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CONTENTS

ARTICLES

Interpretation of Statutes: Is it Possible to Divine a Coherent Approach? by *Dennis M Davis* 1

South Africa and the International Covenant on Economic, Social and Cultural Rights: Deepening the Synergies by *Sandra Liebenberg* 12

A Feminist Perspective to Judgment Writing by *Mbuyiseli R Madlanga* 41

The ‘Family House’, the Lived Experience of Township Dwellers and the Prospects of Judicial Intervention by *Roland Sutherland* 61

Court-Encouraged Mediation: Circumstances where it is Appropriate and those Where it is Not – How the Companies Tribunal can Help by *Katherine Timoney and Peter-John Veldhuizen* 73

BOOK REVIEWS

Oil, Gas and Mining Law in Africa by Dr Tinyiko L Ngobeni 83

Commercial Law – Fresh Perspectives by S Huneberg 89

Labour Litigation and Dispute Resolution by Dr Radley Henrico 91

Realising the Right to Basic Education: The Role of Courts and Civil Society by Dr Roxan Venter-Laubscher 94

The Law of Arbitration: South African and International Arbitration by Bronwyn Le-Ann Batchelor 98

Transformative Property Law: Festchrift in honour of AJ van der Walt by Dr Maropeng N Mpya 100

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INTERPRETATION OF STATUTES: IS IT POSSIBLE TO DIVINE A COHERENT APPROACH?[1]

DENNIS M DAVIS

Judge of the High Court, Western Cape Division and Judge President of the Competition Appeal Court

I INTRODUCTION

Eight years ago, Justice Malcolm Wallis undertook what, with apologies to Ronald Dworkin, was a herculean task. He wrote a judgment that was designed to set out a single, coherent approach to interpretation. His judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[2] changed how courts have gone about the business of interpreting both legislation and contracts subsequent to its delivery. Unquestionably, the judgment has had a major impact on the way in which courts approach the task of interpreting contracts and statutes. Based on SAFLII's Noter-up, as at 10 May 2020, the *Endumeni* judgment has been cited in 170 different judgments.

The purpose of this essay is to examine whether the approach set out in *Endumeni* succeeded in two important respects: first, did it constitute a rupture or, at the very least, a significant change to pre-*Endumeni* jurisprudence and second, did it produce the single coherent approach

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[1] My thanks are due to Joshua Davis for many conversations which have been invaluable in the formulation of the ideas set out in this contribution.

[2] 2012 (4) SA 593 (SCA).

that it claimed to be its objective? Although Justice Wallis dealt with both statutory and contractual interpretation, this essay, will focus on the former.

II THE *ENDUMENI* JUDGMENT

There are a number of paragraphs from the judgment that represent the core of the advocated approach and which thus become the source of any evaluation thereof. In these passages Wallis JA lays out his theory of interpretation:

> *The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.*[3]

Wallis JA then turns to the specific issue of statutory interpretation. Here he writes:

> *But the problem lies in it being said that the primary or 'golden' rule of statutory interpretation is to ascertain the intention of the legislature. At one extreme, as has been the case historically, it leads to a studied literalism and denies resort to matters beyond the 'ordinary grammatical meaning' of the words. At the other judges use it to justify first seeking to divine the 'intention' of the legislature and then adapting the language of the provision to justify that conclusion.*[4]

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[3] *Endumeni* (note 2 above) para 18.

[4] *Endumeni* (note 2 above) para 22.

In the passages that follow Wallis JA seeks to resolve the problem thus:

> *The sole benefit of expressions such as 'the intention of the legislature' or 'the intention of the parties' is to serve as a warning to courts that the task they are engaged upon is discerning the meaning of words used by others, not one of imposing their own views of what it would have been sensible for those others to say. Their disadvantages, which far outweigh that benefit, lie at opposite ends of the interpretative spectrum. At the one end they may lead to a fragmentation of the process of interpretation by conveying that it must commence with an initial search for the 'ordinary grammatical meaning' or 'natural meaning' of the words used seen in isolation, to be followed in some instances only by resort to the context. At the other it beguiles judges into seeking out intention free from the constraints of the language in question and then imposing that intention on the language used. Both of these are contrary to the proper approach, which is from the outset to read the words used in the context of the document as a whole and in the light of all relevant circumstances. That is how people use and understand language and it is sensible, more transparent and conduces to greater clarity about the task of interpretation for courts to do the same.*[5]

If the scope of interpretation is bookended by the two extremes of a rigid application of the literal meaning of the text, presumably by recourse to a dictionary to parse the meaning of each word employed in the text which requires interpretation and, on the other side, by a view that words are inherently ambiguous, most certainly when used within a sentence or phrase, then a way must be negotiated between these extremes. That, however, may not always be necessary. The words of a statute may, when read within a particular context, appear clear and admit of no ambiguity of any consequence. If, by contrast, the context dictates that the plain meaning leads to an obvious absurdity, a court will be required to ascribe a meaning to the provision that avoids that consequence.[6]

Where a court is confronted with the challenge of interpreting words that give rise to more than one possible meaning, then in these hard cases, the court has to do more interpretative work. As Wallis JA explains:

> *In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike*

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5 *Endumeni* (note 2 above) paras 24–25.

6 *Endumeni* (note 2 above) para 25.

> *or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.*[7]

III THE RECEPTION OF THE *ENDUMENI* APPROACH

Two years after the *Endumeni* judgment was handed down, the majority of the Constitutional Court set out an approach to interpretation that appeared to adopt the view that the judgment in *Endumeni* hardly represented anything new – indeed, *Endumeni* received no mention in the judgment. In *Cool Ideas 1186 v Hubbard*[8] Majiedt AJ writing for the majority of the Court said:

> *Cool Ideas contended that it would be inequitable for Ms Hubbard to be absolved from complying with the arbitrator's award and from paying the outstanding approximately R550 000 due to Cool Ideas. I am of the view that equity considerations do not apply. But even if they do, as my Colleague Froneman J suggests, the law cannot countenance a situation where, on a case by case basis, equity and fairness considerations are invoked to circumvent and subvert the plain meaning of a statutory provision which is rationally connected to the legitimate purpose it seeks to achieve, as is the case here. To do so would be to undermine one of the essential fundamentals of the rule of law, namely the principle of legality.*[9]

This passage below, which sets out the Court's approach to interpretation, has to be read with the preceding passage from the same judgment:

> *A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*
>
> *(a) that statutory provisions should always be interpreted purposively;*
>
> *(b) the relevant statutory provision must be properly contextualised; and*
>
> *(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).*[10]

It is significant that the authorities cited by Majiedt AJ as support for this summation of his approach to interpretation were cases which, in the

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7 *Endumeni* (note 2 above) para 26.

8 2014 (4) SA 474 (CC) para 52.

9 *Cool Ideas* (note 8 above) para 52.

10 *Cool Ideas* (note 8 above) para 28.

main, predated *Endumeni*.[11] One of the judgments he cited was the very first judgment of the Constitutional Court delivered by Kentridge AJ in *S v Zuma* where the following was stated:

> *While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination.*[12]

If the approach adopted in *Zuma* in 1995 still remained the basis for interpretation of a statute, then the question must be posed: does *Endumeni* represent a rupture from past approaches or is it but an eloquent and coherent summation of that which had been set out in many earlier cases, in particular by Kentridge AJ in *Zuma*? The latter seems to be the more compelling answer. To broaden the analytical lens beyond statutory interpretation to that of the interpretation of contracts, can it then be said that *Endumeni* represents a breakthrough in the area of contractual interpretation?

IV A BRIEF DETOUR INTO THE WORLD OF CONTRACTUAL INTERPRETATION

The answer to this question requires a brief examination of the judgment in *Coopers & Lybrand v Bryant*, in particular where Joubert JA said the following:

> *The correct approach to the application of the 'golden rule' of interpretation … after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:*
>
> *(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract …;*

---

[11] [9] See, for example, *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd* 2014 (5) SA 138 (CC) paras 84–86; *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 5; *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) para 24; *KPMG Chartered Accountants (SA) v Securefin Limited* 2009 (4) SA 399 (SCA) para 39; *Bhana v Dönges NO* 1950 (4) SA 653 (A) 664E–H.

[12] 1995 (2) SA 442 (CC) para 17–18.

> *(2) to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted …;*
>
> *(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions …*[13]

The main criticism of the approach adopted by Joubert JA is that it overemphasises the literal meaning of words instead of adopting the holistic approach whereby recourse to the literal wording does not dictate the nature of the inquiry.

In his explication of this criticism of the approach in *Coopers & Lybrand*, Justice Wallis had the following to say, writing this time in an academic article.

> *When a passing motorist sees a newspaper poster proclaiming 'BULLS GORE SHARKS', their understanding does not start with their thinking that literally it means that male bovines somehow encountered a school of aquatic animals and savaged them with their horns. Nor would our hypothetical motorist then examine context, of which there would be precious little in relation to a newspaper poster displayed on a lamppost, and conclude that the literal meaning is absurd so that they could resort to extrinsic evidence of surrounding circumstances to discern its meaning. I venture to suggest that the vast majority of South Africans would read it and understand instantly that it referred to the result of a game of rugby. But that would be because from the outset they factored into their understanding the whole of the relevant context, the nature and purpose of the poster, the day of its appearance after a weekend, interest in the game of rugby and their own knowledge of the local participants in the game.*[14]

In short, an interpreter does not read a text for its meaning by recourse to the literal words but rather by way of a holistic examination of the text, taking account of the purpose of the writer of the text, the context in which the individual words are employed in the text and the material known to those responsible for the production of the text.

While the approach set out in *Coopers & Lybrand* does lend itself to the criticism that it advocates a mechanistic approach to interpretation, or expressed differently, an Oxford English Dictionary approach of interpretation by means of reading each word separately through the lens

[13] 1995 (3) SA 761 (A) 768A–E.

[14] M Wallis 'Interpretation before and after *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA)' (2019) 22 *PER/PELJ* 1 at 6.

of the dictionary, if the judgment is read more generously it amounts to this: if the literal words do admit of a coherent meaning, then that is the end of the enquiry. But once the words so interpreted lead to a result that is incongruent with the purpose of the speaker, then further interpretative work is required.

It is here that the distinction between speaker- and sentence-meaning becomes valuable. Expressed in the language of modern linguistic philosophy, the approach adopted by Wallis JA in *Endumeni* draws a distinction between sentence- and speaker-meaning. While the words used in the text to be interpreted are to be classified as sentence-meaning, speaker-meaning is that which can be attributed to the speaker from an examination of the context and the circumstances which gave rise to the existence of the sentence under examination through interpretative process.[15] In other words, sentence-meaning is not the alpha and omega of the inquiry. There may, however, be a need to draw a distinction between contracts and similar documents, which are created after negotiations between a defined group who participate actively in the process, and statutes. The drafting and subsequent interpretation of statutes cannot easily fit into an objectively determined purpose of sharing information which may be ascertained in respect of a contract or similar form of document.[16]

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[15] P Grice *Studies in the Way of Words* (1989).

[16] In the interest of full disclosure, I should mention that I attempted to discuss this very important conceptual distinction in a minority judgment in *Commissioner of the South African Revenue Services v Daikin Air Conditioning South Africa (Pty) Ltd* (185/2017) [2018] ZASCA 66 (25 May 2018). This attempt was seriously misunderstood. Justice Wallis in his article (note 14 above at 19) seeks to distinguish Grice from the business of textual as opposed to conversational interpretation. But the implications of Gricean theory have been employed fruitfully in dealing with legal texts. See, for example, B Slocum (ed) *The Nature of Legal Interpretation: What Jurists Can Learn about Legal Interpretation from Linguistics and Philosophy* (2017). There was also a criticism of the use of Grice by C Ashton 'Towards a jurisprudence of corruption: Reformulating the contra fiscum principle for the purposive approach' (2019) *SALJ* 749. Here the criticism is that this approach reintroduced into South African law the distinction between literalism and intentionalism. Regrettably one can only arrive at this conclusion by way of a complete misunderstanding of Grice. My justification for this observation will become apparent presently in the text of this contribution.

V THE PROBLEM OF STATUTORY INTERPRETATION

The problem confronting an interpreter of a statute is that there is a need to integrate sentence-meaning, that is, the meaning of the words chosen by the legislature, and the 'intention of the legislature' or speaker-meaning. That can hardly be achieved coherently by recourse to a laundry list of factors or by some ritual incantation of the phrase 'purposive interpretation'. The problem is that if the words of the text do not automatically produce the meaning of the text, then: can recourse to the speaker-meaning can come to the interpreter's aid; that is, can the interpreter then employ context and purpose to complete the task?

But which context and purpose is the interpreter to employ? To be sure, the example of the 'Bulls gore Sharks' can be understood by the community to whom it is addressed, namely followers of rugby specifically or sport in general. But to which community are we referring when the interpretation of statutes is involved? And who is speaking to this community? The answer is surely a legislature comprising a transient group of representatives. The idea of a coherent intention or indeed purpose is thus a fiction, in that each public representative, or at the least a caucus thereof, may reach agreement on the text, but by way of vastly different intentions. So how then does the judiciary become an interpretative agent for the product of the legislature?

Mark Greenberg expresses the point thus:

> *The question is not how to be a faithful agent. Given that the legislature lacks a coherent mind, faithful agency theory is the wrong approach to understanding what democracy requires. We will need more nuanced democratic thought. Given that we cannot expect there to be collective intentions on the kinds of difficult issues that arise in legal interpretation, but we need lawmakers in these circumstances to be able to make law, we need to understand what democracy implies about how our lawmakers can make law without having shared intentions.*[17]

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[17] M Greenberg 'Beyond Textualism' (16 October 2019) *UCLA School of Law, Public Law Research Paper No. 19–41* at 16, https://ssrn.com/abstract=3470781 (accessed 23 November 2020). Lord Steyn makes the same point with regard to the problem of the legislature's intention (speaker meaning) when he writes:

> 'A bill is a unique document. It speaks in compressed language. Parliament legislates by the use of general words. It is difficult to ascribe to members of parliament an intention in respect of the meaning of a clause in a complex bill and how it interacts with a ministerial explanation. The ministerial explanation in *Pepper v Hart* was made in the House of Commons only. What is said in one House in debates is not formally or in reality known to

The idea that democracy should be the basis of the normative theory that guides interpretation of a statute at least allows for the establishment of making common cause with textualists, in that central to the latter's argument is the idea that the judge must take care not to impose her views on the text, which, after all, is a product of a democratically elected legislature. Unelected judges are there as interpretative agents and not as legislators. So a theory of democracy lies at the heart of the textualist's argument as it does in the case of the intentionalist, either by way of adherence to the golden rule or to the *Endumeni* adaptation.

The argument in this paper article is that the theory of democracy thus favoured is based on following the text so produced by the legislature, for this intention is based on that of the majority of the people's representatives. But this is a thin theory of democracy founded on the idea of majoritarianism, as opposed to a theory of democracy that has normative content, including values of equal political stake, participation and fairness. The interpreter should be striving to develop this kind of theory of democracy to produce an interpretation that fits in with the overall grundnorm – in South Africa's case, of a constitutional democracy. This is very much what Lord Steyn had in mind when he concluded a lecture on interpretation as follows:

> *In the interpretative process the judiciary owes allegiance to nothing except the constitutional duty of reaching through reasoned debate the best attainable judgments in accordance with justice and law. This is their role in the democratic governance of our countries.*[18]

This is where section 39(2) of the Constitution makes its grand entry, albeit that it was not even mentioned in *Endumeni*. So much is made clear by Mogoeng CJ in *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society,* where he opens his judgment thus:

> *It would be a woeful misrepresentation of the true character of our constitutional democracy to resolve any legal issue of consequence without due deference to the pre-eminent or overarching role of our Constitution.*
>
> *The interpretive exercise is no exception. For, section 39(2) of the Constitution dictates that 'when interpreting any legislation … every court, tribunal, or forum must promote the spirit, purport and objects of the Bill of Rights'. Meaning, every opportunity courts have to interpret legislation, must be seen and utilised*

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the members of the other House. How can it then be said that the minister's statement represents the intention of parliament, ie, both Houses?' (J Steyn 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25 *Sydney Law Review* 1 at 5).

[18] Lord Steyn (note 17 above) 12.

> *as a platform for the promotion of the Bill of Rights by infusing its central purpose into the very essence of the legislation itself.*[19]

Unfortunately, the challenge of clothing the skeleton of 'spirit, purport and objects' of the Bill of Rights has rarely been taken up by the Constitutional Court. Early in the existence of the Court there was a hint in this direction in the judgment co-authored by Ackermann and Goldstone JJ in *Carmichele v Minister of Safety and Security.*[20] But since that tentative attempt, little has been done to develop, at the very least, a working theory which would act as the framework within which statutory interpretation could be developed.

VI CONCLUSION

In an evaluation of the *Endumeni* judgment, Wessel le Roux has observed:

> *It no longer suffices to claim that context is not needed where the meaning of the text is clear, as textualists did for many years. This is so because the clarity of the law must be contextually justified against equally pressing demands for greater consistency, efficiency and social justice in the application of the law. Endumeni seems to embrace all four these foundational values of the legal order as co-equal aims of the interpretative process, without ranking them in any order of priority.*[21]

However, this seems to represent a very generous reading of *Endumeni*. There is little in the approach adopted by Wallis JA that explicates upon the values of social justice. There is, in addition, no overarching theory which guides the interpreter to decide an outcome whereby she must balance, for example, efficiency against social justice. The consequence of an absence of a normative theory that provides a possibility of coherence is shown as well when the interpreter must choose between an outcome that favours purpose over sentence-meaning.

Greenberg makes this point thus when pointing to the advantage of what he refers to as a general normative theory which would apply across legal categories:

> *According to the general version of normative relevance, following a general rule better promotes the relevant values than making provision-by-provision calculations. So, for example, one might argue that the relevant values support*

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[19] 2020 (2) SA 325 (CC) paras 1–2.

[20] 2001 (4) SA 938 (CC) para 36.

[21] W le Roux 'Editorial: Special Edition – Legal Interpretation after *Endumeni*: Clarification, Contestation, Application' (2019) 22 *PER/PELJ* 4.

> *textualism – or, since textualism is, as we have seen, underspecified – some more fully spelled out position in the neighbourhood of textualism.*[22]

But Greenberg then suggests that we may adopt a different normative theory for different legal subjects; for example, the normative theory which underpins criminal law may differ to, say, that applied to commercial law:

> *Variable normative relevance implies that legal interpretation involves a great deal of normative argument. Of course, its competitors themselves do not provide mechanical methods of interpretation; interpreting statutes in accordance with intentionalism, purposivism, or textualism requires a great deal of judgment. But variable normative relevance requires more explicit consideration of values.*[23]

This article has a modest purpose, namely, to examine the approach to statutory interpretation as set out in *Endumeni*. It is thus beyond its scope to discuss the respective merits of variable versus general normative theories which should underpin the process of statutory interpretation. That is for another day, as is a detailed discussion of the content of such theories.

The essential argument of this article has been that *Endumeni* is a welcome move away from a committed literalist position. However, beyond this move, it hardly represents a rupture from past practices nor does it provide the coherence for interpretation that it promised. The most damning illustration thereof is that *Endumeni* failed to mention section 39(2) of the Constitution and its impact on interpreting a statute. In turn, this has meant no mention, let alone any engagement with the spirit, purport and objectives of the Constitution. And that, regrettably, has resulted in an absence of any engagement with a normative interpretative theory, whether general or variable. For these reasons, South African jurisprudence still awaits the development of a normative theory which can introduce coherence into the field of statutory interpretation.

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22 Greenberg (note 17 above) 15.

23 Greenberg (note 17 above) 15.

SOUTH AFRICA AND THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: DEEPENING THE SYNERGIES

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I INTRODUCTION

The International Covenant on Economic, Social and Cultural Rights (ICESCR or the Covenant)[1] is the leading international human rights law treaty devoted to the protection of economic, social and cultural rights. There are currently 171 states that are parties to this Covenant.[2] Along with its sister Covenant, the International Covenant on Civil and Political Rights (ICCPR),[3] it was drafted to give legal force and effect to the Universal Declaration on Human Rights, 1948.[4] Its adoption in 1966 was a major achievement of the international community as it framed the economic, social and cultural conditions necessary to enable all persons to live in dignity and as equal members of the human family, as fundamental human rights norms.[5] The Covenant with its normative commitments to economic, social and cultural rights and substantive equality in the enjoyment of these rights[6] also has a deep resonance with South Africa's imperative to redress the dispossession and impoverishment of the black majority through centuries of colonial and apartheid rule.

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1 993 UNTS 3 (adopted 16 December 1966, entered into force 23 March 1976).

2 See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no= IV-3&chapter=4&clang=_en (accessed 1 October 2020).

3 999 UNTS 171 (adopted 16 December 1966, entered into force 3 January 1976).

4 UNGA Res 217 (III) (adopted 10 December 1948).

5 Preamble to the ICESCR.

6 See article 2(2) of the Covenant read with General Comment 20 42nd session (2009), *Non-discrimination in economic, social and cultural rights (art 2(2) of the Covenant)* UN Doc. E/C.12/GC/20.

Through concluding observations (COBs) on States Reports, general comments, statements, letters to states parties, and the evolving jurisprudence under the Optional Protocol to the Covenant (OP-ICESCR),[7] the UN Committee on Economic, Social and Cultural Rights (CESCR or the Committee)[8] has developed a distinctive set of normative concepts for interpreting Covenant rights and the nature of the obligations imposed on states parties. They include 'minimum core obligations', 'progressive realisation', 'retrogressive measures', 'maximum of available resources', and identifying elements of the rights such as availability, accessibility, acceptability and quality.[9] These concepts have been influential globally in cementing the status of economic, social and cultural rights as human rights, and developing frameworks to guide their implementation, monitoring and adjudication.[10]

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[7] United Nations General Assembly Resolution 63/117, UN Doc. A/RES/63/117 (adopted, 18 June 2008; entered into force, 5 May 2013). Adopted in 2008 and entered into force 2013. The OP, which currently has 24 states parties, establishes a communications and inquiry procedure for violations of Covenant rights. Its adoption finally places economic, social and cultural rights on an equal footing to civil and political rights by establishing a quasi-adjudicative communication procedure for victims of violations of these rights. On the OP-ICESCR, see M Langford, B Porter, R Brown, J Rossi (eds) *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016).

