acts respectively.

Sections 34 and 55 of the 1944 Act *inter alia* provided for remedies of the Land Bank against defaulting debtors. These aforementioned sections authorised the Land Bank to bring about attachments and sales of assets without any court process, in so far as the Land Bank could merely attach any assets of a debtor if the relevant debtor was unable to fulfil its obligations to the Land Bank. Such an attachment by the Land Bank was followed by a sale of the relevant assets in order to liquidate the debtor's indebtedness to the Bank. The provisions of ss 34 and 55 of the 1944 Act also granted certain benefits and rights to the Land Bank, which, if they were read with s 90 of the Insolvency Act,[10] were not affected by the insolvency of the relevant debtor. The effect of this was that notwithstanding sequestration,[11] the Land Bank could nevertheless after the date of sequestration still bring about an attachment and sale of assets for its own account without having to consult with the trustee[12] of the insolvent estate. In the same manner, should the attachment have taken place before the date of sequestration, the Land Bank could merely continue with the sale of the relevant assets in attachment for its indebtedness, notwithstanding the fact that the debtor was sequestrated before the said sale in execution. In other words, the 1944 Act confirmed the Land Bank's exclusion from the insolvency legislation.

Later, during 2000, the Constitutional Court in *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa; Sheard v Land and Agricultural Bank of South Africa*[13] held that certain parts of ss 34 and 55 of the 1944 Act[14] were unconstitutional as they authorised the Land Bank to attach defaulting debtors' property without recourse to a court, thereby denying the debtors their constitutional right to have their cases heard by a court or independent tribunal before the attachment and subsequent sale of their properties.[15] This order of unconstitutionality left the Land Bank without recourse for its unsecured loans. Recognising this consequence, the Constitutional Court ruled that the invalidity of certain parts of s 34 would be suspended until 9 June 2002, giving the Land Bank two years to draft replacing sections or a new Act that would be in line with the Constitution.

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10 24 of 1936 (hereafter "the Insolvency Act"). S 90 provides that the provisions of the Insolvency Act will not affect the provisions of any other law which confer powers and impose duties upon the Land Bank in relation to any property belonging to an insolvent estate. (Also note that s 90, in terms of s 399 of the Companies Act 61 of 1973 applies *mutatis mutandis* to a company in liquidation and in terms of s 66 of the Close Corporations Act 69 of 1984 also to a close corporation in liquidation.)

11 A reference to "sequestration" also includes a reference to "liquidation".

12 A reference to a "trustee" also includes a reference to a "liquidator".

13 2000 3 SA 626 (CC). For a full discussion of this case, see Kelly-Louw "Investigating the statutory preferential rights the Land Bank requires to fulfil its developmental role (Part 1)" 2004 *SA Merc LJ* 211 227–230.

14 For a full discussion of these sections, see Kelly-Louw 2004 *SA Merc LJ* 211 at 213–224.

15 See s 34 of the Constitution of the Republic of South Africa, 1996.

Subsequent to the decision of the Constitutional Court, it was decided to repeal the 1944 Act as a whole because it had become outdated and did not allow the Land Bank to pursue its developmental mandate effectively. This led to the 2002 Act coming into operation on 10 June 2002, thereby repealing the previous 1944 Act.

2 2 New remedies set out in the 2002 Act

The 2002 Act created a new debt collecting procedure set out in s 33. Section 33(1) of the 2002 Act provides that if a debtor defaults with regard to advances he has received from the Land Bank, the Land Bank will, in addition to all the other remedies normal creditors may have, also have further special remedies at its disposal under certain circumstances set out in s 33(2) (often referred to as "triggering events"). Section 33(1) and (2) provide:

> "(1) Despite anything to the contrary in any other law or any agreement and without prejudice to any other remedies the Bank may have, the Bank may in respect of *advances that it has made* take any action envisaged in subsection (3) if any of the circumstances envisaged in subsection (2) exist.
>
> (2) The circumstances contemplated in subsection (1) are if –
>
> (a) payment of any sum of money, due in respect of *any advance made in terms of this Act*, is in arrear, whether it is the capital sum or interest thereon;
>
> (b) any *such advance* has been applied for a purpose other than the purpose for which it was made;
>
> (c) *the advance* has not within a reasonable time been applied for the purpose for which it was made;
>
> (d) any other condition to which *the advance* is subject has not been complied with substantially;
>
> (e) (i) the debtor becomes insolvent, commits any act of insolvency in terms of section 8 of the Insolvency Act, 1936 (Act No. 24 of 1936), or is sequestrated by virtue of an order of court in terms of that Act;
>
> (ii) the debtor is sentenced to imprisonment without the option of a fine;
>
> (iii) judgment is obtained against the debtor for the payment of any sum of money;
>
> (iv) any asset of the debtor is by order of a competent court declared executable or is attached in pursuance of an order of any such court;
>
> (f) the debtor is deceased, and his or her estate is about to be dealt with in terms of section 34 of the Administration of Estates Act, 1965 (Act No. 66 of 1965), or has been sequestrated;
>
> (g) the debtor is a company or close corporation which has been placed under judicial management or is being wound up or is being deregistered, as the case may be; or
>
> (h) the debtor is a private company or close corporation and any director, shareholder or member thereof is sentenced to imprisonment without the option of a fine."[16]

So if one of the circumstances set out in s 33(2) (ie "triggering events") exists, s 33(3) clearly sets out the steps with which the Land Bank must comply if it desires to proceed against its defaulting debtor in terms of s 33. In terms of s 33(3)(a), the Land Bank may refuse to pay any portion of an advance which

16 Emphasis has been placed on those words that are important for purposes of this discussion.

has been approved, but which has not been paid. Furthermore, s 33(3)(b) also provides that where the advance was already made to the debtor, the Land Bank may – after the expiry of seven days after it has in writing made a demand for the repayment of the advance to the debtor and given notice to the holder of a preferent (for example a mortgage bond) or similar security in respect of the property of the debtor and also, if appropriate, to the Registrar of Deeds – apply to a court for an order contemplated in s 33(4). Subsection (4) makes provision for a unique court process by which the Land Bank will be able to attach and sell its defaulting debtor's property to satisfy the outstanding amount owed in special circumstances. It provides that if the Land Bank makes such a court application and there is evidence supported by affidavit that certain requirements have been met[17] (for example that the delay likely to be caused by the institution of a normal court action for recovery of the debt would result in the property having no value due to its perishable nature, or if it is reasonable or just in the circumstances or if compelling considerations exist[18]), a court may authorise the Land Bank directly to attach and sell so much of the property and rights of the debtor as may be necessary to liquidate the amount owing in respect of the advance made by the Land Bank. This special debt collecting procedure set out in s 33(4) authorises the Land Bank to directly attach and sell the debtor's property and rights without recourse to ordinary court processes in certain circumstances. In other words, s 33(4) allows the Land Bank to request the court directly to order an attachment and sale of the debtor's property without obtaining a civil judgment first. The normal procedure is that a creditor must first obtain a civil judgment from a court before the property or rights of a debtor may be attached and sold.

As with the 1944 Act, specific sections were also included in the 2002 Act[19] to ensure that the Land Bank remained excluded from the Insolvency Act. For instance, s 33(10) of the 2002 Act provides that even if the property of a debtor vests in the trustee of the debtor's estate, the Land Bank will still have the right to apply to a court for an attachment order, as set out in s 33(4), to sell the property of the debtor. The purpose of this provision is not to divest the trustee of the debtor's estate, but to merely give the Land Bank the option of acting in terms of the 2002 Act, should it decide to do so. Practically, it means that the Land Bank may, on application to court, prevent certain property of an insolvent debtor from vesting in the trustee and may also "remove" such property after it vested in the trustee. The procedures as set forth in the Insolvency Act need therefore not be followed by the Land Bank in relation to the realisation of its debtor's property. In the event that the court does not grant an order allowing the Land Bank to enforce its rights under s 33(10), or in the event that the Bank, at its discretion, decides not to invoke the provisions of s 33(4) of the 2002 Act, the Bank's fall-back position would be governed by the principles of the Insolvency Act.

In addition, the 2002 Act also provides that, if the Land Bank is an unsecured creditor, it has a preferential right to the proceeds of the sale of a debtor's property above other ordinary creditors. Section 34(2) of the 2002 Act determines

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17 See s 33(4)(a).
18 See s 33(4)(c).
19 See ss 33 and 34 of the 2002 Act read with the Insolvency Act s 90.

that any other creditor who holds a statutory preferential right over property of the debtor (such as local authorities and co-operatives) ranks after the Land Bank's preferential rights in terms of this Act. Section 34(2) appears to have the effect of elevating the Land Bank, as an unsecured creditor, not only above the concurrent creditors,[20] but also above the statutory-preferent creditors[21] of the insolvent estate, with the exception of the secured creditors ranking above the Bank. So the statutory preferential rights of the Land Bank over an insolvent debtor's property in terms of ss 33 and 34 of the 2002 Act will outrank the rights of the statutory-preferent creditors in terms of the Insolvency Act, excluding the rights of the secured creditors (such as the mortgage bondholders or holders of special notarial bonds) that rank above the Bank.

3 LAST CASE TO CONFIRM THE MAJORITY VIEW

As mentioned above, the majority of High Courts held that the Land Bank's special debt-collection procedure set out in s 33 of the 2002 Act also applied to their arrear advances that were made under its repealed 1944 Act and before the 2002 Act came into operation (ie old advances). The most recent and last case to affirm this view was *FirstRand Bank v Master*.[22]

In *FirstRand Bank v Master* the Land Bank, the second respondent, made an advance to a farmer in 1999 when the 1944 Act still prevailed. The farmer became insolvent and his estate was sequestrated on 12 February 2002. In exercising his duties, the trustee later finalised and submitted the fourth liquidation and distribution account to the Master of the High Court, the first respondent. The Master published this account in which a sum of R500 000 (from the free residue account) was awarded to the FirstRand Bank, the applicant. The Land Bank objected to this account. The Land Bank requested the Master on 1 July 2004 to inform the Land Bank if the Master on 1 July 2004 was not going to amend this account, to enable the Land Bank to apply for a court order in terms of s 33(4)(c) of the 2002 Act. The Master upheld the objection, essentially on the ground that s 34(2) of the 2002 Act provided that the Land Bank's preference ranked higher than the preference of other statutory preference rights even though the money had been advanced before the present 2002 Act came into force on 10 June 2002. He also based his decision on s 52 of the 2002 Act, which provided that anything validly done in terms of the 1944 Act continued to have full force despite the repeal of the 1944 Act. Later, the FirstRand Bank applied to the High Court to have the Master's decision set aside.[23]

One of the questions the court had to deal with was whether the Land Bank had a preferent statutory right to the free residue in terms of the 2002 Act. Both parties before the court agreed that the court in the first place had to decide whether ss 33 and 34 of the 2002 Act were in fact applicable in this case, as the Land Bank had made its advance to the insolvent debtor before the 2002 Act took effect. So the key issue that the court had to deal with was whether or not the special debt-collecting procedure set out in s 33 of the 2002 Act also applied to arrear advances made in terms of the 1944 Act.[24]

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20 See s 103.
21 See ss 96–102.
22 See fn 7 above.
23 See *FirstRand Bank v Master* 1.
24 See *FirstRand Bank v Master* 2–3.

In *FirstRand Bank v Master* reference was made to the judgment of the Cape Provincial Division (per Davis J) in *Land Bank v The Master*.[25] There Davis J found that it was clear from the wording of s 33 of the 2002 Act that the debt-collecting procedures applied only in respect of advances made under the 2002 Act and did not apply to advances that were made in terms of the 1944 Act.[26] However, Pretorius AJ in *FirstRand Bank v Master* disagreed with this judgment and as authority for his view referred to the contrary judgment given in *The Land and Agricultural Development Bank v De Villiers*.[27] There it was held that a reference in s 33(2)(a) of the 2002 Act to "any advance in terms of this Act" did not mean that the Land Bank's action was limited to advances made in terms of the 2002 Act, as was decided by Davis J in the *Land Bank v The Master* case. Such an interpretation, it was said, ignored the other provisions of the section, such as s 33(1)[28] that referred to "advances it has made". The court there also pointed out that regard must be had to s 2(1) of the 2002 Act which provides:[29]

> "The Bank established under section 3 of the Land Bank Act, 1912 (Act No. 18 of 1912), and which continued to exist in terms of section 3 of the Land Bank Act, 1944 (Act No. 13 of 1944), continues to exist under the name of the Land and Agricultural Development Bank of South Africa despite the repeal of those Acts."

Pretorius AJ stated that Davis J had referred to s 33(2)(a)[30] in isolation, without having regard to s 33(1) of the 2002 Act. He also said that s 33(2)(e)(i) provided the Land Bank with a remedy in the event of a debtor's insolvency. So s 33(2)(a) must be read with reference to all the provisions of the 2002 Act as well as the preamble to the Act. Further, s 33(1) refers to "advances it has made", which has to be read with s 2(1) that related to the entire existence of the Land Bank since 1912.[31]

The court in *FirstRand Bank v Master* also referred to a similar case, *Die Land- en Landbou-ontwikkelingsbank v Cloete Murray*.[32] There the Land Bank requested that a decision of the Master of the High Court made on 18 March 2005 be set aside. The Master had decided that the Land Bank was a preferent creditor regarding the portion of its claim secured by a first mortgage bond, and merely a concurrent creditor for that portion of its claim that was not secured by the bond. The Land Bank relied on the provisions of s 33(9)[33] of the 2002 Act and argued that it had a statutory preferent right to the portion that was not secured. The Master based his decision on the previous 1944 Act because the

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25 See *Land Bank v The Master* (C), and also the discussion of this case below.
26 See *FirstRand Bank v Master* 3.
27 See fn 4 above.
28 See the full quote of s 33(1) above.
29 See *FirstRand Bank v Master* 9.
30 See the full quote of s 33(2) above.
31 See *FirstRand Bank v Master* 11.
32 See fn 4 above.
33 S 33(9) provides that if an attachment in execution of a court order is made by an ordinary creditor against a debtor's property the Land Bank's statutory preferential right to the proceeds of the realisation of the debtor's property at the sale will take precedence over the rights of the ordinary creditor despite him being armed with a writ or similar instrument, and that the proceeds received must, after payment of the costs incurred in connection with the attachment and sale, be paid in their entirety to the Bank, unless it exceeds the amount owing to the Bank in respect of the advance and the amount of the interest and costs in respect of it.

debtor's estate had been sequestrated before the 2002 Act came into operation. However, the court in this matter held that the 2002 Act was applicable, because the trustee's account was confirmed and the Master made his decision regarding the Land Bank's objection after the 2002 Act had come into operation.[34]

Reference was also made to s 52 of the 2002 Act in the *FirstRand* case. Section 52(1) provides that:

> "Anything validly done in terms of the Land Bank Act, 1944 (Act No. 13 of 1944), continues to be valid and of full force and effect despite the repeal of that Act by section 53 and any regulations made in terms of that Act remain in force until repealed in terms of section 49 of this Act."

Pretorius AJ, on behalf of the court, held that s 52(1) clearly provided that advances made prior to the 2002 Act coming into operation on 10 June 2002 were valid, and therefore the debt-collecting procedure set out in s 33 of the 2002 Act also applied to these old advances.[35] He stated that the intention of the legislature could not have been to exclude all advances made prior to the commencement of the 2002 Act. In addition, he also referred to s 52(7) of the 2002 Act that provides that any reference in any legislation to the 1944 Act must be interpreted as a reference to the 2002 Act. Therefore, the Master's decision to deal with the matter in accordance with the 2002 Act was correct. So the court again confirmed the majority view that the 2002 debt-collecting procedure set out in the 2002 Act could also be applied to these old arrear advances.[36]

4 THE MINORITY VIEW TRIUMPHED

As already stated, Davis J, on behalf of the court *a quo* in *Land Bank v The Master*, previously held the minority view that the special debt-collecting procedure set out in s 33 of the 2002 Act did not apply to arrear Land Bank advances that were made under its 1944 Act. So, when the Supreme Court of Appeal[37] confirmed the decision of the court *a quo*, it caused quite a stir among the financial sector and the insolvency industry as a whole.

In *Land Bank v The Master* the Land Bank had made advances to its debtor under the previous 1944 Act. Later during 2000 the debtor was sequestrated. While the insolvent estate was in the process of being wound up the 1944 Act was repealed and replaced by the new 2002 Act. In terms of the second and final liquidation account there was an amount in the free residue account that was allocated to all the concurrent creditors. The Land Bank objected to this allocation during 2004 and applied to the court for an order to have the full free residue attached in terms of s 33(4)(c) of the 2002 Act. The Land Bank also asked the court for a declaration that the Bank was entitled as a preferent creditor in terms of s 34(1) of the 2002 Act to the free residue.[38] However, the trustees of the insolvent estate contended that the remedies set out in s 33 of the 2002 Act did not apply in terms of advances that were made under the 1944 Act. The court *a quo* agreed with the contention of the trustees and found in favour of the trustees.

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34 See *FirstRand Bank v Master* 9–11.
35 See *FirstRand Bank v Master* 11.
36 See *FirstRand Bank v Master* 12.
37 See *Land Bank v The Master* (SCA).
38 See *Land Bank v The Master* (SCA) paras 2–3 and 5–7.

Davis J, on behalf of the court *a quo*, found that it was clear from the wording of s 33 that the debt-collection procedures applied only in respect of advances made under the 2002 Act and did not also apply to advances that were in terms of the 1944 Act. He regarded the words "such advance" in s 33(2)(b) and the words "the advance" in s 33(2)(c) and (d) as referring quite clearly to an advance contemplated in s 33(2)(a), namely an "advance made in terms of this Act". In the same way he considered the words "the debtor" in s 33(2)(e) to (h) to refer to a debtor in relation to an advance contemplated in s 33(2)(a) to (d). It was his view that reference in s 33(2)(a) to "any advance in terms of this Act" meant that the Land Bank's action was limited to advances made in terms of the 2002 Act. Furthermore, there was no provision in the 2002 Act that provided for relief in respect of sums of moneys due in respect of advances made in terms of the 1944 Act. Davis J noted that his finding might well be incongruent with the intention of the legislature and that the result arrived at in *Land Bank v Venter*[39] would be more in keeping with the legislature's broad intention regarding the 2002 Act. But he still found that the clear wording "advance made in terms of this Act" set out in s 33(2)(a) and which played a central role in the scheme of s 33 could only support a conclusion that advances that were made in terms of the 1944 Act could not be recovered in terms of s 33 of the 2002 Act. Therefore, he held that s 33 had no application in this case, as the advances were made under the 1944 Act and the Land Bank's application was therefore dismissed with costs.[40] It was against this finding of the court *a quo* that the Land Bank appealed to the Supreme Court of Appeal.

The Supreme Court of Appeal (per Scott JA)[41] pointed out that as the Land Bank's right to apply for a court order in terms of s 33(4) and the court's power to grant such an order was dependent on the existence of "any of the circumstances" listed in s 33(2), the court had to decide what the exact meaning of s 33(2)[42] was and what the effect of this subsection was.[43]

The Land Bank pointed out that it was extremely important that s 33 be interpreted against the policy and object of the 2002 Act which included the giving of assistance to small-scale farmers and the beneficiaries of land reform programmes who required financial assistance, but who were unable to acquire such assistance from other banks because of their lack of creditworthiness. The Land Bank also emphasised that the object of ss 33 and 34 of the 2002 Act, just like that of ss 34 and 55 of the 1944 Act, was to provide the Bank with a special remedy and a preference so as to enable it to advance money without sufficient or any security to farmers who would otherwise be unable to obtain financial assistance. In these circumstances, the Bank argued, it would accordingly be anomalous for the Land Bank to be unable to utilise the remedies provided for in s 33 of the 2002 Act in respect of an existing loan just because the advance had been made under the 1944 Act. So it was essential to interpret s 33(2)(a) as including advances made under the 1944 Act, presumably on the basis that the

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39 See fn 4 above. In *Land Bank v Venter* the court dealt with a similar case, but found that the 2002 Act did in fact apply in such a situation.

40 See *Land Bank v The Master* (SCA) para 12; and also *Land Bank v The Master* (C) 88D–89A.

41 Zulman JA, Navsa JA and Heher JA concurring.

42 See the quotation of s 33(2) above.

43 See *Land Bank v The Master* (SCA) para 11.

ordinary meaning of the words used was inconsistent with the intention of the legislature and a departure from the ordinary meaning was consequently justified.[44]

The Supreme Court of Appeal did not share the Land Bank's view. The court stated that the legislature had expressed itself in clear terms and there were no ambiguity in the words "any advance made in terms of this Act" used in s 33(2)(a). Although the consequence of attributing to the words its ordinary meaning was that the remedy provided for in s 33 would not be available where a payment due in respect of an advance made under the 1944 Act fell into arrears, the court pointed out that the Land Bank would still have all its ordinary common law remedies. There was also nothing in the 2002 Act to suggest that this could not have been the legislature's intention. The parties were reminded of the fact that the remedies provided for in ss 34 and 55 of the 1944 Act had been found to be unconstitutional. As the remedy provided for in s 33 of the 2002 Act was new, the court found that it was not inconceivable that the legislature could have deliberately have refrained from affording to one party to a completed loan agreement a remedy which would not have been in existence when the agreement was concluded. The remedy in such circumstances would have interfered with the existing rights of the parties to the loan and it would, therefore, not be unreasonable for the legislature to have decided that the remedy was not to apply in cases where advances were made under the 1944 Act. Besides, the legislature could hardly have been unaware of the consequence of limiting the arrear payments contemplated in s 33(2)(a) of the 2002 Act to payments due in respect of advances made in terms of that Act. Ultimately, the court could not find any justification for departing from the ordinary grammatical meaning of the language used in s 33(2)(a).[45]

In the alternative, the Land Bank also argued that if s 33(2)(a) was to be construed as referring to advances under the 2002 Act only, then the reference to "such advance" in s 33(2)(b) and "the advance" in s 33(2)(c) and (d) had to be construed as a reference to the words "advances that it has made" in s 33(1) that were wide enough to include advances made under the 1944 Act as well as under the 2002 Act. Likewise, the words "the debtor" in s 33(2)(e) to (h), had to be construed as a debtor in relation to the "advances" referred to in s 33(1), not the "advance'' referred to in 3(2)(a).[46]

Regarding the alternative argument of the Land Bank, the court stated that the first question that had to be answered was whether or not the words "such advance" in s 33(2)(b) and "the advance" in s 33(2)(c) and (d) could be construed as a reference to "advances" in se 33(1) as was argued, or whether they rather had to be construed as a reference to "any advance made in terms of this Act" in s 33(2)(a). The court found that there could be no doubt that they were to be read as referring to "advance" in s 33(2)(a). Any other construction would have been contrived. There would also have been no sense in drawing a distinction between s 33(2)(a) on the one hand and s 33(2)(b) to (d) on the other hand as was argued by the Land Bank. For the event contemplated in s 33(2)(a) to apply only to advances under the 2002 Act and the events contemplated in s 33(2)(b) to

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44 See para 13 and the authority cited there.
45 See para 14.
46 See para 13.

(d) to apply to advances under both the 1944 and the 2002 Acts made no sense to the court.[47]

The second question the court said that it had to deal with here was the correct interpretation of s 33(2)(e) (ie "the debtor becomes insolvent, commits an act of insolvency . . . or is sequestrated . . ."). To the court, it was clear that the words "the debtor" used in s 33(2)(e) to (h) could only mean the debtor in relation to an advance. So the question was whether the advance had to be construed as one made "in terms of this Act", in other words an advance of the kind contemplated in s 33(2)(a) to (d), or was the advance to be construed as the advance referred to in s 33(1) that the Land Bank argued included an advance under both the 1944 and the 2002 Acts. It appeared to the court that the 2002 Act was concerned with future and not past insolvencies, but since this was not the basis on which the court *a quo* dismissed the application, the court did not consider this issue further.[48] The court indicated that if one looked at s 33(2), one would notice that it was in fact a single sentence. So the advance contemplated in the reference to "the debtor" would more naturally and logically be to the advance referred to in the same sentence, in other words the advance referred to in s 33(2)(a) to (d). Significantly, a number of anomalous situations would arise if s 33(2)(d) to (h) were to be construed otherwise. The most frequent event that would give rise for the need for the Land Bank to invoke the remedy in s 33 would be if the debtor fell into arrears. In that event the remedy would be available only if the advance had been made "in terms of this Act". Therefore, it was found that it would have made no sense, for example, for the remedy to have applied also to advances made under the 1944 Act. So, if s 33(2)(d) to (h) were to be properly construed, it would be applicable only in the case of advances made in terms of the 2002 Act, and therefore the Land Bank's alternative argument had to fail.[49]

In another alternative argument, the Land Bank also tried to rely on two sub-sections of s 52 of the 2002 Act dealing with transitional matters. The first was subsec (1)[50] that provides that anything validly done in terms of the 1944 Act continues to be valid and of full force and effect despite the repeal of that Act. However, the court disagreed and stated that this subsection did not assist the Land Bank, because s 52(1) rendered valid anything validly done in terms of the 1944 Act despite its repeal, but it did not deem anything done under the 1944 Act and which could have been done under the 2002 Act to have been done under the latter Act.[51] The other subsection relied upon was subsec (7) which provides that any reference in legislation to the 1944 Act had to be interpreted as if it was a reference to the 2002 Act. In this regard, the Land Bank contented that the words "any advance made in terms of this Act" in s 33(2)(a) had to be interpreted as including a reference to an advance made in terms of the 1944 Act. The court had a contrary view and said that there was no merit in this contention, as the subsection said the very opposite and the words "in any legislation" logically and contextually could only mean in any legislation other than the 2002 Act.[52]

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47 See para 15.
48 See para 16.
49 See para 17.
50 See the full quotation of s 52(1) above.
51 See *Land Bank v The Master* (SCA) para 18.
52 See para 19.

The Supreme Court of Appeal confirmed the decision of the court *a quo* and found that the Land Bank's remedies in case of default provided for in ss 33 and 34 of the 2002 Act would not be available where it related to an advance that was made under the 1944 Act. The Land Bank's right to recover outstanding amounts on these advances would be limited to the Bank's ordinary contractual and other rights under the common law.

In a convincingly argued minority judgment, Nugent JA stated that he agreed with the order made by the majority, but that he did not agree with their reasons for doing so. He confirmed that it was the opinion of the majority that the legislature had intended in s 33(2)(a) to distinguish advances made after the 2002 Act came into effect from advances that were made before then. The consequence of making that distinction, he pointed out, was that when the Act came into operation the Land Bank's only protection in respect of its unsecured advances immediately fell away, with nothing to replace it, and the Bank was reduced to a concurrent creditor in respect of those debts. If the majority was correct in holding that the legislature had indeed intended to make such a distinction, then it must have been calculated by the legislature to bring about that result, for there was no other reason to make the distinction. Nugent JA disagreed with the majority view that, based on the words that were used in s 33(2)(a), the legislature had indeed wished to bring about that result. In his view, it was clear from the context within which the section was enacted, and from other indications in the Act itself, that that was not the legislature's intention, but that it in fact intended for the remedies of s 33 to apply to all the Land Bank's advances irrespective of the Act under which they were made. According to Nugent JA, the only reason why the Land Bank could not succeed in this matter was the fact that the debtor was sequestrated before the Act came into operation.[53]

Starting off, Nugent JA referred to a long list of cases dealing with the situation where the words used in an Act are given their ordinary meaning, but then do not give effect to the clear intention of the legislature if the full context and other well-known factors, such as the historical context thereof, circumstances surrounding the drafting thereof, or common knowledge, are all taken into consideration. He stated that it was thus clear that where the true intention of the legislature had been established, and it then conflicted with the language of the Act, the language had to give way.[54]

He then elaborated on the important role that the Land Bank has played since it was created in 1912.[55] For instance, the Land Bank was established *inter alia* for the purpose of advancing loans to farmers and agricultural co-operatives to promote agriculture in the national interest. He pointed out that, since its creation, the Land Bank has always been a statutory preferent creditor and has enjoyed statutory protection against possible financial risks. Later, the Bank was particularly protected where it had made unsecured loans to farmers. These statutory protections and privileges have often allowed the Land Bank to advance money to debtors who would not have been able to access finance elsewhere. For

53 See paras 22–23.

54 See paras 24–28 58, and see also the authority cited there.

55 For a discussion of the important role that the Land Bank plays, see Kelly-Louw "Defending the constitutionality of the Land Bank's exclusion from the insolvency legislation" 2005 *Speculum Juris* 164, in particular at 171–173.

close to a hundred years the legislature has consistently afforded the Land Bank the greatest protection against the risk of loss from defaulting debtors.[56]

Nugent JA then extensively dealt with the judgment of the Constitutional Court in *First National Bank v Land and Agricultural Bank; Sheard v Land and Agricultural Bank*,[57] which declared certain parts of ss 34 and 55 of the 1944 Act unconstitutional. He specifically pointed out that the relevant subsections were declared invalid not because they provided for a special procedure, but merely because they excluded oversight by the courts. He emphasised that the Constitutional Court had specifically ruled that the invalidity of certain parts of s 34 would be suspended until 9 June 2002, because if it were to be declared invalid immediately it would have left the Land Bank without recourse for its unsecured loans. So the legislature was given two years to remedy the matter and to provide for alternative remedies. It followed from the history that one of the purposes of the 2002 Act was to continue to protect unsecured advances that existed at midnight on 9 June 2002 (when the suspension order expired) and to protect future advances. In fact, there was no reason for the 2002 Act to have been introduced so as to coincide with the expiry of the suspension order other than to protect the unsecured advances that existed at that time. Otherwise, the 2002 Act could have been introduced at any time without material consequences. So the order of invalidity of parts of s 34 of the 1944 Act was suspended precisely to avoid the Bank losing its protection for its old unsecured advances, and the 2002 Act was obviously brought into operation to avoid that from happening.[58]

He confirmed that the Land Bank has always had the greatest statutory protection against loss. He also pointed out, that contrary to the 1944 Act that had provided specific protection for the Land Bank's unsecured advances, the 2002 Act has increased the Bank's protection by providing specific protection irrespective of whether or not it was a secured or unsecured advance. So the 2002 Act had indeed increased the protection afforded to the Bank. Based on all these facts, he found it startling that he legislature might have intended to bring about the result that the Land Bank should be reduced to a concurrent creditor regarding all unsecured advances that were made under the 1944 Act. Therefore, he could not agree with the majority's deduction that that was indeed the legislature's intention.[59]

He also referred to the following different language and words used by the legislature in ss 30(1), 33(1) and 33(2)(a) of the 2002 Act: "advance in terms of

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56 See *Land Bank v The Master* (SCA) paras 29–35.