[8] The UN Economic and Social Council (ECOSOC) established the UN CESCR in 1985, Resolution 1985/17. It comprises 18 independent experts from the main geographical areas of the world. Its primary mandate is to supervise states parties' obligations under the Covenant through a periodic state reporting procedure and, since 2013, the consideration of communications under the OP. See, generally, M Langford & JA King 'Committee on Economic, Social and Cultural Rights' in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 477–516; M Odello & F Seatzu *The UN Committee on Economic, Social and Cultural Rights: The Law, Process and Practice* (2013).

[9] See generally, M Ssenyonjo *Economic, Social and Cultural Rights in International Law* (2009).

[10] In the context of the African human rights system, see, for example, the influence of these doctrines in the *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* adopted in 2010 by the African Commission on Human and Peoples' Rights. https://archives.au.int/bitstream/handle/123456789/2063/Nairobi%20Reporting%20Guidelines%20on%20ECOSOC_E.pdf?sequence=1&isAllowed=y (accessed 1 October 2020). See also the references to the Committee's General Comments in the landmark decision of the African Commission in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*

The Covenant was drafted in the 1950s and first half of the 1960s in a very different context to that faced by the world today. Nevertheless, its provisions have withstood the test of time and have been interpreted by the CESCR[11] so as to be responsive to the impact of major contemporary challenges on the enjoyment of economic, social and cultural rights. These include austerity measures,[12] business activities,[13] climate change,[14] the impact of scientific advancements,[15] and recently the Covid-19 pandemic.[16]

Despite signing the Covenant in 1994,[17] South Africa only ratified this treaty on 12 January 2015,[18] and it entered into force for South Africa on

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Communication No. 155/96 (2001) AHRLR 60 paras 52, 63.

[11] This is in line with the purposive or teleological approach to treaty interpretation enshrined in article 31 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. For a detailed exposition of the implications of such an approach, see A Amien *A Teleological Approach to the Interpretation of Socio-economic Rights in the African Charter on Human and Peoples' Rights*, unpublished LLD dissertation, University of Stellenbosch (2017).

[12] See, for example, CESCR Statement, *Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights* UN Doc. E/C.12/2016/1 (24 June 2016).

[13] General Comment No. 24, *State obligations under the International Covenant on Economic, Social and cultural rights in the context of business activities* (2017) UN Doc. E/C.12/GC/24.

[14] CESCR Statement, *Climate change and the International Covenant on Economic, Social and Cultural Rights* UN Doc. E/C.12/2018/1 (31 October 2018). In recent times, this issue has been raised in the Committee's concluding observations on a number of States Parties' reports. See, for example, the concern and recommendations expressed in relation to the investments of public and private institutions, including pension funds, in the fossil fuel industry, despite the harmful effects of such fuels on the climate. CESCR, *Concluding observations on the fourth periodic report of Switzerland*, UN Doc. E/C.12/CHE/CO/4, paras 18–19.

[15] General Comment No. 25 *Science and economic, social and cultural rights (articles 15(1)(b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights)* (2020) UN Doc. E/C.12/GC/25.

[16] CESCR Statement *The coronavirus disease (Covid-19) pandemic and economic, social and cultural rights*, UN Doc. E/C.12/2020/1 (17 April 2020).

[17] For an early exploration of the implications of South Africa's signature of the Covenant, see S Liebenberg 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 *South African Journal on Human Rights* 359–378.

[18] United Nations, Depository Notification, South Africa: Ratification, International Covenant on Economic, Social and Cultural Rights, 12 January 2015, UN Doc. C.N. 23.2015.TREATIES-IV.3.

12 April 2015.[19] The reasons for this long delay between signature and ratification are not entirely clear.[20] South Africa has not, at the date of writing this article, ratified the OP-ICESCR, which provides for a quasi-judicial individual communication procedure for victims of violations of Covenant rights.

This article will examine the international and domestic legal implications of the Covenant for South African law. It commences by examining the influence of the Covenant on the drafting of the Bill of Rights in the 1996 Constitution and on the founding socio-economic rights jurisprudence of the South African Constitutional Court. It proceeds to consider the international law implications of South Africa's ratification of the Covenant, including the outcome of the recent review of South Africa's initial report by the CESCR. Thereafter, it considers the domestic law implications of South Africa's ratification of the Covenant and identifies key doctrines that can contribute to the development of South Africa's evolving jurisprudence on socio-economic rights. The article concludes with reflections on concrete strategies for deepening the synergies between the Covenant and the South African domestic legal system.

II THE INFLUENCE OF THE COVENANT ON THE CONSTITUTION AND FOUNDING SOCIO-ECONOMIC RIGHTS JURISPRUDENCE

A major debate in the drafting of the 1996 Constitution was whether socio-economic rights should be included as fully justiciable rights in the Bill of Rights.[21] Ultimately, the Constitutional Assembly made the decision to incorporate socio-economic rights as justiciable rights. They did so in a way that took account of the state's resource and capacity concerns and the need to preserve a distinction between the roles of the three arms of state in respectively legislating, implementing and adjudicating these rights.[22] As the Constitutional Assembly records show, the ICESCR

[19] In accordance with article 27(2) of the Covenant, it enters into force three months after the date of a state's deposit of its instrument of ratification or instrument of accession.

[20] In comparison, South Africa signed the ICCPR also in 1994 but proceeded to ratify it four years later on 10 December 1998. See John Dugard & Jackie Dugard 'Human Rights' in J Dugard, M du Plessis, T Maluwa & D Tladi (eds) *Dugard's International Law: A South African Perspective* (5 ed) (2018) 454, 471.

[21] For an analysis of the debates and relevant literature, see S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 7–19.

[22] Constitutional Assembly, Constitutional Committee Sub-Committee *Draft Bill of Rights, vol. 1, Explanatory Memoranda* 9 October 1995, 1–285 at 154;

was a major influence in drafting the relevant provisions in the Bill of Rights protecting economic, social and cultural rights, particularly those entrenched in sections 26 and 27.[23]

The influence of Article 2 of the Covenant, which describes the nature of the overarching obligations of states parties in relation to the rights recognised in the Covenant, is particularly evident in sections 26(2) and 27(2).[24] In both instruments, the state's obligations are described not in terms of an ultimate outcome to be attained immediately but rather in terms of a conduct-based standard of taking certain steps or measures towards the full realisation of the relevant rights.[25] Both refer to the concepts of 'progressive realisation' and resource availability.

The Constitutional Court in its landmark judgment of *Government of the Republic of South Africa v Grootboom*[26] noted that the courts are obliged, in terms of section 39(1)*(b)* of the Constitution, to consider international law as 'a tool to interpretation of the Bill of Rights.'[27] It cited the Court's prior holding in *S v Makwanyane* that, in the context of guiding the interpretation of the Bill of Rights, public international law 'would include non-binding as well as binding law.'[28] This implies that all

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and 141–177.

[23] Constitutional Principle II, Schedule 4 of the interim 1993 Constitution required that the Constitution of the Republic of South Africa, 1996 incorporate 'universally accepted fundamental rights, freedoms and civil liberties'. The relevant Constitutional Assembly records pertaining to the drafting of the relevant provisions on socio-economic rights are referenced in Liebenberg (note 21 above) 19 at fn 111–113; see also: S Liebenberg 'Embedding Socio-Economic Rights' in *Reflections on the Bill of Rights* (2016) 87–93; J Fitzpatrick & RC Slye 'Economic and social rights – South Africa – Role of International Standards in Interpreting and Implementing Constitutionally Guaranteed Rights' (2003) 97 *American Journal on International Law* 669.

[24] Article 2 of the Covenant reads as follows:

> 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

[25] On the distinction between obligations of conduct and obligations of result, see the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997) para 7.

[26] 2001 (1) SA 46 (CC) (*Grootboom*).

[27] *Grootboom* (note 26 above) para 26.

[28] 1995 (3) SA 391 (CC), para 35. The Court in this context referred to s 35(1)

international law can serve as a guide to interpreting the Bill of Rights. This includes treaties that South Africa may not ratify,[29] or – as was the case with the Covenant when *Grootboom* was decided – treaties to which South Africa has not yet become a State Party. While international law must be considered as a guide to interpretation, courts are not obliged to follow the particular international law interpretation. As Yacoob J noted in *Grootboom*, 'the weight attached to any particular principle or rule of international law will vary.'[30] He went on to observe that, when relevant international law binds South Africa in terms of the provisions of sections 231 to 233 of the Constitution, 'it may be directly applicable.'

The Court in *Grootboom* proceeded to identify what it regarded as significant differences in the formulation of the relevant provisions of the Covenant to those in the Constitution. Thus, in the context of section 26 of the Constitution, 'the Covenant provides for *a right to adequate housing* while section 26 provides for the *right of access* to adequate housing.'[31] Secondly, '[t]he Covenant obliges states parties to take *appropriate* steps which must include legislation, while the Constitution obliges the South African state to take *reasonable* legislative and other measures.'[32] The precise implications of these drafting differences are not entirely clear from the *Grootboom* judgment and subsequent socio-economic rights jurisprudence in South Africa.

However, in *Grootboom* and subsequent jurisprudence the Court has firmly rejected the application of the concept of 'minimum core obligations'. This concept has been an important component of the Committee's doctrine since it first made its appearance in General Comment No. 3.[33] In this General Comment, the Committee indicated that it would apply a high threshold of scrutiny to situations where people lack access to minimum essential levels of each of the Covenant rights. Thus,

> *[i]n order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposal to satisfy, as a matter of priority, those minimum obligations.*[34]

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of the interim Constitution, which in turn inspired s 39(1) of the Constitution.

[29] For example, the European Convention on Human Rights or the Inter-American Convention on Human Rights.

[30] *Grootboom* (note 26 above) para 26.

[31] *Grootboom* (note 26 above) para 28.

[32] *Grootboom* (note 26 above) para 28.

[33] General Comment No. 3 (1990), *The Nature of States Parties' Obligations (art 2(1) of the Covenant)* UN Doc. E/1991/23 para 10.

[34] General Comment No. 3 (note 33 above) para 10.

In essence, the Committee views minimum core obligations as a floor of social provisioning from which states parties must make expeditious and effective progress towards the ultimate goal of achieving the full realisation of Covenant rights.[35] Despite the urging of the *amici curiae* in the *Grootboom* and subsequently the *TAC* cases,[36] the Court has remained resolute in holding that sections 26 and 27 do not give rise to an independent cause of action based on minimum core obligations.[37]

Any claim invoking the positive duties imposed by sections 26(2) and 27(2) of the Constitution must be based on a lack of reasonableness in the state's acts or omissions.[38] In addition to the textual formulation of sections 26 and 27, the Court has given as its reasons for rejecting the concept of minimum core obligations, the difficulty in defining the precise nature of the concept, institutional comity, and resource considerations pertaining to the ability of the state to guarantee a minimum core for everyone.[39] It has, however, left a window open for the content of a minimum core obligation to be taken into account in assessing the reasonableness of the measures adopted by the state.[40] To date, however, the concept of minimum core obligations has not been applied in the jurisprudence of the South African courts.

Whilst rejecting the direct application of the CESCR's concept of a minimum core obligation, the Court in *Grootboom* endorsed the Committee's concept of 'progressive realisation' as elaborated in General Comment No. 3.[41] It held that the Committee's interpretation of this concept was 'helpful in plumbing the meaning of "progressive realisation"

35 General Comment No. 3 (note 33 above) para 9.

36 *Minister of Health v Treatment Action Campaign (no. 2)* 2002 (5) SA 721 (CC) paras 26–39.

37 See also *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) paras 46–68 (*Mazibuko*).

38 *Grootboom* (note 26 above) paras 34–44.

39 For academic criticism of the Court's rejection of the concept of minimum core obligation, see D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007).

40 *Grootboom* (note 26 above) para 33. However, the Court indicated that, 'even if it was appropriate to do so, it could not be done unless sufficient information is placed before a court to determine what would comprise the minimum core obligation in the context of our Constitution.' The Court also pointed out that the Committee developed the concept of minimum core obligations based on long experience of examining States Parties' reports (para 31). See also *TAC* (note 36 above) para 34; *Mazibuko* (note 37 above) para 54.

41 General Comment No. 3 (note 33 above) para 9.

in the context of our Constitution,' and concluded that, 'there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.'[42]

It is significant that in accepting the Committee's interpretation of 'progressive realisation' the Court also endorsed the Committee's doctrine of 'retrogressive measures'.[43] According to the Committee, the duty of 'progressive realisation' imposes an obligation on states parties 'to move as expeditiously and effectively as possible' towards the goal of full realisation of Covenant rights.[44] A corollary of this duty is that any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[45]

The doctrine of retrogressive measures has been subsequently developed by the Committee to constitute a presumption that retrogressive measures are in principle prohibited unless justified by the relevant State Party concerned according to certain principles. For example, in the context of the right to social security, the Committee has held that it

> *will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.*[46]

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[42] *Grootboom* (note 26 above) para 45.

[43] See General Comment 3 (note 33 above) para 9, cited with approval in *Grootboom* (note 26 above) para 45.

[44] General Comment 3 (note 33 above) para 9.

[45] General Comment 3 (note 33) para 9.

[46] General Comment No. 19 (2007) *The right to social security (art 9)*, UN doc. E/C. 12/GC19 para 42. See also: Letter by Chairperson of CESCR to States Parties, 16 May 2012 (Ref. CESCR/48th/SP/MAB/SW); CESCR Statement, *Public debt, austerity measures and the ICESCR* (note 12 above) paras 4, 10. For the application of this doctrine in the context of the individual communications procedure under the OP-ICESCR, see *Djazia and Bellili v Spain,* Communication No. 5 of 2015, UN Doc. E/C.12/61/D/5/2015 (2017) para 17.6 (*Djazia*).

The relevance of these doctrinal concepts will be explored further in part IV below.

The South African Constitutional Court applies a different model of review to negative infringements that prevent or impair access to the relevant socio-economic rights.[47] Such negative infringements are regarded as limitations to the applicable right, which are subject to justification in terms of section 36, the general limitations clause.[48] This approach is in line with the general approach of the CESCR to violations of the duty 'to respect' Covenant rights.[49] For example, in its recent communications decided under the Optional Protocol, the CESCR confirmed that the general limitations clause in the Covenant (Article 4)[50] is applicable in reviewing deprivations of the right to housing, for example, the eviction of persons from their homes.[51]

In addition to serving as a major source of inspiration for the drafting of the socio-economic rights provisions in the Constitution, the Covenant has also been used as an interpretative tool in terms of section 39(1)*(b)* of the Constitution in developing South Africa's founding jurisprudence on socio-economic rights.[52] However, references to the Covenant have not been consistent, and in a number of judgments, no reference was made to the Covenant or to important General Comments relating to the relevant

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47 *Grootboom* (note 26 above) para 34; *TAC* (note 36 above) para 46.

48 *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) paras 3–34 (*Jaftha*).

49 On the duty 'to respect, protect, and fulfil' Covenant rights, see, for example, General Comment No. 12 (Twentieth session, 1999), *The right to adequate food (art 11 of the Covenant)*, UN Doc. E/C.12/1999/5, para 15.

50 Article 4 of the Covenant reads as follows:

> 'The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law [and] only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.'

51 *López Albán v Spain*, Communication No. 37/2018, UN Doc. E/C.12/66/D/37/2018 (29 November 2019) paras 11.–11.7; *Pardo v Spain*, Communication No. 52 of 2018, UN Doc. E/C.12/67/D/52/2018 (14 April 2020) para 9.4 (*López Albán*).

52 The Covenant has been referred to in *Grootboom* (note 26 above) paras 26–45; *Jaftha* (note 48 above) paras 23–24; *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC) paras 40–44 (*Juma Musjid*).

rights under consideration.[53] The next part considers South Africa's ratification of the Covenant and the international law implications thereof.

III THE INTERNATIONAL LAW IMPLICATIONS OF SOUTH AFRICA'S RATIFICATION OF THE ICESCR

As noted above, South Africa ratified the Covenant on 12 January 2015. At the time of ratification, it incorporated what it termed a declaration pertaining to the right to primary education as provided in Articles 13(2)(a) and 14 of the Covenant.[54] This declaration, which will be considered shortly, reads as follows:

> *The Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in Article 13(2)(a) and Article 14, within the framework of its National Education Policy and available resources.*

By ratifying the ICESCR, South Africa agreed to be bound by its provisions and to perform the obligations imposed by it in good faith.[55] It may not invoke the provisions of its internal law as justification for its failure to fulfil its obligations under the treaty.[56]

In terms of Article 16 of the ICESCR, states parties are required to submit reports 'on the measures which they have adopted to give effect to the rights encompassed in the Covenant, as well as on the progress made in achieving the observance of the rights recognised herein.'[57] The Committee has set a periodicity for the submission of state reports of an initial report within two years of becoming a State Party, and thereafter every five years. South Africa submitted its initial report in 2017 and

[53] See, for example, *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) and *TAC* (note 36 above) except in the context of reiterating the rejection of the minimum core obligation in para 26. In these important right to health cases, no reference was made to article 12 of the Covenant and its interpretation in General Comment No. 14 (2000) *The right to the highest attainable standard of health (art 12)*, UN doc. E/C.12/2000/4. In *Mazibuko* (note 37 above) no reference was made to articles 11 and 12 of the Covenant from which the CESCR derived a right to water in General Comment No. 15 (2002) *The right to water (arts 11 and 12)*, UN Doc. E/C/12/2002/11.

[54] Depository Notification, ICESCR, South Africa: Ratification (note 18 above).

[55] Vienna Convention on the Law of Treaties, 1969 (note 11 above) art 26.

[56] Vienna Convention on the Law of Treaties, 1969 (note 11 above) art 27.

[57] On the overall objectives of the State reporting procedure under the Covenant, see General Comment No. 1 (1989), *Reporting by States parties* UN Doc. E/1989/22. See also Odello & Seatzu (note 8 above) 154–194.

responded to the list of issues on its report prepared by the Committee. A number of non-governmental organisations also made submissions for the review of South Africa's report by the Committee.[58] The constructive dialogue with a delegation of the South African government led by Deputy Minister of Justice and Constitutional Development, Mr John Jeffrey, MP, and former Deputy Minister of International Relations and Co-operation, Mr Luwellyn Landers, MP, took place on 2 and 3 October 2018 at the 64th session of the Committee.[59] The Committee adopted its COBs on South Africa's initial report at its 58th meeting on 12 October 2018.[60]

As is the case with the COBs issued by the other UN human rights treaty bodies, the COBs adopted by the CESCR identify positive aspects, principal subjects of concern, and recommendations addressed to the relevant State Party aimed at improving their implementation of the Covenant in domestic law, policy and practice. As a set of recommendations, COBs are not *per se* legally binding under international law. Nevertheless, they constitute an authoritative assessment of the relevant State Party's implementation of the Covenant by the body with the mandate of supervising states parties' obligations under the Covenant. They are adopted after an exhaustive process of reporting, supplementation through the issuing of a list of issues and responses thereto, as well as participation by civil society organisations in various ways in the reporting process. The COBs issued after the conclusion of a reporting cycle will also be used as a benchmark for assessing progress in the implementation of the Covenant by the State Party concerned during its next reporting cycle. In the light of these considerations, and in line with the duty to implement ratified treaties in good faith, including by cooperating with its supervisory bodies, states are expected to give serious, good faith consideration to the recommendations of the relevant treaty body.[61]

The Committee's COBs adopted in respect of South Africa's initial report are wide-ranging, covering a range of themes. They include the status of the Covenant in the domestic legal order; human rights defenders;

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[58] All relevant documents pertaining to the review are available online at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=1200&Lang=en (accessed 17 June 2020).

[59] The dialogue took place at the 42nd, 43th and 44th meetings of the Committee and the summary reports are contained in UN Doc. E/C.12.2018/SR., 42, 43 and 44.

[60] CESCR, *Concluding Observations on the initial report of South Africa,* UN Doc. E/C.12/ZAF/CO/1 (29 November 2018) (SA COBs).

[61] See the discussion in O de Schutter *International Human Rights Law: Cases, Materials, Commentary* (2019) 920–925; Odello & Seatzu (note 8 above) 179–185.

indigenous peoples; the mobilisation of the maximum available resources for the realisation of Covenant rights; unemployment and just and favourable conditions of work for precarious groups of workers such as domestic and farm workers; the mining sector; the gender pay gap; social security; birth registration; harmful practices; malnutrition and the right to food; the right to housing; land reform; health sector; education; cultural and linguistic rights; and access to the internet. A detailed analysis of these COBs is beyond the scope of this article. However, I will highlight three recommendations of particular relevance to the overarching theme of this article pertaining to the implications of the Covenant for domestic law and the administration of justice.

Firstly, the Committee noted that the South African Constitution 'is particularly progressive in the area of economic, social and cultural rights, and its impact has been further strengthened through the Constitutional Court's interpretation of its provisions.'[62] However, it goes on to observe that the Constitution does not fully incorporate certain rights that are recognised in the Covenant such as the right to work,[63] and the right to an adequate standard of living.[64] It also observed that, although the Constitution provides that international law can be used as an interpretative guide in interpreting the Bill of Rights, 'the provisions of the Covenant are not considered to be directly applicable by the courts, other tribunals or administrative bodies.'[65] The Committee proceeded to recommend, in line with its General Comment No. 9 on the domestic application of the Covenant,[66] that the state ensure that the rights in the Covenant are fully recognised in the Constitution and domestic legislation and that the provisions of the Covenant can be directly invoked before domestic courts. It further recommended that the state 'enhance training for judges, prosecutors, lawyers and public officials on the Covenant and strengthen the capacity of the South African Judicial Education Institute to that end.'[67]

Secondly, the Committee expressed concern regarding the declaration made by South Africa at the time of ratification of the Covenant[68] in relation to the right to primary education, which the Covenant requires 'shall be

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[62] SA COBs (note 60 above) para 4.

[63] Article 6, ICESCR.

[64] Article 11, ICESCR.

[65] SA COBs (note 60 above) para 4.

[66] General Comment No. 9 (1998), *Domestic application of the Covenant*, UN Doc. E/1999/22.

[67] SA COBs (note 60 above) para 5.

[68] See note 54 above and accompanying text.

compulsory and available free to all'.[69] It noted the *Juma Musjid* judgment of the Constitutional Court, which held that the right to basic education in section 29(1)*(a)* of the Constitution is an 'immediately realisable' right and not subject to the internal limitations contained in sections 26(2) and 27(2).[70] The Committee recommended that South Africa withdraw this declaration.[71] It is arguable that this purported interpretative declaration by South Africa constitutes a reservation as defined in Article 2(1)(d) of the Vienna Convention on the Law of Treaties[72] and is 'incompatible with the object and purpose'[73] of the ICESCR.[74]

The final recommendation that I will refer to for present purposes concerns the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The Committee noted with concern that chapter 5 of this Act, which imposes duties on all sectors of society, including the private sector, to promote equality, has not yet been brought into operation. It recommended the implementation of this chapter without delay.[75] Given the inextricable relationship between socio-economic rights and equality

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[69] Article 13(2)(a). This is one of the provisions which the Committee considers self-executing and 'capable of immediate application by judicial and other organs in many national legal systems.' General Comment No. 3 (note 33 above) para 5; General Comment No. 9 (note 66 above) para 10. Article 14 provides a two-year period of grace for those State Parties that, at the time of becoming a party to the Covenant, have been unable to secure free, compulsory primary education. During this two-year period, they are required to adopt a detailed plan of action to achieve this outcome within a reasonable number of years, to be fixed in the relevant plan.

[70] *Juma Musjid* (note 52 above) para 37.

[71] SA COBs (note 60 above) paras 6–7. See the analysis by R Nanina & E Durojaye 'Four Years Following upon the Ratification of the ICESCR and Jurisprudence on the Right to Basic Education: A Step in the Right Direction?' (2019) 23 *Law, Democracy and Development* 270–298.

[72] According to this article, a reservation is 'a unilateral statement, however, phrased or named, made by a State when … ratifying… a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State'.

[73] Vienna Convention on the Law of Treaties (note 11 above) article 19.

[74] On reservations to international treaties, including in the specific context of human rights treaties, see J Dugard 'Treaties' in *Dugard's International Law* (note 20 above) 608, 612–618.

[75] SA COBs (note 60 above) paras 21–22.

rights,[76] the bringing into operation of chapter 5 of the Equality Act is vital for advancing substantive equality, including the enjoyment of economic, social and cultural rights. As the Committee has noted in General Comment No. 9, guarantees of equality and non-discrimination in domestic law 'should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.'[77]

With effect from its 61st session in 2017, the Committee has adopted a follow-up procedure to its COBs on a pilot basis. This entails the identification of up to three recommendations that the Committee considers require 'urgent action' and are 'attainable within a period of 24 months.' The state is required to prepare and submit a concise follow-up report within 24 months on its implementation of these three recommendations, which the Committee assesses according to criteria set out in its follow-up procedure.[78] In the case of South Africa, the three recommendations selected for follow-up by the Committee are: (1) the preparation of a composite index on the cost of living and access to social assistance for adults between 18 and 59 years of age; (2) the adoption of the Social Assistance Amendment Bill, 2018 to increase the level of child support grants for orphaned and abandoned children living with relatives; and (3) access to education for undocumented migrant, refugee and asylum-seeking children.[79]

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[76] The Committee has elaborated on this relationship in two General Comments, one pertaining to the duty of States Parties to ensure non-discrimination in the exercise of Covenant rights (article 2(2)), and one on the equal right of men and women to the enjoyment of Covenant rights (article 3). See General Comment No. 16 (2005), *The equal right of men and women to the enjoyment of all economic, social and cultural rights (art 3 of the Covenant)*, UN Doc. E/C.12/2005/4; General Comment 20 (note 6 above). On the interrelationship between equality and socio-economic rights, see generally S Liebenberg 'Towards an Equality-promoting Interpretation of Socio-economic Rights in South Africa: Insights from the Egalitarian Liberal Tradition' (2015) 132 *South African Law Journal* 411–437.

[77] General Comment No. 9 (note 66 above) para 15.

[78] *CESCR Note on the Procedure for Follow-Up to Concluding Observation*, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fFGD%2f8826&Lang=en (accessed 1 October 2020).

[79] SA COBs (note 60 above) para 83. For an important judgment decided at the end of 2019 on the right to education of so-called 'undocumented children', see *Centre for Child Law v Minister of Basic Education* 2020 (3) SA 141 (ECG). See also CESCR Statement *Duties of states towards refugees and migrants under the International*

The final issue to be considered in this part concerns the status of the General Comments issued by the Committee. The Committee has issued 25 General Comments to date.[80] They elaborate on states parties' obligations under the Covenant in the context of specific rights, vulnerable groups or contemporary issues. As such, they represent the 'jurisprudential commitment' of the CESCR in interpreting the Covenant.[81] Like COBs, they are not legally binding *per se* but should be regarded as persuasive sources of interpretation of Covenant obligations by the body with the formal mandate to interpret and supervise states parties' obligations.[82] It is noteworthy that the International Court of Justice (ICJ) has indicated that it will ascribe great weight to the interpretation of relevant human rights treaties by the expert supervisory bodies.[83] The ICJ pointed out that this approach was desirable in terms of advancing the clarity, consistency, predictability and legal security of the rights to which individuals were entitled under international law.[84]

Finally, the Committee has also adopted a number of statements on various themes. These statements are intended as responses to contemporary developments affecting Covenant rights.[85] They carry less normative weight than fully-fledged General Comments, but are nevertheless indicative of an emerging consensus of the CESCR on how Covenant rights and obligations apply to the contemporary phenomena which are the subject of the relevant statements.

Covenant on Economic, Social and Cultural Rights UN Doc. E/C.12/2017/1 (13 March 2017).

[80] These General Comments are available online at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11

[81] Odello & Seatzu (note 8 above) 29.

[82] M Craven *The International Covenant on Economic, Social and Cultural Rights* (1995) 89–92.

[83] *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 131 at 136 paras 108–113; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo),* ICJ judgment of 30 November 2010, para 66 (*Ahmadou Sadio Diallo*).

[84] *Ahmadou Sadio Diallo* (note 83 above) para 66.

[85] See, for example, the statements on public debt and austerity measures (note 12 above), climate change (note 14 above); and the sustainable development goals: CESCR Statement *The pledge to leave no one behind: The International Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development* UN Doc. E/C.12/2019/1 (5 April 2019).

IV THE DOMESTIC LAW IMPLICATIONS OF SOUTH AFRICA'S RATIFICATION OF THE ICESCR

(a) Constitutional conduits for the ICESCR to influence South African law

International law can enter into, and influence, the development of South African domestic law via several constitutional conduits.[86] In addition to its role as a tool for interpreting the Bill of Rights in terms of section 39(1)(b), the legal status of international agreements and customary law is regulated by sections 231 to 233 of the Constitution.

Section 231(4) of the Constitution deals with the status of international agreements, such as the ICESCR, in domestic law. In line with the dualist approach to international treaties, it provides that an international agreement only 'becomes law in the Republic when it is enacted into law by national legislation.' An exception is created in respect of 'a self-executing provision of an agreement that has been approved by Parliament unless it is inconsistent with the Constitution or an Act of Parliament.' Such a provision is automatically law in the Republic. The ICESCR has not been incorporated into South African law through one of the three methods of transforming international agreements into domestic law described by Dugard and Coutsoudis.[87]

There exists a range of South African legislation in diverse areas of labour law, social security, housing, health care, education, science and culture that deal with themes covered by the Covenant. However, the Covenant itself – although giving rise to international law obligations upon ratification – is not a direct source of legal rights and obligations in South Africa's domestic legal order.[88] As noted above, the Committee expressed concern in its COBs at the lack of incorporation of the Covenant in domestic law, particularly where the Constitution does not expressly protect Covenant rights such as the right to work or the right to an adequate standard of

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[86] On the implications of these provisions regulating the status of international law in domestic law, see *Glenister v President of the Republic of South Africa* 2011 (3) 347 (CC) paras 179–202 (*Glenister*). See also the comprehensive analysis by M du Plessis & S Scott, 'The World's Law and South African Domestic Courts: The Role of International Law in Public Interest Litigation' in J Brickhill (ed) *Public Interest Litigation in South Africa* (2018) 46–91.

[87] See J Dugard & A Coutsoudis 'The Place of International Law in South African Municipal Law' in *Dugard's International Law* (note 20 above) 89–90.

[88] On the position with regard to ratified but unincorporated international agreements, see the succinct account of the legal position by Ngcobo CJ in his minority judgment in *Glenister* (note 86 above) para 92.

living. It recommended the incorporation of the ICESCR into South African domestic law and that steps be taken to permit the Covenant to be directly invoked before the domestic courts.[89]

As noted above, the exception to the rule of legislative incorporation is self-executing treaty provisions that are not inconsistent with the Constitution or an Act of Parliament. As Dugard and Coutsoudis note, the precise meaning of the concept is subject to legal and academic debate, and the authors are critical of the failure of the South African courts to address its meaning.[90] The CESCR regards self-executing provisions as those capable of immediate judicial enforcement. In addition to the duty of non-discrimination in the exercise of Covenant rights, the Committee has identified a number of rights which it regards as 'capable of immediate application by judicial and other organs in many national legal systems.'[91] These include the equal right of men and women to the enjoyment of Covenant rights (Article 3); fair wages and equal remuneration for work of equal value (Article 7(a)(i)); trade union rights (Article 8); protection of and assistance to children and young persons (Article 10(3)); the right to free and compulsory primary education (Article 13(2)(a)); respect for the liberty of parents to choose for their children schools other than those established by public authorities (Article 13(3)); the liberty of individuals and bodies to establish and direct educational institutions subject to minimum prescribed standards (Article 13(4)); and respect for the freedom indispensable for scientific research and creative activity (Article 15(4)). It has commented that any suggestion that the aforementioned provisions 'are inherently non-self-executing would seem to be difficult to sustain.'[92] In its subsequent General Comment No. 9 on the domestic application of the Covenant, the Committee has cautioned against 'any *a priori* assumption that the norms [in the Covenant] should be considered to be non-self-executing.'[93] It goes on to observe, 'many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.' The notion of 'self-executing treaty provisions' in the context of section 231(4) of the Constitution clearly requires elucidation

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[89] See the text to notes 62–67 above and accompanying text. This is in line with its approach in General Comment No. 9 (note 66 above) paras 4–8.

[90] Dugard & Coutsoudis (note 87 above) 81 86.

[91] General Comment No. 3 (note 33 above) para 5.

[92] General Comment No. 3 (note 33 above) para 5. See further General Comment No. 9 (note 66 above) paras 10–11.

[93] General Comment No. 9 (note 66 above) para 11.

by our courts. This doctrine has considerable potential to assist in aligning domestic law and legal remedies with the full scope of Covenant rights. The Committee's doctrine on self-executing treaty provisions could be of assistance in facilitating this alignment.

A further conduit for the Covenant to influence domestic law is section 233 of the Constitution, which provides that, '[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.' As Dugard and Coutsoudis explain, the Constitutional Court judgment in *S v Okah*,[94] 'requires courts to favour the interpretation of legislation that is in line with international law (including unincorporated treaties binding on South Africa) even where another reasonable interpretation of the legislation is possible but not in line with international law.'[95] Thus, the constitutional mandate to promote consistency with international law in statutory interpretation 'applies to all statutes, not only those that are ambiguous.'[96] In the context of the Covenant, the aforementioned approach is in harmony with the Committee's views that 'domestic law should be interpreted as far as possible in a way which conforms to a state's international legal obligations.' The Committee has further observed that,

> *when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter.*[97]

This is another underutilised provision in socio-economic rights litigation and adjudication in South Africa. It has the potential to play an important role in promoting interpretations of domestic legislation that give effect to economic, social and cultural rights in a manner that is consistent with the Covenant.

(b) The CESCR's doctrine and its potential for enriching South Africa's socio-economic rights jurisprudence

In the final section of this part, I briefly consider key doctrines of the Committee that have the potential to inform the development of South

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94 *S v Okah* 2018 (1) SACR 492 (CC) para 38.
95 Dugard & Coutsoudis (note 87 above) paras 91–92.
96 Dugard & Coutsoudis (note 87 above) 91.
97 General Comment 9 (note 66 above) para 15.

Africa's socio-economic rights jurisprudence.[98] For purposes of this article, I limit myself to four doctrines: minimum core obligations; retrogressive measures; the assessment of resource availability; and the application of economic, social and cultural rights in the context of business activities.

(i) Minimum core obligations

As noted above, the Constitutional Court has rejected the minimum core obligations as an independent cause of action in cases brought in terms of sections 26 and 27 of the Constitution. As correctly observed by the Court in *Grootboom*, the Committee's doctrine of minimum core obligations was developed in the context of fulfilling its mandate under the periodic state reporting procedure and in developing General Comments, not through a quasi-adjudicative procedure. The adjudicative context raises distinctive issues of institutional legitimacy and capacity[99] that are not present in the same form in the reporting procedure and the development of abstract General Comments. Nevertheless, it represents an important component of the Committee's doctrine as a floor from which State Parties must progressively advance to the full realisation of the relevant rights. Moreover, as the Court itself acknowledged in *Grootboom* and *TAC*, the concept of minimum core obligations can inform the assessment of the reasonableness of the states' acts or omissions.[100]

The evolving jurisprudence of the Committee under the Optional Protocol provides important indications of how this could occur. As noted above, South Africa has not yet ratified the Optional Protocol. Nevertheless, the jurisprudence of CESCR under the Optional Protocol is indicative of how important doctrinal concepts such as 'minimum core obligations' and 'retrogressive measures' can be integrated into a reasonableness model of review.

The reciprocal influence of the South African jurisprudence on socio-economic rights on the OP-ICESCR can be seen in Article 8(4) of the Optional Protocol, which reads as follows:

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[98] It is not possible to develop each of these arguments fully within the scope of this article. This task must await subsequent academic work.

[99] For a discussion of these and related adjudicative challenges in the context of socio-economic rights, see C Mbazira *Litigating Socio-Economic Rights: A Choice between Corrective and Distributive Justice* (2009) 27–51; Liebenberg (note 21 above) 43–78; KG Young *Constituting Economic and Social Rights* (2012) 133–142.

[100] See the text to note 40 above.

> *When examining communications under the present Protocol, the Committee shall consider* the reasonableness *of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt* a range of possible policy measures *for the implementation of the rights outlined in the Covenant.* (emphasis added)

An impasse in the drafting process of the Optional Protocol between states that wished to restrict the Committee's review mandate and those supportive of a more expansive mandate was ultimately resolved through the abovementioned provision, which was inspired by language borrowed from the *Grootboom* judgment.[101]

In its jurisprudence to date under the Optional Protocol,[102] the Committee has drawn on its doctrine of minimum core obligations in assessing the reasonableness and proportionality of the respondent State Party's conduct. A good example in this regard is the Committee's decision in *Calero v Ecuador*.[103] The 'author' (as a claimant is styled in the Committee's proceedings) was an elderly woman in poor health who, at the time of applying for early retirement, discovered that her membership of the voluntary affiliation scheme of the Ecuadorian Social Security Institute had been terminated. The ground of termination was that she had exceeded the permissible limit of six months of consecutive contributions prescribed in the Codified Statute of the Ecuadorian Social Security Institute. Some 13 years previously, her contributions to the scheme were interrupted for eight consecutive months while she was unemployed and performing unpaid domestic work at home. The Committee found that the failure to give timeous notice and the legitimate expectations created[104], violated the author's right to social security under Article 9 of the Covenant. The Committee further held that the legislative sanction of terminating membership of the scheme if an insured person has a break in contributions of more than six months was neither reasonable nor

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[101] See *Grootboom* (note 26 above) para 41. For a fuller account of this development, see B Porter 'Reasonableness' in *Optional Protocol Commentary* (note 7 above) 186.

[102] For an analysis of this jurisprudence, see S Liebenberg 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights under the Optional Protocol' (2020) 42 *Human Rights Quarterly* 48–84.

[103] *Calero v Ecuador*, Communication No. 10/2015, UN Doc. E/C.12/63/D/10/2015 (14 November 2018) (*Calero*).

[104] The Ecuadorian Social Security Institute continued to receive her contributions to the voluntary affiliation scheme long after her membership had ostensibly been terminated.

proportionate.[105] The disproportionality of the sanction was aggravated by the fact that the state did not have a non-contributory old-age pension benefit scheme that could serve as a safety net for the author.[106] Non-contributory pension schemes for persons who do not have other sources of retirement income were held to constitute a minimum core obligation imposed by the right to social security.[107] Such schemes were of particular significance to women who were most affected by poverty and more likely to experience interruptions in their social insurance contributions due to the gendered burden of unpaid domestic work.[108]

Thus, the failure to fulfil the minimum core obligation of establishing a non-contributory pension scheme was a relevant factor in assessing the reasonableness of the rules of the contributory social security scheme. According to the Committee's existing doctrine, a failure to fulfil minimum core obligations triggers a high burden of justification on the state to show that every effort has been made to mobilise all resources at its disposal to satisfy as a matter of priority this minimum core obligation.[109] The failure of the state to fulfil a minimum core obligation imposed by the right to social security constituted a weighty factor in the Committee's assessment that the rules of the contributory social security scheme were unreasonable.

The Committee's reasoning in *Calero* illuminates a path towards a more substantive model for reviewing the positive duties imposed by socio-economic rights in the context of South Africa's jurisprudence. Such a model would retain reasonableness as an overarching evaluative standard but impose a stricter standard of scrutiny approximating a proportionality analysis where claimants lack access to the basic necessities of life.[110] In determining what constitutes these basic necessities, regard should be had both to relevant empirical evidence as well as the Committee's elaboration of minimum core obligations in General Comments on various Covenant rights.

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105 *Calero* (note 103 above) para 17.1.

106 *Calero* (note 103 above) para 18.

107 *Calero* (note 103 above) paras 14.1 14.3 read together with paras 11.1–11.2.

108 *Calero* (note 103 above) para 14.2.

109 *Calero* (note 103 above) para 14.3, citing General Comment No.19 (note 46 above) paras 59–60.

110 As Cameron J noted in his separate concurring judgment in *Dladla v City of Johannesburg* 2018 (2) SA 327 (CC), 'depending on the right infringed, the reasonableness criterion may vary in intensity.' (paras 77–78). This apt observation would surely apply also to elements of the rights that implicate fundamental human needs.

(ii) Retrogressive measures

As noted above, the *Grootboom* judgment suggests that the doctrine of retrogressive measures is implicitly part of the South African Constitutional Court's understanding of the obligations generated by the concept of progressive realisation.[111] The early jurisprudence of CESCR under the OP-ICESCR also illustrates the potential role of this doctrine. In the communication of *Djazia and Bellili v Spain,*[112] the Committee held that states parties have an obligation to take all necessary steps, to the maximum of their available resources, to provide alternative accommodation to those at risk of homelessness following an eviction from their homes.[113] The state bears an onerous burden to demonstrate that it has exhausted all reasonable means of providing such alternative accommodation.

The scrutiny of the state's justification is intensified when the facts show that the lack of alternative accommodation can be attributed to 'retrogressive measures' adopted by state authorities. The evidence showed that the Madrid Housing Institute had sold a substantial amount of its social housing stock to private companies in order to help balance its budget.[114] The Committee held that this constituted a 'deliberately retrogressive measure' which required the state to demonstrate that the decision 'was based on the most thorough consideration possible' taking into account the rights in the Covenant and the utilisation of all available resources.[115] In essence, such retrogressive measures are subject to a proportionality test and must be shown to be temporary and non-discriminatory.[116] Spain was unable to demonstrate the necessity of the aforementioned retrogressive measures.[117] The Committee accordingly rejected its argument that, due to the large social housing backlog faced by the Madrid Housing Institute, it lacked the resources to provide alternative accommodation to the authors

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111 See notes 43–46 above and accompanying text.

112 *Djazia* (note 46 above).

113 *Djazia* (note 46 above) paras 15.2–15.5.

114 *Djazia* (note 46 above) para 17.5.

115 *Djazia* (note 46 above) para 17.6 read with footnote 35. The Committee cited General Comment 3 (note 33 above) para 9 and the Committee's Statement, *An evaluation of the obligation to take steps to the 'maximum of available resources' under an Optional Protocol to the Covenant*, UN Doc. E/C.12/2007/1 (21 September 2007) paras 6, 8 and 11.

116 *Djazia* (note 46 above) para 17.6 read with footnote 36, referring to its Letter to States Parties of 16 May 2012, and its Statement on *Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights* (note 12 above) para 4.

117 *Djazia* (note 46 above) para 17.6.

and their children following their eviction.[118] The *Djazia* communication is thus a practical illustration of the potential role that the concept of retrogressive measures can play in socio-economic rights litigation and adjudication in South Africa.[119]

(iii) Available resources

The Committee's jurisprudence on available resources and Covenant rights could also be instructive for South Africa's jurisprudence on socio-economic rights. Thus far the concept of 'available resources' in sections 26(2) and 27(2) of the Constitution has been interpreted in the South African jurisprudence as a restriction or limitation on the state's positive duties. As expressed by Yacoob J in *Grootboom*:

> *The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the State to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.*[120]

However, in subsequent jurisprudence, the Court has indicated that it would be prepared to interrogate the reasonableness of justifications by organs of state based on a lack of available resources.[121] Moreover, it has been accepted that where the relevant provisions of the Constitution impose a clear duty on an organ of state, they are obliged to allocate budgetary resources towards the fulfilment of this obligation. As the Constitutional Court held in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties*,[122] it is not satisfactory for an organ of state 'to state that it has not

[118] *Djazia* (note 46 above) paras 17.4–17.5.

[119] For a recent illustration of the application of the doctrine of retrogressive measures in the context of the rights to basic education (s 29(1)*(a)* and of children's right to basic nutrition in s 28(1)*(c)*, see, *Equal Education v Minister of Basic Education* [2020] ZAGPPHC 306 (17 July 2020) paras 46–59. The principle of retrogressive measures is also endorsed by the UN Committee on the Rights of the Child in its interpretation of the economic, social and cultural rights in the Convention on the Rights of the Child (1989): see, General Comment No. 19 (2016), *Public budgeting for the realization of children's rights,* UN Doc. CRC/C/GC/19 (20 July 2016) para 31.