57 See fn 13 above.

58 See *Land Bank v The Master* (SCA) paras 36–42.

59 See *Land Bank v The Master* (SCA) paras 43 46 48 and 50. Heher JA, who concurred with the majority judgment delivered by Scott JA, made his own observations concerning Nugent JA's minority judgment (for a full discussion, see paras 61–68). Heher JA disagreed with Nugent JA and stressed that mere reliance on the historical protections which have over the years been included in legislation affecting the Land Bank was tenuous and even an unreliable means of establishing the context of s 33(1) and (2). Heher JA also pointed out that the Land Bank did not, as one would have expected them to do, place facts before the court indicating what the effect on its old unsecured advances would have been if the 2002 Act were to apply only to advances made under the 2002 Act. The Land Bank also failed to indicate the prejudice that the lack of protection for these old advances would have on their business (see paras 61–62).

this Act"; "advances that it has made"; and "advance made in terms of this Act".[60] He pointed out that the majority had interpreted the term "advance made in terms of this Act" used in s 33(2)(a) to refer to advances made after the 2002 Act came into operation, and not to advances made under the 1944 Act. Contrary to them, Nugent JA found that it was clear that the legislature was neither careful in its manner of expression nor consistent in its use of language and could see no reason in the circumstances to assume that it had used the words "made in terms of this Act" in s 33(2)(a) with any precision.[61]

He continued and indicated that there would be various anomalies that would exist if the relevant sections were indeed interpreted according to the majority view.[62] However, all these anomalies were resolved and no other anomalies arose if s 33(2)(a) were intended to apply to all advances that existed when the 2002 Act came into operation, and also to subsequent advances. For instance, it would have been absurd for the legislature to have intended that the triggering events in s 33(2) would apply only to advances that were made under the 2002 Act. To him, it was clear that the legislature had intended s 33(2) to apply to advances made before the 2002 Act came into operation, and also to those that were made subsequently.[63] The legislature could not have intended to leave the Land Bank exposed as a concurrent creditor regarding all its unsecured advances made under the 1944 Act, by using the term "advance made in terms of this Act" in s 33(2)(a). He also acknowledged that it was possible that the only reason why these words were used could have been to achieve the purpose contended for by the majority. However, to set about achieving that result would have been in conflict with consistent practice since 1912, inconsistent with the purpose for which the invalidity of the s 34 procedure set out in the 1944 Act was suspended, inconsistent with the additional protection that was introduced into the 2002 Act, commercially insupportable, produced various anomalies, and would leave the Land Bank with irresoluble difficulties when it had to apply s 33 of the 2002 Act. So the legislature must have used the word "made" inadvertently and not with that meaning in mind. To him it was clear that the legislature used the word inadvertently, if one took into consideration the lack of precision with which the legislature had used language generally throughout the Act, the full context of the Act, and the clear purpose the Act was aimed to achieve.[64]

However, Nugent JA concluded by saying that the aforesaid did not end the enquiry in this matter. It was obvious that all the provisions of the 2002 Act indicated that it was intended to apply prospectively regarding advances that existed at the time the Act came into operation and subsequent advances. There was nothing in the language used in s 33(2) that suggested that it was to apply retrospectively to triggering events that had occurred before the Act came into operation. A few of these events were of a continuing nature, in particular those referred to in subsecs (a) to (d) and (g) and, if they had commenced before the Act came into operation they would inevitably continue to occur thereafter,

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60 See *Land Bank v The Master* (SCA) paras 45 and 47.

61 Heher JA made many contrary observations in this regard (for a full discussion of this, see *Land Bank v The Master* (SCA) paras 63–66).

62 For a full discussion of the anomalies that would exist see paras 45–46 48–57.

63 See *Land Bank v The Master* (SCA) paras 45 and 56.

64 See para 59.

thereby triggering the remedies of s 33, while other triggering events were the occurrence of a specific event. The event that was relevant for purposes of this case was set out in s 33(2)(e)(i) – if "the debtor . . . is sequestrated". It was evident from the language used in s 33(2)(e)(i) that the sequestration that was contemplated was one which had taken place after the 2002 Act came into operation, and there was nothing in the context to suggest that it was intended to interfere with rights that had accrued to creditors consequent upon the *concursus* of an earlier sequestration. If the Land Bank had failed to make use of the remedies that it had in terms of the 1944 Act when the sequestration had occurred, and such failure then left it exposed as a concurrent creditor when the 2002 Act took effect later and those old remedies then fell away, it would merely have been an unintended consequence of the clear intention of the 2002 Act. So for that reason alone, Nugent JA stated that he would have dismissed the appeal.[65]

5 A FEW COMMENTS

By taking a restrictive interpretation of s 33 (ie that the section applies only where an advance was made in terms of the 2002 Act), the Supreme Court of Appeal in *Land Bank v The Master* has denied the Land Bank the rights and remedies which it had immediately before the commencement of the 2002 Act. This could hardly have been the legislature's intention. In my opinion the words "in terms of this Act" should merely have been omitted from the phrase "any advance made in terms of this Act" used in s 33(2)(a) and it probably was a mere oversight by the drafting team. I agree with Nugent JA, holding the minority view, that it was the intention of the legislature that s 33 of the 2002 Act should apply to all the Land Bank advances irrespective of the Act under which they were made. Initially, the Land Bank had a mandate from the government to support the development of the agricultural sector as a whole. Later the Land Bank's mandate was expanded, so that the Bank also had to implement the constitutional and policy imperatives of government to promote, support and facilitate land redistribution, food security, agricultural growth and development. The Strauss Commission[66] reiterated this perspective during 1996 by broadening the mandate of the Land Bank to include the function of facilitating, supporting and promoting the development of the rural and agricultural financial services system. On 6 August 1997, Cabinet *inter alia* approved the policy principles contained in the recommendations of the Strauss Commission's Report into the provision of rural financial services, including a recommendation that the role of the Land Bank was to be extended and that legislative changes would have to be effected to the previous Land Bank Act to enable the Bank to take on the new role envisaged in the Strauss Commission's Report.[67] So it is highly unlikely that the legislature would not have taken the aforesaid into consideration when it drafted the remedies set out in s 33 of the 2002 Act. Therefore, it would make no sense to expand the Land Bank's developmental mandate (placing it under a higher financial risk), but then to take away its statutory protection for the

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65 See para 60.

66 The Final Report of the South African Law Reform Commission: *Inquiry into the Provisions of Rural Financial Services* RP 108/96 was published on 18 September 1996 (hereafter "the Strauss Commission").

67 See Kelly-Louw 2005 *Speculum Juris* 171.

unsecured loans it has made under the 1944 Act. However, this issue now remains of academic interest only, as the Supreme Court of Appeal has made its final pronouncement. The Supreme Court of Appeal, by applying a strict interpretation of s 33, clearly demonstrates the importance of careful legislative drafting. As seen here, sometimes seemingly small mistakes in sections can cause seriously unintended consequences.

The decision of the Supreme Court of Appeal has been applauded by the commercial banks, because it has levelled the playing fields between them and the Land Bank in some ways. The insolvency industry, particularly the unsecured creditors of insolvent estates, also welcomed the decision because it is one step closer for them to getting the Land Bank to also form part of the insolvency proceedings, at least where it involves one of the Bank's arrear advances that were made under the 1944 Act.

The judgment in *Land Bank v The Master* has adverse effects on the Land Bank in situations where its debtors, who received an advance under the 1944 Act, are in arrears with their payments or are subsequently sequestrated. In these situations, the Land Bank will no longer be able to make use of the special debt-collection procedures, nor be able to rely on any of its statutory preferential rights set out in the 2002 Act. For example, where the estate of a debtor, who had received an advance from the Land Bank made under the 1944 Act, is sequestrated the Bank will no longer be able to apply to a court for an attachment order in terms of the 2002 Act in order to prevent certain property of the insolvent from vesting in his trustee and will also not be able to "remove" such property after it has vested in the trustee. The normal procedures as set forth in the Insolvency Act, such as officially proving a claim, will therefore have to be followed by the Land Bank in relation to the realisation of such a debtor's property. The ranking order of the Land Bank in such a situation will also be governed by the Insolvency Act and the common law respectively. So the Land Bank no longer has the option, in relation to arrear advances made under the 1944 Act, to rather attach and sell the insolvent's property in terms of the special court procedure set out in terms of the 2002 Act, than to form part of the insolvency proceedings.

Where the Land Bank's claims are based on arrear advances made under the 1944 Act, they will be treated the same as any other creditor. The Land Bank's right to recover outstanding amounts in such situations will be limited to the Bank's ordinary contractual and common-law rights. So, in ongoing situations where the Land Bank has decided not to prove a claim for the loan it has made under the 1944 Act against its debtor's insolvent estate, thinking that it would still rely on the remedies set out in ss 33 and 34 of the 2002 Act, the Bank might now run the risk that their claims might have prescribed and they might no longer be able to prove a claim against that estate. However, if the Bank did prove their claims against such insolvent estates, based on old arrear advances it has made, then their claims will be considered and included and dealt with in accordance with the provisions of the insolvency legislation and common law.[68]

However, in relation to advances made under the 2002 Act, the Land Bank will still have all their statutory preferential rights, including the right to be

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68 See also Sloet "The Land Bank, the Doubell appeal, and two Acts" September 2006 *The Newsletter of the Association of Insolvency Practitioners of Southern Africa* 9.

excluded from the insolvency proceedings and the right to make use of the special debt-collecting procedures in certain circumstances.[69]

It is interesting to note that Davis J had in fact refused the Land Bank's application for leave to appeal against the court *a quo*'s judgment, but the Bank was persistent and accordingly submitted a petition. In their papers[70] the Land Bank stated:

> "Due to the conflicting decisions of different provincial divisions, the importance of the matter for applicant and the insolvency industry as such, the appeal warrants the attention of the Supreme Court of Appeal."

It is obvious that the Land Bank must have been quite confident that the Supreme Court of Appeal was going to rule in its favour, otherwise the Bank would not have persisted in its application for leave to appeal. This judgment of the Supreme Court of Appeal serves as a reminder to all that the majority view on an unresolved issue might not necessarily always be the one that will be confirmed in the end.

It is understood that the Land Bank will not institute proceedings in the Constitutional Court, nor are there any grounds for them to do so. The only way in which the Land Bank will be able to rectify the negative effect that the judgment of the Supreme Court of Appeal has on their business, is if the legislature decides to amend the 2002 Act. Towards the end of 2002/beginning of 2003 the Department of Agriculture and Land Affairs, together with the Land Bank were working on legislation to remove the shortfalls and certain ambiguities that exist in the 2002 Act. However, it would appear that that project has since been abandoned. It is expected that due to the significant adverse implications of the latest judgment of the Supreme Court of Appeal for the statutory preferential rights of the Land Bank, the Department will soon resume work on the Amendment Act in an attempt to rectify the negative effect that the judgment may have on a large part of the Bank's business.

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69 See ss 33 and 34 of the 2002 Act read together with s 90 of the Insolvency Act. Commercial banks and trustees have often alleged that the Land Bank's statutory preferential rights, particularly its right to choose to be excluded from the insolvency legislation, is unconstitutional as it is in direct conflict with the equality clause guaranteed in the Constitution (for a full discussion hereof, see Kelly-Louw "Defending the constitutionality of the Land Bank's exclusion from the insolvency legislation" 2005 *Speculum Juris* 164.

70 See the Land Bank's Notice of application for leave to appeal in terms of s 20(4)(b) of Act 59 of 1959 para 5 at 5.

Shareholder Participation in Corporate Governance

Irene-marie Esser

Senior Lecturer in the Department of Mercantile Law, School of Law, College of Law and Justice, University of South Africa

Michele Havenga

*Professor in the Department of Mercantile Law, School of Law, College of Law and Justice, University of South Africa**

1. INTRODUCTION

Corporate governance is a wide term defined in different ways by commentators. In essence it relates to the manner in which corporations are regulated and managed.[1] Principles of good corporate governance are usually entrenched in self-regulatory codes.[2] It is widely recognised that shareholders can, and should, play an important, albeit limited,[3] role in ensuring that companies adhere to sound and effective corporate governance standards. Institutional shareholders in particular can be a highly effective mechanism through which sound corporate governance can be ensured. In this article we focus on the codes of best practice of South Africa and Australia and on the role that institutional investors, like pension funds and unit trusts, should have in ensuring sound corporate governance practices.

The article examines the perceived difficulties relating to the involvement of institutional shareholders in company management. The *King* recommendations and *ASX's Best Practice Principles and Recommendations* on how to encourage

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1 See du Plessis, McConvill and Bagaric *Principles of Contemporary Corporate Governance* (2005) 1–3 on the meaning of "corporate governance"; and, generally, Mongalo *Corporate Law and Corporate Governance A Global Picture of Business Undertakings in South Africa* (2003).

2 See, eg, the *South African King Report on Corporate Governance* of 2002 (hereafter *King II*); the *United Kingdom Combined Code on Corporate Governance* of July 2003 available at www.fsa.gov.uk/pubs (hereafter the *Combined Code*) and the *Australian Stock Exchange (ASX) Corporate Governance Council's Principles of Good Governance and Best Practice Recommendations* of March 2003 and August 2007 (hereafter *ASX's Best Practice Principles and Recommendations*).

3 See Ramsay, Stapledon and Fong "Corporate governance: The perspective of Australian institutional shareholders" 2000 *Company and Securities Law Journal* 110 135. Institutional investors include government and corporate pension funds, labour unions, mutual funds, insurance companies and bank trusts departments.

institutional shareholders to be more actively involved are considered and evaluated. The draft South African Companies Bill of 2007 is also considered.

2. INSTITUTIONAL SHAREHOLDERS

2 1 Introduction

The potential influence of large shareholders on corporate governance was acknowledged in the 1930s by Berle and Means,[4] who highlighted the separation of the owners (shareholders) from the control of the company, which rested with the managers or directors.[5] They were concerned that the divergence between the managers and the shareholders was unchecked because of a lack of incentive for holders of insignificant shareholdings to monitor management in a highly diffuse ownership structure.[6] Stapledon indicates that, although the same highly diffuse ownership structure is not prevalent in modern companies, the divergence between the interests of shareholders and managers remains an issue.[7] This separation of ownership and management leads to the problem that the directors

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4 Berle and Means *The Modern Corporation and Private Property* (1939). See also Ramsay *et al* 2000 *Company and Securities Law Journal* 112; Karmel "Should a duty to the corporation be imposed on institutional shareholders?" 2004 *The Business* Lawyer 1 14–18; Bainbridge "The case for limited shareholder voting rights" 2006 *UCLA LR* 601 620.

5 The classification of shareholders as owners has been criticised. See, eg, Roach "The paradox of the traditional justifications for exclusive shareholder governance protection: Expanding the plurist approach" 2001 *The Company Lawyer* 9 13; Sheehy "Scrooge – The reluctant stakeholder: Theoretical problems in the shareholder-stakeholder debate" 2005 *Miami Business LR* 193 226; Millon "Theories of the corporation" 1990 *Duke LJ* 201 221. See also *King II* Introduction para 17.3. The critics argue that there are substantial differences between shareholders and traditional property owners. Shareholders own stock, which gives them claims to control and certain financial rights. They do not, however, have direct control over a company's underlying assets. Directors are also not directly controlled by their principals (as is the case with traditional agents). Directors' powers are largely statutory. The agency theory, based on the works of Coase "The nature of the firm" 1937 *Economica* 386; Alchain and Demsetz "Production, information costs, and economic organisation" 1972 *American Economic Review* 777–795; Jensen and Meckling "The theory of the firm, managerial behaviour, agency costs and ownership structure" 1976 *Journal of Financial Economics* 305–360; Fama and Jensen "Separation of ownership and control" 1983 *Journal of Law and Economics* 301–325. Proponents of this theory found it strange that the public company with its separation of ownership and control has survived for so long (see Ramsay "Law and economics as an approach to corporate law research? A commentary" 1996 *Canberra LR* 48). See also, generally, Fisch "Measuring efficiency in corporate law: The role of shareholder primacy" 2006 *The Journal of Corporation Law* 637 650.

6 See Stapledon *Institutional Shareholders and Corporate Governance* (1996) 10–11. Actions by institutional shareholders can lead to a balance between management and shareholders and serve to reduce the divergence between the interests of the shareholders and management. Other mechanisms can also be used to create a balance between management and the shareholders. Eg, executive incentive remuneration (link directors' remuneration to the creation of shareholder wealth), mandatory disclosure of financial and non-financial information by management to shareholders, the appointment of non-executive directors to monitor executive directors and by conducting independent audits. This paper only focuses on shareholder participation.

7 See Stapledon *Institutional Shareholders* 10.

do not necessarily act in the best interests of the company (being the shareholders collectively) when they manage a company.[8]

South African and Australian companies have a unitary board structure, clearly separating ownership and control.[9] In South Africa a single board of directors is appointed by the shareholders.[10] The two main organs of the modern company are the general meeting (meeting of shareholders) and the board of directors (managing body).[11] General meetings are usually convened by the board of directors. The board must convene such a meeting if it is in the best interest of the company as a whole.[12]

The board of directors performs certain acts of management and agency.[13] The directors are appointed by the members in an annual general meeting.[14] The general meeting may also remove directors from office by way of a general resolution.[15] The board of directors acts with the general meeting concerning internal matters, but there is a clear separation of powers.[16] If certain matters are assigned to the board of directors in terms of the articles of association then only the board has the power to deal with those matters. The general meeting may, however,

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8 This problem is referred to as "the agency cost problem". See Fama and Jensen 1983 *Journal of Law and Economics* 304–305; Jensen "Self-interest, altruism, incentives and agency theory" 1994 *Journal of Applied Corporate Finance* 40–55; Clarke *Theories of Corporate Governance* (2004) 4 57; Anderson *Corporate Directors' Liability to Creditors* (2007) 34; Mallin *Corporate Governance* (2006) 10–12 explaining the agency cost problem.

9 The company law of both jurisdictions is largely influenced by English common-law heritage. In a two-tier system like Germany, the distinction between ownership and control is less apparent, especially when employees are given board representation through co-determination.

10 Shandu "Shareholders' interests versus social demands: Incongruous agendas" 2005 *Obiter* 87 89. See, generally, ss 208ff of the Companies Act 61 of 1973.

11 Subject thereto that the managers nowadays manage the company and the board of directors have a more supervisory role. See ss 179–192, 242–246 of the Companies Act of 1973; Beuthin "The range of a company's interests" 1969 *SALJ* 155; Cilliers, Benade *Corporate Law* (2000) 93; Beuthin and Luiz *Basic Company Law* (2000) chs 25 26.

12 See Cilliers and Benade *Corporate Law* 95; Havenga *Fiduciary Duties of Company Directors with Specific Regard to Corporate Opportunities* (1998) 1.

13 See Cilliers and Benade *Corporate Law* 116; Beuthin 1969 *SALJ* 156; Beuthin and Luiz *Basic Company Law* 199.

14 The annual general meeting is a general meeting subject to a number of provisions stipulated in the Companies Act. A company should have an annual general meeting within 18 months after the company's incorporation and subsequent annual general meetings are to be held every nine months after the end of each ensuing accounting date, but still within 15 months of the date of the previous meeting (see s 179(1) of the Companies Act). The annual general meeting should deal with the matters as stipulated in the Companies Act and in the articles of association of the company (s 179(2) of the Companies Act). These matters typically include the sanctioning of a dividend, the consideration of the financial statements, the election of directors and the appointment of an auditor See ss 185(6) (resolutions to which members have notice by requisition), 221(3) (extension of general authority to directors to issue shares), 226(3)(b) (approval of certain loans to directors), 286 (annual financial statements to be considered). See Cilliers and Benade *Corporate Law* 93; Wixley and Everingham *Corporate Governance* (2005) 24.

15 S 220 of the Companies Act. The shareholders can also amend the articles of association by way of a special resolution: s 62 of the Companies Act.

16 Cilliers and Benade *Corporate Law* 116.

intrude upon the powers of the board in certain matters. These matters include situations when the board of directors refuses or is unable to institute action on behalf of the company;[17] when the board of directors cannot or will not exercise powers reserved for it or when certain powers have been reserved for the board of directors, but the particular act is voidable because the board has exceeded or abused its powers.[18] The board of directors also acts on behalf of the company in transactions with third parties, but it does not have unlimited powers to bind the company.[19]

In Australia there is also a separation or division of powers between the board of directors and the shareholders of a company. The directors have the responsibility to ensure that a company is properly managed.[20] They are accountable to the shareholders and the shareholders can resolve to remove the directors, in a general meeting of the company, if they are not satisfied that the company is managed in a proper manner.[21] The power that the shareholders have to intervene has a preferred and beneficial impact on corporate governance.[22] The general meeting should decide on certain matters, such as altering a company's constitution, reducing the company's issued share capital and altering a company's status.[23] The board also has wide powers of management. The board usually appoints and reward the chief executive officer of a company, sets goals for the company, monitors management's performance and business results and sets conformance strategies.[24] The board does, however, sometimes need the approval of the general meeting.[25]

Institutional shareholding changed over the years and in countries such as South Africa, Australia and the United Kingdom institutional shareholders started to hold large portions of equity in many companies.[26] Individual shareholdings

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17 See Naude *Die Regsposisie van die Maatskappydirekteur met Besonderse Verwysing na die Interne Maatskappyverband* (1970) 92; Davies *Gower and Davies' Principles of Modern Company Law* (2003) 187.

18 See generally Cilliers, Benade *Corporate Law* 88. See also *LSA UK Ltd (formerly Curtainz Ltd) v Impala Platinum Holdings Ltd* (28 March 2000) available at http://www.uovs.ac.za/apps/law/appeal/files/2000/1/253Lsa.doc (accessed 25-10-2007); *Ben-Tovim v Ben-Tovim* 2001 3 SA 1075 (C) 1085I–1086D (if the board does not want to or cannot exercise the powers vested in them, then the general meeting may do so). The powers conferred on a specific organ by the articles of association of a company are the exclusive powers of that organ (see *John Shaw and Sons (Salford) Ltd v Shaw* 1935 2 KB 113). The general meeting may not simply usurp the powers of the board (see *Automatic Self-Cleansing Filter Syndicate v Cunninghame* 1906 2 Ch 34).

19 Delport "Korporatiewe reg en werkplekforums" 1995 *De Jure* 409 410.

20 See s 198A(1) of the Corporations Act of 2001.

21 See s 203D of the Corporations Act of 2001.

22 See Bebchuk "The case for increasing shareholder power" 2005 *Harvard LR* 833 842.

23 See ss 136, 256B, 256C, part 2B.7 of the Corporations Act of 2001.

24 See Austin, Ford, Ramsay *Company Directors* (2005) 60 on the general functions of the board of directors.

25 For example when a listed company's main undertaking is being sold (see Listing Rule 11.2 of the JSE Listings Requirements in this regard). See Austin *et al Company Directors* 66.

26 Mallin *Corporate Governance* 76–80. See also Anderson and Ramsay "From the picket line to the board room: Union shareholder activism in Australia" 2006 *Company and Securities Law Journal* 279–315 where they examine the recent practice of union shareholder activism in Australia. This article confirms that unions are effectively utilising their powers

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have therefore declined in these countries. Due to their size, institutional shareholders can potentially play a large role in ensuring good corporate governance standards. Institutional investors own large blocks of shares and have an incentive to develop specialised expertise in making and monitoring investments. Holding these large blocks of shares give them the power to hold management accountable for actions that do not promote the shareholders' welfare. Their greater access to firm information and their concentrated voting power enable them to make changes to the board of directors if performance lags.[27] Shareholders are, however, mostly inactive when it comes to the management of a company.[28] The reasons why the majority of shareholders are inactive are discussed in the next section. Some of the reasons are valid in respect of individual shareholders, but institutional shareholders cannot necessarily rely on them for their inactivity. Due to their nature, there are also some deterrents that apply specifically to institutional shareholders.

2 2 Shareholder apathy

The first reason why most shareholders are inactive is a possible lack of knowledge concerning the legal rights and powers available to them. Secondly, shareholders have the perception that their efforts will not bring about any change or compliance with corporate governance principles. Thirdly, shareholders will rather sell their shares than get involved in the management of a company and ensure good corporate governance principles. This is mainly due to the fact that shareholders do not have a fiduciary obligation towards other shareholders or to the company in which they hold shares.[29] Lastly, the costs involved in pursuing shareholder activism also discourages shareholder activism. Attendance of general meetings could, for example, result in travel expenses and loss of productive working hours. Monitoring the conduct of directors' actions would also result in high costs based on the time constraints when perusing and assessing annual reports and other company information.[30] These reasons are, however, more relevant with regard to the smaller investor. Ramsay, Stapledon and Fong distinguish various barriers to institutional shareholder activism, based on the nature of these barriers. They are, in broad terms, categorised as legal, economic and practical barriers.[31]

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as shareholders to advance employee interests. On union-shareholder activism, see further Rawling "Australian trade unions as shareholder activists: The rocky path towards corporate democracy" 2006 *Sydney LR* 227–258. See also Karmel 2004 *The Business Lawyer* 1 7 who indicates that institutional investors account for over half the ownership and 75% of the trading in equities listed on the New York Stock Exchange Inc.

27 Bainbridge 2006 *UCLA LR* 828–629.

28 See recommendation 18 on p 44 of *King II* where it is stated that institutional shareowners in South Africa have been notable for their apathy towards participating actively in shareholder meetings. See also Bebchuk 2005 *Harvard LR* 876, who indicates that some American institutional investors, like mutual funds, are generally reluctant to take the initiative in corporate governance matters.

29 *Gundelfinger v African Textile Manufacturers Ltd* 1939 AD 314.

30 See Rademeyer and Holtzhausen "King II, corporate governance and shareholder activism" 2003 *SALJ* 767 769–770 on the reasons why shareholders are usually inactive when it comes to monitoring directors' actions. A possible fiduciary duty of institutional shareholders to their clients is considered in para 4 below.

31 See Ramsay *et al* 2000 *Company and Securities Law Journal* 127. See also Ramsay and Stapledon "Institutional investors, corporate governance and the new international financial

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The specific legal barriers identified by 12 institutional investors in respect of the Australian legal framework were takeover provisions,[32] insider trading provisions,[33] the possibility of becoming a shadow director[34] and restrictions on the voting powers of unit trust managers.[35] The economic barriers include the option of doing the "Wall street walk" (in other words to sell shares when there is a crisis), collective action and "free rider problems" (in other words that those other shareholders who are not involved in actively monitoring company management get a "free ride") and the high costs of monitoring of corporate governance issues. The practical barriers include a lack of information[36] and the difficulty of getting institutions to meet at short notice.

Many of the same reasons probably lie at the root of inactivity of institutional shareholders in South Africa.[37] We are not aware of any studies done in South Africa where institutional shareholders provided specific reasons why they are generally inactive.[38]

2 3 The Role of Institutional Shareholders

It was stated earlier that institutional shareholders, compared to individual shareholders, can play a much bigger role in monitoring directors' actions. As a collective unit, institutional shareholders can voice their opinions directly to management.[39] By using their power and influence they can also ensure that

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architecture" 2002 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946317 (accessed 11-02-2008). The second part of the paper is of specific importance and deals with institutional investors and their role in corporate governance. It is indicated that institutional investment in a number of Asian countries has been much lower than in the United Kingdom, the United States and Australia.

32 Institutional investors are afraid that they trigger takeover provisions without intending a takeover.

33 Institutional investors are afraid that they acquire insider information and are then prohibited from trading in the specific shares until the information is available to the market.

34 A shadow director is defined as a person who is not validly appointed as a director, but accustomed to act in accordance with the instructions of a director. Institutional investors who are actively involved in the management of a company are afraid that they could be seen as shadow directors and hence be subject to the fiduciary duties of directors.

35 See Ramsay *et al* 2000 *Company and Securities Law Journal* 127–129. The former s 1069(1)(k) of the Corporations Law, regulating the voting powers of unit trust managers, has since been repealed.