[120] *Grootboom* (note 26 above) para 46 citing *Soobramoney* (note 53 above) para 11. See also *TAC* (note 36 above) para 32.

[121] See, for example, *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) *Khosa*') paras 58–62.

[122] 2012 (2) SA 104 (CC) (*Blue Moonlight*).

budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.'[123] The courts have also accepted that relevant organs of state should provide sufficient evidence to support resource constraints arguments.[124] Moreover, in the case of the unqualified socio-economic rights such as the right to basic education in section 29(1)*(a)* of the Constitution, the courts have affirmed that justifications for a failure to fulfil the relevant rights, including resource constraints, would fall to be evaluated under the stringent purpose and proportionality requirements of the general limitations clause (section 36).[125]

The CESCR has developed an extensive body of doctrine on interpreting the concept of 'the maximum available resources' in Article 2(1) of the Covenant.[126] Many aspects of its doctrine could assist in developing the interpretation of 'available resources' in the context of socio-economic rights policy-making, litigation and adjudication in South Africa. It is beyond the scope of this article to discuss the Committee's doctrine in depth. However, for present purposes, it is worth noting that the Committee does not view the concept solely as a shield for the state to defend its lack of progress in protecting or fulfilling the relevant rights. It interprets the concept to incorporate a positive duty on states parties to be proactive in mobilising sufficient resources for the fulfilment of its Covenant

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[123] *Blue Moonlight* (note 122 above) para 74. See generally paras 72–75.

[124] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 88.

[125] See, for example, *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA) para 36.

[126] See, for example, CESCR Statement on Resources (note 115 above). For an excellent synthesis of the Committee's doctrine and its implications for South African law, policy and jurisprudence, see International Commission of Jurists *A Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa* (2019) 133–166. See further: A Nolan 'Putting ESR-based Budget Analysis into Practice: Addressing the Conceptual Challenges' in A Nolan, R O'Connell and C Harvey (eds) *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social* Rights (2013), 41–57; O de Schutter 'Public Budget Analysis for the Realization of Economic, Social and Cultural Rights: Conceptual Framework and Practical Implementation' in KG Young (ed) *The Future of Economic and Social Rights* (2019) 527–623; R Uprimny, S Chaparro Hernández & AC Araúo 'Bridging the Gap: The Evolving Doctrine on ESCR and 'Maximum Available Resources''' in KG Young (ed) *The Future of Economic and Social Rights* (2019) 624–653. For an insightful proposal on the judicial review of resource allocation decisions based on Amartya Sen's theory of human capabilities, see S van der Berg 'The Need for a Capabilities-based Standard of Review for the Adjudication of State Resource Allocation Decisions' (2015) 31 *SAJHR* 330–356.

obligations through internal fiscal and financial policies as well as through seeking international assistance and co-operation when necessary.[127] The Committee will scrutinise whether the state has adequately prioritised its resource allocations to meet its minimum obligations,[128] and will subject retrogressive measures that reduce the resources available for economic, social and cultural rights to particular scrutiny and a proportionality-based justification standard.[129]

Furthermore, the Committee attaches great importance to good governance in the management of resources and emphasises the duty of states to avoid the loss of resources through corruption, maladministration, illicit financial flows and tax avoidance and evasion.[130] It has also emphasised the importance of 'transparent and participative decision-making processes' in the context of resource-related decisions at national levels.[131] The Committee's elaboration of the nature of the proactive duties generated by the concept of 'available resources' can be particularly instructive in developing the interpretation of the concept in the South African context.

(iv) Business activities

The final area that will be highlighted for purposes of this article is the application of the economic, social and cultural rights to business activities. This is a particularly salient issue in the South African context. As Justice Mbuyiseli Madlanga aptly observed in an extra-curial lecture:

> *Economic power still reflects that of apartheid. To a large extent, so does social power. Business after all benefitted from apartheid policy. Concentrated economic power, within the context of our peculiar racist history and present, may and does encourage abuse. …We cannot take a "business as usual" approach and maintain the status quo insofar as our private interactions are concerned.*[132]

[127] General Comment No. 3 (note 33 above) paras 13 and 14.

[128] General Comment No. 3 (note 33 above) para 10; CESCR Statement on Resources (note 115 above) paras 8(f) and 10(b).

[129] CESCR Statement on Resources (note 115 above) para 9; CESCR Statement on public debt and austerity measures (note 12 above), para 4. See also the concerns and recommendations by the Committee in its COBs on South Africa relating to austerity measures and their impact on economic, social and cultural rights: SA COBs (note 60 above) paras 18–19.

[130] See in this regard SA COBs (note 60 above) paras 16 and 17(d).

[131] CESCR Statement on Resources (note 115 above) para 11.

[132] MR Madlanga 'The Human Rights Duties of Companies and Other Private Actors in South Africa' (2018) 29 *Stellenbosch Law Review* 359, 363–364 (footnotes omitted).

The CESCR has paid increasing attention to states parties' obligations under the Covenant in the context of business activities, both within the state's national jurisdiction as well as extraterritorially. In the South African COBs, it expressed its concern regarding the living conditions of mineworker communities, recommending action to improve these conditions, including ensuring access to adequate housing, water, electricity, sanitation, health care, education and other social services.[133] The CESCR's work in this area has culminated in its adoption of General Comment No. 24 on state obligations under the ICESCR in the context of business activities.[134] As corporations and other private entities cannot be parties to an international human rights treaty such as ICESCR, reliance is placed on the doctrine of state responsibility to protect, regulate and ensure remedies in respect of human rights abuses by private actors. General Comment No. 24 represents an extensive elaboration of the State Parties' duties in this context. The Committee noted the possibility in certain jurisdictions of direct horizontal application of economic, social and cultural rights against business entities, whether in order to impose on such private entities (negative) duties to refrain from certain courses of conduct or to impose (positive) duties to adopt certain measures or to contribute to the fulfilment of such rights.[135] In the latter regard, it cited Madlanga J's judgment in *Daniels v Scribante*.[136]

The General Comment is instructive for its detailed elaboration of states' obligations to respect, protect and fulfil economic, social and cultural rights in the context of business activities. It also contains an elaboration of states' extraterritorial obligations to take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction (whether they were incorporated under their laws, or had their statutory seat, central administration or principal place of business on the national territory), without infringing the sovereignty or diminishing the obligations of the host states under the Covenant.[137]

Finally, the General Comment emphasises the importance of effective domestic judicial and non-judicial remedies for violations of economic,

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[133] SA COBs (notes 60 above) paras 37–38.

[134] General Comment No. 24 (note 13 above).

[135] General Comment No. 24 (note 13 above) para 4.

[136] 2017 (4) SA 341 (CC) paras 37–39. For a recent judgment affirming the horizontal duties of private parties in the context of the right to basic education in s 29(1)(*a*) of the Constitution, see *AB v Pridwin Preparatory School* 2020 (9) BCLR 1029 (CC).

[137] General Comment No. 24 (note 13 above) para 26. See further paras 25–37.

social and cultural rights by business entities.[138] It sets out a number of general principles and elaborates on how existing doctrines in this area, such as *forum non conveniens*, should be interpreted to facilitate access to justice in this context.[139]

In developing and strengthening legislation and jurisprudence relating to business and human rights in South Africa,[140] the Committee's extensive doctrine can provide important guidance in the specific context of economic, social and cultural rights.

V CONCLUSION

One of the laudable features of South Africa's transformative Constitution is its openness to international and comparative law influences. This is in sharp contrast to the insular approach of South African law, and the hostile relationship between South Africa and the international community during the apartheid era. Indeed the preamble of the Constitution proclaims that one of the purposes of its adoption is to '[b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'. Since democratisation, South Africa has had a long relationship with the ICESCR. The ICESCR was influential in the recognition and drafting of the economic, social and cultural rights in the Bill of Rights in the 1996 Constitution, and has been an important point of reference in litigation and jurisprudence on these rights in South Africa.

South Africa's ratification of the Covenant in 2015 presents a significant milestone and opportunity for aligning domestic law with the rights and obligations contained in this leading human rights treaty. A number of options are available for aligning South African domestic law with the Covenant. As discussed, the formulation of the socio-economic rights provisions in the Bill of Rights is substantially similar to that of Covenant rights and obligations. However, important rights contained in the Covenant such as the right to work and the right to an adequate standard of living are not entrenched in the South African Bill of Rights. One method of addressing this disjuncture would be a constitutional amendment in terms of section 74 of the Constitution to incorporate these rights in the Bill of Rights. A less drastic measure would be the adoption of legislation as contemplated in Article 2(1) of the Covenant to give effect to the latter

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[138] General Comment No. 24 (note 13 above) paras 38–57.

[139] General Comment No. 24 (note 13 above) para 44.

[140] For a recent study on the need for such development, see RL Kolabhai *Human Rights Obligations and South African Companies: A Transformative Approach*, unpublished LLM thesis, University of Stellenbosch (2020).

rights and provide effective judicial and other remedies for infringements. Whilst such legislation would be vulnerable to repeal or amendment, it would nevertheless constitute an important mechanism to give effect to Covenant rights in domestic law.[141]

This article explored the possibility of making use of the doctrine of self-executing treaty provisions in section 231(4) of the Constitution to incorporate other provisions of the Covenant, such as the right of all workers to fair wages and equal remuneration for work of equal value, directly into domestic law. In addition, the withdrawal of the declaration made by South Africa at the time of ratification in respect of the right to education was identified as necessary to achieve alignment with the provisions of the Covenant, as well as domestic jurisprudence on the interpretation of the right to basic education in section 29(1)*(a)* of the Constitution.

A further avenue for deepening the synergies between South African law and the Covenant is for the courts to rely on section 39(1)(b) of the Constitution to interpret socio-economic rights in ways that are consistent with the Committee's interpretation of the Covenant in its General Comments, Statements and COBs on State Party Reports. Four doctrinal developments in the Committee's work were highlighted as of particular relevance to South Africa's jurisprudence on socio-economic rights. These are the doctrines of minimum core obligations, retrogressive measures, available resources, and the application of Covenant rights in the field of business activities. The mandate in section 233 of the Constitution relating to the interpretation of legislation offers another important avenue for aligning domestic law with the Covenant.

Finally, the article noted that South Africa's own jurisprudence on reasonableness has influenced the standard of review enshrined in Article 8(4) of the Optional Protocol to the ICESCR. This Optional Protocol awaits ratification by South Africa as the next vital step in the journey towards deepening the synergies between the South African Constitution and the ICESCR.[142] Given that both instruments share the common

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[141] Another avenue to be explored would be the power conferred on Parliament by s 234 of the Constitution to adopt Charters of Rights. An analysis of the nature and effect of such a Charter is, however, beyond the scope of the current article.

[142] See in this regard, L Chenwi 'Correcting the Historical Asymmetry between Rights: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2009) *African Human Rights Law Journal* 23–51; L Chenwi 'An Appraisal of International Law mechanisms for Litigating Socio-economic Rights, with a Particular Focus on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the African Commission and Court'

goal of ensuring that the conditions for a dignified life for everyone are achieved, they should be closely aligned in efforts to overcome the twin scourges of poverty and inequality confronting South Africa.

in S Liebenberg & G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 241; F Viljoen & N Orago 'An Argument for South Africa's Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the Light of its Importance and Implications' (2014) 17 *PER/PELJ* http://dx.doi.org/10.4314/pelj.v17i6.09.

A FEMINIST PERSPECTIVE TO JUDGMENT WRITING[*]

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'The wise trial judge knows that human memory is only too fallible; perhaps he should bear in mind the Spanish proverb "memory, like women, is usually unfaithful!"' So said a very senior judge matter-of-factly.[1] This sets the scene for my discussion.

In the main, judicial officers speak through their judgments. In doing so, it is crucial that as judicial officers our concern should not only be about informing litigants what the outcome of a case and the reasons for it are. We should also concern ourselves with the 'how': how exactly do we communicate that outcome and reasons? In fact, how judicial officers communicate with litigants and witnesses is crucial at all stages of the adjudicative process.

In this paper, my focus is going to be on judgment writing, more specifically a feminist perspective to judgment writing. I will consider various manifestations of patriarchy, sexism and misogyny in judgments and – at times – in the adjudicative process at large. In doing so, I will look at historical and present-day manifestations. This will include instances where judicial officers consciously exhibit these three ills, those that are subtle but still conscious and those that – at the risk of being euphemistic – may be termed 'innocent'. The latter are manifestations of these ills that – although not intended – are readily discernible, and equally offensive or downright demeaning, to women. These are also observable to men who have a discerning eye. In addition, the paper will consider why women may also be guilty of these ills. Because these ills manifest themselves in other aspects of the adjudicative process, at times I will touch on these aspects as well. Lastly, the paper will grapple with possible solutions.

I cannot address the topic properly without first dealing with the concepts of 'feminism' and 'feminist'. Until I was asked to speak on this subject at this seminar, I had never applied my mind to the concepts. Holly Sanchez Perry defines feminism as—

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[*] Adapted for publication from an address delivered at a judges' seminar in Bela Bela, Limpopo, South Africa on 17 January 2020.

[1] *S v Nyembe* 1982 (1) SA 835 (A) 842G.

> *the belief in the social [and] political equality of men and women. It operates under the belief that sexism, specifically against women, is enduring, pervasive, systemic, cultural, and ingrained. Feminism is also being armed with the knowledge that women and men are intellectual and social equals, and operates as a movement that advocates gender equality for women and campaigns for women's rights and interests.*[2]

Correspondingly then, this means a feminist is a person who recognises the self-evident truth that women and men are equal socially, politically and intellectually. And because the recognition alone cannot be enough, a feminist advocates, if not fights, for the dismantling of the all-pervading belief amongst some, if not most, men that women are inferior.

Historically – and unfortunately to the present – our society, which is dominated by men, has been, and continues in many ways to be, patriarchal, sexist and misogynistic in outlook. Attitudes rarely, if ever, end at that. They often dictate the holder's actions and utterances. It is unsurprising then that the effect of patriarchy, sexism and misogyny has been to subordinate and oppress women and even subject them to horrendous acts of violence and psychological trauma.

Because attitudes do not end with how we view life but permeate our very being which, in turn, informs our conduct towards others, the law has not escaped the tentacles of the three phenomena of patriarchy, sexism and misogyny. After all, the law is largely informed by societal attitudes or views. And, on what are supposedly societal attitudes and views, the men's world-view predominates. Consequently, the law has often been tainted by these three phenomena. Our legal system has been characterised by a clutter of legal norms which are not only sexist but also unfairly

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[2] Sanchez Perry 'Intersectionality as an Institution: Changing the Definition of Feminism' (2018) 7 *Women, Gender and Law* 140 at 142. There are other definitions, e.g. by Katherine Bartlett, who defined feminism as 'a self-consciously critical stance toward the existing order with respect to the various ways it affects different women 'as women'' (K Bartlett 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829 at 833); and Bell Hooks, who considers feminism to be 'a movement to end sexism and sexist oppression [that] would enable us to have a common political goal', and explains that '[s]haring a common goal does not imply that women and men will not have radically divergent perspectives on how that goal might be reached' (B Hooks *Talking Back: Thinking Feminist, Thinking Black* (1989) 23). Narnia Bohler-Muller frames feminism as a 'fluid discourse. Feminist writers each have particular approaches, influenced by their own particular backgrounds, training and class' (Bohler-Muller 'Other possibilities? Postmodern feminist legal theory in South Africa' (2002) 18 *South African Journal on Human Rights* 614 at 619).

discriminatory against women. I can give a few examples, of which we are all aware. Without getting into the nitty-gritty of the exact norms that applied, a husband enjoyed marital power over his wife.[3] The effect was that she could not conclude contracts or sue or be sued without being assisted by her husband.[4] Before 1993, rape by a husband of his wife was not possible in law. This was either because women were deemed to consent irrevocably to all forms of sex for the duration of the marriage, or this was simply an invariable consequence of marriage.[5] Under customary law, a woman was regarded as a perpetual minor subject to the guardianship of her father or male guardian, and – if she got married – of her husband, notwithstanding her age.[6]

Hoffman and Zeffertt[7] expressed views on a rule that insisted on the corroboration of the evidence of a woman in sexual complaints. This rule plainly stemmed from sexist, misogynistic attitudes. Those views are not only cringe-worthy but are unequivocally abhorrent. They are:

> *Experience has shown that it is very dangerous to rely upon the uncorroborated evidence of a complainant unless there is some other factor reducing the risk of a wrong conviction in cases which involve a sexual element – a view that is currently enraging feminists and which has, as a result, led to a rejection of the need for caution by some lawyers, who should know better than to pander to trendy and emotional protests, but which, nevertheless, seems to have been justified from as early as Joseph's troubles with Potiphar's wife. The bringing of the charge may have been motivated by spite, sexual frustration or other unpredictable emotional causes. If a question of paternity is involved, the complainant may even have a financial motive in wishing to implicate someone who will be able to support the child.*[8]

These views were expressed in a leading text on the law of evidence and must have influenced many a lawyer.

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[3] PQR Boberg, B van Heerden, A Cockrell & R Keightley *Boberg's Law of Persons and the Family* 2 ed (1999) 161.

[4] Bonthuys et al 'The discriminatory history of South African law' in WA Joubert (ed) *Law of South Africa* 3 ed (2019) 71.

[5] *S v H* 1985 2 SA 750 (N); *S v Ncanywa* 1993 (2) SA 567 (CkA). This marital rape exemption was abolished by s 5 of the Prevention of Family Violence Act 133 of 1993.

[6] *Machika v Mthethwa* (55842/2011) [2013] ZAGPPHC 308 (24 October 2013) para 58.

[7] LH Hoffmann & DT Zeffertt *The South African Law of Evidence* 3 ed (1983).

[8] Hoffmann & Zeffertt (note 7 above) 455.

In addition to these instances that typify laws which expressly discriminated against women, there were instances where – in interpreting facially neutral laws – judicial officers adopted meanings that excluded women from benefits afforded by those laws. In the case of *Incorporated Law Society v Wookey*[9] the secretary of the Cape Incorporated Law Society – purporting to act in terms of legislation that was then applicable in the Cape Province – had refused to register the articles of Ms Wookey, a woman aspirant articled clerk. At issue on appeal was whether the neutral word 'person' in the legislation included women. The Appellate Division held that it did not. Ms Wookey thus could not become an attorney. A couple of years previously a similar decision had been made in *Schlesin v Incorporated Law Society* in respect of Transvaal legislation.[10] In *Wookey* the Appellate Division strongly relied on the reasoning in *Schlesin* saying that the judge, in that case, decided against Ms Schlesin based on the long-established *practice* not to admit women. That is circular logic. It does not answer the question why the 'practice' was in existence in the first place. Of course, we know why: sexist attitudes.[11]

If, as I say, the laws themselves were facially neutral, these decisions were most likely informed by the outlook on life of the judicial officers concerned. That outlook was one that saw women as undeserving of the benefits afforded by the laws in issue.

Judicial officers grow up in an environment where patriarchy, sexism and misogyny predominate. Therefore, that is likely to influence them.

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[9] 1912 AD 623.

[10] 1909 TS 363.

[11] The Appellate Division continued (in *Wookey*) and fortified its reasoning by relying on a Scottish case, holding:

> 'A similar question came before the Scottish Law Courts in the case of *Hall v The Incorporated Society of Law Agents* (38 Sc. L.R. 776) upon the application by a woman to order the society to enrol her for the first examination, which has to be passed by persons who intend to become law agents. In that case, also, the decision turned entirely upon the question whether women were included in the meaning of the word "person", as used in the 7th section of the Law Agents Act, 1873. Four of them held that the word "person" being an ambiguous term, must be construed in accordance with inveterate usage. "Accordingly", they say, "we interpret the word as meaning male person, as no other has ever been admitted as a law agent." Five of the judges expressed the following opinion: "We think that before the Act of 1873 women were not eligible to be appointed law agents, and that they are not made eligible by that Act."'

BJ Neblett says we are the sum total of our experiences, and immediately continues:

> *Those experiences – be they positive or negative – make us the person we are, at any given point in our lives. And, like a flowing river, those same experiences, and those yet to come, continue to influence and reshape the person we are, and the person we become.*[12]

The renowned and revered African-American poet and thinker, the late Maya Angelou, says something to similar effect, but with a positive spin to it. She says:

> *You are the sum total of everything you've ever seen, heard, eaten, smelled, been told, forgot – it's all there. Everything influences each of us, and because of that I try to make sure that my experiences are positive.*[13]

It is only natural that the environment that judicial officers grew up in may influence their decision-making. Justice Benjamin Cardozo confirms this thus:

> *There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judicial officers cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs. … In this mental background every problem finds it[s] setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.*[14]

In similar vein, Justice Dambuza – writing extra-curially – warns that we should 'be mindful that, apart from the history of the foundations of the South African legal system, the reality is that generally, under the cloak of judicial impartiality, individual judicial officers bring with them personal experiences that become part of their decision-making process'.[15]

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[12] BJ Neblett 'George (Part One)' http://bjneblett.blogspot.com/2013/02/george-part-one.html.

[13] M Angelou 'Maya Angelou Quotes' https://www.goodreads.com/quotes/1227209-you-are-the-sum-total-of-everything-you-ve-ever-seen.

[14] BN Cardozo *The Nature of the Judicial Process* (1921) 12–13, quoted approvingly in *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) para 42.

[15] N Dambuza 'Judicial Social Context Education in South Africa' (2018) 1 *South African Judicial Education Journal* 39 at 45.

Information available to judicial officers within their social context thus affects their judging.[16]

Happily, discriminatory laws of the nature I have mentioned as well as the judicial interpretation of facially neutral laws in the manner I referred to have no place in present-day South African constitutionalism; the Constitution stipulates that everyone is equal before the law and has the right to equal protection and benefit of the law, and proscribes unfair discrimination of whatever nature.[17] But the experiences that – according to Justice Cardozo – inform the judicial decision-making process[18] cannot disappear overnight. The experiences of judicial officers and their outlook on life are deeply ingrained. Therefore, it would be naïve to think that – just because we now have a Constitution that has a justiciable Bill of Rights – our decision-making will no longer be influenced by those experiences. Our experiences and the attitudes they engender do not disappear the minute laws with a patriarchal, sexist and misogynistic flavour are wiped off the legal plane. They will continue to be infused into the thought processes of some – if not most – of us.