36 The board of directors usually have more information than the investors.

37 In South Africa, insider trading is regulated by chapter VIII of the Securities Service Act 36 of 2004. The Companies Act does not provide for the concept of "shadow directors", which has been regarded by some commentators as unfortunate (see Locke "Shadow directors: Lesson from abroad" 2002 *SA Merc LJ* 420). *De facto* directors can, however, incur liability as if they were properly appointed.

38 We contacted the African Institute of Corporate Citizenship to enquire whether they have conducted any research on the role of South African institutional shareholders in enhancing corporate governance principles. No such research was conducted (see also their website: http://www.aiccafrica.org where reports are posted on research done by them).

39 See also the *Report of the Committee on the Financial Aspects of Corporate Governance chaired by Sir Adrian Cadbury* 1992 (hereafter the *Cadbury Report*) and the *Report of the Committee on Corporate Governance Final Report* 1998 (hereafter the *Hampel Report*) in the United Kingdom which relied heavily on the powers of institutional investors within a company. It is stated in the *Combined Code* (at section 2) that institutional investors have a

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directors comply with self-regulatory codes of best practice. Mallin[40] refers to the United Kingdom Institutional Shareholders' Committee (which consists of the ABI,[41] NAPF,[42] AITC[43] and IMA[44]) and which issued a statement on the responsibilities of institutional investors in late 2002. In terms of this statement institutional investors should be clear on their policy on activism and how they will discharge their responsibilities. They should further monitor the performance of the directors, review company accounts, attend company meetings and be satisfied that the board structure of a specific company is effective. The committee also recommended that institutional investors should intervene with company management when necessary, for example, when they are concerned about a company's board structure. Finally, institutional investors should evaluate and report on the outcomes of their shareholder activism.[45] The *King Report* also refers to a report by NAPF and ABI providing recommendations to shareholders on how to vote at annual general meetings. *King II* recommends that similar bodies (consisting of institutional shareholders) should be established in South Africa.[46]

3. CODES OF BEST PRACTICE

3 1 South Africa

3 1 1 Principles of good governance

The King Committee on corporate governance was formed under the auspices of the Institute for Directors in Southern Africa, with support from, amongst others, the Johannesburg Stock Exchange[47] and the South African Chamber for Business. The report took into account the recommendations in the *Cadbury Report* of the United Kingdom, but its ambit was wider and it considered the specific circumstances of South Africa.[48]

It is stated in the introduction[49] of *King II* that there are seven characteristics of good corporate governance. These characteristics include discipline, transparency, independence, accountability, responsibility, fairness and social responsibility. These principles include that an outsider should be able to make a meaningful analysis of a company's actions, its economic fundamentals and the

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responsibility to make use of their votes and should be ready to engage with a company in a dialogue concerning the objectives of a company.

40 Mallin *Corporate Governance* 80–82.

41 The Association of British Insurers.

42 The National Association of Pension Funds in the United Kingdom.

43 The Association of Investment Trust Companies in the United Kingdom.

44 The Investment Management's Association.

45 See Mallin *Corporate Governance* 82.

46 See *King II* s 6, ch 6, para 1.

47 As it then was. It is now the JSE Ltd. The first *King Report* on corporate governance was published in 1994 and the second *King Report* in 2002. It is anticipated that a third *King Report* will be published by the end of 2008.

48 See Armstrong "The King Report on Corporate Governance" 1995 *Juta's Business Law* 65–70.The *King Report* has a wider application than the *Cadbury Report*. The *Cadbury Report* mainly focuses on the financial aspects of corporate governance such as financial accounting. *King II* also considers social accounting (including stakeholder protection).

49 See para 18, p 11 of *King II*.

non-financial aspects pertinent to the business.[50] Mechanisms should be in place regulating possible conflict of interests such as dominance by a chief executive officer or a large shareholder in order to ensure that decisions are taken objectively without any undue influence. These mechanisms include the appointment of board committees and the appointment of an independent auditor. The board should further act in a responsible manner towards the company and its stakeholders.[51] A company should, lastly, place a high priority on ethical standards like environmental and human rights issues and acknowledge the rights of various interest groups.[52]

The *Code of Corporate Practices and Conduct* issued by *King II* gives effect to these principles of good governance. In terms of this *Code* all companies listed on the JSE Limited should comply with the *Code*.[53] Other companies are, however, encouraged to comply with the *Code* where applicable. The *Code* operates on a "comply and explain" basis – if companies do not comply with the *Code* they should explain why they did not comply.[54] The *Code* contains recommendations concerning the board and directors. These recommendations include aspects like the composition of the board, the chairperson and chief executive officer, remuneration of directors, board meetings and board committees.[55] Risk management, internal audits, integrated sustainability reporting, accounting and auditing, relations with shareowners and communication issues are also addressed in the *Code*.[56] The underlying principle of *King II* is, however, that directors should act not only in accordance with the letter of the law, but also in the spirit of their fiduciary duties.[57]

The King Committee recommends that every board should have a charter setting out its responsibilities. The board should give strategic direction to the company and monitor how management carries out its functions. The board should comprise of a balance of executive and non-executive directors. It should also ensure that a company complies with all relevant laws and regulations.[58] The chairperson of the board should preferably be a non-executive director.[59] The chief executive officer and the chairperson should not be the same person.[60] Both executive and non-executive directors are subject to fiduciary duties and duties of care and skill.[61] The board of directors is appointed by the shareholders. They should be assisted, where appropriate, by a nomination committee. New

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50 See para 18.2, p 12 of *King II*.
51 See para 18.5, p 12 of *King II*.
52 See paras 18.6 and 18.7, p 12 of *King II*.
53 See para 1.1.1, p 21 of the *Code*. In terms of Listings rule 3.84 of the JSE Listings Requirements (dealing with corporate governance issues) listed companies have to comply with certain of the recommendations in *King II*. Eg, there has to be a separation between the roles of the chief executive officer and the chairperson.
54 See para 1.2, p 21 of the *Code*.
55 See pp 22–30 of the *Code*.
56 See pp 30–40 of the *Code*.
57 Esser and Coetzee "Codification of directors' duties" 2004 *Juta's Business LR* 26 27.
58 See s 1, ch 1 of *King II* on recommendations concerning the role and function of the board.
59 See s 1, ch 8 of *King II* on recommendations concerning board committees.
60 See s 1, chapters 2 and 3 of *King II* on recommendations concerning the chairperson and the chief executive officer.
61 See s 1, ch 5 of *King II* on recommendations concerning the role and function of the executive and non-executive directors

directors should be trained to inform them on their duties, responsibilities and powers.[62] Board committees should also be appointed. As a minimum each company should have audit and remuneration committees. The remuneration of directors should be sufficient to retain and motivate executives of the quality required by a board. A remuneration committee should make recommendations to the board relating to the company's framework of executive remuneration. This committee should consist of non-executive directors only.[63]

With regard to risk management it is stated that risk management and internal control should be practised by all staff of a company and embedded in its day-to-day activities. The board is responsible for creating a process relating to risk management as well as the implementation and effectiveness of such a process. A board committee should be appointed to assist the board to review its risk management policies and processes.[64] Companies should also have an effective internal audit function that has the respect of the board and management. An internal audit relates to an independent, objective assurance and consulting activity that should add value and improve a company's operation.[65] Integrated sustainability reporting is also important and concerns reporting on the nature and extent of a company's social, transformation, ethical, safety, health and environmental policies and practices.[66] Companies should be subject to external audits which provide an independent and objective check on the way in which the financial statements have been prepared by the directors in exercising their stewardship to the various stakeholders. An audit committee should be appointed to determine whether an internal audit report should be subject to an independent review by an auditor.[67]

The King Committee proposed a number of enforcement mechanisms in order to ensure that management conforms to these recommendations. Shareholder activism is identified in *King II* as a very important component of these mechanisms. Shareholders have control over the composition of the board.[68] They appoint the auditors and directors and the annual financial statements are considered and evaluated by them at an annual general meeting.[69] *King II* suggests that an environment should be developed for shareholders, and particularly for institutional shareholders, to be more than mere spectators, and rather to be "owners" concerned with the well-being of a company by monitoring the behaviour of the company managers.[70] A number of recommendations are made in *King II* to encourage institutional shareholders to take a more active part in the management of a company. These recommendations are considered below.

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62 See s 1, ch 5 of *King II* on recommendations concerning director selection and development.

63 See s 1, ch 4 of *King II* on recommendations concerning the remuneration of directors.

64 See s 2 of *King II* on recommendations relating to risk management.

65 See s 3 of *King II* on recommendations concerning internal audits.

66 See s 4 of *King II* on recommendations relating to sustainable reporting.

67 See s 5 of *King II* on recommendations concerning accounting and auditing.

68 See s 220 of the Companies Act 61 of 1973 which allows directors, by ordinary resolution, to remove a director from the board.

69 See para 2.1 above where the unitary board structure as applied in South Africa is discussed.

70 Rademeyer and Holtzhauzen 2003 *SALJ* 768.

3 1 2 Recommendations relating to shareholder activism

King II highlights the need for the education of shareholders on corporate governance issues.[71] It indicates that shareholders should be aware of their rights as minority shareholders (if applicable), their place within the corporate structure, their functions, and the importance of scrutinising the acts of company management.[72] Shareholders can only be pro-active when they have the relevant knowledge to determine whether or not directors are complying with principles of good corporate governance. When they have sufficient knowledge they are able to influence the corporate behaviour of directors. It is, however, important to note that this recommendation about informing shareholders is not necessarily relevant when dealing with institutional shareholders, but is rather aimed at individual shareholders. Due to their size and power institutional shareholders usually have the necessary knowledge and expertise to monitor directors' actions when they manage a company. Institutional shareholders will therefore usually have the necessary expertise concerning corporate governance principles. Secondly, *King II* points out that shareholders do not easily institute legal action against directors. The main reason for this is high litigation costs. To overcome this problem, class actions[73] and a system based on contingency fees[74] are proposed by the King Committee.[75] If legal enforcement mechanisms were more accessible to shareholders, it would create an environment that encourages greater shareholder activism.[76] It may also serve a preventative purpose, in that directors would be more mindful of principles relating to good governance and strive to achieve them in order to avoid legal action. Thirdly, the Committee made recommendations concerning quorum thresholds. It argued that it is important to ensure that the quorum threshold for company meetings is sufficient to permit access of shareholders to management through this forum. It also suggested that consideration should be given to amending the Companies Act in order to increase the quorum requirement for ordinary resolutions to the same as is

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71 See s 6, ch 6, paras 2 and 4 of *King II*.

72 Rademeyer and Holtzhauzen 2003 *SALJ* 768.

73 Class actions enable a large number of claimants, whose claims are based on a well-defined common question of law or fact, to have their matters heard in one proceeding (see s 6, ch 3, para 5.1 of *King II*).

74 A contingency fee is an agreement between a legal practitioner and a client to the effect that no fees are payable by the client if the case is conducted unsuccessfully (see s 6, ch 3, para 6.2 of *King II*).

75 See s 6, ch 3, paras 5 and 6 of *King II*.

76 Rademeyer and Holtzhauzen 2003 *SALJ* 768. The draft Companies Bill provides for new enforcement mechanisms for shareholders. Cl 163 relates to an application to declare a director delinquent or to place a director under probation. A company, a shareholder, director, company secretary or other officer of a company, a registered trade union or other representative of the employees of a company, or the Commission or the Takeover Regulation Panel may apply to a court for an order declaring a person delinquent or under probation. Cl 164 states that a shareholder, creditor or director of a company may apply to a court for relief if directors, *inter alia*, exercised their powers in a manner that is oppressive or unfairly prejudicial to, or unfairly disregards, the interests of the specific applicant. Cl 166 relates to derivative actions. A shareholder, former shareholder, a person entitled to be registered as a shareholder, a director, a former director, a registered trade union or another representative of employees may apply to a court on behalf of the company in terms of a derivative action.

required for special resolutions.[77] These recommendations concerning quorum requirements for company meetings can be problematic as too high a quorum requirement can frustrate the convening of meetings and the proper functioning of a company. We suggest that the quorum requirement should only be increased when decisions are taken on issues that affect the shareholders and specifically when they have to vote on (and approve) actions of management.[78] Fourthly, the King Committee also proposes the establishment of watch-dog organisations to look after the interests of minority shareholders or to determine whether companies comply with good corporate governance principles.[79] With regard to this recommendation it is important to remember that watch-dog systems are only as good as their management and leaders, but it would be unwise for a company to ignore such systems completely.[80] Lastly, the King Committee specifically refers to the role of institutional shareholders when discussing shareholder activism.[81] It indicates that when one considers the "make-up" of shareholders in South African companies it is clear that the majority are institutional shareholders. Focus should therefore be placed on the actions of institutional shareholders, and their conduct should be scrutinised. The Committee recommends that institutional shareholders should make their voting policies publicly available and should communicate the information to their constituencies on a regular basis.[82] Heightened transparency on the part of institutional shareholders is recommended by *King II*.[83] It should be borne in mind that institutional shareholders may incur liability to their clients if they do not provide them with sufficient information.[84]

Mallin[85] refers to tools of corporate governance that would encourage institutional shareholders to play an active role in company management. She refers to one-on-one meetings between the management and the institutional shareholders. She argues that it is much easier for institutional shareholders, compared to individual shareholders, to have meetings with the directors of a company on a regular basis. Issues such as the achievement of the objectives of a company and the quality of management could be discussed at these meetings. The right to vote is also a fundamental element of control by shareholders. Given the weight of the votes of institutional shareholders it is clear that their votes are of primary importance. Mallin argues that shareholders should make use of their voting rights. In order to ensure that institutional shareholders vote, voting should be as easy and convenient as possible. Electronic voting is a possible method to

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77 See recommendation 7 on p 42 of *King II*. See also Rademeyer and Holtzhauzen 2003 *SALJ* 767. Cl 81(3)(a) and (b) of the draft Companies Bill of 2007 provides for a quorum of 25% of holders of shares entitled to vote.

78 A duty to be actively involved in company management (and specifically on voting) is discussed below.

79 See s 6, ch 6, para 3 of *King II*.

80 Rademeyer and Holtzhauzen 2003 *SALJ* 773.

81 See s 6, ch 6, para 2 of *King II*.

82 See recommendation 19 on p 44 of *King II*.

83 See also Rademeyer and Holtzhauzen 2003 *SALJ* 769.

84 Eg, the Collective Investment Schemes Act 45 of 2002 contains a duty to act in the best interests of the investor/client (see s 71).

85 Mallin *Corporate Governance* 84.

increase voting by shareholders.[86] Information can also be provided to shareholders electronically and cost-effectively.

We suggest that shareholder activism can be improved in various ways. First, institutional shareholders should complete service level agreements with their clients in which their expectations should be clearly defined. The agreement should set out what the clients expect of the institutional shareholders regarding voting at general meetings and how much information they want to receive from the investors concerning the affairs of the company. Voting and other procedures at meetings should be kept as simple as possible. Institutional shareholders should also ensure that amendments to the company charter or founding documents reflect current corporate governance principles, particularly in older companies.

3 2 Australia

Ramsay *et al* indicate that the growth in institutional shareholding in Australia mirrors even greater growth elsewhere. The lower percentage of institutional investors in Australia reflects the prevalence of large founding family and intercorporate stakes in almost half of Australia's large- and medium-sized listed companies. The increase in institutional investors is, however, set to continue in Australia.[87] The Australian Institutional Managers' Association (AIMA) established in 1991 reflects increasing institutional shareholder activism.[88] Representative groups, such as AIMA, play an active role concerning corporate governance issues in the companies in which they invest.[89]

3 2 1 Principles of good governance

ASX listed companies are compelled to comply with *ASX's Best Practice Principles and Recommendations.*[90] Non-compliance must be explained in their annual reports.[91] These principles of good corporate governance were established by the ASX Corporate Governance Council, established on 15 August 2002. The Council developed ten principles on corporate governance and approved the *ASX's Best Practice Principles and Recommendations* in March 2003. The *ASX's Best Practice Principles and Recommendations* consist of various parts, namely: corporate governance in Australia; the essential corporate governance principles; and best practice recommendations. There are 28 recommendations[92]

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86 Mallin 84; Rademeyer and Holtzhauzen 2003 *SALJ* 771. See also s 5, ch 4, para 4.2 in *King II* on information technology. See cl 81(2)(a) of the draft Companies Bill of 2007 stating that a meeting of shareholders may be conducted by way of electronic communication.

87 See Ramsay et al 2000 *Company and Securities Law Journal* 111.

88 Today it is known as IFSA (Investment and Financial Services Association Ltd).

89 See the *Corporate Law Economic Reform Programme: Paper 3 Directors' Duties and Corporate Governance* (hereafter *CLERP 3*) at 69.

90 Most of the recommendations only apply to companies wef 1 July 2004. For non-listed companies there are comparable guidelines, see *Standards Australia* (June 2003) available at www.standards.org.au (accessed 20-10-2007).

91 These principles and recommendations are therefore not mandatory rules, nor are they entirely voluntary since they operate on a comply-or-explain basis or "if not why not" approach. This is similar to the approach followed in terms of *King II*, discussed in para 3.1.1 of this article above.

92 These recommendations include that the majority of the board should be independent directors (2.1), that the board should establish a remuneration committee (9.2) and, very

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representing implementation guidance for listed companies to satisfy the ten principles of good corporate governance. The ten chapters each explain one of the ten corporate governance principles.

ASX's Best Practice Recommendations and Principles were reviewed during 2007 and new revised recommendations and principles were issued in August 2007. The aim of the revision was to reduce the number of principles and to simplify them. The principles have now been reduced to eight.

Institutional investors and their role in promoting good corporate governance principles are not referred to in *ASX's Best Practice Principles and Recommendations*. No recommendations are provided on how institutional shareholders can ensure that companies adhere to sound corporate governance principles. The recommendations focus more on the role of non-executive directors and the structure of the board.[93]

Principle 1 states that solid foundations should be laid down for management and for oversight. A board charter should be established for this purpose. Principle 2 concerns the structure of the board and that it should add value. A nomination committee is important in this regard. Principle 3 relates to the recognition of stakeholders' interests and specifically the promotion of ethical and responsible decision-making. Principle 4 concerns the safeguarding of integrity in financial reporting. A formal audit committee charter is relevant in this regard. Principle 5 requires timely and balanced disclosure. Written policies should be established to ensure listing and statutory disclosures. Principle 6 states that the rights of shareholders should be respected; this can be achieved by way of a communication policy. Principle 7 states that risk should be recognised and managed. Companies should therefore have a risk management policy in place.

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importantly, that a code of conduct should be established. Compliance with legal and other obligations to legitimate stakeholders should also be disclosed (10.1). See du Plessis *et al Principles of Contemporary Corporate Governance* 134–137. See also Blackmore "Evaluating New Zealand's evolving corporate governance regime in a comparative context" 2006 *The Canterbury LR* 34 47–49; Havenga "Duties of the company chairman" 2005 *SA Merc LJ* 137 145; Von Nessen "Corporate governance in Australia: Converging with international developments" 2003 *Australian Journal of Corporate Law* 189 199–200 and 205–206. See also Grantham "Corporate Governance Codes in Australia and New Zealand: Propriety and prosperity" 2004 *Queensland LJ* 218–225 where he discusses the *ASX's Best Practice Recommendations and Principles* as well as the New Zealand version, *Corporate Governance in New Zealand: Principles and Guidelines* (2004). He asked whether these two codes address the agency-cost problem. The agency-cost problem concerns senior management who act self-interestedly. According to him the codes do address this problem, especially due to the principles dealing with independent boards and financial reporting. He also deals with the question whether or not the codes improve governance. He states that the solution does not necessarily lie in independent directors, they do not have detailed knowledge of the nature of the company's business and should therefore rely on senior management. Independent directors are also only part-time and they do not always give enough time to the affairs of the specific company. He states furthermore that the codes are overly concerned with corporate scandals and corruption. Accountability is only one aspect of corporate governance; the quality of decision-making and the realisation of wealth is also important. Propriety in management is a prerequisite for wealth maximisation, but it is not an end in itself. It is therefore a pity that the codes did not pay more attention to the creation of wealth. We suggest that institutional shareholders can play an active role relating to the agency-cost problem.

93 See Principles 1 and 2 of *ASX's Best Practice Principles and Recommendations*.

Principle 8 encourages sound principles of corporate governance in Australia. The extent to which companies comply with the recommendations of ASX and the approach towards monitoring and enforcing compliance of the recommendations by listed companies will determine the extent of involvement of ASX in corporate governance regulation. Du Plessis and others[94] argue that ASX should assume a dual role, namely that of both educator and regulator. The ASX recommendations and how they operate should be explained. The intention of the drafters was that the recommendations would give companies flexibility in implementing specific aspects that they find useful. ASX has therefore not yet assumed a strong role as enforcer. The recommendations are, however, supported by the Listing Rules.[95]

These recommendations are similar to those of the South African *King Report.* They are also mainly suggestions and encourage flexibility when directors manage a company. In both instances the recommendations are supported by the Listing Rules of the respective countries.

3 2 2 Recommendations relating to shareholder activism

The Investment and Financial Services Association Ltd's (IFSA's) Guide for Investment Managers and Statement of Recommended Corporate Practice[96] is of specific importance with regard to the role of institutional shareholders in Australian company management.[97] They provide a guide as to what is considered best practice in certain areas of the industry. Guidance Note 2 concerns guidelines on corporate governance for fund managers and corporations.[98]

In 1999 the *Guide* was divided in two parts. The first part concerns specific recommendations for fund managers regarding their approach to corporate governance, and the second part contains general principles on corporate governance for corporations generally.[99] With regard to institutional shareholders (or fund managers as referred to in the *Guide*) it is recommended that they should establish direct contact with companies, including constructive communication with senior management and board members, especially about the performance of these managers.[100] It is also recommended that fund managers should vote on all Australian company resolutions where they have the voting authority and responsibility to do so.[101] Fund managers should further have a written policy on

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94 *ASX's Best Practice Principles and Recommendations* 136–137.

95 See rule 4.10.3 stating that listed companies should comply with the recommendations or state why they did not comply.

96 Available at www.ifsa.com.au (accessed 20-10-2007).

97 Codes were published in 1995, 1997 and 1999, and republished in December 2002. The latter version of the code is referred to as the *IFSA Blue Book*. In October 2004 another version was published, but changes were made to this version after the release of the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act of 2004 and *ASX's Best Practice Recommendations and Principles*. See du Plessis *et al Principles of Contemporary Corporate Governance* 101 on the *IFSA Blue Book*.

98 See www.ifsa.com.au/public/content (accessed 26-10-2007) for the Guidance Notes.

99 The largest part of the *Guide* deals with recommendations to corporations, including guidelines regarding the composition of the board, that the chairperson should be an independent director and guidelines on board committees and company meetings. These guidelines do not deal with institutional investors specifically and are not discussed in this article. See du Plessis et al *Principles of Contemporary Corporate Governance* 103–106.

100 Guideline 1.

101 Guideline 2.

corporate governance. This policy should include the articulation of internal measures to ensure that the policy is applied consistently.[102] Fund managers should report to their clients, especially if a proxy was awarded to the particular fund manager.[103]

No practical methods are provided to encourage or assist institutional shareholders to comply with these guidelines as was the case in the recommendations of the South African King Committee. A body like IFSA can, however, play an important role in assisting institutional shareholders and their members to play an active role in monitoring corporate governance. We suggest that such a body should also be formed in South Africa to assist South African institutional shareholders to play an active role in company management.

4. INSTITUTIONAL INVESTORS AND THE DUTY TO ACT IN THE BEST INTERESTS OF THEIR CLIENTS

4 1 Introduction

It was mentioned above that institutional investors have a duty to act in the best interests of their clients. It is important to consider whether or not active institutional shareholders should only consider the interests of their clients or whether they should also have regard to the interests of the stakeholders of the company. In other words, should institutional shareholders only consider profit maximisation for their clients, or should they also take the wider interests of other stakeholders of the company and broader corporate social responsibility issues that might have long-term benefits for the company into account? Clients usually have short-term goals in mind; they want profit maximisation or the best return on their investment. By only acting with profit maximisation as goal institutional shareholders might act in the best interests of their clients, but act against the interests of the company and the other stakeholders. [104]

The duties of institutional shareholders towards their clients are, in some respects, similar to those of directors to the company. In addition to their duties arising from contract or other common-law and statutory obligations, institutional shareholders and their clients are in a fiduciary relationship.[105] Directors'

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102 Guideline 3.

103 Guideline 4. These guidelines remained basically the same since 1999. See du Plessis *et al Principles of Contemporary Corporate Governance* 102.

104 See paras 5.3–5.14 of the *Report on Corporate Responsibility: Managing Risk and Creating Value* by the Australian Parliamentary Joint Committee on Corporations and Financial Services (June 2006) (hereafter the *Corporate Responsibility Report*) on the fact that superannuation funds usually have long-term interests which place them in an excellent position to consider the interests of other stakeholders. It is stated in para 5.6: "If anyone has a long-term interest, it is surely the superannuation funds." This does not mean that these investors do not take advantage of short-term speculative investments, but they usually have the funds to do both (para 5.11). See also Pozen "Institutional Investors: The Reluctant Activists" 1994 *Harvard Business Review* 140 141, who states that institutional investors have a fiduciary duty to try to achieve their clients' objectives. Profit maximisation is usually the main objective of a client. Institutional investors should justify their activism in company management in terms of achieving this objective.

105 This article focuses on this fiduciary relationship. A director's common-law duties include his obligations as a fiduciary. The term "fiduciary" is applied to a large number of persons in diverse capacities, including commercial relationships. The relationship

continued on next page

duties towards the company's shareholders provide some guidance to institutional shareholders on the fiduciary duties offered to their clients, although it is generally accepted that directors owe their fiduciary duties to the company and not to individual shareholders. Due to the specific nature of their position, directors nominated by institutional shareholders may incur additional responsibilities and liabilities.

Shareholders' interests are traditionally granted primacy in the management of a company in South Africa and Australia. The traditional function of directors is that of profit maximisation for the shareholders. There has, however, been a shift in public opinion towards recognition of a wider variety of interests which should be considered than only those of the shareholders.[106] The wider variety of interests includes, *inter alia,* those of investors, employees, consumers, the general public and the environment.[107] The Constitution and other legislation also compel consideration of wider interests than those of the shareholders.[108] Increasingly, social, safety, health and environmental factors have been advanced as issues to be considered by company management. The so-called "triple bottom line" approach[109] embraces not only financial performance but also imposes social responsibility on companies.[110]

Two important schools of thought relating to the question in whose interests the company should be managed are the enlightened-shareholder-value and plurist approaches.[111] In the enlightened-shareholder-value approach the primary role of the directors is seen as being to promote the success of the company for the benefit of the company as a whole and to generate maximum value for

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between a company and a director of that company is an example of a commercial fiduciary relationship. A director can be seen as an agent, due to the fact that the director does not act on his or her own behalf, but on behalf of the company. A director can also be regarded as a trustee since he does not own company assets, but controls the assets and exercises powers for the company's and not for his own benefit, but the relationship between a director and a company remains unique. Categorising directors as agents or trustees is intended to prove the existence of a fiduciary duty rather than to equate directors with those particular positions. See Dawson "Acting in the best interest of the company – for whom are directors 'trustees'?" 1984 *New Zealand Universities LR* 68–81 in this regard. The relationship between institutional investors and their clients is also a commercial fiduciary relationship: Pozen 1994 *Harvard Business Review* 141; Karmel 2004 *The Business Lawyer* 1 3.

106 Havenga "Directors' fiduciary duties under our future company-law regime" 1997 *SA Merc LJ* 310 314.

107 Shareholders have a permanent stake in the profits of the business, whereas creditors provide loan capital to the company. They usually have a fixed income and invest for a limited period. Their interests are often secured. The interests of employees lie in job security. Consumers and the general public are concerned with the company as a source of products and services. Suppliers (as a special type of creditor) are concerned about timely payment of their services and that the company should keep to the contract concluded between them.

108 See the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution). See, eg, the Labour Relations Act 66 of 1995 and the Broad-based Black Economic Empowerment Act 53 of 2003.

109 The "triple-bottom line" refers to economic, social and environmental factors. Directors should consider all three of these factors when they manage a company.

110 Crook "The good company" 2005 *The Economist* 1–18.

111 These were the terms used during the company law reform process in South Africa and the United Kingdom.

shareholders.[112] The second school is that of plurism, which sees shareholders as one constituency among many and recognises the interests of various groups.[113] Thus, a company's existence and success are seen as inextricably intertwined with the consideration of the interests of its employees and other potentially qualifying stakeholders in the business, such as suppliers and customers.[114] Scholars in South Africa and Australia have debated on the interpretation that should be given to "the company" in the interpretation of directors' fiduciary duties. This is briefly dealt with below to indicate that it is uncertain in whose interests directors should manage a company.

4 2 South Africa

In May 2004 the Corporate Regulation Division of the Department of Trade and Industry issued a policy document with guidelines for a comprehensive review of South African corporate law.[115] It envisaged a review of South African corporate laws, including the Companies Act, the Close Corporations Act[116] and the common law relating to these corporate entities.[117] In February 2007 the draft Companies Bill was published, and which stated in clause 91(1)(b) that directors should act honestly and in good faith, and in a manner the director reasonably believes to be in the best interests of, and for the benefit of, the company.