A judicial officer who is a man may be completely oblivious to a factor that is crucial to the resolution of a dispute before him and which would have been quite obvious to a woman judicial officer. And, as male judicial

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[16] Dambuza (note 15 above) 39.

[17] Section 9 of the Constitution 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 Chapter 2: Bill of Rights 6 to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’

[18] Cardozo (note 14 above).

officers numerically dominate the judiciary, the men's perspective will in all likelihood dominate legal thought and jurisprudence. To the undiscerning eye, that perspective will especially have a veneer of neutrality, whereas the reality is that it represents only a partial, skewed view of reality.[19] The men's perspective may even result in biased factual assessments, as people – including judicial officers – tend to think in terms of stories they are familiar with, and fill in the gaps based on their own experience of the world.[20]

Needless to say, something must be done. As men in judicial office, it is only when we are alive to this reality that we may go some distance towards ridding ourselves of this negative influence.[21] Of course, that is not enough; the endpoint we should all strive for is to dismantle the patriarchal, sexist and misogynistic elements underlying our judgments. We can reach that endpoint if – in our judgment writing – we consciously embrace the truism that women are equal to men and that several phenomena affect women in a myriad of ways which are either not discernible or not readily discernible to men. And we should also be alive to, and – where that is called for – act in accordance with the fact that according to the concept of intersectionality these negative phenomena affect women differently. This is a concept that was coined by Kimberlé Crenshaw, a leading African-American legal scholar on race theory. Crenshaw says:

> *The problem with identity politics is not that it fails to transcend difference, as some critics charge, but rather the opposite – that it frequently conflates or ignores intra group differences. In the context of violence against women, this elision of difference is problematic, fundamentally because the violence that many women experience is often shaped by other dimensions of their identities, such as race and class. Moreover, ignoring differences within groups frequently contributes to tension among groups, another problem of identity politics that frustrates efforts to politicise violence against women. Feminist efforts to politicise experiences of women and antiracist efforts to politicise experiences of people of colour have frequently proceeded as though the issues and experiences they each detail occur on mutually exclusive terrains. Although racism and sexism readily intersect in the lives of real people, they seldom do in feminist and antiracist practices. And so, when the practices expound identity as 'woman' or 'person of colour'*

[19] R Hunter 'Can Feminist Judges Make a Difference' (2008) 15 *International Journal of the Legal Profession* 7 at 11.

[20] United Nations Office on Drugs and Crime *Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence against Women and Girls* (2019) 100.

[21] Cf SE Rush 'Feminist Judging: An Introductory Essay' (1993) 2 *Review of Law and Women's Studies* 632.

> *as an either/or proposition, they relegate the identity of women of colour to a location that resists telling.*[22]

According to Canadian Supreme Court Justice Claire L'Heureux-Dubé, 'making a difference', particularly with regard to dismantling patriarchal, sexist and misogynistic elements, should not be seen as the responsibility of only women judicial officers.[23] One practical method that judicial officers, both women and men, can use is one Katherine Bartlett identifies as 'asking the woman question'.[24] This entails examining and highlighting the gender implications of laws and rules that appear to be objective or gender neutral.[25] The question is essentially: What implications does this have for women? Have women been left out of consideration?[26] For example, the gendered, masculine view of the law often ignores human relationships and their interdependence, which, to a greater extent, are experienced by women through, for example, pregnancy, childbirth, nurturing and caregiving.[27] I consciously use 'to a greater extent' because some men do experience nurturing and caregiving, and transgender men may also experience pregnancy and childbirth.

'Asking the woman question' can, and should, lead to judgments that evince the feminist concern with intersectionality. That is, judgments that

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22 KW Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241 at 1242. She also explains that—

> 'dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis. … [T]his single-axis framework erases Black women in the conceptualisation, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group. In other words, in race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women.'
>
> (KW Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989 *University of Chicago Legal Forum* 139 at 140).

23 C L'Heureux-Dubé 'Making a Difference: The pursuit of a Compassionate Justice' (1997) 14 *Canadian Journal of Family Law* 7.

24 Bartlett (note 2 above) 837.

25 Bartlett (note 2 above) 837.

26 Bartlett (note 2 above) 837.

27 R Hunter 'Account of Feminist Judging' in R Hunter, C McGlynn & E Rackley (eds) *Feminist Judgments: From Theory to Practice* (2010) 21.

acknowledge that gender intersects with class, race, ethnicity, religion, sexuality and so on, in different ways.[28] The diverse and intersectional experiences of women are often not recognised or represented in law and legal adjudication.

In some jurisdictions like Australia, the United Kingdom and Canada, feminist academics have engaged in what is called the 'Feminist Judgments Project'.[29] These academics have written alternative judgments on significant legal cases, to engage in practical, real-life judgment writing from a feminist perspective.[30] Rather than write these as mere critiques of judgments, they have written them within the constraints of the legal system to which judicial officers are subject.[31] In 2004 the first such initiative was launched by a collective of Canadian scholars and lawyers under the auspices of the Women's Court of Canada.[32]

The 'Feminist Judgments Project' has proved pertinent from both intersectional and practical legal standpoints.[33] It contributes to a broader construction of a feminist judicial language; one that incorporates careful attention to issues of gender, sexuality, race and other components of human identity into judicial reasoning, while still abiding by precedent.

It is self-evident that, if male judicial officers heed the alternative judgments produced by the 'Feminist Judgments Project', that is bound to help infuse feminist perspectives into their judgment writing. And, given that patriarchy, sexism and misogyny persist in society, there is considerable scope for this.[34] One only wishes that there were such a project in South Africa as well.

The ills that women suffer at the hands of men include physical and psychological torment. This violation leaves raw emotional and psychological wounds that may last a lifetime. How we, as judicial officers, handle and decide cases at the centre of which is such violation may mean

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[28] Hunter 'Feminist Judgments as Teaching Resources' (2012) 2 *Oñati Socio-legal Series* 47 at 52.

[29] Hunter et al (note 27 above) 3.

[30] Hunter et al (note 27 above) 3.

[31] Hunter et al (note 27 above) 3.

[32] D Majury 'Introducing the Women's Court of Canada' (2006) 18 *Canadian Journal of Women and the Law* 1 at 1–2. The Women's Court of Canada is a feminist legal project bringing together academics, activists, and litigators to 'rewrite' Canadian Charter of Rights and Freedoms equality jurisprudence.

[33] LL Berger, BJ Crawford & KM Stanchi 'Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment' (2018) 47 *University of Baltimore Law Review* 167 at 179.

[34] Hunter et al (note 27 above) 31.

the difference between contributing towards healing or opening up the raw wounds even more. It is not enough that some of us judicial officers may not ourselves be subjecting women to horrendous acts of violence: acts which violate their dignity, their bodily integrity, their psychological wellbeing; indeed, acts which cause them to lose their self-esteem; their very sense of being. We each have an obligation to do something. When a conviction and sentence of, for example, a rapist are viewed *in isolation*, there may be no basis for faulting them and they may appear to serve the interests of justice. But if – in the process of getting there – the rape survivor was subjected to untold insults, insensitivity and all manner of demeaning conduct, to her the outcome may be empty justice; justice that exists only on paper. Worse still, there may be instances of acquittals or ridiculously lenient sentences as a result of sexist or misogynistic attitudes.

The violation of women within the court system – where they should be afforded justice – happens with disturbing frequency.[35] This is best illustrated by giving concrete examples. The examples are not given to shame the judicial officers concerned, but hopefully to highlight what we should not do or say.

The first example is the controversial case of Mr Robin Camp, a former Canadian Federal Justice who grew up and studied and later practised law in South Africa. His sexist comments during a sexual assault trial sparked international outrage.[36] The conduct complained of was that while presiding over a sexual assault trial in 2014, he said to the 'complainant, a vulnerable 19 year old woman, 'why didn't [she] just sink [her] bottom down into the basin so [the accused] couldn't penetrate [her]' and 'why couldn't [she] just keep [her] knees together,' that 'sex and pain sometimes go together … that's not necessarily a bad thing' and suggesting to Crown Counsel 'if [the complainant] skews her pelvis slightly she can avoid him''.[37] He acquitted the accused. The Canadian Judicial Council recommended his removal from judgeship. He resigned.

Here at home, we have had our fair share of intolerable judicial attitudes in matters involving the violation of women and children, in particular rape. So as not unduly to burden this piece, I will focus only on a few

[35] People Opposing Women Abuse *Criminal Injustice: Violence Against Women in South Africa* (Shadow Report on Beijing +15, March 2010) 19.

[36] The narrative is to be found in the Report to the Minister of Justice, 'Canadian Judicial Council Inquiry into the Conduct of the Honourable Robin Camp' (8 March 2017) (Judicial Council Report).

[37] Judicial Council Report para 17.

recent examples. The first is the matter of *S v Modise*.[38] The appellant was convicted of raping his wife. At the time of commission of the offence, he and his wife had not shared a bed and had not had sexual intercourse for almost a year. Divorce proceedings were pending. One night, without a word about it to his wife, the appellant went straight to the main bedroom which was used only by the wife at the time. When the wife later went to bed, she found the appellant in bed. She joined him in bed dressed in her briefs[39] and a nightdress. He asked to have sex with her. She turned him down. He grabbed her and took off her briefs. She was lying on her side. He throttled her and turned her over. As she now lay on her back, he tried to get on top of her. She managed to free herself. As she started to flee, he grabbed her nightdress. It got ripped off and she was left completely naked. She took a petticoat from a chair, hurriedly put it on and ran to the neighbours', where she spent the night. As she ran there, she fell and was injured by a fence.

In reducing an effective five-year term of imprisonment imposed by the Magistrate's Court, the High Court found mitigation in the fact that the appellant was—

> *a man whose wife joined him in bed, clad in panties and a nightdress. When life was still normal between them, they would ordinarily have made love. The appellant must, therefore, have been sexually aroused when his wife entered the blankets. The desire to make love to his wife must have overwhelmed him, hence his somewhat violent behaviour. He, however, neither smacked, punched nor kicked her. Minimum force, so to speak, was resorted to in order to subdue the complainant's resistance.*[40]

I cannot but read this to mean the sexual arousal made the appellant's conduct of forcing himself on his wife less reprehensible. This is reminiscent of the now jettisoned marital rape 'exemption'. Also astonishing is the use of the word 'somewhat'; the appellant's 'somewhat violent behaviour'.[41] To further trivialise the violence, the High Court described it as 'minimum force'. All this, in respect of a man who had throttled a woman, forcibly turned her over and was about forcibly to mount and then rape her.

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[38] [2007] ZANWHC 73.

[39] This is a conscious choice of word because I learnt – to my embarrassment – on the eve of submitting this piece to the journal that the word ordinarily used for women's briefs is seen as offensive by some. Imagine my embarrassment when I realised how close I was to being guilty *on record* of causing the *very* offence I am cautioning against.

[40] *Modise* (note 38 above) para 19.

[41] *Modise* (note 38 above) para 19.

This ends with the claim that the appellant resorted to this minimum force 'in order to subdue the complainant's resistance'. This too sounds like the complainant ought not to have resisted, hence the appellant's entitlement to subdue her.

As if that was not enough, the High Court concluded by saying:

> *It is true that the complainant was injured, outside the house when she fell, but the appellant himself did not inflict any injury on her directly. He never chased after her. No real harm or injuries resulted from the throttling. It is not in the interest of justice to send the appellant to prison. This case is not comparable to a case where a lady comes across a stranger on the street who suddenly attempts to rape her. An effective term of imprisonment is, therefore, inappropriate in this case.*

This comparison too conjures up the abhorrent marital rape exemption. Also, the court's view of the injuries disregards the crucial fact that, in and of themselves, rape and attempted rape are extremely traumatic. In any event, the physical injury that the wife sustained was the direct result of the husband's conduct. As a consequence of its views, the High Court imposed a wholly suspended five-year term of imprisonment.

At the centre of all the remaining examples is one judicial officer, an acting Regional Magistrate of the Umlazi Regional Court, KwaZulu-Natal. Many of her judgments on sentence have been reviewed and set aside by the High Court, which held that the sentences were 'shockingly inappropriate'.[42] The two that I have selected were the subject of a combined High Court review judgment.[43]

In the first of these matters, the *S v Vilakazi* matter, the accused was convicted of raping his nine-year-old daughter. After correctly emphasising the seriousness and prevalence of the crime of rape in the area, the acting Regional Magistrate found mitigation in a matter that had no factual foundation. The High Court says 'without cogent reason or evidence, [she] resorted to speculative hypotheses. … Although there was no evidence that the accused was not in his sound and sober senses when he raped his child, the magistrate stated:

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[42] See, for example, the unreported special review judgment of High Court of South Africa, KwaZulu Natal Local Division, Durban in the matters of *S v Vilakazi,* Review Case No. DR 81/19; *S v Mkhize* Review Case No. R82/19; *S v Dudula* Review Case No. R83/19; *S v Gumede* Review Case No. 84/19 paras 12 and 18.

[43] Note 42 above.

> *This Court believes that the accused was not honest regarding his state of sobriety on that day. Whether he had taken alcohol and how much and whether he had taken some dependence producing substance, like dagga or drugs, because really the Court does not understand what influenced his mind to commit such a serious offence.*[44]

Effectively, the acting Regional Magistrate created mitigation, which was that the accused was not in his sound and sober senses when he raped his nine-year-old daughter. In what the High Court describes as 'a shocking aberration', the acting Regional Magistrate decided to have mercy on the 'loving father'.[45] Despite the fact that in an offence of that nature the mandatory sentence, with the exception of where there are substantial and compelling circumstances, is life imprisonment,[46] she sentenced the accused to a wholly suspended five-year term of imprisonment.

In the second of these two review matters, the *S v Mkhize* matter, the complainant, a ten-year-old girl, had been raped by the accused on two occasions.[47] On the first occasion, the accused took the complainant from outside – where she was looking for her friend – into his 'male hostel' abode. He raped her. Afterwards, he kicked and threatened her that he had killed his own children. The subtext was obviously that if she dared tell anybody about the rape, he would kill her. On the second occasion, the complainant was on her way home, coming from the shop. The accused grabbed her, tied her up with a rope and taped her mouth shut. He then took her to his room where he raped her.

Yet again, the acting Regional Magistrate highlighted the seriousness and prevalence of rape in Umlazi and, therefore, the need for heavy sentences. She systematically itemised the following aggravating circumstances: the rape had caused the complainant physical injury; it had a serious psychological impact in that the complainant had become mentally unstable; the accused had not used a condom during the rapes and thus exposed the complainant to possible infection with HIV; and the accused had not shown any remorse. In this matter as well the applicable minimum sentence – unless there were substantial and compelling circumstances – was life imprisonment.[48] In what the High Court correctly describes as a *volte face*, the acting Regional Magistrate said she 'believe[d]' the accused's

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[44] *Vilakazi* (note 42 above) para 7.6.

[45] *Vilakazi* (note 42 above) para 7.6.

[46] Section 51(1) read with Part I of Schedule 2 to the Criminal Law Amendment Act 105 of 1997.

[47] *Mkhize* (note 42 above) para 7.3.

[48] See note 46 above and accompanying text.

children would suffer if life imprisonment were imposed. She then sentenced him to ten years' imprisonment, half of which was suspended.[49]

These examples illustrate what I said: that instead of getting justice before the courts, women who have been raped and subjected to other forms of physical and psychological violation may sometimes receive no justice at all or be left scarred even more. The last two of these examples are so extreme that some of us will not identify with them; we cannot see ourselves acting in this manner. The danger with that sense of comfort is that – through a missed nuance or an apparently innocent utterance – we may be equally guilty of conduct that is demeaning and injurious to women. And that may happen quite easily. However much we may try, those of us who are male judicial officers have not experienced what women have experienced; have not been subjected to the subtle abuse and insults that women have suffered at the hands of men; and, therefore, may not only miss the nuances and subtleties but may – ourselves – be perpetrators.

How do we – in practical terms – ensure that we do not miss the nuances and are not guilty of the subtle abuse; how do we rid ourselves of utterances that are demeaning and insulting to women or conduct that is in any other way injurious to women? I do not profess to have answers. I will proffer a suggestion or two. Of course, the problems can be addressed only if judicial officers accept that there is, indeed, something that needs to be remedied.

Something structured is perhaps to heed what Justice Dambuza is advocating. On a much broader front,[50] which – of course – must find application to an appropriate feminist approach to adjudication, she argues for formal social context education. I agree. She cites the example of a programme aimed at enhancing social context knowledge and skills, which allowed magistrates in the Eastern Cape to 'reflect on how they addressed witnesses, and many were made aware of their inadvertent use of racist and sexist language'.[51]

Formal remediation cannot be the only answer. Without themselves having the experiences of women, the best way for male judicial officers

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[49] In the third of the matters on review, the *Dudula* matter, the acting Regional Magistrate sentenced an accused who had raped a 15-year-old girl to a wholly suspended four-year term of imprisonment. This, despite the fact that the rape had serious consequences. The complainant suffered 'profound psychological and emotional trauma'. She failed a class. And she had to change schools as a result of being ridiculed by other school children as a result of the rape.

[50] 'Much broader front' in the sense that her focus is not only a feminist perspective to the art of adjudication.

[51] Dambuza (note 15 above) 46.

to recognise the offensive ills is by *truly* listening to women; to stories of their frustrations with subtle offence, and their critique of how men miss the offensive nuances, if not ills. Referring in part to the greater inclusion of women into the legal sphere in 1987, Menkel-Meadow observed that—

> *each time we let in a new excluded group, … each time we listen to a new way of knowing, we learn more about the limits of our current way of seeing. Rather than being threatened by new entrants into the legal profession and the law, we should be grateful for the opportunity to learn that perhaps there are new and other ways to do things.*[52]

Weiss and Melling explain that 'more prevalent than … outspoken misogyny is a kind of wilful deafness toward what [women] say'.[53]

The importance of the language used in judgments cannot be overstated. Even if the outcome and reasoning are correct, the use of certain terms and phrases may undermine a victim of sexual or domestic abuse. For example, a statement that an offender 'snapped', or was motivated by 'anger' or 'jealousy' may appear to attempt to explain the perpetrator's actions and ameliorate his responsibility.[54] In the process, damaging stereotypes may be reinforced.[55] Judicial officers should also avoid mutualising language, such as references to a 'stormy' or 'violent' relationship, where there is a clear abuser and victim.[56]

In whatever we do, at the very least the obligation we have as judicial officers is not to be complicit in the continued violation of affected women through what we do or say and, indeed, through what we allow those who participate in proceedings before us – litigants, witnesses, accused persons, and practitioners – to do or say. Crucially, this applies to *all* matters that affect women as women. And we must always be alive to the multiplicity of the ways in which women suffer disadvantage as a result of being women: intersectionality.

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[52] C Menkel-Meadow 'Excluded Voices: New Voices in the Legal Profession Making New Voices in Law' (1987) 42 *University of Miami Law Review* 29 at 52.

[53] C Weiss & L Melling 'The Legal Education of Twenty Women' (1987) 40 *Stanford Law Review* 1299 at 1336.

[54] E Buxton-Namisnyk & A Butler 'What's language got to do with it? Learning from discourse, language and stereotyping in domestic violence homicide cases' (2017) 29 *Judicial Officers' Bulletin* 49 at 51.

[55] For example, if a woman is assaulted or killed upon her entering a relationship with another person, references to jealousy and anger of her assailant or murderer reinforce a gendered expectation that women remain chaste, faithful and controlled (Buxton-Namisnyk & Butler (note 54 above)).

[56] Namisnyk & Butler (note 54 above) 52.

As a judicial officer – woman or man – you should never allow your voice to be drowned by the weight of a majority that – on your considered opinion – displays the insensitivity that I am cautioning against. To fulfil the obligation resting on each of us, you should readily dissent from the views of the majority where a majority judgment: is oblivious to, or does not reflect, a feminist perspective that is key to the resolution of a matter; fails to explore feminist and intersectional perspectives on an issue where they bear relevance to the issue at hand; or preserves or endorses – plainly or otherwise – patriarchy, sexism or misogyny. Although the dissent will not be the law, it will place the feminist view out there, and that view will help demonstrate an alternative way of thinking about the issue concerned.[57] Who knows? That dissent may become the majority of tomorrow.

This same result may also be achieved through a separate concurrence that brings to the fore such alternative thinking. This is illustrated by the separate concurrences of Khampepe J and Victor AJ – both women – in a recent judgment of the Constitutional Court in the *Tshabalala v S; Ntuli v S* matter whose subject was the offence of rape.[58] This is not to suggest that our male colleague, Mathopo AJ, who penned the majority judgment was not alive to the true nature of the offence of rape and the need for the court to pronounce with that awareness in mind. He very much was and, as I will show shortly, pronounced accordingly.

At issue in that case was whether a rape accused who had not personally penetrated the rape survivor could be convicted on the basis of the doctrine of common purpose. At that stage, it could not be said that there was clarity in our law that the doctrine of common purpose found application. There was a school of thought, the main proponent of which was Professor Snyman,[59] that took the view that rape was an offence which could not be committed through the instrumentality of another – 'the instrumentality argument'. About this argument, Snyman writes that 'if X rapes a woman while his friend Z assists him by restraining the woman but without himself having intercourse with her, Z is an accomplice, as opposed to a co-perpetrator, to the rape'.[60] Although being an accomplice to the serious crime of rape is itself serious, it would border on being euphemistic to call a rapist an accomplice. Mathopo AJ opened the judgment by making this point:

57 Hunter (note 19 above) 25.

58 *Tshabalala v S; Ntuli v S* 2020 (3) BCLR 307 (CC).