The draft Companies Bill of 2007 provides for a partial codification of directors' duties.[118] One of the advantages of such a codification is the clarity that it should provide to directors concerning their duties. It seems, however, if clause 91(1)(b) has not been drafted in sufficiently clear terms. First, it seems as if acting "honestly" and "good faith" are treated as two separate issues. It is unclear

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112 This conclusion is based on the "too many masters" argument; namely if more stakeholders were recognised in whose favour the duties of directors had to be exercised, the various stakeholder groups would have to be identified and the nature and the extent of directors' duties and responsibilities to each of them would need to be determined. The result would be that directors would not effectively be held accountable to anyone, since there would be no clear yardstick for judging their actions: Proctor and Miles "Duty, accountability and the company law review" 1999 *The Company Lawyer* 21. See also Dawson 1984 *New Zealand Universities LR* 68 81; Havenga "The company, the Constitution and the stakeholders" 1997 *Juta's Business LR* 134 135 where she refers to the Berle-Dodd debate as summarised in Hodes "The social responsibility of a company" 1983 *SALJ* 468 485. See also Cheffins "Teaching corporate governance" 1999 *Legal Studies* 515–525; the *Policy Document* ch 3 para 3.2.2.

113 Sealy "Directors' wider responsibilities – Problems conceptual, practical and procedural" 1989 *Monash University LR* 164 173; Dean "Stakeholding and the company law" 2001 *The Company Lawyer* 66; the *Policy Document* ch 3 para 3.2.2.

114 See also Havenga 1997 *SA Merc LJ* 173; the *Policy Document* ch 3 paras 3.2.1–3.2.2; Roach 2001 *The Company Lawyer* 9.

115 See generally, the *Policy Document.*

116 69 of 1984.

117 The review does not include partnership law. The review process aims to identify the fundamental rules regarding procedures for company formation, corporate finance law, corporate governance, mergers and acquisitions, the cessation of the existence of a company and the administration and enforcement of the law.

118 See ch 2 of the draft Companies Bill concerning directors' duties and cl 91(6) stating that the common law is still applicable.

what the difference is between these two concepts.[119] Secondly, the clause provides that directors should act in the best interests of and for the benefit of the company. The meaning of "benefit" has not been explained and it is uncertain if this term only relates to a financial benefit or whether any benefit is relevant. Since the term is unqualified it seems that all benefits will be considered.[120] Thirdly, it is unclear what is meant by "the company". This last aspect is discussed in more detail below.

By stating in clause 91(1)(b) that a director has a duty to act honestly and in good faith, and in a manner the director reasonably believes to be in the best interests of, and for the benefit of, *the company*,[121] it seems if the drafters of the draft Companies Bill opted for the enlightened-shareholder value approach. This is, however, by no means clear as will be seen from the discussion below.

The meaning of "the company" is not clear in terms of the common law and various academics have debated its exact meaning.[122] The new Companies Act should have been the ideal vehicle to clarify this issue. With the current drafting in the draft Companies Bill, it is still unclear whether directors should manage a company for the sole benefit of the shareholders or whether they should also consider the interests of other stakeholders. It can be argued that the traditional viewpoint is still applicable due to the wording of the clause in the Bill ("the company" has always been interpreted as meaning the shareholders collectively) and the fact that a preference for the enlightened-shareholder value approach was expressed in the *Policy Document*. The proposed new Companies Act should promote clarity on the meaning of this phrase and eliminate further uncertainty and debate on its definition.[123]

4 3 Australia

In Australia directors should act in the best interests of the shareholders collectively and only take the interests of other stakeholders into account when shareholders will benefit. The general law duty of directors to act in good faith in the best interests of the company has been incorporated into legislation. S 181(1) of the Corporations Act of 2001 states that directors should act in good faith and in the best interests of the company for a proper purpose.[124]

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119 As indicated by Mervyn King SC at the Department of Trade and Industry (the DTI) Conference, Velmore Estate, Pretoria, South Africa, 19 and 20 March 2007, where the draft Companies Bill of 2007 was discussed.

120 These issues where discussed at the DTI Conference by various speakers.

121 Our emphasis.

122 On South African authority, see for example, Fourie "Die plig van direkteure teenoor maatskappyskuldeisers" 1992 *SALJ* 25–52; Havenga 1997 *SALJ* 134–139; Mongalo "Self-regulation versus statutory codification: Should the new regime of corporate governance be accorded with statutory backing" 2004 *THRHR* 264–273.

123 See Esser and du Plessis "The stakeholder debate and directors' fiduciary duties" 2007 *SA Merc LJ* 346 where suggestions are provided on providing clarity regarding the definition of "the company".

124 Although s 181(1) refers to directors acting in good faith and for a proper purpose, these are two separate duties imposed on directors. This is confirmed by ss 184(1) and 187 of the Corporations Act 2001 which treat them as two separate duties. See Austin *et al Company Directors* 266 and 271; Baxt, Fletcher and Friedman *Corporations and Associations Cases and Materials* (2003) 337–361. See for instance, *Mills v Mills* 1938 60 CLR 150 162–163 concerning the duty of directors to act in good faith, especially when the directors are also shareholders (see further Baxt *et al Corporations and Associations Cases*

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It is necessary to understand what is meant by "the company" to determine in whose interests directors should manage a company.[125] In some cases it has been stated that directors should act in the best interests of the company, whereas other cases indicate that they should act in the best interests of the company "as a whole".[126] The Corporations Act of 2001 only refers to "the company". The general or traditional viewpoint is that directors owe their duties to the company and that no independent duties are owed to any third parties.[127] It seems that owing their duty to "the company" does not imply that directors should act in the best interests of the company as a separate legal entity, but rather that they should act in the best interests of the members collectively.[128]

Policy documents issued by various committees in Australia dealing with corporate governance issues and specifically the protection of stakeholders' interests also indicate that directors should manage a company in the best interests of the shareholders collectively, but that they should not ignore the interests of other stakeholders. In the *Corporate Responsibility Report* it is stated that directors should act in the best interests of the shareholders collectively. Directors should consider the interests of other stakeholders when it enhances profit maximisation for the shareholders. The committee therefore supports the enlightened shareholder value approach (or enlightened self-interest approach) and states that an effective director will realise that it is in the best interests of the corporation to consider the interests of other stakeholders.[129] According to the committee,

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and Materials 339–342 who discusses to what extent directors should consider the interests of the company rather than their own interests); *Hospital Products Ltd v United States Surgical Corp* 1984 156 CLR 41 69 and *News Ltd v Australian Rugby League Ltd* 1996 21 ACSR 635 where it is stated, *inter alia*, that directors are under certain legal discretions and they should use those discretions honestly. There is some uncertainty on the interpretation of "best" in s 181(1); see Austin and Ramsay *Ford's Principles on Corporations Law* (2005) para 8.065. In some cases judges used the two phrases interchangeably, indicating that there is no significant difference between the two phrases: *Whitehouse v Carlton Hotel Pty Ltd* 1987 162 CLR 285 293 (for a discussion of this case, see Baxt *et al Corporations and Associations Cases and Materials* 378–382). This issue of the inclusion of the word "best" was also considered by Klein, du Plessis "Corporate Donations, the Best Interest of the Company and the Proper Purpose Doctrine" 2005 *The University of New South Wales LJ* 69 85.

125 Eg, *Re Smith & Fawcett Ltd* 1942 Ch 304 306.

126 See *Greenhalgh v Arderne Cinemas LD* 1951 Ch 286 at 291. Directors should not just consider existing shareholders when managing a company, but also future shareholders.

127 See Berkahn "Directors' duties to the 'company' and creditors" 2001 *Deakin LR* 360 367 referring to the traditional viewpoint when discussing directors' duties to creditors. See also Austin *et al Company Directors* 274–276 on this issue; Du Plessis *et al Principles of Contemporary Corporate Governance* ch 2 and Baxt *et al Corporations and Associations Cases and Materials* 343–344.

128 See *Greenhalgh v Arderne Cinemas LD* 291; *Ngurli v McCann* (1953) 90 CLR 425 438. See also Austin *et al Ford's Principles on Corporations Law* para 8.095; Dawson 1984 *New Zealand Universities LR* 78. See *Teck Corporation Ltd v Millar* (1973) 33 DLR 288 where it was held that a directors' duty is to the company, the company's shareholders are the company and therefore no interests outside of those of the shareholders can be considered by the directors. See, however, *People's Department Stores Inc v Wise* (2004) 244 DLR 564 where the court found that in determining whether directors did act in the best interests of the corporation it may be legitimate to consider the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.

129 Chapter 4 para 4.76.

mandatory approaches to corporate responsibility are not appropriate, because nothing in the Corporations Act of 2001 restrains directors from considering the interests of stakeholders.

Principle 3 of *ASX's Principles and Recommendations* concerns the promotion of ethical and responsible decision-making. The council recommendation states: "[I]nvestor confidence can be enhanced if the company clearly articulates the practices by which it intends directors and key executives to abide."[130] Recommendation 3.1 requires companies to: "Establish a code of conduct to guide directors, the chief executive officer (or equivalent), the chief financial officer (or equivalent) and any key executives as to the practices necessary to maintain confidence in the company's integrity;[131] the responsibility and accountability of individuals for reporting and investigating reports of unethical practices".[132] Such a code is an effective way to guide the behaviour of directors and demonstrate the commitment of a company to its ethical practices and responsible decision-making.[133]

In the *CLERP 3* paper it seems clear that the drafters favour the enlightened-shareholder value approach to be followed. It provides that directors should be clear on their duties and they should know that they must maximise shareholder value, but should also consider the interests of other stakeholders.[134]

4 4 Conclusions on the beneficiary of directors' duties

To the extent that an analogy can be drawn between the duties of directors to the company and those of institutional investors to their clients, it could be argued that institutional shareholders should mainly act in the best interests of their clients, thus enhancing profit maximisation.[135] This could conflict with good corporate governance principles. They can, however, consider the interests of stakeholders and pay attention to the other principles of good governance when they manage the funds of their clients if it also serves the best interests of their clients. If the clients feel that their interests are not sufficiently protected by institutional shareholders then they can always sell their shares and invest in another company.[136] This approach is similar to the enlightened-shareholder

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130 *ASX's Best Practice Recommendations and Principles* p 25.
131 See para 3.1.1.
132 See para 3.1.2.
133 See du Plessis *et al Principles of Contemporary Corporate Governance* 204.
134 See *CLERP 3* part 4 para 4.1.
135 See Berns and Baron *Company Law and Governance An Australian Perspective* (1998) 127, where it is argued that institutional investors can play an important role in ensuring that good governance principles are adhered to, but in the end profit maximisation is their main goal. "After all, institutional investors are themselves profit-driven corporate persons."
136 See also the United Nation's Principles for Responsible Investments of 2005 available at www.unpri.org (accessed 2007-10-20). The UN considered the role of institutional investors in corporate social responsibility and issued relevant principles. The principles include that institutional investors should be active owners, seek appropriate disclosure and promote implementation of the principles in the industry. Institutional investors are signatories of these principles and it is recommended in para 5.55 of the *Social Responsibility Report* that Australian institutional investors became signatories to this UN report. See also Pozen 1994 *Harvard Business Review* 147, who states that if institutional investors are dissatisfied with decisions taken by company management, they should sell their shares in the company.

value approach discussed above and is in line with the current view that directors should act in the best interests of the shareholders collectively.

5. CONCLUSIONS

Institutional shareholders can clearly play an important role in enhancing corporate governance principles, in view of the size of their shareholdings in South African and Australian companies, and the fact that their influence is likely to increase. Empirical research in the United States of America on the effect of institutional investor activism has not found strong evidence that company performance is necessarily improved by such involvement. But in an emerging economy like that of South Africa, it can be expected that participation by institutional shareholders will be influential and will be to the advantage of smaller and sometimes less sophisticated shareholders. Due to their size and power, institutional investors can have one-on-one discussions with senior management, ensure that self-regulatory codes of best practices are adhered to and vote in a responsible manner on the basis of their involvement with the company. In this article we considered the (potential) role of institutional investors in Australia and South Africa. Some recommendations were provided on how to encourage institutional shareholders to be more active in the management of a company. It was suggested that the clients of institutional shareholders should clearly express what they expect from them. Electronic voting and the electronic distribution of information to shareholders will enable institutional shareholders to be more active.

The question in whose interests institutional investors should act when they monitor the management of companies in which they invest was also considered. In addition to their specific contractual obligations, institutional investors also incur fiduciary duties. Their duties to their clients were therefore compared with those of directors towards a company. It was seen that in Australian and South African company law directors should manage a company in the best interests of the shareholders collectively, subject to the consideration of the interests of other stakeholders. The consideration of the interests of all, in accordance with good corporate governance principles will, in any event, be in the best interests of shareholders, especially over the long term. The primary obligation of institutional investors when they monitor a company's management is to ensure that the interests of their clients are protected. In their exercise of this duty they should consider to what extent the company takes the interests of its shareholders and other stakeholders into account. Directors sometimes have to consider the interests of stakeholders other than the shareholders, because their duty to the company as a whole entails considering specific stakeholders in certain circumstances, for example when the company is insolvent. Institutional investors should also consider other stakeholders' interests, but their primary obligation is towards their clients. Directors nominated by institutional shareholders should be aware that they may have additional responsibilities and liabilities.

Traditional Leadership: Constitutionalism and Democracy in South Africa

Khunou Samuelson Freddie*
Senior Lecturer, Faculty of Law, North-West University, Mafikeng Campus

1. INTRODUCTION

The position and role of traditional authorities in South Africa is controversial. Some people argue that they no longer have a role to play in a democratic dispensation. Ss 211 and 212 of the Constitution,[1] however, recognise a role and place for traditional leadership. The legal history of traditional leadership has not been fully and clearly written in South Africa and it might be that people's perceptions rest on a lack of historical knowledge. The primary objective of this article is to discuss the roles, functions and responsibilities that the traditional leaders are expected to play under South Africa's constitutional and democratic settlement.

The post 1994 democratic government established democratic institutions in all spheres of government. These institutions include, *inter alia*, the National House of Traditional Leaders,[2] the Provincial Houses of Traditional Leaders[3] and the Traditional Councils.[4] The Constitution established these institutions to ensure maximum participation and involvement of traditional leaders on matters

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* B Juris (Unibo) LLB (UNW) LLM (UNW) LLD (NWU-Potchefstroom Campus).

1 Constitution of the Republic of South Africa Act, 1996, hereafter referred to as the final or the 1996 Constitution.

2 See the National House of Traditional Leaders Act 10 of 1997. This legislation provides for the establishment of a council to be known as the National House of Traditional Leaders. It further provides for the objects and functions of the House. See also the National House of Traditional Leaders Amendment Bill, 2008. This Bill contains a number of key provisions covering *inter alia*: the establishment of the National House of Traditional Leaders; alignment of the powers, functions and duties of the House with the White Paper on Traditional Leadership and Governance, 2003 and the Traditional Leadership and Governance Framework Act 41 of 2003; provision for support of the House by government; accountability of the House and the relationship between the House and the Kings and Queens.

3 There are approximately seven Provincial Houses of Traditional Leaders in South Africa. These Provincial Houses were established in terms of different provincial legislation. For example, the North-West Provincial House of Traditional Leaders was established in terms of the North-West Traditional Leadership and Governance Act 5 of 2005 while the Free State Provincial House of Traditional Leaders was established in terms of the Free State Traditional Leadership and Governance Act 8 of 2005.

4 S 3 of the Traditional Leadership and Governance Framework Act 41 of 2003 provides for the establishment and recognition of traditional councils. See also the Traditional Leadership and Governance Framework Amendment Bill, 2008, which provides for the establishment of the sub-traditional councils. This Bill also provides for the recognition of Kingship and the establishment of the Kingship Councils as well as the functions of the Kingship Councils.

of governance. Traditional leaders, as members of these constitutional structures, are obliged to fulfil the obligations and duties imposed by the Constitution. It is evident that the post-apartheid epoch has subjected traditional authorities and institutions to a democratic process of transformation. This article will illustrate that the consequences of this transformation are enormous and pose daunting challenges to the traditional leaders. The fact that traditional leadership and the demands of democratic governance are fundamentally at odds cannot be disputed. The institution of traditional leadership is hereditary and not subject to the electoral process. This makes the constitutional transformation of traditional authorities an intricate exercise. The democratisation of traditional leadership and traditional institutions was both politically and constitutionally inevitable.

2 CONFLICTING ARGUMENTS

One of the major political issues which post-apartheid South Africa had to address was what to do with the institution of traditional leaders under the new democratic dispensation. This institution was seen by its critics as inherently undemocratic since these leaders were not elected. The institution seemed to militate against the notion that an electoral system was a prerequisite for democracy.[5] For some, the institution of traditional leaders was considered a patriarchal organisation that had no place in an open and democratic South Africa founded on human dignity, the achievement of equality and the advancement of human rights and freedoms.[6]

Ntsebeza has argued that it is only possible to have an institution of traditional leaders that is democratic once rural people are involved in decision-making processes. On the other hand, there is a valid reason to believe that since traditional leadership is anchored in hereditary rule, the institution would still be undemocratic. Rural masses would still be denied an opportunity to choose their own institutions and individuals to rule them. It has been argued that the traditional framework impinges upon the values and ethos of democracy.[7] Williams simplified the problem as follows:

> "Because we all voted that is why we call ourselves . . . [a] democracy. We are unified and we have equal rights. We do have democracy here. The only problem is that we still do not understand it . . . there is no democracy with Chiefs and *izinduna* . . . they must be taught what is democracy."[8]

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5 De Koker "Male primogeniture in African customary law: are some more equal than others?" 1998 *THRHR* 99. The striking feature of democratic systems is that those in public office are elected.

6 See, eg, *Ex Parte Chairperson of the Constitutional Assembly: In the Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC), where the court declared that after a long history of deep conflict between a minority which reserved for itself all control over the political instruments of the state, and a majority who sought to resist that determination, the overwhelming majority of South Africans across the political divide realised that the country had to be urgently rescued from imminent disaster by a negotiated commitment to a fundamentally new constitutional order premised upon open and democratic government and the universal enjoyment of fundamental human rights.

7 Ntsebeza "Land Rights and Democratization: Rural Tenure Reforms in South Africa's Former Bantustans" 2003 *Transformation* 74.

8 Williams "Leading from Behind: Democratic Consolidation and the Chieftaincy in South Africa" 2004 *J of Modern African Studies* 113–114.

Government's intention was to create a type of institution of traditional leaders that would be more representative and accountable to communities. Maloka quoted a civic leader from a village in Gazankulu saying:[9] "In the new South Africa, Chiefs will melt away like ice in the sun."

November and Wessels pointed out that negative attitudes towards the institution of traditional leaders were based on a number of combined factors. They argued that some of those factors were attributed to the ongoing western modernisation of rural life that reduced the power and integrity of traditional leaders. Some young people, especially those who had contact with western education, were detached not only from the institution of traditional leadership but also from their parents and ancestral culture.[10]

The institution of traditional leaders suffered a great deal of damage to its image during the colonial and apartheid era due to its oppressive, authoritarian and corrupt nature. Chief Holomisa confirmed the flaws of the institution when he said:

> "We have admitted we made mistakes in the past, that deep in our hearts we never intended to act against the interests of our people. We are, after all, not the only ones who were used by *apartheid*. There was really no choice. Life had to go on. We should not be singled out."[11]

The institution of traditional leaders in South Africa was a feature of national, provincial and local politics. Despite the role the institution played during the colonial and apartheid era, the institution continued to enjoy support from local and rural communities. Traditional leadership was regarded as a legitimate voice for the rural masses, the most underprivileged and disadvantaged section of society.[12] According to Williams, those communities living under this institution expected it to co-exist with newly established democratic institutions.[13] Traditional

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9 Maloka "Populism and the Politics of Chieftaincy and Nation Building in the New South Africa" 1996 *J of Contemporary African Studies* 173.

10 November and Wessels "The Political Status of Traditional Leadership in South Africa's New Perspective" 2002 *J of Contemporary History* 149.

11 Maloka 1996 *J of Contemporary African Studies* 173.

12 TARG "The role and future of traditional leaders in South Africa" 1999 *Koers* 297. According to TARG, the following observations were made during fieldwork undertaken in North West, Limpopo and KwaZulu-Natal provinces. The research team found that traditional leaders were still recognised and respected by the different traditional communities that were interviewed. According to TARG, the communities which were interviewed stated that the idea of abolishing the institution of traditional authorities would be disastrous, and would lead to chaos. They argued that traditional leaders had a definite role to play in traditional communities because they were the embodiment of law and order, the upholders of values, and provided for the needs of the communities. It was also observed that the communities regarded traditional leaders as the institutional form of government closest to the people. It is apparent from these observations that traditional leaders have a definite role to play in the formulation of policy, decision-making, planning or the implementation of policy by local government structures. The courts confirmed the positive role of traditional leaders in rural areas when the Venda court pointed out in *Tshivhase Royal Council and Another v Tshivhase* 1990 3 SA 828 (V) that the tribal government remained strong and active especially in the sphere of local and traditional politics. The court further declared that the system of traditional government served as a local government understood by the people with its roots deep in history.

13 Williams 2004 *J of Modern African Studies* 115.

leaders were viewed by those who supported them as men of great importance in their communities:

> "They are the executive leaders of their people and are perceived as symbols of tribal unity and guardians of the community's customs and culture. They perform several judicial and governmental functions such as presiding over customary tribunals, allocating land, settling land disputes, levying taxes and regulating law and order. Their shortcomings, notwithstanding, traditional authorities are often more in touch with the needs and sentiments of their people than central government."[14]

Despite the attitude of the rural communities, traditional leaders were still marginalised by government, non-governmental organisations (NGOs), academics and other sections of civil society.[15] The political debate on the role of traditional leaders in the new South Africa divided the anti-apartheid forces, especially the African National Congress (ANC). There were those who, if given a chance, would probably have voted for the abolition of the institution. Others, including former President Mandela, supported the cause of the traditional leaders. President Mandela commented on the conflict line between the civic associations and traditional leaders as follows: "How can civics . . . and traditional leaders fail to work peacefully when . . . (they) have the same cultural background. There is too much which unites . . . (them)."[16]

The post-apartheid government had therefore been confronted with the challenge to adapt the institution of traditional leadership to democracy. The government organised workshops and conferences throughout the country in an attempt to sort out and identify all problems inherent in the institution. The government also initiated the compilation of the *White Paper on Traditional Leadership and Governance*[17] to determine how the institution could be adapted to the Bill of Rights in the Constitution.[18]

Traditional leaders lobbied for more powers in the new constitutional state. Since the early 1990s, they lobbied to control development projects, to have

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14 Pieterse "Traditional leaders win battle in undecided war" 1999 *SAJHR* 180.

15 TARG 1999 *Koers* 295.

16 As quoted by Maloka 1996 *J of Contemporary African Studies* 173. See also TARG Project Background 1, where TARG team established that the fact that the former President Mandela concerned himself with the future of traditional authorities and tried to defuse tensions between the democratic structures such as civic associations and traditional leaders is an indication of the relevance and the importance of traditional leadership in a new South Africa.

17 *White Paper on Traditional Leadership and Governance* (2003). This White Paper was co-ordinated and assembled by a special task team. The White Paper Task Team was made up of Adv S Nthai (Chairperson), Ms MF Mopeli (Deputy Chairperson), Mr D Masimola, Prof R Mqeke, Prof P Ntuli, Adv T Mayimane-Hashatse, Chief BLMI Motsatsi, Chief SV Suping, Ms S Mkhize, Mr Z Titus and Mr S Selesho, supported by the White Paper Secretariat Mr J Meiring, Mr S Khandlela, Ms W Khuzwayo, Ms V Maleka and Ms D Pienaar, the Director-General, Ms L Msengane-Ndlela, and the entire Department of Provincial and Local Government.

18 Williams 2004 *J of Modern African Studies* 117. See also Ch 2 of the Constitution regarding the Bill of Rights. S 7 of the Constitution states as follows: "(a) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. (b) The state must respect, protect, promote and fulfil the rights in the Bill of Rights. (c) The rights of the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill."

more access to local government funds, for more representation in local government structures and to have a role in the law-making processes at provincial and national level.[19] These demands sometimes caused a rift between government and traditional leaders. At local government level conflict arose between councillors and traditional leaders. In view of the role of traditional leaders, President Mbeki[20] stated in 2000 that if the government had to give a clear expression of the role of traditional leaders, it had to do so in the context of a democratic society.[21]

Traditional leaders gradually acknowledged the fact that times had changed and democracy was a significant component and indeed a norm of a modern civilized nation. According to Rugege, this sentiment was expressed in a memorandum to President Mbeki dated 16 May 2000, proposing *inter alia* that:

> "Members of the community falling within the area of jurisdiction of the traditional authority should democratically elect representatives to sit on the authority together with traditional leaders who will be automatic members. The elected members of the authority should be the majority."[22]

3 CONSTITUTIONAL PROVISIONS

3 1 The 1993 constitutional settlement

In 1994 South Africa entered a new constitutional dispensation based on democracy, equality, fundamental rights,[23] the promotion of national unity and reconciliation. The new constitutional dispensation culminated in the interim Constitution.[24] Traditional leaders became alert and soon began to realise that their

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19 Williams 2004 *J of Modern African Studies* 117.

20 President Thabo Mbeki was inaugurated for the first time as the President of South Africa on June 16, 1999. From 1994 to 1999 Mbeki served as a Deputy President of the South African Government of National Unity.

21 The 1996 Constitution articulates in clear terms the context of a democratic society. See Ch 1 of the Constitution, in particular ss 1 and 2. S 1 reads as follows: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the Constitution and the rule of law. (d) Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness." S 2 makes specific provision for the supremacy of the Constitution. It reads as follows: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled."

22 As quoted by Rugege "The Institution of Traditional Leadership and its Relation with Elected Local Government" 2002 *Seminar Report* 12.

23 See *Prince v President, Cape Law Society* 2001 2 SA 388 (CC), where the court stressed that the fundamental rights in the Bill of Rights are the hallmarks of a free society. The court did, however, point out that these rights are not absolute.

24 TARG 1999 *Koers* 295. The interim Constitution was the supreme law of the Republic of South Africa up to 1997. It was a rigid type of a constitution, which differed fundamentally from an ordinary piece of legislation. There was a procedure which was prescribed for amendments to this interim Constitution. See in this regard *Premier, KwaZulu-Natal v President of the Republic of South Africa* 1996 1 SA 769 (CC), where the Constitutional Court declared that there was a procedure which was prescribed for amendments to the Constitution and this procedure had to be followed. If that procedure was properly followed, the amendment was unassailable. The court further stated that the radical and fundamental structuring and re-organising of the fundamental premises of the Constitution might not qualify as amendment at all.

status, powers and authority might disintegrate in the new system. The Inkatha Freedom Party (IFP) and the Congress of Traditional Leaders of South Africa (CONTRALESA) negotiated for the recognition and protection of the institution of traditional leaders and indigenous law.[25]

The efforts and determination of the IFP and CONTRALESA resulted in agreements (which were included in Chapter 11 of the interim Constitution[26]) which provided for the recognition of all existing traditional leaders and customary law.[27] These constitutional provisions were as follows:

> "(1) A traditional authority which observes a system of indigenous law and is recognised by law immediately before the commencement of this *Constitution*, shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority.
>
> (2) Indigenous law shall be subject to regulation by law."[28]

The interim Constitution further provided a function for traditional leadership at the local level of government.[29] It also provided for a National Council of Traditional Leaders at national level and a Provincial House of Traditional Leaders at provincial level.[30] The six Provincial Houses of traditional leaders were established in terms of the legislation enacted by the relevant provincial legislatures.[31]

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25 Pieterse 1999 *SAJHR* 180.

26 The Constitution of the Republic of South Africa, Act 200 of 1993, hereafter referred to as the interim Constitution.

27 Although Ch 11 recognised and protected the institution, status and role of traditional leadership according to customary law, the recognition of customary law and traditional leadership was subject to the supremacy of the Constitution and the Chapter on Fundamental Rights and the compulsory application of common and statutory law.

28 S 181 of the interim Constitution. In *ANC v Minister of Local Government and Housing, KwaZulu-Natal* 1998 3 SA 1 (CC), the Constitutional Court stated that s 181 of the Interim Constitution was an important constitutional entitlement for traditional leaders whose customary authority and role were being affected by the transition to democracy. The court went on to say that this constitutional arrangement ensured that traditional leaders were entitled to representation on a council without having to stand for election.

29 Interim Constitution s 182.

30 S 184(1).

31 See Olivier "Indigenous law: Traditional leadership and institutions" in Joubert WA (ed) *LAWSA* Vol 32 (2004) paras 36ff. Provisional Houses of Traditional Leaders were established in North-West, KwaZulu-Natal, Mpumalanga, the Free State, Eastern Cape and Limpopo. See in this regard House of Traditional Leaders for the Province of the North-West Act 12 of 1994, KwaZulu-Natal Act on the House of Traditional Leaders Act 7 of 1994, Mpumalanga House of Traditional Leaders Act 4 of 1994 as amended in 1998, Free State House of Traditional Leaders Act 6 of 1994, Northern Province House of Traditional Leaders Act 6 of 1994 and Eastern Cape House of Traditional Leaders Act 1 of 1996. These various pieces of provincial legislation are more or less similar in content. They determine the powers, functions and duties of their respective Houses. They also give provinces powers to advise on and make recommendations on any draft Bill in respect of the status, powers and functions of traditional authorities, the affairs of traditional communities, traditional and customary law. At the time of writing, some parts of North-West Province, which consisted of areas of traditional authorities, were incorporated into Northern Cape Province. The Northern Cape Provincial Legislature is expected to pass legislation for the establishment of House of Traditional leaders in that province.