59 Snyman *Criminal Law* 5 ed (2008).

60 Snyman (note 59 above) 269.

> *The facts of this case demonstrate that for far too long rape has been used as a tool to relegate women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity. The high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa. Some men view sexual violence as a method of reasserting masculinity and controlling women.*[61]

And of the Snyman view he said:

> *The Snyman approach on which the applicants placed much stock in support of the argument is flawed. It perpetuates gender inequality and promotes discrimination. There is no reason why the use of one's body should be determinative in the case of rape but not in the case of other crimes such as murder and assault. I agree with the amici that the instrumentality argument has shortcomings because it seeks to absolve other categories of accused persons from liability, who may not have committed the deed itself (penetration) but contributed towards the commission of the crime by encouraging persons who fail to exclude themselves from the actions of the perpetrators. Permitting accused persons in similar positions as the applicants, and the other co-perpetrators to escape liability on the basis of common purpose is unsound, unprincipled and irrational.*[62]

Khampepe J and Victor AJ had other dimensions to add. Khampepe J first highlighted the intersectional nature of the crime of rape.[63] Debunking the notion that only monsters commit the crime of rape, she made the point that—

> *[t]he notion that rape is committed by sexually deviant monsters with no self-control is misplaced. Law databases are replete with cases that contradict this notion. Often, those who rape are fathers, brothers, uncles, husbands, lovers, mentors, bosses and colleagues. We commune with them. We share stories and coffee with them. We jog with them. We work with them. They are ordinary people, who lead normal lives.*[64]

One may ask: What is the point of this? Being alive to these realities may have a great impact on how a judicial officer approaches evidence. In a rape trial, a judicial officer should not subconsciously expect to see an accused that does 'look like a rapist'. In any event, what does a rapist look like? I will revert to this after the discussion on *Tshabalala*.

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[61] *Tshabalala* (note 58 above) para 1.
[62] *Tshabalala* (note 58 above) para 53.
[63] *Tshabalala* (note 58 above) note 38.
[64] *Tshabalala* (note 58 above) para 74.

Victor AJ highlighted the archaic patriarchal attitudes towards rape survivors, in particular the views expressed by Hoffmann and Zeffertt which I quoted earlier.[65] She added that

> *[o]ther archaic evidential obstacles were the adherence to the prompt complaint rule, multiple witness consistency, and the identification of the first witness to whom the rape was reported. All of these underpinned the continued gender bias against victims of sexual assault.*

She too dealt with the intersectional nature of rape.[66]

Reverting to the question of what a rapist looks like, surprisingly, the same acting Regional Magistrate who presided in the *Vilakazi*, *Mkhize* and *Dudula* matters[67] purported to know what a rapist looks and behaves like. In the matter of *Mbuyisa*,[68] during an enquiry in terms of sections 77 and 78 of the Criminal Procedure Act 51 of 1977,[69] the acting Regional Magistrate first commented on her observations of the accused, a man. She said the accused, Mr Mbuyisa, carried a women's purse and that this was 'just not normal for a man. The way he styles his hair, it is [as] if it is that of a female'.[70] A few pages later, she made the startling conclusion that – based on Mr Mbuyisa's habit of performing 'house chores' like doing the washing – he was 'clearly … not interested in females, in sexual relations with females'.[71] She said this without reference to the earlier observations about the purse and hairstyle. But it is unlikely that these did not also

65 *Tshabalala* (note 58 above) para 81.

66 *Tshabalala* (note 58 above) para 92.

67 See note 42 above.

68 *S v Mbuyisa* Umlazi Regional Court Case No. RC46/2014.

69 Section 77 provides that '[i]f it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79'. Section 78(1) provides that a person who, when committing an offence, is – by reason of a mental illness or mental defect – incapable of appreciating the wrongfulness of the conduct constituting the offence or of acting in accordance with an appreciation of the wrongfulness of the conduct shall not be criminally responsible for such conduct. Section 78(2) provides that 'in the case of an allegation or appearance of mental illness or mental defect, the court shall, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79'.

70 *Mbuyisa* (note 68 above) 126 of transcript of hearing.

71 *Mbuyisa* (note 68 above) 129 of transcript of hearing.

influence this conclusion. She closed the conclusion by categorically saying that she 'does not believe' that Mr Mbuyisa is interested in women.[72]

The likelihood is that had the acting Regional Magistrate been trying Mr Mbuyisa for rape, she would have acquitted him on this basis alone. Fortunately, what was before her was the enquiry in terms of sections 77 and 78 of the Criminal Procedure Act.[73]

The focus of my views has largely been on male judicial officers. Understandably so. But there is a concept known as internalised sexism. This 'occurs when women enact learned sexist behaviours upon themselves and other women'.[74] A study by Bearman et al[75] says that sexism manifests not only in the form of exceptional incidents (such as sexual harassment) but also through mundane practices within everyday interactions. The study involved the analysis of conversations between 45 pairs of women friends to assess in what form and how often internalised sexism appeared. It was found that internalised sexism fell into four categories: assertions of incompetence (an internalised sense of powerlessness); competition between women (resulting from the tendency of people to compare themselves with others in their ingroups rather than to people in relatively privileged groups); the construction of women as objects;[76] and the invalidation or derogation of women.[77] According to the study, on average

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[72] *Mbuyisa* (note 68 above) 129 of transcript of hearing.

[73] At the end of the enquiry she found Mr Mbuyisa 'not guilty by reason of mental or intellectual disability'. On review the High Court of South Africa, KwaZulu Natal Division, Pietermaritzburg set that decision aside and declared that Mr Mbuyisa was fit to stand trial and ordered that he be tried before a different magistrate (*State v Mbuyisa* Case No. DR190/2019 delivered on 18 December 2019).

[74] S Bearman, N Korobov & A Thorne 'The Fabric of Internalized Sexism' (2009) 1 *Journal of Integrated Social Sciences* 10 at 10.

[75] Bearman et al (note 74 above) 10.

[76] Construction of women as objects occurs when women refer to themselves, a conversational partner or another woman on the basis of 'how her physical person is or might be seen by another from the outside'. According to Bearman et al, '[t]hese instances frequently sexualise the bodies spoken of or compare them to an external standard of appearance' and 'the woman's personality characteristics, behaviour or relationship to the speaker' are not referred to (Bearman note 74 at 20).

[77] Instances of invalidation and derogation 'sometimes consist of suggestions that a woman's thoughts, opinions, interests, feelings, reactions, or responses are invalid. … Derogation includes identification of negative traits or characteristics, and epithets that would be considered sexist coming from a man.' (Bearman note 74 at 20–21).

11 such practices occurred per 10-minute conversation, which emphasises the routine nature of internalised sexism.

The short point is that the notion of internalised sexism tells us that the decisions of some of our women colleagues are not immune to the negative phenomena of patriarchy, sexism and, possibly, even misogyny. The *Mbuyisa* judgment[78] and the *Vilakazi*, *Mkhize* and *Dudula* judgments,[79] all of which have shocking utterances and conclusions, were penned by a woman judicial officer. Whether that was as a result of internalised sexism or other reasons does not matter much. What matters is that they are illustrative of the point of substance; women judicial officers can be and sometimes are guilty of the ills I am addressing. Thus we can only win the fight against the danger posed to judgment writing by the dominance of these phenomena if our women colleagues recognise that some among them may also subconsciously be operating under the influence of this dominance.

To conclude, for us judicial officers it cannot be business as usual. We should forever be alive to the reality that for far too long the law, including judge-made law, has been characterised by patriarchal and – as illustrated by the views of Hoffmann and Zeffert and the opening *S v Nyembe*[80] *dictum* – sexist, misogynistic attitudes. It lies with each and every one of us consciously to do something about this.

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78 *Mbuyisa* (note 68 above).

79 Reviewed jointly under Review Case No. DR 81/19 in the High Court of South Africa, KwaZulu Natal Local Division, Durban (note 42 above).

80 *S v Nyembe* (note 1 above).

THE 'FAMILY HOUSE', THE LIVED EXPERIENCE OF TOWNSHIP DWELLERS AND THE PROSPECTS OF JUDICIAL INTERVENTION

ROLAND SUTHERLAND

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I INTRODUCTION

The phrase 'family house' ought to conjure up an image of harmony, nurturing, and safe refuge. In the townships, it is not always so; instead, strife, betrayal, deceit, and competition for survival are the watchwords. The family house is sometimes a site of struggle; a phenomenon, as much a place, because of the intersection of an individualistic ideology of property owning, the economics of poverty and the inadequacies of the law to meet expectations. In short, the 'family house' is a stage for human tragedy, the roots of which dystopia have been, and continue to be, nourished by the legacy of apartheid.

This article addresses an aspect of the legal framework of township home ownership pursuant to the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 (as amended in 1993) (the Conversion Act).[1] It further analyses examples of High Court litigation about rival claims to possession of houses. A critique is offered about well-intentioned policymaking conceived to redress the denial of home ownership to Africans and the unintended consequences of its shortcomings. I contend that law reform is required to take social realities into account, that administrative procedures must be made transparent and genuinely accountable and that, in the absence of these steps, social justice as contemplated by section 26 of the Constitution, shall continue to be thwarted.[2] I argue that a case exists for judicial supervision to be exercised over the process of transfer of ownership

[1] The Conversion Act has a sister statute, the Upgrading of Land Tenure Rights Act 112 of 1991 (ULTRA) which reflects a similar mindset and is tangentially alluded to in the Conversion Act.

[2] Section 26 of the Constitution provides:

'(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

of township houses for policy reasons similar to those that inspired the advent of judicial supervision over sales in execution of homes initiated in *Jafta v Schoeman*[3] and over foreclosures on mortgages, as initiated by *Gundwana v Steko Development CC*.[4]

II HISTORY AND SOCIAL CONTEXT

The beginning, for our purposes, is the procession of policy retreats from apartheid over decades, incrementally acknowledging that Africans were permanently in the towns. In the face of popular insurrection, a critical

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(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

[3] 2005 (2) SA 140 (CC) paras 55–56*:*

'Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution. The crucial difference between the provision of judicial oversight as a remedy and the possibility of reliance on sections 62 and 73 of the Act is that the former takes place invariably without prompting by the debtor. Even if the process of execution results from a default judgment the court will need to oversee execution against immovables. This has the effect of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act.

It would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight. However, some guidance must be provided. If the procedure prescribed by the Rules is not complied with, a sale in execution cannot be authorised. If there are other reasonable ways in which the debt can be paid an order permitting a sale in execution will ordinarily be undesirable. If the requirements of the Rules have been complied with and if there is no other reasonable way by which the debt may be satisfied, an order authorising the sale in execution may ordinarily be appropriate unless the ordering of that sale in the circumstances of the case would be grossly disproportionate. This would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless.'

[4] 2011(3) SA 608 (CC).

gear change to grant long leases was made. It ultimately led to a system to confer ownership rights in 1993.[5]

The system of allocating houses was administered by the local authorities, and later by special administration boards, all called in this article, simply, the Authority. A dwelling owned by the Authority was rented to a person by permit. That person (usually, but not always, a man) became *the permit holder*, a socially significant status in the context of the times because it was concrete proof of an entitlement to live in the town.[6] The permit holder was allowed to have as cohabitants, typically, a wife, children and, as time went by, grandchildren and great-grandchildren and sometimes siblings and their families. All these persons were dependents, or notional dependents, of the permit holder and their right to dwell in that house hung entirely on their names being lawfully registered on the permit. Millions lived in townships under this regime.

Then, during the last gasps of apartheid, the Conversion Act was enacted in 1988. The ideological premise was to confer, initially, leasehold rights and, later, from 1993, ownership rights on an occupant, an individual, typically the permit holder, or an heir. A conventional common law real right vested by way of an entry in the deeds register as 'owner'. Axiomatically, it carried with it the full right to rent, encumber, bequeath, or sell.

The risks in the societal implications of this policy choice were not given due weight. Paradoxically, it was a correction of an injustice, but without an appreciation of the dynamics of the lived experience of people in the townships, and in particular, indifferent to the notion that all who were members of a family linked to a house had a practical interest in the house being a *de facto* family asset, rather than a tradable asset. The policy choice of conferring individual title to property on the same footing as hitherto monopolised by white people trumped a more nuanced assessment of what the people affected by the choice really needed. An effort was made administratively, in the 1990s, *to offer protection of rights of occupancy by the non-owners by the encouragement of* '*family house agreements*', an example of which

[5] For an expansive account of this development, see *Nzimande v Nzimande* 2005 (1) SA (W) paras 28–37 per Jajbhay J.

[6] The gender discrimination issue is resolved: *Rahube v Rahube* 2019 (2) SA 54 (CC) held that ULTRA is unconstitutional in so far as females are excluded by conferring property rights only on the head of the family who was, in the terms of s 2(1) of ULTRA, a male. The Conversion Act *per se* does not evince an inherent gender bias. A permit has been held to be an asset in the joint estate of a married couple: *Moremi v Moremi* 2000 (1) SA 936 (W).

is referred to later, but the effort was meek and ineffective, as illustrated in the case law. In the post-Conversion Act era, intense competition between socially vulnerable occupants and the member of the family who was the successor-owner arose; tragedies followed.

The housing shortage is well known, hence the burgeoning informal settlements around every town. In a social environment of chronic under-supply of affordable housing, a brick house – with access to electricity and water and to public transport, and, perhaps, in reasonable proximity to shops, to schools and to clinics – is invaluable. Moreover, many 'houses' are extended by backyard rooms to accommodate sub-units of an extended family.[7] The family house is often a cluster of sub-family households.

In a household comprising multiple generations, where often, all or most adults are jobless, and have young children, the vulnerable occupants' dependence on the belief that they would forever enjoy the refuge of the family house is acute. The policy choice of conferring home ownership on an individual, who could legally alienate the property, therefore, runs counter to the expectations of all other occupants. In families stricken by chronic poverty, *their house is their castle, inviolate, and belonging to all; the 'owner' being a mere custodian and the family's collective welfare paramount.*

The roots of a perspective of a home held in common by a kin-group can be argued to reflect a deep-seated ethical and cultural norm in traditional African social custom. That dimension of the belief in the idea of the family house is beyond the scope of this article but its influence cannot properly be left out of account.[8] This article seeks to emphasise the idea of the family house as primarily a local response to the lived experience of poverty and shortage of housing. Even absent traditional African social practice, the idea of the family house enters the collective consciousness of the urban proletariat because of the condition of perpetual deprivation. In an era of plentiful employment and of plentiful housing, the family house concept might not really be needed.

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[7] In 2019, South Africa Survey (IRR, Johannesburg) 742, Stats SA figures are reported: between 1996 and 2017, brick structures increased by 120%, yet backyard brick dwellings increased from 403 334 to 869 000 and backyard shacks from increased from 483 465 to 620 000; and in 2017, 16% of Africans still lived in informal dwellings.

[8] Maxim Bolt & Tshenolo Masha 'Recognising the family house: a problem of urban custom in South Africa' (2019) 35 *SAJHR* 147–168 address the African traditional cultural influences in the popular conceptualisation of the family house, and also recognise what they call 'urban custom.'

III THE MECHANISMS OF THE CONVERSION ACT

Initially, leases were granted to permit holders who became common law lessees.[9] Then in 1993, the Conversion Act was amended to confer ownership on occupants. The administrative machinery remained the same. In 1996 the provincial governments were vested with the power to implement the transfers of ownership.[10] In Gauteng, a provincial statute was enacted which mirrors the Conversion Act.[11]

The system had four main steps: (1) an enquiry into occupancy; (2) a 'declaration' of a specific person as the owner; (3) a publication of the declaration, also a right of any aggrieved competitor to an administrative appeal and thereafter an appeal to a court; and (4) registration in the deeds register of the new owner's title. Regulations were promulgated to facilitate these administrative processes.[12]

Prior to the enquiry *per se*, the records of the Authority must be consulted to see who occupies the site 'by virtue of a site permit'.[13] Notice of the enquiry is posted at the office of the Authority and published in either the official gazette or an English or Afrikaans newspaper circulating in the area.[14] Personal service is required of the notice on the person who is the 'occupier' according to the records of the Authority.[15] A notice must be served at the site of the house on a person 16 years or older. Both forms of service are required. The enquiry takes place not less than 14 days afterwards.[16]

The purpose of the enquiry is ultimately to 'declare' one or more individuals as having been 'granted … ownership in respect of the site'.[17] The inquiry has to be conducted in a prescribed manner.[18] In particular, an

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[9] Section 6: The permit holder became ipso facto a lessee, at rentals no higher than amounts payable immediately before the statute took effect, subject to the lease being terminable on three months' notice. Section 11 preserved putative rights to acquire the status of lessee.

[10] The transfer of power was pursuant to s 235(8) of the Interim Constitution Act 200 of 1993 and by s 2(2) of the Land Administration Act 2 of 1995.

[11] Conversion of Certain Rights into Leasehold or Ownership Amendment Act 7 of 2000; see also, Gauteng General Law Amendment Act 4 of 2005.

[12] Government Notice 1043 *GG* 13230 of 17 May 1991.

[13] See Regs 2(1). In addition, the Authority is empowered by s 7 to access any record anywhere held by an Authority, relevant to the enquiry.

[14] Section 2(1); regs 3(1)*(b)*.

[15] Regulation 3(2)*(a)*.

[16] Regulation 3(2)*(b)*.

[17] Section 2(4) Conversion Act.

[18] Section 2(1) Conversion Act.

opportunity to testify by any claimant is peremptory. If nobody responds to the notice, a declaration could nevertheless be made,[19] based on the records.[20] In addition, witnesses may be subpoenaed.[21] They must be questioned in a public hearing.[22] *The enquiry, in other respects, is not required to be in public, an aspect that has proven to be problematic because, as illustrated later, of officialdom's failures to act correctly.*

In the enquiry, the *prima facie* occupier as *per* the records, is called upon to confirm *actual* occupation. In addition, the permit holder is required to disclose if any transaction occurred with another person to *de facto* alienate the permit holder's rights, even though, axiomatically, no lawful power to divest such rights exists. A putative successor in title is called upon to substantiate a right to be declared owner. The Authority is empowered to give *de jure* recognition to any *de facto* alienation effected by the permit holder.

There might be other persons who, either as co-occupiers or despite being absent from the house, could assert a claim to be declared the owner. These persons would include a person who was an heir, testate or intestate, of the last 'recorded occupier'.

After the declaration is published, any aggrieved person may appeal to the relevant Member of Executive Council (MEC) of the Province, and if still aggrieved may appeal to the High Court as if the MEC's decision was a decision of a Magistrate.[23]

Once these steps are exhausted, the declaration of the selected person is presented to the Registrar of Deeds who registers the ownership and issues a deed of transfer. Thereby a real right in the property is vested in the new owner.[24]

IV CRITIQUE OF THE CONVERSION ACT

No contract is concluded for the transfer of ownership. This decision is not an adjudicative one, determining existing, but perhaps uncertain, rights. The process is entirely administrative. The exercise of the discretion *creates* the right of ownership.[25] The Authority, in effect, affords ownership by a

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19 Regulation 4(7).

20 This possibility is an obvious space for fraud to flourish.

21 Regulation 6(1).

22 Regulation 6(6).

23 Section 3(5).

24 Section 5.

25 *Nzimande v Nzimande* 2005 (1) SA 83 (W) paras 54–56; see too, *Moloi v Moloi* (20175/2010, 14628/2012) [2012] ZAGPJHC 275 (26 October 2012).

unilateral act. The official determines facts about who really is in occupation and who, if anyone, has the better claim having regard to dealings about the house. The statutory and regulatory framework offers little substantive guidance as to the appropriate factors which must be weighed, other than an implication that *actual* occupancy is primary. Ultimately the selection of the person to be declared the new owner is a value judgment.

Being a wholly administrative process, despite requirements for public notice, the public dimension is peripheral. Although, for good order, the publication of notices in the gazette and in English (and Afrikaans) newspapers is appropriate, the reality is that such notice is unlikely to reach potentially interested persons; it is merely form over substance.

The prospect that all interested persons will genuinely have the benefit of being fully informed about the process and its implications is slim. The process does not contemplate the taking of legal advice prior to or during the enquiry.

As will be illustrated by the examples from the case law referred to shortly, an expectation that officials will act diligently is in vain. Patent errors, failure to follow the prescribed procedure, and opportunity for fraud are enabled by the opaque process. This lack of transparency and concomitant lack of accountability is a dimension of the system that is structural and warrants reform.

V DISPUTES ABOUT THE FAMILY HOUSE IN THE CASE LAW

A selection of the typical range of disputes is described.

In *Hlongwane v Moshoaliba*[26] the quintessential tragedy is illustrated. The initial permit holder, and father of four siblings, was declared owner. He died intestate. The four siblings were called by the Authority to address the future ownership and offered the prospect of joint undivided quarter-shares in the house. They declined. They decided that D, the eldest, should become the owner as 'custodian' for the rest. Facilitated by the officials, a 'family house agreement' was concluded in writing and D was registered as owner. Years passed. The siblings fell out; D moved elsewhere. Years again passed. Then M turned up to say she had bought the house from D and the three siblings should vacate. The house had already been registered in her name.

Eviction proceedings followed. The siblings countered with an application to set aside the registration of the property in M's name on the

[26] (A5009/2017) [2018] ZAGPJHC 114 (2 February 2018).

grounds of their rights under the family agreement. The application failed. M was a *bona fide* third-party purchaser, with unassailable title. The siblings had a personal claim against D. But even if D could pay 75 per cent of the price of the house he had acquired for nothing, the family home was lost. The siblings had not been advised to enter a caveat in the deeds register, supposing the Registrar would do so; D was not in law, a nominee owner or a trustee. D misappropriated his siblings' equitable interest in the house and upended their lives. In a contest between the ideology of individual title to property and the belief in a 'home' being a family resource, the individualistic right trumps the collectivist social practice. Only through formal joint ownership is there security of occupancy.

It might be thought that the siblings brought this debacle on themselves by rejecting the express suggestion of joint undivided shares. But, were the siblings properly informed of the implications of their decision? Had they appreciated the implications, would they, being fully informed, have consented to D being the sole owner? Plainly, the social practice of deference to the eldest male relative was a major influence in the choice made. This norm prevailed over the prospect of joint ownership. In privileging individual title to remedy an injustice the policy-makers scored a colossal own goal because the effect of the Conversion Act has been inadvertently to undermine section 26(1) and (2) of the Constitution.

The consequences of *Hlongwane* can be compared to the circumstances addressed in *Jafta* where a perfectly lawful procedure was hijacked by unscrupulous persons to take advantage of debtors who had defaulted on modest repayments but whose equity in their homes was, in relative terms, considerable, and who would likely be homeless after the execution sale of the house. The courts intervened because it was patent that the law was being manipulated to achieve morally reprehensible outcomes. Upon the hook of section 26 of the Constitution, a remedy for the egregious conduct was conceived by judicial supervision of the process. Similarly, in *Gundwana,* the loss of a home upon foreclosure was re-conceptualised within its proper social context and regulated again by judicial supervision. The role of the courts in supervising evictions is another important example, again where homelessness is a risk.[27] The advent of judicial supervision of outwardly lawful processes is a profound development in our legal practice, too large a phenomenon to address fully here. For present purposes, it suffices to recognise that, licensed by the Constitution

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[27] In *Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) it was held that in an eviction the court must *mero motu* investigate the relevant facts that impinge on whether an eviction is just and equitable.

to advance its values, the appetite of the courts for judicial assertiveness is one of the trends of post-1994 jurisprudence.