These constitutional provisions were once again a victory for traditional leaders in the new democratic South Africa.[32]

Traditional leaders negotiated for the type of Constitution that would respect and uphold their aspirations and powers. CONTRALESA commented:

> "The democratic dispensation developed in South Africa should be developed in a manner, which reflects the values of the whole community it serves. The *Constitution* should therefore be a mirror of the soul of the nation – it must include all the aspirations, beliefs and values. The institutions and role of traditional leaders, which have been in existence as longer than [*sic*] – a liberal democracy in the West, have to be treated with respect and accordingly be integrated within the structures of national, provincial and local government."[33]

3 2 National Council of Traditional Leaders

The Council of Traditional Leaders Act[34] was promulgated to give effect to s 184(1), which laid the basis for the establishment of the National Council of Traditional Leaders. The Act determined the composition, powers and functions of the Council.[35] It also envisaged a Council with an elected chairperson and 19 elected representatives.[36] The Council of Traditional Leaders Act, although passed, did not come into operation. As a result the Council was not elected because Provincial Houses of Traditional Leaders were also not established.[37]

The Council of Traditional Leaders Amendment Act[38] later amended the Council of Traditional Leaders Act[39] in 1998, replacing the Council of Traditional Leaders by a National House of Traditional Leaders.[40] The Council of Traditional Leaders Act prevented elected officials from serving in the National

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32 S 183(1) of the interim Constitution. This section was mandatory and therefore six Provincial Houses of Traditional Leaders were established. According to Olivier, Constitutional Principle XIII, which provided for the recognition and protection of traditional leadership, was of paramount importance. The Interim Constitution gave effect to the protection of institutions of traditional leadership.

33 Maloka T 1996 *J of Contemporary African Studies* 185.

34 10 of 1997. S 7 dealt with the objects and functions of the National Council of Traditional Leaders. These functions include: (a) to promote the role of traditional leadership within a democratic constitutional dispensation; (b) to enhance unity and understanding among traditional leaders; (c) to enhance co-operation between the Council and the various Houses; (d) to advise government on matters relating to traditional leadership, the role of traditional leaders, customary law and customs of communities observing a system of customary law. The Act also generally deals with matters relating to nomination of members of the council, duration and dissolution of the council, qualifications and period of office of members of the council, vacation of office and filling of vacancies on the council.

35 S 7.

36 S 9.

37 Pieterse 1999 *SAJHR* 180.

38 85 of 1998. The Act provides, *inter alia*, for the removal from office of the chairperson and deputy chairperson of the National House by way of a resolution supported by a majority of the members.

39 10 of 1997.

40 In terms of s 4(a) of Council of Traditional Leaders Amendment Act 85 of 1998, the word "Council" whenever it occurs except in s 15, is substituted by the words "National House". In terms of s 4(b) of Act 85 of 1998, the word House or Houses, whenever they occur except in s 1, are substituted by the words Provincial House or Houses respectively.

House of Traditional Leaders. This restriction applied only to the National House and not to the various provincial houses.[41]

3 3 National House of Traditional Leaders

The Council of Traditional Leaders Act (later the National House of Traditional Leaders Act)[42] was enacted in 1997 and culminated in the establishment of the National House of Traditional Leaders. Each Provincial House of Traditional Leaders was required to nominate three members to represent it in the National House.[43] It consists of 18 members. These members are not to be members of National Parliament or provincial legislatures.[44] These members represent their Provincial Houses in the National House. Thereafter, the National House elects its office bearers.[45] Members of the House render their services on a part-time basis. However, it is important to note that the chairperson and deputy chairperson are full-time members. The life span of the House is five years, as its life span is linked to the life cycle of the Provincial Houses.[46] The main challenge in respect of the composition of the National House is to provide a House which is representative because the current Houses are male-dominated institutions.[47]

The National House of Traditional Leaders functions in an advisory and consultative capacity. The National House is *inter alia*, responsible for:[48]

- advising the national government on the role of traditional leaders and customary law;
- dealing with legislation pertaining to custom and customary law;
- monitoring the functioning of the Provincial Houses of Traditional Leaders; and
- advising the government on issues pertaining to the remuneration and privileges of traditional leaders.

3 3 Provincial Houses of Traditional Leaders

The interim Constitution made a provision for the establishment of Provincial Houses of Traditional Leaders. It recognised the Zulu King as the Provincial King in KwaZulu-Natal. This constitutional recognition afforded to the King was a victory for the IFP, which pressed for the recognition of the Zulu monarch

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41 This restriction was in force at the time of writing this article in 2007. According to this restriction, traditional leaders who have been elected to take part in the National Assembly, provincial legislatures and municipal councils could not serve in the National House of Traditional Leaders.

42 10 of 1997. S 2 provides for the establishment of the Council to be known as National House of Traditional Leaders.

43 S 4.

44 S 6.

45 Du Plessis and Scheepers "Institutions of traditional leaders" 1999 *Seminar Report* 74.

46 *White Paper on Traditional Leadership and Governance* (2003).

47 Interview with Chief Masibi of Batlharo Traditional Authority (Disaneng village Mafikeng 29 November 2005). Chief Masibi confirmed in an interview that men in all leadership positions dominate the National House of Traditional Leaders and Provincial Houses of Traditional Leaders. He further stated that the reason for this male dominated arrangement is attributed to the history of the institution, which has been deeply patriarchal for many years.

48 See also Council of Traditional Leaders Act 10 of 1997 s 7.

during the negotiations.[49] South Africa has nine provinces and initially six of these provinces had traditional leaders, namely Limpopo, North-West, Eastern Cape, Mpumalanga, KwaZulu-Natal and the Free State. Later, some of the North-West traditional authorities' areas were incorporated into the Northern Cape.[50] This means that there are seven provinces which have traditional leaders in South Africa. These provinces have Houses of Traditional Leaders. The Houses differ in size, ranging from 84 members in KwaZulu-Natal to 15 in the Free State.[51]

According to Maloka, if the case of the Northern Griqua traditional leaders is upheld and the incorporation process of some of the traditional authorities' areas from the North-West Province into the Northern Province is finalised, only Gauteng and the Western Cape would be without traditional leaders.[52] The Northern Cape Griqua traditional leaders negotiated with the government and in particular the Department of Provincial and Local Government for their recognition. It seemed the government was not prepared to encourage the multiplication and proliferation of traditional leaders in the new South Africa. To this end, the government has taken steps to limit the number of traditional leaders.[53] The National Griqua Forum was established in Upington to represent the Griquas, the Khoi-San community, the Nama, and the Koranna. The main aim of the forum was to promote culture, language, heritage and traditional leadership of these groups.[54]

According to Du Plessis and Scheepers, the functions of the Provincial Houses of Traditional Leaders as described and provided for in the various provincial statutes differed slightly.[55] However, the White Paper on Traditional Leadership

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49 See generally the interim Constitution.

50 At the time of writing this article, Northern Cape did not have a Provincial House of Traditional Leaders. The traditional leaders of this province were still represented in the North-West Provincial House of Traditional Leaders.

51 Maloka 1996 *J of Contemporary African Studies* 187. The provincial legislatures of the said provinces have promulgated legislation dealing with traditional leadership and governance. All these pieces of legislation are based on the Traditional Leadership and Governance Framework Act 41 of 2003. The content of this provincial legislation is more or less the same. Differences exist with regard to names of traditional leaders. For example, the KwaZulu-Natal legislation refers to a traditional leader as Inkosi and Isilo (in case of the King) of the Province of KwaZulu-Natal while the North-West legislation refers to a traditional leader as Kgosi. Different names are also used in these pieces of legislation to refer to a traditional leader, eg Ingwenyama, Indlovukati, Libambela. This legislation deals *inter alia* with the following matters: the recognition and appointment of traditional leaders, traditional councils and communities; roles and functions of traditional leaders; dispute resolution; codes of conduct; co-operative governance; capacity development and trans-provincial issues. See in this regard North-West Traditional Leadership and Governance Act 5 of 2005; Free State Traditional Leadership and Governance Act 8 of 2005, Limpopo Traditional Leadership and Institutions Act 6 of 2005; Mpumalanga Traditional Leadership and Governance Act 3 of 2005; KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 and Traditional Leadership and Governance (Eastern Cape) Act 4 of 2005.

52 Maloka 1996 *J of Contemporary African Studies* 187.

53 Maloka 1996 *J of Contemporary African Studies* 186.

54 Burger and Feris *Traditional Leadership* (2000) 68.

55 Du Plessis and Scheepers 1999 *Seminar Repor*t *75.* TARG *Report on Development Management: The Administrative and Legal Position of Traditional Authorities in South Africa and their Contribution to the Implementation of the Reconstruction and Develop-*

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and Governance outlines a uniform approach concerning a number of responsibilities and roles of Provincial Houses of Traditional Leaders. The Provincial Houses are required to:[56]

- ensure that traditional leaders are properly elected to represent their communities in Provincial Houses and National House of Traditional Leaders;
- ensure that there are skills development programmes for traditional leaders;
- ensure that traditional leadership structures carry out their functions and account for their activities;
- ensure that traditional leadership structures are well resourced so that they may carry out their functions; and
- ensure that the principles of co-operative governance are promoted.

Du Plessis and Scheepers indicated the following problems experienced by the Provincial Houses:[57]

- lack of infrastructure and resources;
- poor administration due to lack of professional staff and funds;
- poor co-ordination and communication between different Houses of Traditional Leaders;
- lack of uniformity and consistency in as far as how the Provincial Houses carried out their activities and affairs;
- the composition of the Houses is not representative of all the regions in a particular province;
- succession disputes have a bearing on the composition of the Provincial Houses;
- the need for empowerment and training of the members of the House;
- the reluctance on the part of the provincial government and legislatures to pay heed to suggestions or comments of the Provincial Houses; and
- an inability to force provincial legislatures to take comments or suggestions into account.

4 THE 1996 CONSTITUTIONAL ARRANGEMENT

The 1996 Constitution[58] recognises the institution of traditional leadership. This recognition is contained in s 211(1), (2) and (3) of the Constitution:

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ment Programme Vol III (1996) 146–150. According to TARG, almost all traditional leaders interviewed in North-West and Limpopo stated that they were ignored by the government. These traditional leaders also argued that they were not trained and empowered to become able to participate in the new dispensation and they did not receive the training given to other government officials. It is also contended that traditional leaders must be given adequate training to enable them to play a specific role in the development and management process of local government.

56 *White Paper on Traditional Leadership and Governance* (2003) 58–59.

57 Du Plessis and Scheepers 1999 *Seminar Report* 75.

58 *South Africa: Debates of the Constitutional Assembly* (1994) 93–95. The 1996 (Final) Constitution was drafted by the Constitutional Assembly (CA). The CA was charged with the responsibility of passing a new constitutional text within two years from the date of the first sitting of the National Assembly on 9 May 1994. The Constitutional Committee was

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> "(1) The institution, status and role of traditional leadership according to customary law, are recognised, subject to the *Constitution*.
>
> (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs that include amendments to or repeal of, that legislation or those customs.
>
> (3) The courts must apply customary law when that law is applicable, subject to the *Constitution* and any legislation that specifically deals with customary law."[59]

Many traditional leaders have consistently argued that the extent of this constitutional recognition of their roles was uncertain and too ambiguous. As Williams correctly stated, the 1996 Constitution recognises traditional leaders even though it does so in extremely vague and general terms.[60] Rugege took this point further when he asked: what was the role of traditional leaders under customary law that was recognised by the Constitution? According to him, the Constitution does not clearly spell out the role it recognised. Was it the pre-colonial role or not?[61] Williams also observed that the 1996 Constitution does not state explicitly how the institution of traditional leadership should interact with other government institutions, nor did the Constitution enumerate what obligation the institution owed to local populations.[62]

The 1996 Constitution[63] endorsed the existence of institutions such as the National House of Traditional Leaders and the Provincial Houses of Traditional

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also appointed to co-ordinate (under the control and guidance of the CA) the drafting of the new constitutional text and in particular the work of all committees, commissions, technical committees and other bodies appointed by or on the authority of the CA. The Committee was also required to submit reports and recommendations to the Constitutional Assembly. The CA resolved on 15 August 1994 that as part of the Constitution drafting framework, Select Committees (hereafter referred to as the Theme Committees) of the CA consisting of not more than 30 members each be appointed to deal with such themes of the new constitutional text as the Constitutional Committee may determine. Moosa, ANC MP commented about the role of CA and the involvement of the public in the Constitution-making process as follows: "No stone will be left unturned in ensuring the involvement of all South Africans in the process. In doing this, merely calling on the public to make submissions as we have done in the past is simply not good enough. Only those with the means, the knowledge and the confidence to make submissions will do so. In other words we will be flooded with submissions from these privileged sections of our community. We need to take special steps to ensure that the views of the disempowered majority in this country are also represented in (the Constitutional Assembly)." It seems as if what Moosa wanted could not happen because the majority of the people, including the traditional leaders and their communities, did not participate in the Constitution-making process. However, it is important to note that despite what seemed to be regarded as little participation by the majority of the South Africans in the drafting of the Constitution, the CA was successful in all its endeavours to produce the final Constitution. For more information in this regard see *South Africa: Debates of the Constitutional Assembly* 221.

59 S 211 of the final Constitution.

60 Williams 2004 *J of Modern African Studies* 116.

61 Rugege 2002 *Seminar Report* 16.

62 Willliams 2004 *J of Modern African Studies* 116.

63 S 212(2) of the final Constitution. S 212(2) of the final Constitution provides that "to deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law – (a) national or provincial legislation may provide for the establishment of traditional leaders; and (b) national legislation may establish a council of traditional leaders".

Leaders. The powers and functions of these constitutional institutions were not entrenched. Chapter 12 of the 1996 Constitution afforded traditional leaders less protection than was the case under Chapter 11 of the interim Constitution. The exact role that these institutions should play in a democratic South Africa remained constitutionally unclear.[64]

Traditional leadership is subject to the 1996 Constitution and is therefore required to comply with the provisions of the 1996 Constitution. It seems that this constitutional provision requires traditional leadership to change its own rules and practices so as not to be in conflict with the Bill of Rights.[65] Discrimination would, for example, not be allowed and more inclusive participation in the decision-making process will have to be considered. The 1996 Constitution seems to be a legal attempt to recreate a new and democratic institution of traditional leaders in South Africa.[66]

The traditional leaders in South Africa made a call to the government to amend the final Constitution to define and articulate, in unambiguous terms, their roles, functions and powers in a new democratic South Africa.[67] They argued that this move was necessary because once the Constitution spelled out their roles and functions, it would no longer be a question of whether traditional leaders had a role to play in governance, but rather how they should play that role.

The Constitution of Botswana[68] provides for the recognition and roles of traditional leaders. The traditional leaders in South Africa argued that South Africa should learn from Botswana and incorporate in its Constitution the functions and roles of traditional leaders. The traditional leaders further argued that the Constitution of South Africa should be amended because their powers especially at local government level might be regarded as being inconsistent with the Constitution.

Equal partnerships between municipalities and traditional leaders are a viable solution to ensure that sound local government is maintained. The 1996

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64 Unlike in Botswana where the 1966 Constitution of Botswana provides the institution of traditional leadership with a judicial ceremonial and development role, the constitutional role of traditional leaders in South Africa is still a grey area.

65 *South Africa: Debates of the Constitutional Assembly* (1994) 134–135. Mr Maduna, an ANC MP, argued in the Constitutional Assembly that the question of traditional authorities and the Constitution was characterised by some ambiguity. He said that in as far as the Bill of Rights were concerned, it could well mean that certain forms of traditional leadership with regard to both the equality and the property provisions would be set aside under the final Constitution. Accordingly, this would have an impact on the nature and content of the Bill of Rights in its attempt at harmonisation with traditional law.

66 Williams 2004 *J of Modern African Studies* 116.

67 The traditional leaders resolved in a Panafest Conference of Traditional Leaders held in East London on 25 October 2004 that the 1996 Constitution should be amended to define the powers, functions and duties of the traditional leaders.

68 See the Constitution of the Republic of Botswana Act 83 of 1966. The Constitution of Botswana provides the institution of traditional leadership with a judicial, ceremonial and developmental role. Traditional leadership remains significant to a great many Batswana, especially in rural areas. The government is quite aware of this fact, hence it allocated them roles and functions in the Constitution and the House of Chiefs (now Ntlo ya Dikgosi) and other government institutions. Although the Ntlo ya Dikgosi is not a central institution especially in terms of law-making, there is surely an impression on the part of many that the institution still exists and that it has a contribution to make in the running of national affairs.

Constitution does not give traditional leaders an equal role with that of municipalities. Since the 1996 Constitution is Eurocentric, the horizontal application of the Bill of Rights has the potential of rendering null and void well-established customs such as *bogadi* and succession, including succession to traditional leadership. Over and above this, traditional leaders hold a view[69] that the 1996 Constitution be amended to avoid the possible obliteration of powers vested in traditional institutions in terms of customary law.

5 CONCLUSION

The main objective of the democratic government of South Africa is to transform the institutions of traditional leadership and re-create the type of institution completely in line with the values of the Constitution and democracy. The post-apartheid order rejects the old order in so far as it is sexist, racist, authoritarian and unequal in its treatment of persons. All the rules, principles and doctrines of the institution of traditional leaders apply in the new dispensation only because they are rules, principles and doctrines that will survive the scrutiny of the present society when measured against its compliance with the requirements of human dignity, equality and freedom. Although the government has demonstrated its intention to retain and recognise position and status of traditional authorities, it has changed their pre-colonial and colonial roles and standing.

These changes have resulted in the creation of a transformed institution of traditional leadership based on a number of core constitutional values, for example democracy, human dignity, equality, human rights and freedoms, non-racialism and non-sexism. The institution of traditional leadership is obliged to ensure full compliance with these constitutional values and other relevant national and provincial legislation. The right to equality, including the prohibition of discrimination on the basis of gender and sex, has an important impact on the institution of traditional leadership and rural communities. The changes regarding the roles and functions of traditional leaders are evident in respect of their position and status in local, provincial and national governments.

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69 See fn 68 above.

Black Economic Empowerment: Can there be Trickle-down Benefits for Workers?

Evance Kalula
Professor and Director, Institute of Development and Labour Law, University of Cape Town

Andrea M'Paradzi
Teaching and Research Assistant, Faculty of Law, University of Cape Town

1. INTRODUCTION

Black economic empowerment (BEE) is an initiative that aims to distribute economic benefits to a broad base of previously disadvantaged persons. The aim of this article is to assess critically whether BEE can offer trickle-down benefits to workers, and the extent thereof, if there are any benefits. We start by defining the BEE philosophy within the context of the regulatory instruments governing the programme. We shall then proceed to engage with the issue of possible trickle-down benefits for workers, first, on a theoretical level, and secondly, on a practical level. The theoretical endeavour will involve investigating the extent to which the Codes of Good Practice[1] enables a trickle-down effect, with the practical inquiry involving an assessment of the realities on the ground. We conclude that while there can be trickle-down benefits for workers, much is required on the part of government, business and trade unions to make this prospect a reality.

1 1 Black economic empowerment: a definition

BEE is an integrated socio-economic undertaking aimed at remedying the inequalities characteristic of apartheid.[2] The programme aims to transform the South African economic landscape strategically by ensuring the participation of the majority of the population in the economy and the redistribution of control over the country's economic resources.[3] The need for such an undertaking arises out of the constitutional imperative to rectify the gross economic disempowerment

1 Cliffe Dekker Attorneys uses the following format to describe individual statements in the Codes: C000S000 represents Code Series 000 Statement Number 000, and C100S100 represents Code Series 100 Statement Number 100 and so on. (Cliffe Dekker "The way to BEE" at http://bee.sabinet.co.za?CD_Way2BEE_guide.pdf (accessed 29-01-2007). We adopt this same format in this article.

2 BEE Commission "A National Integrated Black Economic Empowerment Strategy" *BEE Commission Report* (2001) 2 and also see http://www.yokogawa.com/za/cp/overview/za-bee.htm (accessed 30-07-2005).

3 BEE Commission *BEE Commission Report* 2.

of black people during apartheid that resulted in a mainstream economy that largely excluded the majority of citizens.[4]

BEE is described as "broad-based". This is to be understood in two senses: first, "broad" in terms of the wide span of beneficiaries and, secondly, "broad" in terms of the various methods through which the empowerment aims can be achieved. With regard to the first sense, the beneficiaries of the Broad-Based Black Economic Empowerment Act[5] are "black people", defined as Africans, Coloureds and Indians.[6] This broad definition extends further to include "women, workers, youth, people with disabilities and people living in rural areas".[7] It is clear that this definition specifically mentions groups that were "historically [susceptible] to disempowerment".[8] The second sense of the term "broad-based" refers to "economic empowerment . . . through a non-exhaustive list of diverse but integrated socio-economic strategies".[9] The core strategies that are evident from the Codes of Good Practice are the transfer of equity holdings to incorporate previously disadvantaged South Africans;[10] the re-organisation of management structures;[11] the furtherance of employment equity;[12] the enhancement of skills;[13] the preferential procurement from BEE-compliant enterprises;[14]

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4 Osode "The new Broad-Based Economic Empowerment Act: A critical evaluation" 2004 *Speculum Juris* 108.

5 53 of 2003.

6 S 1 of the BBBEE Act 53 of 2003 and Osode 2004 *Speculum Juris* 112.

7 S 1.

8 Osode 2004 *Speculum Juris* 112.

9 S 1 of the BBBEE Act 53 of 2003 and Osode 2004 *Speculum Juris* 110. S 1 provides: "These strategies include but are not limited to –
(a) increasing the number of black people that manage, own and control enterprises and productive assets;
(b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;
(c) human resources and skills development;
(d) achieving equitable representation in all occupational categories and levels in the workforce;
(e) preferential procurement; and
(f) investment in enterprises that are owned or managed by black people."

10 C100S100 of 2007: Department of Trade and Industry (Final 2007 Codes): Code 100 "The Measurement of The Ownership Element of Broad-Based Black Economic Empowerment: Statement 100 'The General Principles for Measuring Ownership' " at www.dti.gov.za/bee/generic_code_p1.pdf (accessed 22-03-2007).

11 C200S200 of 2007: Department of Trade and Industry (Final Codes): Code 200: "Measurement of the Management Control Element of Broad-Based Black Economic Empowerment": Statement 200 "The General Principles for Measuring Management Control" at www.dti.gov.za/bee/generic_code_p1.pdf (accessed 22-03-2007).

12 C300S300 of 2007: Department of Trade and Industry (Final Codes): Code 300 "Measurement of the Employment Equity of Broad-Based Black Economic Empowerment": Statement 300 "The General Principles for Measuring Employment Equity" at www.dti.gov.za/bee/generic_code_p1.pdf (accessed 22-03-2007).

13 C400S400 of 2007: Department of Trade and Industry (Final Codes): Code 400 "Measurement of the Skills Development Element of Broad-Based Black Economic Empowerment": Statement 400 "The General Principles for Measuring Skills Development" at www.dti.gov.za/bee/generic_code_p1.pdf (accessed 22-03-2007).

14 C500S500 of 2007: Department of Trade and Industry (Final Codes): Code 500 "Measurement of the Preferential Procurement Element of Broad-Based Black Economic Empo-

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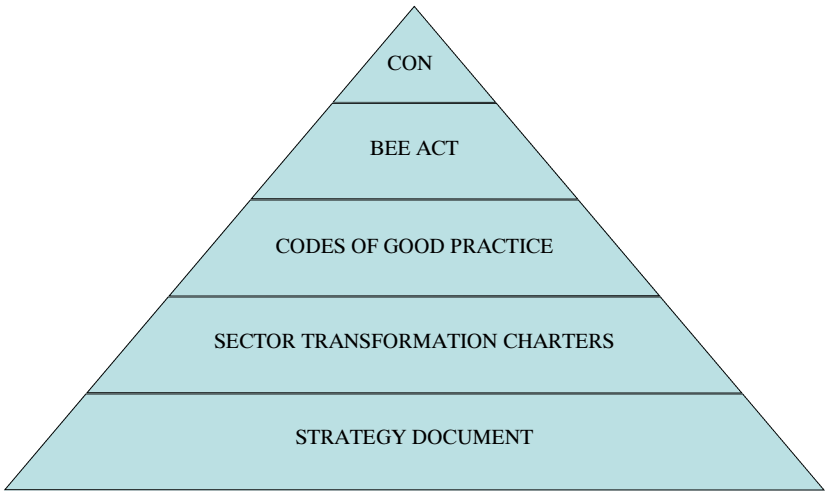
the development of black-owned enterprises[15] and socio-economic advancement.[16]

Before addressing the central question arising – that is, whether BEE can have trickle-down benefits for workers – clarification and contextualisation are necessary. The clarification relates to the scope of this article, which will be limited to a discussion of benefits for workers, understood as lower-level staff and labourers. The ambit of the article is also restricted to investigating the company business form, as this is where the idea of trickling down, as opposed to pooling, is evident. The contextualisation relates to the BEE regulatory regime, which deserves brief elucidation for a better understanding of the discussion. It is to this latter task that we shall now turn.

2 THE BEE REGULATORY FRAMEWORK

There are several instruments governing BEE, namely, the Constitution,[17] the BEE Act, the Codes of Good Practice (the Codes), the Sector Transformation Charters (the Charters) and the BEE Strategy Document (the Strategy Document). The status of these instruments *inter se* is reflected diagrammatically below.



werment": Statement 500 "The General Principles for Measuring Preferential Procurement" at www.dti.gov.za/bee/generic_code_p1.pdf (accessed 22-03-2007).

15 C600S600 of 2007: Department of Trade and Industry (Final Codes): Code 600 Measurement of Enterprise Development Element of Broad-Based Black Economic Empowerment": Statement 600 "The General Principles for Measuring Enterprise Development Element" at www.dti.gov.za/bee/generic_code_p1.pdf (accessed 22-03-2007).

16 C700S700 of 2007: Department of Trade and Industry (Final Codes): Code 700 "Measurement of the Socio-economic Development Elements of Broad-Based Black Economic Empowerment": Statement 700 "The General Principles for Measuring the Socio-Economic Development Element" at www.dti.gov.za/bee/generic_code_p1.pdf (accessed 22-03-2007).

17 The Constitution of the Republic of South Africa, 1996.

2 1 The Broad-Based Black Economic Empowerment Act 53 of 2003 (BEE Act)

BEE is a constitutional imperative and the BEE Act is legislation as envisaged by s 9(2) of the Constitution.[18] The Act is the primary regulatory instrument of BEE and provides a framework for the programme in general: it defines BEE, enables the instruments supporting it in the regulatory hierarchy, and establishes the BEE Advisory Council. Although the BEE Act is framed in broad terms, this is, in general, unproblematic because it is supplemented by the detailed directives contained in the Codes.

2 2 The Codes of Good Practice

Section 9 of the Act empowers the Minister of Trade and Industry to issue Codes of Good Practice on BEE,[19] and in terms of this provision the Final BEE Codes were gazetted in February 2007.[20]

The Codes intend to standardise the definition of "broad-based BEE" as well as to benchmark measurement principles in the interests of clarity and certainty.[21] They are an endeavour to provide uniform regulations and indicators for empowerment transactions concluded in every sector[22] and to ensure that companies not accounted for by the Charters are included in the purview of empowerment.[23] An additional objective of the Codes is to institute structures that facilitate the implementation and appraisal of the BEE initiative. The Codes therefore provide for the establishment of verification and accreditation agencies[24] that are intended to facilitate, standardise and validate BEE transactions.[25] In a nutshell, the Codes were designed to ensure "real empowerment"[26] by giving content to the regulatory framework and unifying the system.

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18 The right to equality is embodied in s 9 of the Constitution. S 9 provides:
"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

19 S 9(1) of the BEE Act provides: "In order to promote the purposes of the Act, the Minister may by notice in the *Gazette* issue codes of good practice on black economic empowerment . . .".

20 The Department of Trade and Industry at http://www.dti.gov.za/bee/beecodes.htm (accessed 22-03-2007).

21 The Department of Trade and Industry "The Codes of Good Practice on Black Economic Empowerment – Phase One: A Guide to interpreting the First Phase of the Codes" (2005) 3 at http://www.dti.gov.za/bee/Chapterone_1_11.pdf (accessed 26-06-2006). This is referred to as the DTI Guide to Interpretation.

22 Singh *et al* "Cracking the Codes" 15 April 2005 *Financial Mail* 19.

23 *Ibid.*

24 C000S000 of 2007: Department of Trade and Industry (Final 2007 Codes): Code 000 "Framework for Measuring Broad-Based Black Economic Empowerment": Statement 000 "General Principles and the Generic Scorecard" para 10 at www.dti.gov.za/bee/generic_code_p1.pdf (accessed 22-03-2007).

25 DTI Guide to Interpretation 3.

26 Singh *et al* 15 April 2005 *Financial Mail* 19. Real empowerment means that beneficiaries should be able to service their debts and thus take ownership of shares allocated to them (Singh 15 April 2005 *Financial Mail* 19).