In another example, *Shai v Makena Family*,[28] the Makena family occupants were subjected to an eviction application by Mr Shai, the *bona fide* third-party purchaser. At the time the Makena family had occupied the house for 50 years. In 1960, V and her three children, A, E and P, took occupation. At that time, the Authority would not issue a permit to a woman. Instead, it was issued to A, the eldest son. A married and left, never to return. P, at V's instance, became the permit holder. P subsequently married M whereafter P and M were granted joint ownership of the house in 1998, although no enquiry, as required, occurred – an example of officialdom's dereliction. The interest of the matriarch V was totally overlooked. P and M divorced and M left, never to return. Their joint estate was divided and they did not declare the house as an asset. Both P and A died. V expressed the wish that A's son, Monty, inherit the house. V died. P's and V's estates were not wound up. The records of the Authority still reflected P and M as owners.

M, who had married into the Makena family then, acting unilaterally, sold the house to Mr Shai. In the inevitable eviction application, it was contended that P and M always knew the 'proper owner' was V, and thus M could not conclude transactions about the house. The court held that neither P nor M could have intended to acquire ownership of the property. Nor could either of them alienate it. Confusingly, the court also seemed to assume the house was in P's estate. The court refused the eviction and ordered E to be executor to wind up the estates of V and P, leaving open the underlying question of who would ultimately obtain ownership. The court remarked, in passing, perhaps unconvincingly, that the Makena occupants might have recourse against the transfer of ownership to Mr Shai who, in turn, might have a right of recourse against M.[29] In law, that is unlikely if Mr Shai was a *bona fide* third-party purchaser and transfer had already been registered. On the approach in *Hlongwane* the house, post-registration, was lost to the Makena family. How might the Makena family get justice?

In *Nzimande v Nzimande*,[30] the permit holder, J, died and his younger brother, B, inherited the house according to custom. The Authority issued a permit to B by way of a cession of J's permit. J's wife, W, was not considered merely because she was female. After the Conversion Act became effective, B and W each sought a declaration to be owner. B was

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28 (2013) JDR 0608 (GNP).

29 *Shai* (note 28 above) para 49.

30 2005 (1) SA 83 (W).

not, at that time, an occupant. W was a long-time occupant before and after the cession of the permit. W was declared to be the owner. B appealed. The court, in noting the decision in *Bhe v Magistrate, Khayelitsha,*[31] held that the gender discrimination implicit in the cession to B rather to W, was unconstitutional. This point was, however, moot by then. B lost his claim, primarily because he was not an occupant. The court upheld the declaration of ownership to the occupant, W.

In *Khwashaba v Ratshitinga*[32] the widow of S, the initial permit holder, agreed that K, their son, be the permit holder to get funding to extend the house. K subsequently was granted a leasehold. K married R in community of property. They divorced in 1991 and R claimed a half share of the house from the joint estate. Then K's 'share' of the lease was sold to R who applied to evict the extended family of K. They resisted, claiming the house was never the exclusive property of K, who held it on their behalf. The court held that K had no exclusive title but was merely a co-lessee. In addition, by 2014, when the eviction application was launched, co-ownership had been granted to K and R without an enquiry and without regard to the interests of other occupants. The court thus held that the conferral of ownership on K and R was invalid and so too the sale of the half share. The court ordered an enquiry under the Conversion Act.

In *Moloi v Moloi*,[33] the matriarch, V held the initial permit. A and H were her sons. H married R. When V died in 1991 A lived at the house; H and R lived elsewhere. At a family meeting it was proposed that H 'be considered for the tenancy of [the house, which would] … be regarded as a family house'. No agreement was reached, and the decision was deferred to the Authority, which awarded the permit to H. Thereafter, in terms of the Conversion Act, H and R were, in 1998, after an enquiry in which a nephew competed for ownership, declared to be owners and registration followed. Meanwhile, A was imprisoned from 1994 to 2004. Upon his re-emergence into society, he sued R, H having presumably died by then, and challenged the title of R, who had married into the family, based on an alleged fraudulent failure of H to disclose A's interest in the house and absence of notice of an enquiry in 1998. On the approach followed in *Khwashaba* the declaration would be invalid. On the approach taken in *Hlongwane*, the registration was regular and unimpeachable. The court upheld the declaration of ownership to H and R.

[31] 2004 (2) SA 544 (C).

[32] (27632/14) [2016] ZAGPJHC 70 (29 February 2016).

[33] (20175/2010, 14628/2012) [2012] ZAGPJHC 275 (26 October 2012).

There are examples of astonishing ineptitude by officials. Is it merely slackness, or is a suspicion of corruption, so rife in public administration, a more likely explanation? What is graphically illustrated by both these following examples is the ease with which the administrative machinery can be subverted to deprive deserving people of their rights.

In *Kuzwayo v Representative of the Executor in the Estate of the Late Masilela,* the matter ended up in the Supreme Court of Appeal.[34] In 1985 Mrs Kuzwayo became the permit holder. She surrendered the permit in 1987 for financial reasons. The Authority issued the permit to Mr Masilela who built a house on the site. He and his family were occupants for 22 years. In 2004, without any enquiry, a declaration was made that Mrs Kuzwayo was the owner. The Masilela family first learnt of this from municipal accounts in Mrs Kuzwayo's name. No explanation by Mrs Kuzwayo of how, after so many years, the declaration could have been made. The court cancelled the registration of the house in Mrs Kuzwayo's name. Lewis JA remarked that this case revealed 'a sad tale of bureaucratic bungling and an opportunistic attempt to take advantage of it'.[35] The Supreme Court of Appeal inferred that the official who issued the declaration had merely glanced at the file and picked up Mrs Kuzwayo's initial allocation – a generous interpretation of the events.[36]

In *Smith v Mokgedi*,[37] the permit holder, E, by agreement leased a house to S in 1969. Neither E nor his sister, M, and nephew, both of whom he had listed on the permit as his dependents, lived on the property. Instead, S and her family lived there. An enquiry in 1997 in terms of the Conversion Act considered two competing claims lodged by S and M. The Authority found that S had an indefinite lease over the property. M lodged an appeal against this decision, which she later withdrew. Then suddenly in 2002, M sought the eviction of the S family, based on the house having been registered in her name in 2000. The court ordered the cancellation of the title deed in M's name. Of no little importance is the unanswered question how such an improper registration could occur. Was it the result of a 'clerical or administrative error', as the court held,[38] or worse?

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34 [2011] 2 All SA 599 (SCA).

35 *Kuzwayo* (note 34 above) para [1].

36 *Kuzwayo* (note 34 above) para 1.

37 (2012) ZAGPJHC 275.

38 *Smith* (note 17 above) para 56.

VI WHAT SHOULD BE DONE?

Ownership of property is too important to be regulated solely by an opaque administrative process, especially in circumstances where the vast majority of the persons who are affected are poor, uninformed and without access to legal advice. The opportunity for wrongdoing is too great. The discretion to select who, in effect, should fairly get a declaration of ownership is, true enough, subject to the check of an appeal, but this, in practice, is plainly inadequate. The risk of interested persons not being notified, or being ill-informed about their rights and prospects, and being prejudiced by overly trusting assumptions of kinship solidarity is too great. The examples cited illustrate these conclusions. People are being rendered homeless because of these social dynamics.

As in the cases of *Jafta* and *Gundwana* and a spate of decisions that followed them, social justice is properly a realm in which the courts ought to be proactive, premised on the imperative to positively promote and secure the fulfilment of our constitutional value choices. In the absence of legislative reform, judicial supervision of declarations of ownership in terms of the Conversion Act could meet this need. Vulnerable occupiers could thereby be protected from exploitation by their kinfolk.

Whether the idea of a 'family house' achieves the status of legal precept or not is itself unimportant. What is important is to achieve social justice – whether by conventional legal principles or by an innovation.

Judicial oversight in a public hearing similar to that contemplated in *Jafta* is recommended. There could be a peremptory procedure, justified by reference to section 26 of the Constitution. Before a declaration of 'new' ownership is issued, the Authority must submit the proposed declaration to a court for scrutiny. This could occur by way of an application for approval. In support of such application a full account of the enquiry must be furnished. The court would examine all the relevant factors, including the question of whether interested parties have had effective notice and that whenever they have given consent to the declaration such consent was adequately informed so that the full implications have been appreciated. By such means, as in *Jafta* and in *Gundwana*, administrative failures can be prevented, full disclosure and informed consent can be guaranteed, and social justice can be achieved.

COURT-ENCOURAGED MEDIATION: CIRCUMSTANCES WHERE IT IS APPROPRIATE AND THOSE WHERE IT IS NOT – HOW THE COMPANIES TRIBUNAL CAN HELP

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I INTRODUCTION

Courts around the world have been encouraging the use of alternative dispute resolution (ADR) among litigants in order to provide quicker, customised solutions to parties to a dispute without damaging the relationship between them through an adversarial process. South Africa has, in general, been lagging behind in this area, but the courts and the legal profession are beginning to take the first steps in the area of commercial law to promote mediation as a valued part of the legal system to free up judges for questions of law. This follows the incorporation of elements of ADR in other areas of law, such as in labour disputes and the processes followed at the Commission for Conciliation, Mediation and Arbitration.

There is a dearth of case law on commercial mediation in South Africa. Therefore, it is necessary to turn to foreign jurisdictions for guidance as to how mediation may be used in the commercial context. In that regard we look to English law. This article examines English case law to understand the English courts' approach to mediation before considering the position in South Africa, with particular focus on the *MB v NB* decision of the South Gauteng High Court, Johannesburg and the introduction of rule 41A to the Uniform Rules of Court. This rule sets the stage for a wider use of mediation as an alternative to litigation in South Africa.

The article then goes on to examine the Companies Tribunal, which was established by the Companies Act 71 of 2008, and the framework it creates for ADR for disputes involving aspects of the Companies Act and how the Companies Tribunal can operate in conjunction with, and in support of, court-encouraged mediation in South Africa.

II WHAT IS ALTERNATIVE DISPUTE RESOLUTION?

Alternative dispute resolution (ADR) is an umbrella term for different suitably structured processes for dispute resolution, ones that are either binding or non-binding on the parties involved, which depend on 'the intervention of a third party to assist in the resolution of a dispute'.[1] ADR can take different forms, which allows for flexibility to adapt depending on the parties involved and the kind of dispute at hand. For example, a dispute involving specialised technical or scientific knowledge could be brought before an industry expert for determination rather than a commercial mediator.

The rise in ADR as an alternate strategy for dealing with disputes between parties is due in part to the disadvantages of settling disputes through litigation. For example, the litigation process often involves lengthy and expensive delays, resulting in a long wait before the final outcome is known. Litigation is also uncertain, particularly where there are complicated factual or legal issues or where there is a risk that the trial process will unearth surprises for the litigants.[2] In South African courts, litigation is an adversarial process which may also impact negatively on the personal and professional relationships between the litigants. The consequences of this in a commercial context can be far-reaching, as there is a risk that long-standing and mutually beneficial business relationships, whether between companies or among individuals, can be destroyed.

One of the major advantages of ADR, when compared to adjudication through the courts, is that it allows the parties to agree on how they wish to resolve their dispute, by allowing them a higher level of control over the process and the outcome. It also allows the parties the freedom to make use of creative problem-solving in a way that a trial court, which is bound by pleadings and the rules of court, cannot.[3] This can also be a contributing factor to preserving a working relationship between the parties, along with the removal of the adversarial aspect of litigation discussed above.

III WHAT IS MEDIATION?

Mediation may be defined as 'a flexible and confidential process facilitated by a neutral third party' who provides 'active assistance' to the parties in

[1] J Brand, F Steadman & C Todd *Commercial Mediation: A User's Guide to Court-Referred and Voluntary Mediation in South Africa* 2 ed (2016) 15.

[2] Brand, Steadman & Todd (note 1 above) 14.

[3] Brand, Steadman & Todd (note 1 above) 14.

their attempts to resolve their dispute.[4] The third party, usually a trained mediator, aims to assist the parties in resolving some or all of the issues in dispute between them to reach a negotiated settlement or narrow the issues in dispute to a smaller list of crisp questions which can then be decided by a court.

Mediation is a solution to many problems which are frequently experienced by litigators. First, it allows the parties to take control of the process completely, including the timeline and the costs. In a mediation, the parties 'remain in control of the process of resolving their dispute' and may even have the opportunity to agree on a 'mediator they are comfortable with' rather than being allocated a judge to hear the matter.[5]

Second, it allows the parties to find creative solutions to resolve a dispute, which are not always available in a traditional court setting, such as an apology or an explanation,[6] which can go a long way in preserving business or family relationships between the parties or promoting the ideals of restorative justice contained in the Constitution.[7] This allows the parties a feeling of 'self-determination' in being able to choose their own resolution, rather than having a judge impose a solution on them.[8]

Mediation can protect existing relationships between parties to a dispute by allowing both sides to keep their dignity through thoughtful and appropriate solutions or by removing the adversarial nature of litigation proceedings from the dispute completely. This is particularly important in situations where the parties will have to work together or cooperate in the future, such as in business relationships or family situations. In *MB v NB*,[9] Brassey AJ observed that a solution should preferably be found through a 'consensus-seeking process' such as ADR instead of 'adversarial proceedings' in which each party's stance on the dispute can create 'every appearance of callousness and cruelty'.[10]

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[4] Brand, Steadman & Todd (note 1 above) 19.

[5] BC van der Berg 'Court-annexed mediation: Should it be embraced by the legal profession?' (2015) http://www.derebus.org.za/court-annexed-mediation-should-it-be-embraced-by-the-legal-profession/ (accessed 24 September 2019).

[6] It should be noted that the courts are increasingly making use of alternative remedies such as apologies in appropriate cases, see for example the judgment of Sachs J in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 105; *Le Roux and Others v Dey* 2011 (3) SA 274 (CC).

[7] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 (11 May 2004) para 15.

[8] Van der Berg (note 5 above).

[9] *MB v NB* 2010 (3) SA 220 (GSJ).

[10] *MB* (note 9 above) para 57.

Mediation can also help to narrow down the issues between the parties. This is at least partly due to the informal setting and procedure of a mediation compared to litigation, which allows parties to communicate their concerns, interests and ideas off the record without the added stresses of adversarial questioning or the need to follow strict court procedures such as the law of evidence.[11] For example, in a divorce matter, it would be preferable if the parties were to begin by referring the matter to mediation and then, once most of the outstanding issues in dispute have been settled, proceed to a court for adjudication on any remaining issues.[12]

Another example can be found in the area of labour law, where the conciliation, mediation and arbitration components of the procedures followed at the Commission for Conciliation, Mediation and Arbitration (CCMA)[13] allow for the parties to discuss, and attempt to resolve, their disagreements in a less formal context and with the assistance of an independent commissioner before embarking on litigation. It should, however, be noted that the CCMA procedure creates a structured environment with its own set of rules, whereas commercial mediation is generally structured by the mediator or the parties themselves as they see fit.

Mediation encourages parties to look to the future and to try and repair relationships.[14] It stands to reason that a constructive, forward-thinking agreement reached in a participant-controlled process will be more likely to succeed in the long run. Indeed, it has been suggested that mediated settlements have a higher rate of compliance than court orders because a settlement negotiated during a mediation will often address 'the underlying issues' and gives the parties the 'sense that they have arrived at a fair outcome through a process that is conducive to the building, rather than the destruction, of relationships'.[15]

There are, however, situations where mediation may not be appropriate, such as where a litigant has an interest in obtaining a ruling that would set a precedent, for example, where a company seeks the court's views on a question fundamental to its business activities in order to obtain valuable legal certainty, or where interdictory relief is essential to protect one or

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[11] Van der Berg (note 5 above).

[12] *MB* (note 9 above) para 55.

[13] See ss 135 and 136 of the Labour Relations Act 66 of 1995.

[14] Brand, Steadman & Todd (note 1 above) 27.

[15] Barney Jordaan 'The potential of court-based mediation' (2012) http://www.derebus.org.za/potential-court-based-mediation/ (accessed 14 September 2020).

both of the parties.[16] It may also be that mediation cannot be utilised where the parties are so entrenched in their positions and their attitude is so uncompromising that 'nothing short of the legal equivalent of warfare, at any cost, will satisfy their desire for victory'.[17]

IV COURT-ENCOURAGED MEDIATION IN ENGLAND

The absence of a substantial body of case law in South Africa concerning the topic of mediation means that we must look to other jurisdictions for guidance on how best to make use of mediation where that is warranted. Engaging in a detailed comparative study of what pertains in a number of other jurisdictions is beyond the scope of this article. If only because of similarities between our legal systems as a result of historical ties, we have turned to the position in England for that guidance.

The English courts have vocally and repeatedly encouraged the use of ADR in general and mediation in particular. For example, in *Hurst v Leeming,*[18] Lightman J observed that the mediation process can often lead to 'a more sensible and more conciliatory attitude' between the parties, as it often leads them to recognise the strengths and weaknesses of each party's position.[19]

Egan v Motor Services (Bath),[20] a matter in which the claim was worth about £6 000 but in which the combined litigation bill amounted to approximately £100 000, is a perfect illustration of how valuable mediation may be. Ward LJ, aptly describing the parties as 'completely cuckoo',[21] commented that mediation can 'bring an air of reality to negotiations' and that an independent third party can play an important role in demonstrating to both parties 'the sheer commercial folly' involved in proceeding with litigation over a relatively small claim where legal costs can quickly accumulate to exceed the value of the claim.[22] The Lord Justice also observed that, far from being a sign of weakness, mediation is the 'hallmark of common sense' as it is 'a perfectly proper adjunct to litigation'.[23]

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16 *Halsey* (note 7 above) para 17.
17 Jordaan (note 15 above).
18 *Hurst v Leeming* [2003] 1 Lloyd's Rep 379.
19 *Hurst* (note 18 above) 381.
20 *Egan v Motor Services (Bath)* [2007] EWCA Civ 1002.
21 *Egan* (note 20 above) para 53.
22 *Egan* (note 20 above) para 53.
23 *Egan* (note 20 above) para 53.

Lord Woolf, at the time the Lord Chief Justice of England and Wales, stated in *Cowl & Ors v Plymouth City Council*:

> *Without the need for the vast costs which must have been incurred in this case … the parties should have been able to come to a sensible conclusion as to how to dispose [of] the issues which divided them. If they could not do this without help, then an independent mediator should have been recruited to assist. That would have been a far cheaper course to adopt. Today sufficient should be known about ADR to make the failure to adopt it, in particular when public money is involved, indefensible.*[24]

Dyson LJ in *Halsey v Milton Keynes General NHS Trust*[25] made the court's role in encouraging mediation even clearer by observing that:

> *All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR. But we reiterate that the court's role is to encourage, not to compel. The form of encouragement may be robust.*[26]

Halsey is a particularly noteworthy judgment, as it also sets out the various factors that should be considered when deciding whether a costs order should be granted against a party who unreasonably refuses to participate in mediation, even one who is successful in their case. These include the nature of the dispute, the merits of the case, whether previous attempts have been made to settle the dispute, the costs of mediation in relation to the quantum, the delay mediation would cause to the court process, and the chance of a mediation being successful. The factors identified by the court in *Halsey* provide useful guidance to South African courts on the question of costs orders in commercial matters where a party has unreasonably refused to mediate.

The English Civil Procedure Rules (CPR) have also incorporated procedural mechanisms for judges to promote ADR. The CPR allow for judges to take an active role in managing cases that come before them. This 'active case management' by judges is defined in rule 1.4(2)(e) to include 'encouraging the parties to use an alternative dispute resolution procedure' where the court considers it appropriate to do so while 'facilitating the use of such procedure'.[27]

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[24] *Cowl & Ors v Plymouth City Council* [2001] EWCA Civ 1935 para 25.

[25] *Halsey* (note 7 above).

[26] *Halsey* (note 7 above) para 11.

[27] CPR – Rules and Directions http://www.justice.gov.uk/courts/procedure-rules/civil/rules (accessed 28 October 2019).

V COURT-ENCOURAGED MEDIATION IN SOUTH AFRICA

Apart from bodies such as the CCMA that rely on formal statutory processes incorporating ADR, the South African courts appear to have been relatively slow to pick up on this international judicial trend in favour of ADR. While mediation has taken hold in certain areas such as labour law and family law, it has been particularly 'slow to gain currency' in the context of commercial disputes.[28] This is unfortunate, as our courts are undoubtedly overburdened with cases and the litigation process is often subject to lengthy delays. However, the attitude towards ADR among legal practitioners and the judiciary is shifting and the rules of court and judicial practice are adapting to reflect this.

One trailblazer in this area is the case of *MB*, decided in 2010 in the then South Gauteng High Court, Johannesburg, where an acrimonious divorce was brought to the courts for adjudication on various questions such as maintenance and support for a minor child from a previous relationship. Brassey AJ went to some lengths in his judgment to explain his view that the matter should have been resolved by mediation so as to prevent the unnecessary escalation of costs, described as 'a tragedy', which resulted from the matter proceeding via litigation.[29] He went on to observe that each party's attorney clearly failed to advise their clients to make use of mediation and, in doing so, 'fail[ed] properly to serve the interests of their clients'.[30] Brassey AJ went on to limit the fees that the attorneys could recover from each of their clients.[31]

It is worth noting that, despite the existence of decisions like Brassey AJ's, which threaten consequences for legal practitioners if they do not advise their clients of the option of ADR, commercial mediation does not appear to have gained much traction. There continues to be very little case law on the topic of commercial mediation. Likewise, it seems that practitioners have been waiting for mediation to receive more formal recognition from the judiciary and regulation in terms of the rules of court before following suit.

However, recently a significant change took place: ADR was formally incorporated into the litigation process. In 2018, the Rules Board for Courts of Law (the Rules Board) published a proposed amendment to the Uniform Rules of Court to introduce a new rule, rule 41A, which came

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28 Brand, Steadman & Todd (note 1 above) 11.