2 3 The Sector Transformation Charters

The BEE Transformation Charters are sector-specific regulatory instruments voluntarily developed by stakeholders in a particular industry together with government departments.[27] Transformation Charters, which reflect a sector's commitment to BEE,[28] are gazetted "for general information" purposes in terms of s 12 of the Act,[29] and aim to guide transformation.[30] The Charters are legally subordinate to the Codes, and can be classified as voluntary partnership agreements binding only private sector signatories.[31]

2 4 The BEE Strategy Document

Section 11 of the BEE Act[32] now specifically mandates the Minister to release a Strategy Document which sets out the philosophical and policy background to BEE.[33]

3 CAN THERE BE TRICKLE-DOWN BENEFITS FOR WORKERS? A THEORETICAL INVESTIGATION

The logical point of departure, when assessing whether BEE can offer trickle-down benefits, is to look at the provisions of the Codes, which are the driving regulatory instruments of the initiative and which contain the detailed directives of BEE.

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27 S 12 of the BEE Act and Osode 2004 *Speculum Juris* 114.

28 C000S003 of 2007: Department of Trade and Industry (Final 2007 Codes): Code 000 "Framework for Measuring Broad-Based Black Economic Empowerment": Statement 003 "Guidelines for Developing and Gazetting of Transformation Charters and Sector Codes" para 4.1 at www.dti.gov.za/bee/generic_code_p1.pdf (accessed 22-03-2007).

29 S 12 of the BEE Act mandates the Minister to "publish in the Gazette for general information and promote a Transformation Charter for a particular sector of the economy, if [he] is satisfied that the Charter –
(a) has been developed by major stakeholders in that sector;
(b) advances the objectives of [the] Act".

30 C000S010 of 2005: The Department of Trade and Industry (Phase One 2005) Code 000 "Framework for the Measurement of Broad-Based Black Economic Empowerment: Statement 010 "Guidelines for the Development and Gazetting of Transformation Charters" para 4 at www.dti.gov.za (accessed 29-01-2007).

31 Balshaw *et al Cracking Broad-Based Black Economic Empowerment: Codes and Scorecard Unpacked* 84 and 91. Transformation Charters that are codified in terms of s 9 of the BEE Act are regarded as Sector Codes (C000S003 of 2007 paras 3.2.2 and 3.2.3).

32 S 11 of the BEE Act, entitled "Strategy for broad-based black economic empowerment", provides:
"11(1) The Minister –
(a) must issue a strategy for broad-based black economic empowerment;
(b) may change or replace a strategy issued in terms of this section.
(2) A strategy in terms of this section must –
(a) provide for an integrated co-ordinated and uniform approach to broad-based black economic empowerment . . .;
(b) develop a plan for financing broad-based black economic empowerment;
(c) provide a system for organs of state, public entities and other enterprises to prepare broad-based black economic empowerment plans and to report on compliance with those plans; and
(d) be consistent with this Act."

33 The Department of Trade and Industry: The Black Economic Empowerment Strategy Document at http://www.dti.gov.za/bee/complete.pdf (accessed 13-06-2007).

3 1 The structure and content of the Codes

There are three core components and seven sub-elements of BEE. The first component is "direct empowerment", which comprises the "ownership"[34] and "management"[35] elements; the second component is "human resource development", which comprises the "employment equity"[36] and "skills development"[37] elements; and the last component is "indirect empowerment", which comprises "preferential procurement",[38] "enterprise development"[39] and "socio-economic development and sector specific contributions"[40] elements.[41] The overall structure of the codes is predicated on these divisions, with each code detailing the specifics of a particular element.

Central to the entire system is the Generic Scorecard, which is also based on these elemental categories. The Scorecard is intended to gauge progress made towards BEE by enterprises subject to the Codes, and works on a weighted average, allocating points to each criterion. The Scorecard is shown below.[42]

Table 2: The BEE Scorecard

ELEMENT	WEIGHTING	CODE
Ownership	20 points	100
Management control	10 points	200
Employment equity	15 points	300

continued

34 "The Ownership Element, as set out in Code series 100, measures the effective ownership of enterprises by black people" (C000S000 of 2007 para 7.1).

35 "The Management Control Element, as set out in Code series 200, measures the effective control of enterprises by black people" (C000S000 of 2007 para 7.2).

36 "The Employment Equity Element, as set out in Code series 300, measures initiatives intended to achieve equity in the workplace under the Act, and the Employment Equity Act" (C000S000 of 2007 para 7.3).

37 "The Skills Development Element, as set out in Code series 400, measures the extent to which employers carry out initiatives designed to develop the competencies of black employees" (C000S000 of 2007 para 7.4).

38 "The Preferential Procurement Element, as set out in Code series 500, measures the extent to which the enterprises buy goods and services from suppliers with strong B-BBEE procurement recognition levels" (C000S000 of 2007 para 7.5).

39 "The Enterprise Development Element, as set out in Code Series 600, measures the extent to which enterprises carry out initiatives intended to assist and accelerate the development and sustainability of enterprises" (C000S000 of 2007 para 7.6).

40 "The Socio-Economic Development and Sector Specific Contributions Element, as set out in Code series 700, measures the extent to which enterprises carry out initiatives that contribute towards Socio-Economic Development or Sector Specific initiatives that promote access to the economy for black people" (C000S000 of 2007 para 7.7). Note that the Socio-Economic Development and Sector Specific Contributions Element, as it appears in the Final 2007 Codes, was previously termed the "Residual Element" in both 2004 Codes and The Phase One 2005 Codes. Although the current substance mirrors that of both the 2004 and 2005 Codes, the formulation of the 2004 Codes differs slightly in that it reflects a list of specific factors that entities are encouraged to consider when undertaking such initiatives.

41 C000S000 of 2007 paras 7.1–7.7.

42 C000S000 of 2007 para 8.

ELEMENT	WEIGHTING	CODE
Skills development	15 points	400
Preferential procurement	20 points	500
Enterprise development	15 points	600
Socio-economic development	5 points	700

Each element is geared towards the distribution of benefits and empowerment of a unique kind, and although all elements may potentially have a beneficial effect for workers, the elements that will have the most apparent trickle-down impact are the ownership, employment equity (EE), skills development and socio-economic development aspects. Each of these will be dealt with in turn in order to establish whether, in theory, the codes can offer advantages to workers.

3 1 1 Ownership

(a) Schemes

One way in which the codes enable the extension of ownership stakes to workers is by providing vehicles that allow for the distribution of economic interests. In this regard, the primary vehicles provided by the codes are broad-based ownership schemes (BBOS),[43] employee share ownership schemes (ESOS)[44] and trusts,[45] all of which broadly operate in the same way. Each vehicle is regulated by a governing document, which sets out rules pertaining primarily to issues of corporate governance and benefit distribution policies.[46] These arrangements are designed to grant workers (who would not usually be able to afford to purchase equity) access to ownership by offering shares, share options or other economic interests on advantageous terms. Such favourable terms may include, *inter alia*, the offering of interests at below market value, the allowance of payment plans, or the provision of financial assistance.[47] An entity can earn bonus points for these endeavours over and above a standard point allocation,[48] and because

43 C100S100 of 2007 paras 2.2.3.3, 4, 11, Annexe 100 (B) paras 2 5. This scheme is branded "broad-based" because it is a requirement that "at least 85% of the value of benefits allocated by the scheme must accrue to black people".

44 *Ibid.*

45 C100S100 of 2007 para 7, Annexe 100 (B) para 3.

46 See in this regard, for BBOS, C100S100 of 2007, Annexe 100 (B) para 1; for ESOS, C100S100, Annexe 100 (B) para 2 and for trusts, C100S100, Annexe 100 (B) para 3.

47 S 38 of the Companies Act 61 of 1973.

48 For reaching the target of 2,5% of black participants in employee ownership schemes; or black beneficiaries of broad-based ownership schemes (or black participants in co-operatives), one weighted point can be earned, with the prospect of earning more points if certain criteria are fulfilled (C100S100 of 2007 paras 2.2.3 para 4).
There is also the opportunity to earn a bonus point in terms of para 11 of C100S100 of 2007, if a "Measured Entity with 25% black Economic Interest . . . [has] a holding of 10% Economic Interest by black Participants in Employee Ownership Schemes; Broad based ownership schemes and Co-operatives" (C100S100 of 2007 (n 9) para 2.4.2).
The Ownership Scorecard does not represent expressly the point allocation in relation to trusts. It is probable that trust considerations are catered for in the point allocations detailed in C100S100 of 2007 para 2.2.1 and para 2.2.2 broadly detailing points for "Economic Interest".

workers have a vested interest in the profitability of the company, there is an incentive for increased productivity, which is an added benefit for the company.

It would appear, in the absence of provisions to the contrary, that forfeiture clauses can be included in the documents governing the share schemes. This relinquishment novelty appears often in ownership schemes constructed in terms of the Companies Act[49] where, should a worker leave the company before a prescribed period, the worker forfeits his or her economic interest in the company.[50] The use of this feature in the BEE context could possibly enhance a trickle-down effect by encouraging long-term equity ownership.

(b) Co-operatives

The Codes also reflect a commitment to the use of co-operatives[51] as a means of divesting ownership interests to workers. The co-operative medium can either be a direct empowerment tool, where the co-operative is itself the measured entity,[52] or an indirect one, where the co-operative is a shareholder in another measured entity.[53]

Co-operatives are governed by the Co-operatives Act[54] and may be regarded as voluntary associations based on a collaborative effort by members to achieve a common socio-economic goal.[55] Where a co-operative is the measured entity, the Scorecard applies as it would to any other enterprise, but there is one indicator that is peculiar to a co-operative organisational form. This is the acknowledgement of an ownership point for the number of black participants in the co-operative.[56] A literal interpretation of the indicator points to the fact that a company could never earn this point, because a juristic person is not capable of belonging to a co-operative.[57] A generous understanding may be that recognition would be given to a measured company for workers who are not only employed by it, but who are also members of a co-operative. This would, however, be difficult to reconcile with the logic that underlies the Ownership Scorecard, which is to award credit to an entity for the number of BEE beneficiaries who hold an ownership stake in the actual measured company, and not who fortuitously happen to hold a stake in a co-operative as well. It is thus arguable that this point cannot be earned by measured entities that are not themselves co-operatives.

However, insofar as an interface with co-operatives is concerned, there is a bonus point that stands to be earned by a company, and this is where a co-operative, comprising beneficiary groups, holds economic interests in the measured company,[58] for example, as a shareholder. It is crucial to bring co-operatives within the ambit of application because this medium is extremely well-suited

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49 61 of 1973.
50 Opinion shared by company law specialist, Ms Jacqui Yeats, Commercial Law Lecturer, University of Cape Town, South Africa, interviewed 4 June 2007.
51 C100S100 of 2007 paras 2.2.3.4 and 2.4.2.3.
52 C100S100 of 2007 para 3.1.1.3.
53 C100S100 of 2007 para 2.4.2.
54 14 of 2005.
55 S 1 "Definitions section" of the Co-operatives Act 14 of 2005.
56 C100S100 of 2007 para 2.2.3.4.
57 The Co-operatives Act restricts membership to natural persons. See s 1 "Definitions section" for the definitions of a "primary co-operative" and a "secondary co-operative".
58 C100S100 of 2007 para 2.3.2.3.

to the empowerment of labourers, farm workers and mine workers in particular. This is because the farming and mining industries are often community-centred, and inherent in the composition of a co-operative structure is an intersection between community and economic interests.

3 1 2 Employment equity

For our purposes here, the employment equity (EE) element will be discussed only insofar as a measured entity may earn points for the placement of black disabled employees in the enterprise.[59] A maximum of two weighted points can be earned for this measurement category of the EE Scorecard,[60] and it is therefore apparent that disabled workers may secure the advantage of employment retention in entities eager to accrue as many BEE points as possible.

3 1 3 Skills development

The transfer of skills is pivotal to the empowerment of workers. C400S400 governs skills development,[61] and enterprises can earn up to 15 points depending on their level of "skills development expenditure on programmes specified in the Learning Programmes Matrix"[62] and learnership participation by black employees.[63] In order to earn points, measured entities must be registered with the applicable Sector Education Training Authority[64] and must have devised a Workplace Skills Plan.[65] Furthermore, eligibility on the Scorecard depends on whether the entity in question has "implemented programmes targeted at developing Priority Skills generally, and specifically for black employees".[66] C400S400 is buttressed by, and is compatible with, the Skills Development Act (SDA)[67] as well as with the Skills Development Levies Act (SDLA).[68] The combination

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59 We have limited the discussion to this group of beneficiaries because the other indicators reflected on the Scorecard relate to employment equity in positions of senior, middle and junior management levels in the organisational tier that are beyond the ambit of this paper.

60 C300S300 of 2007 para 2.1.1.

61 C400S400 of 2007.

62 C400S400 of 2007 para 2.1.1.

63 C400S400 of 2007 para 2.1.2.

64 C400S400 of 2007 para 3.1.2.

65 C400S400 of 2007 para 3.1.3.

66 C400S400 of 2007 para 3.1.4.

67 97 of 1998; C4000S4000 of 2007 para 3.1.1; Balshaw *et al Cracking Broad-Based Black Economic Empowerment* 125. "The SDA is aimed at directly improving South Africa's skills base. The SDA is complemented by the Skills Development Levies Act, which obliges certain employers to contribute 1% of their annual payroll to the South African Revenue Service (SARS)." (Balshaw *et al Cracking Broad-Based Black Economic Empowerment* 124.) "SARS in turn distributes 20% of this to the National Skills Fund (which engages in training and development programmes) and 80% to Sector Education Training Authorities (SETAs) – which are required to establish learnerships for employees." and "Levies paid can be reclaimed by contributors in relation to actual expenditure on training" (Cheadle, Thompson and Haysom *Black Economic Empowerment: Commentary, Legislation and Charters* 1-19 and Scholtz "BEE Service Empowermentor" (2006) para 1.4, site hosted by LexisNexis Butterworths (accessed 20-07-2006) as cited in Safi "How broad is broad-based black economic empowerment: A critical analysis of the challenges facing BEE" unpublished LLB Mini-Dissertation, University of Cape Town (2006) 33–35.)

68 9 of 1999.

provides an excellent framework for skills development, which is arguably the most crucial aspect in ensuring the long-term empowerment of workers.

3 1 4 Socio-economic development (SED)

Communities are the broadest base of beneficiaries envisaged by the Act, and as such the SED element is indispensable in realising the BEE objective of wide-spread empowerment. This element will be particularly advantageous to workers whose employment centres on communal settlements, like mine workers and farm workers mentioned above. Measured entities stand to earn five points on the Generic Scorecard for undertaking initiatives geared towards the uplifting and advancement of beneficiary communities. Activities that will earn point recognition include, but are not limited to, the contribution of capital[69] and the granting of awards to such groups,[70] as well as the deployment of training and mentoring facilities to "assist [workers] to increase their financial capacity".[71] Clearly a commitment by measured entities to the broad-based ideal will see benefits flowing, on account of this element, directly to community-based workers.

3 2 Implementation

Section 10 of the BEE Act makes the Codes legally binding on organs of state and public entities,[72] but the Act is silent on the obligation of private enterprises to act in accordance with them. It is submitted that a "carrot/stick" approach has been adopted to ensure compliance with the Codes because public entities consider a measured entity's BEE score[73] when deciding to transact with it. An entity's adherence to the BEE standards stipulated in the Codes thus determines its success in tenders for government patronage, in applications for licences, in authorisations for projects or in the granting of concessions.[74]

In instances where private entities do not transact directly with the state or with state entities, the "cascade effect"[75] pressurises private entities that transact *inter se* to comply with the Codes. This "cascade effect" works as follows. Enterprises that transact directly with the state strive to attain the highest BEE score possible for the reasons mentioned above. One of the ways to improve this

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69 C700S700 of 2007 para 3.2.4.5.

70 C700S700 of 2007 para 3.2.4.1.

71 C700S700 of 2007 paras 3.2.4.8 and 3.2.5. See Annexe 700 (A) "Benefit Factor Matrix" for an indication of other recognised activities.

72 S 10 of the BEE Act provides: "Every organ of state and public entity must take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of this Act in –
(a) determining qualification criteria for the issuing of licences, concessions or other authorisations in terms of any law;
(b) developing and implementing a preferential procurement policy;
(c) determining qualification criteria for the sale of state owned enterprises; and
(d) developing criteria for entering into partnerships with the private sector."

73 BEE entities are rated and accorded a BEE status based on an overall weighted average score as determined by the application of the BEE Scorecard. This rating is calculated by an accredited verification agency that will issue a valid verification certificate reflecting the BEE status of the measured entity (C000S000 of 2007 paras 10.1 and 10.8).

74 S 10 of Act 53 of 2003 and Osode 2004 *Speculum Juris* 116.

75 Balshaw *et al Cracking Broad-Based Black Economic Empowerment* 25.

score is by procuring goods and services from BEE-compliant suppliers as this will count towards the procurer's "preferential procurement" score on the BEE Scorecard.[76] This process will replicate itself throughout the supply chains of most industries, that is to say, it will "cascade" downward.[77] Thus, in the interests of survival and competitive advantage, all suppliers at different tiers of the value chain will be pressured to become BEE-compliant. Other factors that compel BEE compliance are, for example, that banks are weary of extending credit to unempowered enterprises because such enterprises are prone to becoming bad debtors.[78] A further risk is that directors of non-compliant companies may be burdened with claims for damages instituted by the company for breach of both their fiduciary obligations and their duties of care and skill.[79] Compliance with the Codes is thus effected, notwithstanding the non-binding status of the Codes on private sector entities.[80]

Ultimately the implementation of BEE within an entity is a strategic business decision[81] undertaken with the awareness of survival imperatives. It is clear that the theoretical framework devised by the DTI caters for workers and is capable of having a practical effect through the application of the ingenious carrot/stick mechanism. It is thus submitted that in theory the Codes can enable trickle-down benefits for workers.[82]

3 3 Inherent difficulties

Several aspects, however, show that there are inherent difficulties in the theoretical framework that may hinder trickle-down effects. An interesting case in point is the amendment to the Generic Scorecard where there has been a redistribution of weighting points within the human resource and indirect empowerment components. Under both the 2004 and 2005 versions of the Codes, the employment equity and skills development elements were awarded 10 and 20 points

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76 Balshaw *et al Cracking Broad-Based Black Economic Empowerment* 19 20 25.

77 "An example of the cascade effect is DaimlerChrysler South Africa. They will not be fined or penalised directly for not implementing the Act through legislation. They, however, do business with the government insofar as the sale of vehicles and trucks is concerned and further rely on government incentives for their exports. It is in this regard that when government deals with them, it applies the legislation to impose direct pressure on DaimlerChrysler South Africa to comply with the broad-based BEE regulations. Further down the supply chain a consultancy wanting to do business with DaimlerChrysler South Africa will be required to comply because Daimler Chrysler South Africa would like to score procurement points to contribute towards their broad-based score" (Balshaw *et al Cracking Broad-Based Black Economic Empowerment* 25–26).

78 The operation of the "cascade effect" will impact on the profitability of these non-compliant companies, making them high risk clients (Daly "Black Economic Empowerment" May 2005 *Business Day Survey* 14 and Janisch *Keep in Step: Broad-Based BEE for Small Businesses* 62).

79 Janisch *Keep in Step: Broad-Based BEE for Small Businesses* 62.

80 It should be noted that should private entities *choose* to embark on BEE strategies, the regulatory guidelines contained in the Codes become applicable (C000S000 of 2005: Department of Trade and Industry (Phase One 2005 Codes) Code 000 "Framework for the Measurement of Broad-Based Black Economic Empowerment: Statement 000 'The Organisation of the Codes of Good Practice, The Elements of Broad Based Black Economic Empowerment' " at para 3 www.dti.gov.za (accessed 29-01-2007).

81 Balshaw *et al Cracking Broad-Based Black Economic Empowerment* 18.

82 C000S000 of 2005 para 3.

respectively, whereas this 30-point total has now been split evenly between the two elements. Similarly, a point reallocation has been effected between the enterprise development and the socio-economic development elements, with the former carrying 15 points (previously 10 points), and the latter now reflecting a 5-point weighting (previously 10 points).

It can be argued that in light of the broad-based philosophy upon which BEE is based, this reallocation is counter-intuitive. Skills development and socio-economic development, it is asserted, are possibly the two most fundamental elements that constitute the bedrock of a broad-based initiative, and for our purposes here, the two most crucial aspects when considering the empowerment of workers. A reduction in points on these fronts undermines not only the empowerment of workers but, more fundamentally, hinders the objective of promoting access to the economy by *more* black people, which is what truly broad-based empowerment is all about. It is submitted that the reallocation of points in this manner is misdirected. If a reallocation was necessary, the DTI would have done better to lower the equity ownership points in light of the current fixation in the economic landscape with this element of BEE which, although important, is primarily geared toward a narrow idea of empowerment. An interrelated internal difficulty with the Codes is that of targets stipulated in the individual element scorecards.

A common criticism of the Codes has been that the scorecard targets are "unrealistically high" and are unlikely to be attained in the stipulated timeframe.[83] A 2005 Empowerdex Review of measurable listed entities showed that only one company reached the "excellent contributor" rank, and only 26% of these entities were in a position to show even minimal compliance.[84] In a recent report it was cogently argued that the 25% direct ownership target is ill-conceived as it is unreasonable to expect black people to acquire 25% of all companies, even the commercially unsound ones.[85] The scorecard targets remain more or less unchanged despite these concerns, but it is hoped that difficulties may be alleviated by the target leeway afforded by the Sector Codes. These Codes are essentially instruments arising out of Transformation Charters and codified in terms of s 9 of the BEE Act.[86]

In concluding this section detailing the theoretical prospect of BEE benefits reaching workers, it can be said that, although difficulties linger within the Codes, the DTI has made considerable headway in instituting a scheme that has the capacity to cater for workers and to facilitate implementation. In the next part we provide a telescopic overview of the realities on the ground.

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83 Mathabo le Roux "Mpahlwa, business to clarify BEE codes" *Business Day* 11 July 2006 http://www.businessday.co.za/articles/topstroties.aspx?ID=BD4A230554 (accessed 11-07-2007).

84 Lester "Weightings in favour of black women" (May 2005) *Black Economic Empowerment: Business Day Survey*.

85 Rumney "The end-all of BEE-all" *Mail and Guardian* 18 January 2007 at www.mg.co.za/articlePage.aspx?articleid=296226&area=/insight/insight_economy_business/ (accessed 29-01-2007).

86 C000S003 of 2007 paras 3.2.2 and 3.2.3.

4 PRACTICAL CONSIDERATIONS

4 1 Financing BEE

The financing of BEE is a particularly thorny issue[87] that may prevent workers within black-owned enterprises from gaining benefits. This is mainly because these companies usually obtain credit at extremely high interest rates as a result of the fact that they are viewed as high-risk clients by potential financiers.[88] These black-owned businesses are therefore severely restricted in accessing business opportunities.[89] Additionally, the fact that debt instruments are usually used to purchase equity means that profits made by black companies are channelled towards servicing these debts,[90] and are thus diverted away from providing any benefits to workers.

Efforts have been made to alleviate the financing problem. The Strategy Document[91] and state practice reveal that the government has proceeded on the understanding that it is legally obliged to source funds from both the public and private sectors.[92] With the DTI as co-ordinator, some mechanisms have been set up to ensure the financing of BEE, for example, the Industrial Development Corporation (IDC),[93] Khula Enterprise Finance,[94] the National Empowerment Fund (NEF),[95] Development Bank of Southern Africa (DBSA),[96] the Public

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87 Osode 2004 *Speculum Juris* 117.

88 *Ibid.*

89 *Ibid.*

90 Kennedy *Black Economic Empowerment in the South African Business Community: A Beginning of Economic Empowerment of Black South Africans* MBA thesis, Graduate School of Business, University of Cape Town (1997) 42.

91 A Strategy for Broad-Based Black Economic Empowerment at www.dti.gov.za/bee.htm (accessed 06-07-2006).

92 Osode 2004 *Speculum Juris* 117.

93 The IDC "is a self-financing, state-owned development finance institution with the mandate to be the driving force of commercially sustainable industrial development and innovation, to the benefit of South Africa and the rest of the African continent. The IDC's Empowerment Strategic Business Unit (SBU) and the Wholesale and Bridging Financing Unit are almost exclusively dedicated to financing historically disadvantaged entrepreneurs and contributing to the rapid advancement of empowerment. Investments realised by means of the Risk Capital Facility (RCF) are also aimed at broad-based empowerment initiatives and facilitating development initiatives in rural areas. The key challenge facing the IDC is the growth of the SMME sector to stimulate sustainable development and encourage greater equity in the economy" (Fubu "Financial development initiative: Role and future perspectives" *Business Map, Empowerment 2003: State and Market Initiatives Gain Momentum* (2003) 40–45).

94 "Khula Enterprise Finance Limited is an agency of the DTI, established in 1996 to facilitate access to credit for SMMEs through various delivery mechanisms. These include commercial banks, retail financial intermediaries (RFIs) and micro credit outlets (MCOs). Khula also provides mentorship services to guide and counsel entrepreneurs in various aspects of managing a business. Khula is a wholesale finance institution, which means that entrepreneurs do not get assistance directly from Khula but through various institutions." (Khula (2003) cited in Burger *et al Black Economic Empowerment: A Review of the Impact of Funding Structures on Sustainable BEE Transactions* MBA thesis, Graduate School of Business, University of Cape Town (2003) 21–22.)

95 "The main objective of the NEF Corporation is to facilitate the redressing of economic inequality, which resulted from the past unfair discrimination against historically disadvantaged persons. It aims to do this by:

continued on next page

Investment Commissioners (PIC),[97] Ntsika Enterprise Promotion Agency and the Isibaya and Umsombomvu funds.[98]

It can be argued that the high liquidity of financial institutions renders the financial sector an ideal BEE financier,[99] where contributions by the sector would not only facilitate BEE, but would make good business sense in view of the points that entities could earn for the Enterprise Development element of the Scorecard. To date, the finance sector has shown some initiative in this regard as illustrated in Table 3 below.

The Financial Sector Charter has dedicated billions of rands to "targeted investment in support of small and medium enterprises, low-income housing, resource-poor farmers and developmental infrastructure".[100] The Charter also implements mechanisms to facilitate affordable access to banking. A success story in this regard is the Mzansi account started in October 2004, where over 3,3 million bank accounts have since been opened[101] and where funds have been

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– Providing historically disadvantaged persons with the opportunity of, directly or indirectly, acquiring shares of interest in the State Owned Commercial Enterprises that are being restructured , or in private business enterprises.
– Encouraging and promoting savings, investments and meaningful economic participation by historically disadvantaged persons.
– Promoting and supporting business ventures pioneered and run by historically disadvantaged persons.
– Promoting the universal understanding of equity ownership among historically disadvantaged persons.
– Encouraging the development of a competitive and effective equities market inclusive of all persons in the Republic.
– Contributing to the creation of employment opportunities." (NEF (2003) as cited in Burger *et al Black Economic Empowerment: A Review of the Impact of Funding Structures on Sustainable BEE Transactions* MBA thesis, Graduate School of Business, University of Cape Town (2003) 21–22 and Mthombo IT Services Pamphlet (2005) *Brainstorm* (unpaginated)).

96 The DBSA's "key purpose is to address socio-economic imbalances and help improve the quality of life of the people of South Africa. The core business of the DBSA is the financial and facilitative support for the creation of infrastructure. In addition to the primary focus on infrastructure, the DBSA also attends to short-and medium-term rural finance requirements".
More comprehensively its mandate is to:
– invest in infrastructure and facilitate the provision of infrastructure development finance;
– finance sustainable development in partnership with the public and private sectors;
– respond to development demands and act as a catalyst for investment.
(Fubu "Financial development initiative: Role and future perspectives" *Business Map, Empowerment 2003: State and Market Initiatives Gain Momentum* 43).

97 "The PIC is responsible for the administration and investment of public sector pension and provident funds" (Fubu "Financial Development initiative: role and future perspectives" *Business Map, Empowerment 2003: State and Market Initiatives Gain Momentum* 40–45).

98 Osode 2004 *Speculum Juris* 117.

99 Morar *An Analysis of Black Economic Empowerment (BEE): Is BEE being Facilitated by the Financial Service Sector?* MBA thesis, Graduate School of Business, University of Cape Town (1998) 14.

100 Mahlangu "SA finance sector reaches out" 15 August 2006 at http://www.southafrica.info/doing_business/trends/empowerment/financialcharter-150806.htm (accessed 01-06-2007).

101 *Ibid*.

provided in a sustainable way to low-income groups.[102] Furthermore, Finance Minister Trevor Manuel has stated that "South Africa's financial institutions [have] collectively committed themselves to provide R25 billion worth of funding for transformational infrastructure by the end of 2008".[103] This is promising indeed, and enhances the prospects of sustainable BEE enterprises, with sustainability having a knock-on benefit for employees in terms of income and job security.

4 2 Broad-based BEE: The breadth of the matter

Crucial to the possibility of worker empowerment is a commitment to the broad-based philosophy. However, a trend that has gained impetus in the market is a tendency to empower narrowly. There is a preoccupation with expanding ownership through equity transfer and increasing levels of management control,[104] which is probably a result of the fact that these narrow tools of empowerment are easier to facilitate,[105] and because these methods of empowerment show visible empowerment progress by companies, in contrast with the other elements where progress tends to be less visible.

If the fixation on the Equity Ownership element included methods of transfer to workers, then maybe this would not be so serious, but a recurring complaint about BEE is that the initiative has been skewed in favour of a small black elite.[106] Perhaps the Johnnic deal, which was the first large and "visible buy-in by black businessmen"[107] and which was regarded as the "symbolic birth of BEE",[108] was prophetic of the future tone of BEE, where the pattern has since been the perceived enrichment of a few as opposed to the desired empowerment of many.[109]

This sentiment is corroborated by a recent *Business Day* report, where, in commenting on BEE in the information and communication technology (ICT) sector, it was noted that numerous BEE transactions appear to have done "everything to line the pockets of the black elite",[110] while doing little to benefit workers, who are in fact the driving force behind the success of these enterprises.[111] In the same vein, "the SMME Forum, an organisation for small black businesses, agrees that black workers are being sidelined".[112]

In defence of the system it can be argued that BEE, like the development of the Codes, is a gradual process, and the empowerment drive will take place in

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102 *Ibid*.
103 *Ibid*.
104 Balshaw *et al Cracking Broad-Based Black Economic Empowerment* 89; Shubane et al "Behind the deals" (2005) *BusinessMap Foundation: Economic Transformation and Empowerment* 15.
105 "Black economic empowerment: Focus on a broad-based philosophy" (May 2005) *Business Day Survey* 7.
106 "Is South African black economic empowerment a mining myth?" at http://www.minesandcommunities.org/Action/press435.htm (accessed 23-04-2005).
107 Kennedy *Black Economic Empowerment in the South African Business Community* 31.
108 *Ibid*.
109 Labour Bulletin "The colour of money" June/July 2005 *South African Labour Bulletin* 4.
110 "BEE deals overlook black staff" 3 May 2007 *Business Day* http://www.businesday.co.za/article/technology.aspx?ID=BD4A451766 (accessed 22-05-2007).
111 *Ibid*.
112 *Ibid*.

stages. The South African Advertising Research Foundation (SAARF)[113] has identified a pattern, finding that the first wave of BEE has been characterised by the empowerment of a few. The second wave of BEE, it is argued, has seen the rise of young, upcoming black professionals (called "buppies"), with the third phase being characterised by the emergence of "bappies" – "booming, aspirational and previously poor" entrepreneurs.[114] It is hoped that the fourth wave will be characterised by increased skills development and rural community upliftment but, as we have emphasised, these factors are prone to incremental implementation.[115]

Following this argument, it can therefore be said that it is too early to judge BEE progress.[116] After all, the final Codes were only gazetted in February 2007, and it is only when they have been applied over time that an informed assessment can be made.[117] Indeed, Empowerdex has noted that "to say [the Codes] do not work at this time would be a bit premature".[118] Ultimately, practice will reveal the pragmatic challenges and solutions. An immediate solution to the elite bias would perhaps be the imposition of BEE transaction restrictions, which would limit the total number of BEE transactions that any individual beneficiary can conclude,[119] and in turn encourage a more broad-based approach.

BEE is clearly intended to be an all-inclusive enterprise aimed at empowering the majority of the black population, but the lived realities reflect a divergence from this goal. Ultimately, the true impetus for a broad-based movement rests with companies, who should display a commitment to BEE and should use their initiative to design means that will expedite the achievement of the broad-based empowerment. A feasible starting point is to focus on the critical issue of skills development, which is essential for sustainable economic empowerment and is vital in ensuring the economic advancement of workers.

4 3 Skills development

That there is a dire need to develop broad-based skills in South Africa is beyond doubt.[120] Inadequate skills transfer results in the consequent inability of black people to perform sufficiently well, thus extending undue reliance on previously advantaged partners.[121] In addition, inadequate human resource development may disadvantage South Africa's competitive standing in the global markets.[122]

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113 "The emerging black middle class – True black economic empowerment?" www.sagoodnews.co.za/newsletter/previous_newsletters/24June2005.htm (accessed 23-09-2006).

114 *Ibid*.

115 Balshaw *et al Cracking Broad-Based Black Economic Empowerment* 89.

116 Labour Bulletin "BEE: What about the workers?" June/July 2005 South *African Labour Bulletin* 10 at 11.

117 "Empowerment: Too soon to review BEE-analysts" *Legal Brief* Issue 1803 12 April 2007; Abdul Milazi "Manuel's criticisms stir BEE controversy" 11 April 2007 http://www.businessday.co.za/articles/topstories.aspx?ID=BD4A434341 (accessed 27-04-2007). C000S000 para 13.2 actually makes provision for continuous review.

118 *Ibid*.

119 Osode 2004 *Speculum Juris* 119.

120 Woolley "Everyone's guide to black economic empowerment and how to implement it" 2005 *Financial Mail* 69.

121 Kennedy *Black Economic Empowerment in the South African Business Community* 45.

122 *Ibid*.

Skills transfer is thus crucial to ensuring effective empowerment, but progress on this front has been sporadic. The main problems are poor implementation, apathy and resource shortages.

As indicated above, the Skills Development Act (SDA) is indispensable in attaining the skills development vision of the broad-based BEE endeavour and therefore an inquiry into the progress achieved under this Act is important. It has been noted that although the SDA provides potential benefits for workers in its concentration on vocational training, Adult Basic Education (ABE) programmes and Recognition of Prior Learning (RPL) initiatives are not taking place in companies. A 2004 survey revealed that, by and large, employers had done the bare minimum in this regard, leaving workers to resort to union assistance in their attempt to challenge employers.[123] Another survey carried out in the engineering industry shows that even though several companies provided "on-the-job and basic/generic training", very few engaged in critical/advanced training skills,[124] reasoning that such undertakings are expensive.[125] It has also been noted that SETAs have not assisted workers insofar as RPL and ABE are concerned. [126]

A 2005 survey, conducted on behalf of the National Union of Metalworkers of South Africa (NUMSA) as part of a study on BEE,[127] reflected a similar trend that "unskilled and semi-skilled workers receive very little training that can be classified as upgrading of skills",[128] and, even though many companies acknowledge "the need for upgrading the skills of shop-floor workers, few have coherent strategies to achieve this objective".[129] This was not true across the board, however, with motor and tyre manufacturers reflecting policies geared toward the upgrading of skills,[130] which is a positive step forward. Such a positive measure is not an isolated occurrence either: in the broader economic environment, several successful learnerships have been established, for example, the "Employment Skills Development Lead Employer Pilot Project"[131] that was instituted to hasten "learnership intake within the small and medium business sector".[132]

Identifying these successes is important so that lessons can be learnt with a view to improving skills development strategies generally. The progress in the motor- and tyre-manufacturing industries can be attributed to the adoption of high-level human resource strategies and the prevalence of collective bargaining

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123 Maserumule and Madikane "Is the Skills Act working for workers?" June 2004 *South African Labour Bulletin* 30. This survey formed part of a review of NUMSA's collective bargaining strategy.
124 Maserumule and Madikane June 2004 *South African Labour Bulletin* 31.
125 Maserumule and Madikane 30.
126 Maserumule and Madikane 33.
127 Bardien "Is metal getting a colour rinse?" October/November 2005 *South African Labour Bulletin* 22 23. This article draws on a project entitled, "An investigation of BEE in the metals sector of the economy". The study commissioned by NUMSA was intended to form part of the union's position on BEE in the sector.
128 *Ibid*.
129 *Ibid*.
130 *Ibid*.
131 Labour Bulletin "Learnerships gain momentum, but is that enough?" April 2004 *South African Labour Bulletin* 46.
132 *Ibid*.

agreements, which aid "skills training and development in terms of operational needs".[133] What also seems to be a vital driving force is the institution of private-public partnerships (PPPs) and, in line with this, the Finance Minister has announced that government will "continue to drive empowerment in every facet of PPPs because [government is aware] that these projects hold huge potential . . . to develop ... skills".[134]

Another possible solution is the use of a stringent differentiated grants system, in terms of which SETA grants are to be given in strict accordance with the level of training carried out in a particular enterprise.[135] This should encourage employers to train more people and concentrate on advanced training skills in order to secure larger grants.[136] The difficulty, however, is that what tends to happen is that grants so obtained are often not spent on the skills advancement of *black* employees.[137] A related problem with the grant system is that many companies view the 1% of annual payroll contribution to the South African Revenue Service (SARS), made in terms of the SDLA,[138] as a straight tax and do not even bother to reclaim the grant entitlements that attach to these contributions.[139] Hence the effectiveness of a differentiated grant system as a solution is questionable.

A proposed practical solution for facilitating skills empowerment is a sector-unified effort. This would involve each sector pooling resources and focusing on developing skills within its own sector. Such a move is apparent in the ICT sector, where the Black Information Technology Forum (BITF)[140] embarked on a skills deployment initiative,[141] which is slowly but surely gaining momentum.[142]

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133 Bardien October/November 2005 *South African Labour Bulletin* 23.

134 Mahlangu "SA finance sector reaches out" 15 August 2006 at http://www.southafrica.info/doing_business/trends/empowerment/financialcharter-150806.htm (accessed 01-06-2007).

135 Maserumule and Madikane 2004 *South African Labour Bulletin* 32. "An employer that prepares and submits to the SETA a workplace skills development plan and an implementation report is entitled to a mandatory grant. This grant is equivalent to 15% of its levies in respect of the skills plan and 45% of its levies in respect of the implementation report. Employers may also apply for discretionary grants in respect of learnerships and other occupational skills programmes" (Cheadle, Thompson and Haysom *Black Economic Empowerment: Commentary, Legislation and Charters* 1-19 as cited in Safi *How Broad is Broad-Based Black Economic Empowerment: A Critical Analysis of the Challenges facing BEE* unpublished LLB Mini-Dissertation, University of Cape Town (2006) 34).

136 Maserumule and Madikane 2004 *South African Labour Bulletin* 32.

137 Balshaw *et al Cracking Broad-Based Black Economic Empowerment* 123–124 interpreting the "qualified" Empowerdex BEE ratings" cited in Safi *How Broad is Broad-Based Black Economic Empowerment: A Critical Analysis of the Challenges facing BEE* unpublished LLB Mini-Dissertation, University of Cape Town (2006) 34.

138 Skills Development Levies Act 9 of 1999.

139 Balshaw *et al Cracking Broad-Based Black Economic Empowerment*.

140 The BITF is a voluntary association that was established in 1995. It comprises black entrepreneurs and professionals within the ICT industry. See "Blueprint for black economic empowerment" (2000) Issue 2 *IT Training* 6.

141 "Blueprint for black economic empowerment" (2000) Issue 2 *IT Training* 6. The BITF has instituted a skills development programme which covers, *inter alia*, technical and business training, sales, marketing and mentorship programmes. The BITF believes that by pooling resources, and with support of major corporate industries, it will be possible to create a development infrastructure that will revolutionise the level of black participation within the IT industry.

Sector-oriented skills development[143] has the advantage of being able to combine capital and other resources to nurture the skills specifically required in each sector. We would argue that the initiative for sector-focused schemes rests with individual sector industry bodies.

At a micro-level, shop stewards need to engage in proactive capacity-building exercises to enable them to transform the prevalent dynamics in the contestation of training committee procedures, where employers often dominate these processes and suppress effective engagement.[144] Essentially "[w]here gains have been made by workers, they were the result of a strong shop steward push and strong organisation".[145] Unions need to assume more responsibility for the advancement of skills, "but [ultimately] this . . . depends on capacity and commitment".[146]

4 4 Empowerment through union involvement

Unions have moved to empower workers through the use of "union investment companies". With regard to such empowerment, the issue of capacity is central, and this was highlighted in the National Labour and Economic Development Initiative (NALEDI) Report of 2005.[147] This report noted that in order for unions to exercise effective oversight in respect of union investment companies, matters of capacity within the unions needed to be addressed.[148] The report stated that to neglect these issues would mean inadequate oversight, which might potentially "expose the union movement to grave financial, socio-political and reputational risks".[149]

In terms of progress, the NALEDI report revealed that union members have not gained much from these investment companies because of the manner in which the deals were structured.[150] The report also indicated that, apart from two major investment companies associated with the National Union of Mineworkers (NUM) and the South African Clothing and Textiles Workers Union (SACTWU), most of the other companies were largely insignificant.[151]

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142 This success is apparent in that major players in the ICT industry have committed their support to the accredited members of the BITF Institute. These major players include Datatec, Microsoft and Novell SA. "Blueprint for black economic empowerment" (2000) Issue 2 *IT Training* 6 7.

143 Such development should include the use of learnerships. (Woolley 2005 *Financial Mail* 12.) Also, a process of mentoring may be useful, and would ensure a degree of "intellectual empowerment" (Kennedy *Black Economic Empowerment in the South African Business Community* 39).

144 Maserumule and Madikane 2004 *South African Labour Bulletin* 32.

145 Maserumule and Madikane 30.

146 Maserumule and Madikane 33.

147 The NALEDI Report was commissioned by COSATU to examine investment companies. Labour Bulletin "The colour of money" June/July 2005 *South African Labour Bulletin* 4 5.

148 *Ibid*.

149 *Ibid*.

150 Labour Bulletin "The colour of money" June/July 2005 *South African Labour Bulletin* 4 7.

151 *Ibid*.

Commenting on general union contributions to empowerment, Sithebe[152] accepted that unions have been unsuccessful in securing benefits for their members largely because of a failure to influence deal structuring in a way that would encourage the inclusion of a broad staff base.[153] Drawing attention to the ICT sector in particular, he conceded that "union . . . influence has been minimal".[154]

It has been asserted that unions need to explore proactively the effective use of investment companies as well as investigate the use of other means to extend empowerment to workers.[155] Alternative kinds of empowerment that can be pursued are worker and community co-operatives.[156] Another suggestion is that more can and should be done to channel workers' money into "job-creation [and] socially useful projects".[157] The Labour Job Creation Trust is one such instance where workers' money has been pooled as capital for the empowerment of other unemployed workers, and for the uplifting of communities.[158]

Unions could perhaps also step in to exert pressure on employers to pursue more inclusive initiatives, for example, the institution of employee share ownership schemes (ESOPs). It would appear that commerce is amenable to this mechanism as evident from initiatives such as the impressive Edcon[159] ESOP-type scheme, in terms of which an employee trust, housing R445m worth of shares, was established, with dividends earned distributable to "18 000 beneficiaries in an empowerment payment twice a year".[160] Ultimately trade unions have a great potential to influence the means and pace of empowerment, but "a qualitative leap in theory, organising and practice [is] needed"[161] to ensure trickle-down benefits for workers.

4 5 The fronting barrier

A factor that serves as a barrier to BEE in general, and to the empowerment of workers in particular, is the prevalent occurrence of fronting, which limits the prospects of sustainable[162] empowerment. Fronting is in essence "tokenism [or the] superficial inclusion of historically disadvantaged individuals",[163] with no

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152 Sithebe is the head of communications for the Communication Workers Union (CWU). "BEE deals overlook black staff" 3 May 2007 *Business Day* at http://www.businesday.co.za/article/technology.aspx?ID=BD4A451766 (accessed 22-05-2007).

153 *Ibid*.

154 *Ibid*.

155 Labour Bulletin "The colour of money" June/July 2005 *South African Labour Bulletin* 4 at 7.

156 Madisha "The BEEhive empowers the drones not the workers" June/July 2005 *South African Labour Bulletin* 9.

157 Ibid.

158 Ibid.

159 "Edcon is the holding company that owns Edgars, Jet and others" (Labour Bulletin June/July 2005 *South African Labour Bulletin* 4 7.)

160 Labour Bulletin South African Labour Bulletin 4 7.

161 Ebrahim-Khalil Hassen "The BEE-hive swarm – if you've got the money, honey" June 2004 *South African Labour Bulletin* 26.

162 Pinnock "The ins and outs of structuring deals in South Africa" at http://www.cliffe dekker.co.za/literature/pets/index.htm (accessed 16-05-2006).

163 "What is fronting?" August 2004 at http://www.foundation-development-africa.org/afica_black_business/fronting.htm (accessed 19-08-2005). Originally at http://www.capegateway.gov.za.

actual transfer of wealth or control.[164] It is a cynical manipulation of regulatory requirements that amounts to defrauding the government, and defeats the aims of BEE.[165] Fronting is most commonly understood as "window dressing" which involves either promoting inexperienced and unskilled black people to senior managerial positions, or employing black people without giving them any work to do.[166] All this is done with a view to appearing to be BEE-compliant. More insidious fronting forms include, but are not limited to, "fronts on paper",[167] "fictitious companies",[168] "fronts in joint ventures"[169] and "front companies".[170]

The fronting problem has frequently reared its head in the construction industry where contracts are often awarded to BEE companies and then sub-contracted to white-owned enterprises, where "all [the] white minority shareholders in the BEE company are in fact majority shareholders in the white company".[171] The impact of fronting is apparent from the probe by the Departments of Trade and Industry and Public Works in August 2005,[172] which revealed an estimated loss of R441,1 million from fronting scams.[173] It is clear that fronting is one of the greatest obstacles that hinder a trickle-down effect, and thus control measures are essential to deal with this problem.

C000S001[174] of the 2005 Codes was specifically geared towards combating fronting, and indicated that verification agencies were to play a central role in

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164 Singh et al 15 April 2005 *Financial Mail* 19.

165 "Sigau guns for BEE 'wolves' " in *The Mercury Business Report*: http://www.themercury.co.za/index.php?fSEctionId=282&fArticleId=2814616 (accessed 19-08-2005).

166 *Ibid*.

167 According to Moloi: "The documents are legitimate, but the 'owners' are unaware of being shareholders, have no control in the company and do not manage any aspect of the company." Moloi "Combating corruption and fronting" Dec/Jan 2006 *Government: Building Women* 32.

168 "Fictitious companies" are established for the purpose of procuring contracts and on the ground fees accrue to a white company which does all the work (statement by Minister of Public Work Ms Stella Sigcau on the findings of a probe on the extent of fronting in the construction industry at http://www.info.gov.za/speechless/2005/05080512151001.htm (accessed 19-08-2005)).

169 "Fronts in joint ventures" involve joint ventures being formed between non-BEE contractors and BEE contractors for a specific project in terms of which the BEE company has no responsibilities or control over the project (statement by Minister of Public Work Ms Stella Sigcau on the findings of a probe on the extent of fronting in the construction industry at http://www.info.gov.za/speechless/2005/05080512151001.htm (accessed 19-08-2005)).

170 Moloi "Combating corruption and fronting" Dec/Jan 2006 *Government: Building Women* 32.

171 *Ibid*.

172 Ntuli "Government gets tough on BEE fronting" (August 2005) at http://safrica.info/doing_business/trends/empowerment/bee-public-works-030805htm (accessed 19-08-2005).

173 Statement by Minister of Public Work Ms Stella Sigcau on the findings of a probe on the extent of fronting in the construction industry at http://www.info.gov.za/speechless/2005/05080512151001.htm (accessed 19-08-2005). Also see Masondo "Fronting costing taxpayers millions" at http://www.netassets.co.za/include/dynamicContentDEtailPrint.asp?websiteContentIte (accessed 19-08-2005).

174 C000S001 of 2005: Department of Trade and Industry (Phase Two 2005 Codes) Code 000 "Framework for the Measurement of Broad-Based Black Economic Empowerment: Statement 001 'Fronting Practices and Other Misrepresentation of BEE Status' " at www.dti.gov.za (accessed 29-01-2007) 5.

this exercise. The responsibilities of verification agencies were specifically laid out and included identifying "fronting risk indicators",[175] determining fronting scores[176] and reporting on their findings.[177] This statement also provided for the blacklisting of a company and its directors in the event of fraud or misrepresentation.[178]

The new 2007 Codes do not deal with the fronting issue in such an express manner, but verification agencies are still provided for, albeit with a very broad mandate.[179] The very nature of verification is to ascertain the correctness and accuracy of an entity's reported BEE status, and thus it is possible that fronting will more than likely be catered for when the DTI and industry bodies formulate verification methodology in future.[180]

Certain consequences follow from deviant behaviour by companies. One such repercussion is that any entity engaging in fronting practices may be prosecuted, because fronting amounts to fraud and as such is a criminal offence.[181] A further consequence of such fraudulent behaviour is that any contracts entered into are voidable.[182] We would argue that the blacklisting penalty in the 2005 Codes should be reinstated as it would probably be an extremely effective deterrent because of its long-term and crippling effect.

5 CONCLUSION

The aim of this paper has been to establish whether BEE can have trickle-down benefits for workers. This undertaking involved an introduction of the BEE philosophy within the context of the BEE regulatory framework. We then illustrated, through a systematic account of the Ownership, Employment Equity, Skills Development and Socio-Economic Development Elements that, in theory, the Codes facilitate trickle-down benefits to workers, and a look at the implementation mechanism revealed that the theoretical design is workable. We then proceeded to engage with the practical realities.

In conclusion, BEE is a necessary condition for the transformation of the South African economic landscape,[183] and a comprehensive and commendable

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175 "Indicators of fronting risk may be either high-risk or moderate risk in nature" (C000S001 of 2005 para 7). For an enumeration of these indicators, see C000S001 of 2005 paras 7.2 and 7.3.

176 See C000S001 of 2005 para 10. "The fronting risk Indicators will allow Verification Agencies . . . to classify Enterprises according to four different levels of Fronting Status . . . namely 10.4.1 Fraud; 10.4.2 Excessive Fronting risk; 10.4.3 High Fronting risk; 10.4.4 Low Fronting Risk."

177 See C000S001 of 2005 paras 7–10.

178 C000S001 of 2005 para 10.5.

179 C000S000 of 2007 para 10.

180 C000S000 of 2007 para 10.7.

181 Daly "A Recipe for Woe" in Black Economic Empowerment May 2003 *Business Day Survey* 8 and Moloi Dec/Jan 2006 *Government: Building Women* 32.

182 Daly *ibid* and Moloi 33.

183 Mbeki, addressing the African American Institute of New York, said "it would be a fatal mistake if we decided to depend on the market to correct the disastrous economic outcome born of 350 years of colonialism and apartheid . . . No trickle-down effect, even in the context of an economy growing at high and sustained rates would produce the non-racial and non-sexist society that reality and the constitution demanded". Fabricius "Black super

continued on next page

framework has been put in place to further the empowerment objective. However, as Jain and others have rightfully observed, "[i]t is becoming clear that legislative compliance alone . . . cannot create the necessary mindset changes, organisational commitment and cultural transformation, in what is a deep and profound change in management process".[184] Ultimately, whether there can be trickle-down benefits to workers depends on continued government effort, private sector proactivity and commitment and trade union mobilisation.

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rich 'not essence of BEE'" at www://www.iol.co.za/general/news/newsprint.php?art_id=vn20060921041554733C35 (accessed 23-09-2006).

184 Jain, Mbabane and Horwitz "What are unions doing about employment equity?" June 2005 *South African Labour Bulletin* 58 61.

NOTES AND COMMENTS

DEFINING THE SCOPE AND CONTENT OF THE RIGHT TO A FAIR TRIAL: AN EVALUATION OF *SHINGA v S (SOCIETY OF ADVOCATES, PIETERMARITZBURG BAR AS* AMICUS CURIAE*); O'CONNELL v S* 2007 5 BCLR 474 (CC)

1 Introduction

Without doubt, the right to a fair trial is a crucial hallmark of modern democracies. In today's world, the manner in which a state treats persons accused of criminal acts or omissions defines the extent to which such a state respects human rights and fundamental freedoms in general. Despite the almost universal appeal that the right to a fair trial has generated, the core content of the obligation it creates for states and their institutions remains unsettled in many countries.[1] South Africa is no exception. The right to a fair trial is guaranteed by s 35(3) of the Constitution of the Republic of South Africa, 1996 (the Constitution). As would have been expected of an evolving constitutional democracy, the elements enumerated in s 35(3) consist of sharp contradictions with various statutory and procedural aspects of the South African criminal justice system which existed before the advent of the new constitutional order.

This was the background against which the "twin cases" of *S v Shinga*,[2] and *S v O'Connell and Others*,[3] came before the Constitutional Court of South Africa in 2006. The confirmation referrals in both cases were consolidated and the unified judgment in both cases was delivered on 8 March 2007.

Even though these two cases originated from two different courts in two different jurisdictions, the issues in contention were similar, and concerned the validity of certain procedural rules relating to an appeal against conviction under the Criminal Procedure Act 51 of 1977. At first glance, this consolidated judgment is significant for criminal procedure in South Africa. However, a closer examination demonstrates that the decision is also strikingly significant as far as human rights jurisprudence is concerned.

This note analyses the judgment of the Constitutional Court in the twin cases and highlights its jurisprudential value in the development of a human rights culture in South Africa. Beyond the municipal realm, the note also identifies the

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1 See generally Harris "The right to fair trial in criminal proceedings as a human right" 1967 *ICLQ* 352; Weissbrodt & Wolfrum *The Right to Fair Trial* (1997); Weissbrodt *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (2001) 10–12; Max Planck Institute for Comparative Public Law and International Law *Max Planck Manual on Fair Trial Standards* (2005) 1–2; Langbert *The Right to a Fair Trial* (2005).

2 Case CCT 56/06.

3 Case CCT 80/06.

strategic implications of this judgment for the future development of international human rights law.

2 Brief facts of the cases

Mr Mandilakhe Khehla Shinga, the applicant in the first case, had been convicted of robbery by a regional court in Scottburgh, KwaZulu-Natal, in June 2004. He was granted leave to appeal under s 309B of the Criminal Procedure Act. In the High Court at Pietermaritzburg, which heard the appeal, his main defence was based on an alibi. The High Court held that it was necessary to hear oral argument on the constitutional validity of certain provisions of the Criminal Procedure Act 51 of 1977.[4] The relevant provisions are examined in the next segment of this note. While the appeal against robbery was pending before the Pietermaritzburg High Court, Shinga remained in prison, and the court sat for some two and half years dealing with this procedural matter without considering the substantive appeal against conviction.

Following arguments by advocates on both sides, as well as the Pietermaritzburg Society of Advocates, the High Court proclaimed that the provisions of the Criminal Procedure Act that makes it lawful for the High Court to decide an appeal in chambers without oral argument except where the court itself decides against doing so, were inconsistent with the Constitution. Accordingly, the decision invalidating those statutory provisions was referred to the Constitutional Court for confirmation pursuant to s 172(2)(a) of the Constitution.[5]

In the second case involving Mr Daniel O'Connell and others, the applicants were all charged with various offences relating to housebreaking with intent to steal, theft of firearms and ammunitions, and illegal possession of firearms and ammunition. All the applicants were subsequently convicted and sentenced to various terms of imprisonment by the magistrate's court.[6] When the applicants sought leave to appeal to the Cape High Court, their application for leave was refused by the trial magistrate. In the High Court, where their application for leave to appeal re-emerged, the issue centred on the constitutionality of the requirement of s 309C of the Criminal Procedure Act that trial records must be made available prior to the hearing of an appeal, except in four instances.[7] The Cape High Court held that the absence of trial records will not provide an opportunity for "adequate reappraisal" and that the exceptions were inconsistent with the Constitution.[8]

Another related development in *O'Connell* was that while questioning the rationale behind the reduction of the number of judges who must consider an

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4 *Shinga v S; O'Connell v S* paras 12–13.

5 Section 172 provides, *inter alia*: "(a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

6 *Shinga v S; O'Connell v S* paras 17–18.

7 *Shinga v S; O'Connell v S* para 19. Such situations are: (i) where the accused was tried in a regional court and was legally represented at the trial; or (ii) where the accused and the Director of Public Prosecutions agree thereto; or (iii) where the prospective appeal is against the sentence only; or (iv) where the petition relates solely to an application for condonation. In such instances, a copy of the judgment, which includes the reasons for conviction and sentence, suffices for the purposes of the petition.

8 *Shinga v S; O'Connell v S* para 38.

application for leave to appeal from two to one, in terms of s 309C(5)(a), the Cape High Court rejected arguments in favour of a reading-in or severance, preferring to remit the question to the Constitutional Court.[9]

As in the *Shinga* case, the Cape High Court consequently remitted the judgment to the Constitutional Court for confirmation under s 172(2)(a) of the Constitution.[10] When both of these cases came before the Constitutional Court, it decided to hear further submissions before proceeding to judgment.[11]

It is submitted that since the judgment of the Constitutional Court delivered on 8 March 2007 made no reference to the substantive issues which led to the convictions in the two cases before the two different magistrates' courts, the significance of the judgment lies more in its implications for procedural fair trial rights as envisaged by s 35(3) of the Constitution.

3 Issues for determination before the Constitutional Court

Three core issues arose for determination before the Constitutional Court, namely:

(i) whether the requirement in s 309(3A) of the Criminal Procedure Act 51 of 1977 requiring a High Court to decide an appeal in chambers without hearing oral argument except where the court is of the view that the interest of justice requires the appeal to be heard in an open court was constitutional;

(ii) whether the procedural requirement was consistent with the Constitution that, in applying for leave to appeal to the High Court where a magistrates' court has refused an appeal, the High Court must be furnished with the full record of the trial in the lower court except in the four prescribed circumstances; and

(iii) whether the rule requiring the reduction in the number of judges to consider an application for leave to appeal from two to one is consistent with the Constitution.

In determining these critical questions, the Constitutional Court (per Yacoob J, who delivered the main judgment) dwelt extensively on its relevant jurisprudence, the intentions of the legislature, and set itself to examine each issue within the broader outlook of the Constitution. It is evident from the totality of the pronouncements of the court that it viewed these cases as an opportunity to restate South African criminal procedure in a rights-based context.

In light of the significant influence of statutes in the cases under review, it may be helpful at this point to highlight the vital provisions that were the focus of this important judgment. The two statutes were the Criminal Procedure Act and the Constitution. The critical provisions of the first relate to those in ss 309A(a) and (b) and s 309(4)(a) to (c) and (5)(a), which relate to the competence of the High Court to hear and determine appeals from a magistrate's court, and the procedure for the filing and hearing of appeals against convictions, respectively. With regard to the Constitution, the vital provisions were those in s 35(3) dealing with the rights of arrested, detained and accused persons, with

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9 *Shinga v S; O'Connell v S* para 36.

10 *Shinga v S; O'Connell v S* para 1.

11 *Ibid*.

particular reference to the right to a public trial before an ordinary court,[12] and the right of appeal to, or review by, a higher court.[13]

3 1 Resolving issue one: appeals in chambers

The Constitutional Court frowned upon on the statutory procedure requiring criminal appeals to be dealt with in chambers. The Constitutional Court spoke plainly in declaring that "the provisions [s 309(3)(a) and (b) of the Criminal Procedure Act] are so objectionable in principle that even practical merit would not easily render them acceptable".[14]

Yacoob J, who delivered the lead judgment, re-emphasised the philosophical foundations of South African democratic and constitutional experience, and proclaimed that the content of s 309(3)(a) and (b)

> "makes dangerous inroads into our system of justice which ordinarily requires court proceedings that affect the rights of parties to be heard in public. It provides that an appeal can be determined by a judge behind closed doors. No member of the public will know what transpired; nobody can be present at the hearing . . . The provision is inimical to the rule of law, to the constitutional mandate of transparency and to justice itself. And the danger must not be underestimated. *Closed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based*".[15]

Furthermore, Yacoob J made a special case for the importance of the right to public hearing in criminal appeals; namely, that all interested parties and stakeholders in the criminal justice process – victims, accused, prosecutors, the larger community – deserve to see that justice is done in a way that will reinforce the legitimacy of the process and public confidence in the criminal justice system.[16]

Although not specifically mentioned, Yacoob J's comments are firmly rooted in the fundamental principle of openness proclaimed in s 1 of the Constitution, among others. It was thus apposite that in his conclusion, Yacoob J held that:

> "[T]he provision requiring an appeal ordinarily to be determined in chambers on written argument limits the right in section 35(3)(o) of the Constitution because it renders the process of appeal or review unfair and unjust. Strong and cogent justification will be required if the provision were to stand. In any event, none has been put forward. In the circumstances the provisions of section 309(3A) must be held to be inconsistent with the Constitution."[17]

It is necessary to stress the significance of this firm pronouncement against the backdrop of the attitude of the same court in a similar context, over a decade ago. In *S v Rens*,[18] decided on 28 December 1995, the Constitutional Court had held that applications for leave to appeal could be heard in chambers without this being unconstitutional.[19] Ten years later, however, the court was emphatic in holding that such an exceptional case must not be extended to all criminal appeals.[20]

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12 S 35(3)(c).
13 S 35(3)(o).
14 *Shinga v S; O'Connell v S* para 24.
15 *Shinga v S; O'Connell v S* para 25. The emphasis is mine.
16 *Shinga v S; O'Connell v S* para 26. See also paras 28–29.
17 *Shinga v S; O'Connell v S* para 31.
18 1996 2 BCLR 155 (CC); 1996 10 SA 1218 (CC).
19 Para 24.
20 *Shinga v S; O'Connell v S* para 27.

It is essential to observe that the approach of the court in the *Shinga* and *O'Connell* judgment strengthens the impression that the Constitutional Court is inclined more towards the protection of fair trial rights in criminal processes. Recently, in *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions*,[21] Langa CJ pointed out that accountability, responsiveness and openness are fundamental constitutional values which must at all times be factored into the administration of justice, and therefore held that:

> "These values underpin both the right to a fair trial and the right to a public hearing . . . The public is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness."[22]

From the tone of the above pronouncement, therefore, it becomes plausible to conclude that courts should permit the public coverage of their efforts, subject of course, to their duty to ensure that proceedings are fair to all parties.

Overall, the approach adopted by the Constitutional Court is commendable. In s 4 of this note below, some of the far-reaching implications of this judgment for international human rights development will be discussed.

3 2 Resolving issue two: limitations on the production of a record

While agreeing with the finding of the Cape High Court judgment in *O'Connell*, the Constitutional Court held that a High Court considering an application for leave to appeal from a magistrates' court will not, in all circumstances, be in a position to reappraise the case adequately without a full trial record.[23] The exceptions provided in paras (i) to (iv) of s 309C(4)(c) of the Criminal Procedure Act on situations when trial records may be dispensed with were held to be incapable of curing the defect in the entire section.[24] The court consequently held that subsec 309C(4)(c) was unjustifiable and inconsistent with the constitutional right to a fair trial.[25]

After dealing with each of the exceptions in that provision, and after noting that counsel for the Minister was understandably unable to present any persuasive argument in support of any of the exceptions, the court pronounced that the provisions pertaining to the exemption of trial record in terms of s 309C(4) inevitably limit the right of accused persons to appeal to a higher court. In the court's opinion therefore, s 309C was inconsistent with the Constitution to the extent that the exceptions contained in subsecs 4(c)(i), 4(c)(ii), (4)(c)(iii) and (4)(c)(iv) could not be justified and because each of them constitutes an unjustifiable barrier to the right of review or appeal guaranteed by s 35(3)(o) of the Constitution.[26]

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21 2007 2 BCLR 167 (CC).

22 *SABC v NDPP* para 32.

23 *Shinga v S; O'Connell v S* para 40.

24 The exceptional situations where trial records may not be required to be placed before a higher court are:

(i) if the accused was tried in a regional court and was legally represented at the trial; or
(ii) if the accused and the Director of Public Prosecutions agree thereto; or
(iii) if the prospective appeal is against the sentence only; or
(iv) if the petition relates solely to an application for condonation in which case a copy of the judgment, which includes the reasons for conviction and sentence, shall, subject to subsec (6)(a), suffice for the purposes of the petition.

25 *Shinga v S; O'Connell v S* paras 41–44.

26 *Shinga v S; O'Connell v S* para 45.

With the above decision, it follows that in every criminal appeal matter arising from a lower court, the right to a fair trial demands that the record of proceedings before the lower court must be presented before a higher court, without exceptions, to afford the higher court the full opportunity of "adequate reappraisal".[27]

3 3 Resolving issue three: reduction of judges

On the third issue of permitting one judge to determine an application for leave to appeal under s 309C(5)(a), the Constitutional Court unequivocally established the rationale for preservation of the rule that this procedural act should be carried out by two judges. In justifying the procedure requiring more than one judge to reconsider the trial records of a lower court to determine whether leave to appeal should be granted or refused, Yacoob J explained:

> "A decision by the court that leave should not be granted is the end of the road for the accused whose conviction and sentence will then stand . . . Collegial discussion in considering a record is valuable and enhances the quality of reappraisal of a record and it is not surprising therefore that it has been the general practice in our courts for more than one judge to be engaged in such reconsideration. The practice enhances the quality of justice and is a safeguard to ensure that the right to appeal is not precluded improvidently."[28]

The decision on this issue, as well as the above pronouncement, endorses the stance already established by the Constitutional Court in previous decisions. In *S v Rens*,[29] and *S v Twala* (*South African Human Rights Commission Intervening*),[30] the Constitutional Court had held that the rule requiring that applications for leave to appeal from the High Court to the Supreme Court of Appeal are to be dealt with, in the first instance, by two judges, is of critical importance in the criminal appeal process and is constitutionally valid.

4 Implications for Fair Trial-Rights Jurisprudence

While there is indeed a broad array of multilateral human rights instruments recognising the right to a fair trial and the obligation of states to protect these,[31] the precise content of the obligation so created has remained controversial.[32]

Since the advent of current US-led "war on terror", questions have arisen, not only within the US, but also in various jurisdictions around the world, about the commitment to and compliance of states to protect the right to a fair trial.[33] Apart

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27 *Shinga v S; O'Connell v S* paras 4 37 40 41 46 and 52. See also *S v Ntuli* 1996 1 BCLR 141 (CC) paras 15, 17.

28 *Shinga v S; O'Connell v S* para 47.

29 1996 2 BCLR 155 (CC); 1996 10 SA 1218 (CC) paras 23 26.

30 2000 1 BCLR 106 (CC); 2000 1 SA 879 (CC); 1999 2 SACR 622 (CC) para 22.

31 See Universal Declaration of Human Rights, 1948 (UDHR) art 10; International Covenant on Civil and Political Rights, 1966 (ICCPR) art 14; African Charter on Human and Peoples' Rights, 1981 (African Charter) art 7. South Africa is a state party to all these instruments.

32 See generally Grim "The 'right' to fair trial" 1978 *J of Libertarian Studies* 115–120; Weissbrodt "Travaux Preparatoires of the Fair Trial Provisions – Articles 8 to 11 – of the Universal Declaration of Human Rights" 1999 *HRQ* 1061–1096; Heffermehl "Did Vanunu get justice and a fair trial in Israel's High Court? Report on the Supreme Court judgment of 26 July 2004" at http://www.peaceispossible.info/vanunujustis.html (accessed 06-02-2008).

33 See generally Dias & Gamble "Fair trial protections under international law: Too narrow a canvas?" 2006 *Sri Lanka J of International Law* 241–270.

from the challenges encountered in securing the substantive protection of the right to a fair trial within national systems, there have also been procedural difficulties relating to how judicial processes should operate to guarantee this right. Should the trial of criminal matters be in the open at all times? What should be the rules of fair trial in criminal appeals? How will judicial systems in the divergent legal traditions of the world adopt universal standards of fair trial?

Various attempts, at institutional and individual levels, have been made to provide plausible answers to this barrage of issues, yet the debate continues.[34] Apart from pronouncing that general reservations which seek to defeat the object and purpose of the provision of article 14(1) of the International Covenant on Civil and Political Rights, 1966 (ICCPR), are not acceptable,[35] the United Nations (UN) Human Rights Committee, the body of experts established by the UN to monitor the implementation of the ICCPR, has not been able to define the core content of the right to a fair trial.

Fortunately, this eminent group has now deemed it to be a matter of urgency that it makes a clear pronouncement on the content of the right to a fair trial. At about the same time the South African Constitutional Court was delivering its judgment in *Shinga* and *O'Connell*, the UN Human Rights Committee was busy formulating a "draft general comment" on the right to a fair trial.[36]

The delivery of the judgment in *Shinga* and *O'Connell* will no doubt be a salutary development, as this landmark decision will be a useful and beneficial resource in the deliberations of this global body. While the Committee will be relying heavily on its own jurisprudence in producing the general comment, if it abides by its established practice,[37] it will inevitably have to consider jurisprudence emanating from various jurisdictions, particularly those that affect the substantive and procedural contents of article 14(1) of the ICCPR.

Whether viewed from a domestic angle or from an international perspective, therefore, the Constitutional Court decision in the twin cases of *Shinga* and *O'Connell* undoubtedly constitutes a high watermark in the protection and promotion of the right to a fair trial in the modern world.

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34 Some of the most remarkable efforts at formulating acceptable formalities in the protection of a fair trial right include those mentioned in fn 1 above as well as Lawyers' Committee for Human Rights *What is a Fair Trial? A Basic Guide to Legal Standards and Practice* (2000); Amnesty International USA "Fair Trials Manual" at http://www.amnestyusa.org/International_Justice/Fair_Trials_Manual/page.do?id=1104744&n1=3&n2=35&n3=843 (accessed 06-02-2008).

35 See UN Human Rights Committee *General comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenan*t 52nd Session (1994) para 9.

36 See United Nations *Human Rights Committee Discusses Draft General Comment Concerning Right to Fair Trial, Equal Treatment Before Courts* UN GA HR/CT/686, 16 March 2007.

37 See Nowak "The International Covenant on Civil and Political Rights" in Hanski & Suski (eds) *An Introduction to the International Protection of Human Rights: A Textbook* 2 ed (1999) 79, 91–100; Nowak *Introduction to the International Human Rights Regime* (2003) 78–81. For an analysis of the jurisprudence emanating from the UN Human Rights Committee since 1977, see Hanski & Scheinin *Leading Cases of the Human Rights Committee* (2003) 147–200.

5 Conclusion

The Constitutional Court has established itself at the vanguard in developing a vibrant human rights culture in South Africa. The decision in *Shinga* and *O'Connell* further reinforce this stance. While the far-reaching implications of this judgment may not be immediately realised by followers of the jurisprudence of this court, the quality of this decision should, with time, be manifest in the emergence of a transformed criminal appeals process in South Africa and, possibly, the emergence of international consensus on procedural safeguards for the protection of the right to a fair trial.

One concern that might be problematic for some observers is the virtual silence of the Constitutional Court on the possible limitations to the right to a fair trial in the open, more so when the Constitution creates no explicit limitations to the right. Although the court did not seize the platform afforded by the issues in these cases to enumerate such limitations or exceptions, there is no doubt that the traditional restrictions will apply to exclude public trials in the interests of public morals; public order or national security in a democratic society; juveniles; protection of the private life of the parties; and where, in the opinion of the court, publicity would prejudice the interest of justice. The examples cited here accord with case law and normative standards emanating from comparative jurisdictions, the jurisprudence of international and regional juridical bodies, as well as the writings of eminent scholars.[38]

Far from being an *ex cathedra* pronouncement on all the diverse discourses that could resonate from the Constitutional Court's judgment in *Shinga* and *O'Connell*, this note will have achieved its purpose if it stimulates further discussion.

'DEJO OLOWU

Associate Professor
Nelson R Mandela School of Law
University of Fort Hare

38 See generally Lawyers' Committee for Human Rights *What is a Fair Trial?* 13; Harris 1967 *ICLQ* 359; Dias & Gamble 2006 *Sri Lanka J of International Law* 241; Stavros "The Right to a Fair Trial in Emergency Situations" 1992 *ICLQ* 343–365. For the view that the general limitation clause in the South African Constitution will be applied to this right where necessary, see Rautenbach & Malherbe *Constitutional Law* 4 ed (2004) 315–325; Devenish *The South African Constitution* (2005) 179–183.

SOUTHERN AFRICA CAN BE A TOUGH COUNTRY FOR TOURISM SERVICE PROVIDERS . . . EVEN WITH AN EXEMPTION CLAUSE *DRIFTERS ADVENTURE TOURS CC v HIRCOCK* 2007 1 All SA 133 (SCA)

1 Introduction

One of the main southern African tourist attractions is its natural environment. Indeed, visits to game parks and other outdoor activities such as horse and elephant riding, bungi-jumping, hiking, abseiling, mountaineering and white water rafting feature high on the list of priorities of many international and domestic tourists. By their very nature those attractions present greater risks and, therefore, a greater potential for accidents and resultant claims for damages. It is for this reason that the service providers involved make use of exemption-of-liability clauses as a matter of course. As a result, tourists are usually required, before departing on an adventure activity, to sign an agreement in terms of which the service provider seeks to exclude as much liability as possible for damages that may result from that activity.

The question arises as to the effectiveness of such an agreement. In addressing this issue, this note focuses on the decision in *Drifters Adventure Tours CC v Hircock* 2007 1 All SA 133 SCA (hereafter *Drifters*) and offers a few suggestions to try and ensure that the use of exemption clauses in adventure-tourism contracts brings about both certainty and fairness.

2 Facts

With its pristine natural landscapes, Namibia is a country where the wealthy of this world, normally confined to sprawling and overpopulated conurbations, including Cape Town and Johannesburg, may escape to a rugged, timeless and mostly uninhabited world of breathtaking beauty. This is what the respondent, from Maryland, USA, wanted to do, apparently using Cape Town as her base. To that end, she contracted with the appellant, one of the many South African businesses catering for the adventure tourism market. As could be expected, the appellant made sure that the respondent signed an indemnity form prior to the tour. That form contained the following in bold letters:

> "I have read and fully understand and accept the conditions and general information as set out by Drifters in their brochure and on the reverse side of this booking form. I acknowledge that it is entirely my responsibility to ensure that I am adequately insured for the above venture. I further absolve Drifters, their staff and management and affiliates of any liability whatsoever, and realise that I undertake the above venture entirely at my own risk" (para 6).

The reverse side of the form contained the "BOOKING CONDITIONS AND GENERAL INFORMATION" referred to on the front and provided *inter alia* that,

> "[d]ue to the nature of hiking, camping, touring, driving and the general third-world conditions on our tour/ventures, DRIFTERS, their employees, guides and affiliates, do not accept responsibility for any client or dependant thereof in respect of any loss, injury, illness, damage, accident, fatality, delay or inconvenience experienced from time of departure to time of return, or subsequent to date of

> return, such loss, injury etc arising out of any such tour/venture organised by DRIFTERS" (para 6).

Unfortunately for the respondent, things went wrong. Not on the slope of a rock-strewn desolate outcrop or in the jaws of a ravenous quadruped, but rather, on an apparently ordinary Namibian public road, where she sustained injuries as a result of an accident. The respondent sued the appellant for damages on the ground that the driver of the tour bus (who took no part in the proceedings and was believed to be resident in Switzerland) was negligent in the course and scope of his employment with the appellant. The latter admitted that the accident had been caused by the negligence of the driver. It defended the action, however, by relying on the above indemnity form.

The court *a quo* found that, on a proper interpretation of the indemnity form, the latter did not exempt the appellant from its employee's negligence (para 5). It is against this finding that the appellant appealed.

3 Question and decision

The specific issue that the Supreme Court of Appeal had to pronounce upon was whether liability for damages arising from negligent driving on a public road had been excluded under the exemption clause in the contract (para 12). A unanimous bench dismissed the appeal with costs (para 17).

The court noted that it was common cause that the appellant had the onus of establishing that the exemption clause was enforceable against the respondent (para 9). The court also reiterated "that indemnity provisions in general should be construed restrictively" (para 9) and that, as already stated in *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) 989H, where the language is ambiguous it must be construed *contra proferentem*, provided however that the alternative meaning which is relied upon to illustrate the ambiguity is not fanciful or remote (para 9).

The court held that the clause which appeared on the front of the indemnity form and which was formulated in wide terms (sufficiently so to exclude liability for negligence if read on its own), had to be read in the context of the contract in its entirety, particularly as the exemption clause (on the front) referred the reader to the booking conditions on the back of the form (para 10).

In casu, the only relevant terms were: "Due to the nature of hiking, camping, touring, *driving* and the general third-world conditions on our tour/ventures" (emphasis added). The question was then how a "reasonably astute customer" would understand the expression "the nature of driving". The court reasoned that she would notice that

> "the expression occurs among other 'adventure' activities, those that she hopes to enjoy on the tour. If she reads in the context of driving over unmade roads or slippery, steep or otherwise exciting terrain the expression 'nature of the driving' might well make perfectly good sense. If it is read in the context of passenger transportation on a public road, it makes only imperfect sense. So, although it is possible to interpret the expression 'driving' as referring to any kind of driving anywhere in the country and on any terrain, it is probably not the interpretation that a reasonable reader would give to it and is, in the light of the established canons of interpretation, not one [a court] should favour" (para 14).

The court also pointed out another reason to reject that interpretation. It resides in the Cross-Border Road Transportation Act 4 of 1998, which must be seen in the light of article 21 of the Southern African Development Community Treaty

in pursuance of which a Protocol on Transport, Communications and Meteorology was adopted in 2002. The latter requires that member States promote economically viable integrated transport service provision in the region (art 3.1) and, to that effect, they ensure that their domestic measures conform to regional policies (art 5.5). In this context, the Act aims at improving the unimpeded flow of passenger road transportation in southern Africa, introducing regulated competition in that sector and reducing operational constraints. Section 25(1) of the Act requires a permit to undertake cross-border road transportation. For the good of passengers and to ensure the health of the tourism industry, holders of such permits must hold minimum passenger liability insurance. Under those circumstances, the court felt that contracting out of liability "altogether would be so perverse that [it could not] accept that the appellant would have done so" (para 16).

4 Discussion

The purpose of an exemption agreement is to limit the liability of the one party in respect of another in situations where the former would have been liable for damages to the latter (or his/her next of kin). This type of agreement can be abused quite easily and the courts have developed methods of restricting the use of exemption clauses to within reasonable bounds. (The legislature can also decide to prohibit the use of exemption clauses in particular instances. The focus in this note is however on the common-law restraints.)

There are essentially two methods used at common law for limiting the extent of exemption clauses: public policy and a restrictive interpretation of the clause (Christie *The Law of Contract* 4 ed (2001) 210–217).

The Supreme Court of Appeal held in *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 91 that

> "[i]n its modern guise 'public policy' is now rooted in our Constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism".

The Constitutional Court expressed itself as follows on this issue in *Barkhuizen v Napier* 2007 7 BCLR 691 (CC) para 29:

> "What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."

In other words, for all intents and purposes the matrix of constitutional values that underlies the Constitution now constitutes the public policy of South Africa. The Supreme Court of Appeal made it clear that freedom of contract is one such fundamental constitutional value constituting public policy (*Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 23; *contra* Bhana & Pieterse "Towards a Reconciliation of Contract Law and Constitutional Values: *Brisley* and *Afrox* revisited" 2005 *SALJ* 865 883). It is for this reason that enforcing an exemption agreement entered into freely and with due seriousness by competent persons is in the public interest. Enforcing an exemption clause gives effect to the underlying fundamental value of freedom of contract but also to other values such as dignity. The court in *Brisley v Drotsky* (para 94) stated, for example, that

> "the Constitution's values of dignity and equality and freedom require that the courts approach their task of striking down contracts or deciding to enforce them with perceptive restraint. One of the reasons . . . is that contractual autonomy informs also the constitutional value of dignity".

What then is the role of public policy in limiting the application of an exemption clause? In *Afrox Healthcare Bpk v Strydom* (para 8) the court reiterated the principle that contracts that are unfair to such an extent that they violate the public interest, will not be enforced, but that this power to declare a contract void for violating public policy must be exercised sparingly. The unfairness referred to is constituted by a violation of one or more of the fundamental constitutional values constituting public policy, bearing in mind that there is no definitive set of constitutional values (Roederer "Post-Matrix Legal Reasoning: Horizontality and the Role of Values in South African Law" 2003 *SAJHR* 57 80). The question in each case must be, therefore, considering the particular context of the case, whether there has been a violation of a constitutional value. If this is the case, the exemption agreement violates the public policy and will not be enforced.

It is at this point, it is submitted, that there is a link with the second method at common law for limiting the application of exemption agreements, namely a restrictive interpretation of such agreements.

The restrictive interpretation of the clause includes the *contra preferentem* rule where applicable. This rule, as was explained in *Drifters*, provides that, where the wording of an exemption clause is vague or ambiguous, it must be construed against the *proferens*. Stated differently, if an exemption clause is vague or ambiguous then it must be given the interpretation that favours the party seeking to escape the application of the clause, provided that such an interpretation is reasonable and not fanciful or remote.

The way in which an exemption clause is worded and structured is therefore critical to determining liability or lack thereof. The clearer the wording of the clause, the greater is the certainty about the consensus that has been reached between the parties. Clarity serves both parties: it informs the customer of the risks and it protects the service provider more effectively. A lack of clarity means that the customer is not sufficiently informed about the risks, which will in turn lead to the service provider not being able to escape liability as it intended to (see in this regard *First National Bank of SA Ltd v Rosenblum* 2001 4 SA 189 (SCA) para 6 and *Johannesburg Country Club v Stott* 2004 5 SA 511 (SCA) para 5).

A number of factors will impact on whether a clause is sufficiently clear. First, the language in which the clause is drafted will play a significant role. This is especially important when contracting with foreign tourists who either might not have English as their mother tongue or might not be fully conversant with South African idiom.

A second factor is what can be referred to as the macro-text structure. This factor includes aspects such as the placement of units of information (where and how the exemption clause is placed in the document) and the typographical layout of the text (this aspect includes, for example, the font size, headings, indentations and bold format).

Thirdly, one needs to take into account the extent to which the parties understood the nature of the activity concerned. This is particularly important when offering tourism services whose main attraction is their novelty, as is often the case in adventure tourism.

A fourth factor that can play a significant role is the context which the customer is provided with, and in terms of which he or she is required to sign the exemption agreement. In practice it often happens that the customer receives and is expected to sign the form after he or she has paid and is at the point of departing on the adventure. The atmosphere is full of excitement and the other members of the group are waiting to go. The pressure is then to just sign (often without reading the document) so as not to keep the boat, or elephant, waiting. This is not an atmosphere conducive to seeking clarification and to considering the risks and their potential ramifications. To turn back and to stop the bus, so to speak, is out of the question.

On that basis, fairly simple practical guidelines can assist the service provider in dealing with exemption clauses in a way that will not only serve its own interests but also that of the customer by providing much greater clarity as to the meaning and potential implications of an exemption clause (see Corrada "Liability Waivers in the United States Travel Adventure Sports Industry" 2006 *International Travel Law Journal* 156). In this regard, it must borne in mind that a Consumer Protection Bill is in the process of being drafted (the second draft, hereinafter referred to as "the draft Bill", is available at http://www.thedti.gov.za/ccrdlawreview/CPBillSept21_06.pdf). The future legislation will not only aim at protecting consumers from "unfair, unreasonable and otherwise improper trade practices" (clause 3(1)(d)(i)), but also aim at "reducing and ameliorating any disadvantages experienced in accessing the supply of . . . services by consumers . . . whose ability to read and comprehend [a contract] . . . is limited by reason of low literacy, vision impairment, or limited fluency in the language" in which that contract is drafted (clause 3(1)(b)(v)).

(a) With regard to language:

- The wording should be "in plain language" (clause 28(3)(a)(i) read with clause 27(1)(b) of the draft Bill). This would be the case when it would be "reasonable to conclude that an ordinary consumer of the class of persons for whom [the contract] is intended, with average literacy skills and minimal experience as a consumer of the relevant . . . services, could be expected to understand the content, significance and import of [the provisions of the contract] without undue effort" (clause 27(2)).
- Legalese terms should be avoided to the extent that they are not part of the plain language's lexicon.
- The document will generally be in English, but service providers should attempt to provide the document in the language of the client base if different. In future, the document may actually have to be available in at least two official languages if so prescribed by the minister responsible for consumer protection matters, such languages to be determined "having regard to usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population ordinarily served by" the service provider (clause 26(2)(a) of the draft Bill).
- Specific and express language should be used for notifying the customer about the risks of the activity and for the customer's agreement to the risk (see also paragraph (c) below).

(b) As far as the macro-text structure is concerned, the exemption agreement will soon have to be drawn to the attention of the customer "in a conspicuous manner and form that is likely to attract the attention of an ordinarily

alert consumer, having regard to the circumstances" (clause 49(4)(b)(i) of the draft Bill). It is suggested in that regard that:

- The exemption agreement should be the only unit of information on the page and should not be combined with other information or other forms.
- The document should be supplied with a title in a format that clearly identifies the document as an indemnity form.
- Careful attention should be given to the typography (or architecture) of the document. A proper font size (a minimum of a 12 point font size) should be used. Moreover, the use of spacing and numbered paragraphs should contribute in making the document easier to follow and read.
- The signature and date lines must appear at the end of the document (after the last paragraph on the last page) and, if the document consists of more than one page, the customer must initial the other pages. In the case of an exemption provision in a wider agreement, the consumer will have to sign or initial that provision or otherwise indicate acceptance of that provision by conduct consistent with that acceptance (clause 49(3)(c) of the draft Bill).

(c) With regard to the nature of the event and the nature of the risk:

- The document should alert the customer that he or she is signing a contract that may have legal consequences for the customer or, in the event of death, for his or her estate.
- The nature of the activity, the nature of the risks inherent to the activity, the type of accidents, weather conditions and dangers, as well as the possibility of death should be stated in specific and express language. In future the agreement will be void otherwise (clause 49(5) of the draft Bill).
- The document should inform the customer that, by signing the contract, he or she is agreeing to and accepting the risks.
- The exemption of liability for negligence should be expressed clearly and not by implication. The document should furthermore indicate clearly and expressly to whom and in what regard the exemption for negligence applies.

(d) As to context:

- The draft Bill provides that an exemption provision is void unless the fact, nature and effect of that provision are drawn to the attention of the customer before the latter concludes the agreement (clause 49(2)). This means, it is submitted, that customers should be provided with adequate time and opportunity to read, query, consider and sign the exemption agreement before commencement of the activity. It may be sound practice to provide customers who have pre-booked (eg via travel agents) well in advance with copies of the exemption agreement that the customers will be required to sign.
- In addition, the exemption agreement should be placed on display at the registration point and the activity location for review together with clearly visible warning signs alerting customers to the inherent risks of the activity.
- The exemption should incorporate an assurance that monies paid in advance will be refunded if the customer decides to withdraw from the activity prior to commencement. This may help to prevent a situation where

a pre-paying customer feels pressured to proceed in order not to waste monies already paid even when, having observed the activity and/or conditions, the customer has second thoughts.

5 Conclusion

Undertaking an adventure activity is in many instances the highlight of a holiday. It however also has the potential for ending in disaster, causing huge loss. Who will bear the costs is often regulated by an exemption clause. How that exemption clause is structured can result in the customer and the service provider having a different understanding of what is excluded or not in terms of the agreement. The result is uncertainty and potentially costly litigation. This risk, it is submitted, can be reduced considerably by following the few relatively simple guidelines spelled out above.

PATRICK VRANCKEN
Nelson Mandela Metropolitan University

MARK TAIT
Nelson Mandela Metropolitan University