29 *MB* (note 9 above) para 48.

30 *MB* (note 9 above) para 59.

31 *MB* (note 9 above) para 60.

into force on 9 March 2020.[32] This rule obliges parties to indicate when initiating or defending legal proceedings whether they are in favour of, or opposed to, referring the matter for mediation. It also provides judges with the option to direct parties to consider referring a dispute to mediation. The new rule also contains a framework for conducting mediation in the context of the litigation process, including provisions for maintaining the confidentiality of information discussed at mediation. It also makes provision for mechanisms for certain issues or aspects of a dispute to be resolved at mediation and outstanding issues to be referred to a judge for trial and adjudication.

Rule 41A is likely to go a long way in encouraging the use of ADR to resolve disputes in litigious matters. When read together with the judgment in *MB*, which encourages legal practitioners to consider ADR options carefully when advising their clients, rule 41A should have a positive impact by lessening the burden on the court rolls and promoting access to justice for litigants through ADR.

VI THE ROLE OF THE COMPANIES TRIBUNAL

The arrival of the Companies Act 71 of 2008 brought about many changes in South African company law and this area of law is still undergoing further development through the courts. One of the innovations introduced by the Companies Act is the Companies Tribunal (the Tribunal), which was established to adjudicate applications made to it in terms of the Companies Act and to assist in the voluntary resolution of certain kinds of disputes related to the Companies Act.

The Companies Act provides in section 166 that a person who would be entitled to file a complaint or apply for relief in terms of any provision of the Act can choose to refer the matter to be resolved by mediation, conciliation or arbitration at the Tribunal rather than launching proceedings in a civil court.

The broad scope of provisions contained in the Companies Act means that the Tribunal may have a role to play in a variety of company law-related disputes, including, but not limited to, shareholder disputes, pre-incorporation contracts, corporate governance, directors' duties, corporate takeovers and mergers, company shares and securities, and business rescue.

The Tribunal covers costs like the hiring of a venue and the mediator's fee. This helps to make arbitration at the Tribunal a very affordable option for commercial disputes relating to the Companies Act. Section 167(1)

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[32] Government Notice 107 *GG* 43000 of 7 February 2020 at 32.

provides further that if the parties have resolved their dispute in terms of section 166 using ADR, the Tribunal can 'record the resolution of that dispute in the form of an order' and, if both parties consent to the order, the Tribunal can 'submit it to a court to be confirmed as a consent order'.[33] This means that the solution agreed to by the parties can be made into an enforceable order of court.

Using the Tribunal is also a much swifter way to resolve disputes, which can be extremely advantageous in a commercial context. Typically, ADR matters before the Tribunal are resolved within approximately 25 working days. Conversely, it can take three to four years for a matter to reach trial in the civil courts.[34] The CCMA, as discussed briefly above, is another example of how ADR processes, even structured ones, can be a useful tool in promoting the efficient resolution of disputes, both in terms of time and cost.

While the courts and the judiciary are starting the process of encouraging parties to make use of mediation and other forms of ADR to resolve disputes rather than litigation in an effort to save costs and to lessen the burden on the courts, the Tribunal is uniquely placed to assist the public with the resolution of commercial and company law-related disputes. Mediation at the Tribunal provides an opportunity for parties to find a creative, tailor-made solution without the delays and expenses involved in litigation.

VII CONCLUSION

The use of ADR has been on the rise around the world and has found a role alongside more traditional litigation procedures, and as separate, party-controlled processes. The disadvantages of litigation, such as inordinate delays, uncertainty and the effects of the adversarial process on the relationships between litigants, have thrown into sharp focus the comparative advantages of mediation and other forms of ADR for modern legal practitioners and litigants alike. Mediation allows the parties to control the process, to make use of creative problem-solving, and to preserve business or family relationships by working together, with an independent mediator, to find a solution that is acceptable to both sides. It also has a useful role as a complement to litigation, where it can be used to

[33] Section 167 of the Companies Act.

[34] The Companies Tribunal 'Frequently Asked Questions' https://www.companiestribunal.org.za/faq/ (accessed 24 October 2019).

narrow the issues in dispute between the parties in a way that streamlines any subsequent court process.

While commercial mediation in the South African context is still developing, we can draw some guidance from the position in English law. English cases such as *Hurst*, *Egan*, *Cowl* and *Halsey* acknowledge the advantages of ADR processes such as mediation and take the view that the courts should robustly encourage the use of ADR. *Halsey* even goes so far as to provide guidance on the question of costs orders against parties who unreasonably refuse to mediate. There are also rules in place in the CPR which allow for judges, in the context of case management, to encourage the parties to make use of ADR in appropriate cases and to facilitate such ADR. These examples, both as to the role of the courts and legal practitioners in promoting ADR and as to the potential sanctions that can be applied for refusing to consider ADR, will be useful guidance in the development of commercial mediation and other forms of ADR in South African courts and the legal fraternity in general.

Although ADR has played a successful role in more formal processes facilitated by bodies such as the CCMA, references to smaller-scale and party-driven mediation are fairly sparse in South African case law. It is interesting to note that despite Brassey AJ's robustness in the early *MB* example, entailing as it did even the reduction of practitioners costs on both sides, the landscape of mediation has generally evolved slowly in the last decade.

However, the introduction of rule 41A of the Uniform Rules of Court on 9 March 2020 is a sure sign that mediation as a complementary process to litigation is gaining traction in South Africa. It will be interesting to see how legal practitioners adapt to it. It is hoped that, as the court in *MB* did even before the advent of rule 41A, courts will play an active role in robustly causing parties seriously to consider mediation as an alternative or, where appropriate, supplement to litigation. It is also to be hoped that, used optimally, the Tribunal ADR process under the Companies Act and the ADR process introduced by rule 41A will jointly promote access to justice for litigants through lessening the congestion of rolls in South African courts. These processes will also help to free up time for judges to develop the law.

Lastly, aside from the new procedures in rule 41A, which function alongside the traditional court process, parties have the option of coordinating and conducting their own mediation without first preparing court papers, which improves access to justice by facilitating the provision of alternate and more efficient forms of dispute resolution.

Oil, Gas and Mining Law in Africa
by Thiery Lauriol & Emilie Raynaud. Juta 2018
507 pages. Price: R810 (soft cover)

Oil, Gas and Mining Law in Africa, authored by Dr Thiery Lauriol and Emilie Raynaud, is a bold attempt at unpacking the nuances of the regulation of oil, gas and mining activities in Africa. The authors are attorneys at the Paris Bar and academics at the Paris-II Pantheon Assas. Dr Lauriol is an attorney specialising in this energy and mining field and holds a Doctor of Philosophy degree in natural resources contracts. He has over 30-years of experience and has dealt with clients in Africa. Although there is not much information about the expertise of Ms Emilie Raynaud in the energy and mining field, it seems that collectively the authors are ideally positioned to tackle the task of publishing this book.

The issues that the book deals with fall squarely within the ambit of international economic law, in particular the sub-area of international law on foreign investments.

In terms of structure, the book comprises three parts and 24 chapters.

The title of the book draws immediate attention. It is ambitious in that taken at face value, it appears to discuss the oil, gas and mining of all African states. In order to determine if the book meets this expectation, it is appropriate to briefly look at its contents.

As Professor Yves Nouvel states in the foreword, oil, gas and mining operations cover a vast array of issues, commencing with the existence of a state's sovereign right to regulate mining and natural resource activities within its territory, through to the protection of mining rights. Understanding the legal intricacies of this sector entails unpacking the three layers represented by each of the three parts of this book. Hence Nouvel agreeably says that the book drills down each layer to get to the bottom of all the issues.

The book puts into focus how African states grapple with the regulatory challenges arising from the need to maximise the returns from their oil, gas and mining sectors. The notion of the natural resources curse is a reality in Africa. As the book shows in Part I, Africa is endowed with extensive natural resources, some of which are found nowhere else in the world. But despite this natural wealth, the majority of African states are languishing in poverty and are unable to help themselves, socio-economically speaking. Without external funding, many African governments cannot fund their operations or render basic services to their people. Could it be that part of the reason for this curse is the poor regulation of the exploitation of their

natural resources? Maybe the book will shed some light in this regard, as one expects it to analyse how African states regulate the exploitation of natural resources. In my view, the book draws the reader near and invites them to make a judgment in this regard.

A theme that runs through the book is that of the protection of the rights of private operators in the oil, gas and mining sector. Two stages are pivotal in this regard, being the contracting and operational stages of exploitation activities. At the contracting stage, an operator will typically seek to protect itself as much as possible. This is often done by means of contractual provisions such as those that seek to stabilise the domestic laws (stabilisation clauses); and/or select supranational laws instead of those of the host state (internationalisation clauses); and/or refer investor-state disputes to international arbitration or to the courts of a foreign state. Capital-exporting states also lend a hand to their nationals who intend to invest abroad by entering into bilateral investment treaties with developing, capital-importing states. These treaties have the underlying aim of providing protection for investors, including those that venture into oil, gas and mining in Africa. On the other hand, host states also seek to protect and advance their interests throughout their dealings with investors. The result is an ongoing tussle of interests between the two parties.

It is a fact that mining operators sue host states when circumstances permit them to do so.[1] By way of example, from 1995 to date, operators in the mining and quarry sectors commenced 81 international arbitration cases against host states.[2] These cases are significant in terms of the amount of damages claimed, as well as those awarded. For example, in *Occidental Petroleum v Ecuador* (ICSID Case No. ARB/06/11 Award of 5 October 2012), the tribunal awarded approximately USD1,77 billion (para 86). Closer to home, in the long-running case of *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2018] SGCA 81 (Singapore), Lesotho won the last round of the case in Singapore, but the case is ongoing. In arbitration, under the International Centre for the Settlement of Investment Disputes (ICSID), 24 per cent of all cases opened from 1966 to date are from the

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1 For grounds that investors rely on when suing host states in international arbitration see https://investmentpolicy.unctad.org/investment-dispute-settlement (accessed 18 August 2020).

2 https://investmentpolicy.unctad.org/investment-dispute-settlement (accessed 18 August 2020).

oil, gas and mining sector.[3] ICSID is the largest investor-state arbitration institution by number of known cases.[4]

The contents of *Oil, Gas and Mining Law in Africa* are as follows.

In Part I, the book provides valuable information on the state of natural resources in Africa, the problems that African states face with regard to the exploitation of natural resources, state policies in this regard, key stakeholders in natural resource exploitation activities, and the various resource exploitation activities. It then moves on to discuss and acknowledge a cardinal issue: that under international law, states own and have the sovereign right to regulate the natural resources within their territories. With this being said, the reader can be forgiven for asking the question: if this is the case, and African states have such vast wealth, then why is there so much poverty all over the continent? Are they wrongly regulating and managing their resources? Chapters 5 to 6 discuss how the ownership of natural resources is regulated and explain the legal and contractual framework that is used in the exploitation of natural resources. What is clear from these chapters is that it is entirely up to a state to regulate its natural resource exploitation in such a manner that it maximises its gains. Given the vastness of the continent and the lack of financial and human resources in most African states, it is noteworthy that West African states have taken the lead in harmonising the regulation of the exploitation of their natural resources. The book provides examples of such harmonisation in the West African Economic and Monetary Union (WAEMU) and Economic Community of West African States (ECOWAS). These are commendable initiatives as having a common regulatory framework not only makes it easy for investors to analyse the regulatory environment in the states but also allows the participating states to save on the cost of regulating their natural resources by pooling their resources.

In Part II, the book commences Chapter 8 with an informative discussion of the concept of mining rights as practised in various jurisdictions. Chapter 9 discusses the classification of mining rights, the legal nature of mining rights, and the legal consequences of mining rights on third parties. Thereafter the book discusses the different ways in which

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[3] ICSID *Caseload Statistics* 2020–2 at 12 https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.pdf (accessed 18 August 2020). As of 30 June 2020 the total number of ICSID cases was 728.

[4] As of 18 August 2020 (the CSID administered 630 out of 1023 known investor-state cases). See https://investmentpolicy.unctad.org/investment-dispute-settlement (accessed 18 August 2020).

mining rights are granted. This is followed by a discussion in Chapter 10 of the various forms of contracts that are used in the exploitation of natural resources. This section provides a useful history of these contracts and moves on to discuss current practice. Chapter 11 discusses the engagement and subsequent relationships between exploitation operators, both private and state-owned. Chapter 12 discusses mining rights over non-extracted resources. It covers marketing, evacuation, processing, and the use of non-extracted resources in the production process. Chapter 13 discusses mining rights over extracted resources. This covers the marketing, evacuation, processing and use of extracted products. Chapter 14 deals with the important subject of the taxation of mining and petroleum resources. It is important because taxation is a crucial part of a state's revenue on one hand, while on the other hand tax incentives are also beneficial to exploitation operators. Chapter 15 discusses the financing of exploitation activities. The discussion includes funding organisations, funding techniques, and investment guarantee schemes. Finally, Chapter 16 deals with the participation of host states in exploitation activities. This aspect is key, as the participation of a host state will ultimately determine the value that the host state may derive from its natural resources.

Part III commences in Chapter 17 with the modalities of performance of exploitation operations. This covers the preparation, performance and amendment of work programmes. Chapter 18 discusses surveillance rules that may be applied to an exploitation activity. These are mainly aimed at ensuring adherence by an exploitation operator to its obligations towards the host state and other operators. Projects for the exploitation of natural resources are exposed to natural, financial, economic and political risks among others. Thus, in Chapter 19, the book deals with various measures by which these risks can be mitigated. Chapter 20 discusses contractual provisions that are not unique to the natural resources sector, which are intended to prevent litigation. These are force majeure and change of circumstances clauses. The next section of this chapter deals with contractual provisions that are drafted in anticipation of litigation. These are change of law of clauses, clauses that designate a single applicable law, those that designate multiple laws, and arbitration clauses. The last four chapters (21–24) of the book discuss the contribution of an exploitation activity to a host state. The first two discuss the transfer of technology to the host state. These include material resources and human resources. Chapter 23 discusses measures for the stimulation of the host state or local economy. These include national preferences in favour of local equipment suppliers, personnel and local service providers. Finally, this section deals with the injection of capital into the local economy. Chapter 24 discusses measures for the enrichment of the host state. These include measures

that may reinforce the local economy in terms of human and material resources, the development of non-extractive sectors through the use of infrastructure and agriculture, as well as the development of the health and education sectors of a host state.

Having outlined the scope of the book, the question is: does the book discuss the oil, gas and mining of all African states with regard to each aspect under discussion? The straight answer is that the book does not. It does not tell the reader what the position in every African state is, with regard to any one aspect it discusses. Instead, it provides common patterns and at times, deviations with regard to the regulation of the oil, gas and mining sectors. To be fair to the authors, it would be too much to expect the book to be an encyclopaedia on oil, gas and mining laws in Africa. Despite the title, that is clearly not what the authors intended to produce.

Ultimately, the issues covered in the book centre on the right of a host state to regulate the exploitation of its natural resources, versus the protection of the rights of an operator. The book is better viewed against this background, so that readers can judge for themselves how different African states regulate their natural resources, with due consideration of the need to attract investment. The book does not deal with the rules that form the basis of the responsibility of a state towards a foreign investor. Therefore, it is better read together with other international economic law texts that discuss the protection of investments by means of contracts, investments treaties, domestic law and customary international law. That way the reader will get a high-level perspective of the issues involved in balancing the rights of investors and host states. Two books come to mind, namely M Sornarajah *The International Law on Foreign Investment* 4th ed (Cambridge University Press Cambridge 2017) and M Sornarajah *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press Cambridge 2015). It will also assist the reader to have background knowledge or to have access to materials on state responsibility, as the rules of state responsibility are one of the determinants of the responsibility of a host state towards a foreign investor. The basic materials in this regard are United Nations (International Law Commission) (2001) 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001'[5] and United Nations (International Law

[5] Adopted on 31 May 2001, 3 August 2001, 6-9 August 2001, UN Doc A/56/10 https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed 19 August 2020).

Commission) (2001) 'Draft Articles on Diplomatic Protection', Report of the International Law Commission Fifty-eighth session.[6]

In the end, the verdict is that *Oil, Gas and Mining Law in Africa* is a valuable resource for lawyers, policymakers, students, and those with an interest in the exploitation of natural resources in Africa. The different regulatory practices that the book identifies are highly informative. The book has an extensive list of statutes, regulations and constitutions of African states. This allows a reader to delve deeper into the oil, gas and mining laws relating to a state of their choice if they so wish. For these reasons, the book is a good investment.

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[6] Adopted on 1 May–9 June and 3 July–11 August 2006, General Assembly Official Records Sixty-first Session Supplement No. 10 UN Doc A/61/10 https://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf (accessed 19 August 2020).

Commercial Law – Fresh Perspectives
by A Govindjee & K Pillay. Third edition.
Pearson Holdings Southern Africa. 2019

535 pages. Price: R570 (soft cover)

There is a plethora of commercial law textbooks available in the South African tertiary education market. This specific textbook is aimed at non-law students and concentrates on the law of contract in general as well as specific, nominate contracts and other important related aspects of commercial law.

Commercial Law – Fresh Perspectives has been written from a practical viewpoint and provides non-law students with an ideal introduction to commercial law. From an aesthetics and layout point of view, the textbook is easy to navigate and the text is well spaced out and reads easily. The margin notes in each chapter provide definitions of key terms where they appear in the book. The textbook feels 'easy' to work with and makes use of diagrams and tables which provide the students with good visualisation of legal concepts. There is a good balance between theory and practical examples for the students. It is trite that non-law students struggle to grasp difficult legal concepts as they have generally never been exposed to these concepts before. This textbook appears to simplify these concepts for the students, thus making it easier for them to grasp.

This new, fully revised version of the previous two editions contains 31 chapters and an extensive bibliography which contains a full list of legislation referred to throughout the book as well as case law citations. The book contains numerous practical examples for the students to complete as well as applicable summaries of case law. The references to relevant cases illustrate the integration of theory and practice in law. Another commendable element of each chapter is the chapter summary which consolidates everything taught in that chapter. Also, at the end of each chapter there is a 'Review your understanding' section which provides students with sufficient practical examples.

The book is broken down into four parts. Part 1 comprises an introduction to Commercial Law and contains background to the South African legal system, the branches of law and the interpretation of statutes. Part 2 deals with the general principles of contracts. It covers the requirements for the conclusion of a valid contract in South African law and discusses breach of contract and available remedies in case of breach. The chapters follow logically and concisely.

Part 3 consists of three chapters dealing with specific types of contracts, being lease agreements, credit agreements and contracts of sale.

The last part, Part 4, contains important aspects of commercial law. These aspects include the Consumer Protection Act 68 of 2008, law of agency, online contracts, insolvency, succession, business enterprises, labour law, intellectual property and insurance, just to name a few. Part 4 covers broader aspects of commercial law and this is laudable, as it makes the book valuable to a wide range of non-law students.

The textbook does not go into significant detail on each topic covered – it is quite superficial in terms of theory – but this is due to the fact that is written specifically for non-law students. It is not essential for non-law students to know the detail of the topics and, therefore, this textbook only covers the fundamental concepts. Worth mentioning is the fact that each chapter contains an opener which starts with the main ideas and skills that students will take away from that chapter. Each topic covered contains suitable theory and appropriate case law. The case law provided is brief so not as to overwhelm the students with unnecessary information. Chapters contain case studies for the students to test what they have learnt as well as 'added value' segments which require the students to go back and try to remember what they have learnt thus far.

In conclusion, the textbook provides non-law students with a thorough understanding of commercial law and all related aspects. The textbook is well written and contains a good balance of theory and practice for students. Overall, the textbook is recommended for non-law students wishing to gain knowledge that is comprehensive enough for their purpose on all areas of commercial law but concise enough so as not to overwhelm them.

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Labour Litigation and Dispute Resolution
by John Grogan. Third edition. Juta. 2019
580 pages. Price: R654.00 (soft cover)

Labour Litigation and Dispute Resolution, authored by John Grogan and initially published in 2010 by Juta, is to be welcomed, given the complexity accompanying labour law litigation and dispute resolution. This third edition is a useful and helpful book for labour practitioners, academics, judges, commissioners, arbitrators and trade union officials. As the author states in the preface, '[m]any procedural snares lie in wait for those using the forums created for resolving labour and employment disputes. This book is designed to serve as a map through the maze'. Litigating labour disputes or employing dispute resolution mechanisms can be - and often is – beset with a host of potential problems that are not to be flippantly disregarded. The mere failure to follow a proper procedure or pursue a *causa* in an inappropriate forum can have far-reaching implications for an employee seeking to press a claim against an employer, or for the latter defending such claim.

This book makes a noteworthy contribution to the extant body of works covering the field of legal practice in South African labour tribunals, as stated by the author (in Chapter 1). In the preface, the author states that the book, '[d]oes not deal with substantive law, which is further discussed in three other works that form a quartet with this book, and to which readers may turn where this is needed'. Rather it emphasises that the key to succeeding in realising the remedies offered by labour law is an understanding (and knowledge) of its practice. The latter cannot be considered in isolation, hence the caveat highlighted by the author (Chapter 1) that, '[s]ave to the extent necessary, issues of substantive law are not dealt with'.

The book serves as a useful guide in offering valuable insight into the manner in which labour disputes are dealt with. It is an indispensable tool in the literary arsenal of any labour practitioner or professional seized with a justiciable or arbitral dispute who seeks to ensure substantive and proper compliance with the relevant procedures.

A noteworthy aspect of the work is the sequential manner in which the author selects to deal with the topics of discussion. Chapter 1 provides the reader with an introduction stating the purpose of the book; sources that will be referenced; a brief commentary on labour litigation before the commencement of the Labour Relations Act 66 of 1995; and a helpful outline succinctly setting out the subject matter of each chapter. The author supports each chapter with old and more recent cases (as at March 2019). The way in which the author deftly discusses such cases – with

reference to labour litigation and dispute resolution – provides insightful knowledge in respect of the subject matter of the work

Although Chapter 2 mainly focuses on disputes arising from the employment relationship, it does not ignore the reality of labour disputes arising from claims in delict, administrative law and other specific disciplines of law. This is a practical affirmation of the interstitial nature of labour law. The processing of labour disputes is then dealt with at some length (Chapter 3). Whilst broad and general guidelines are provided on the enforcement of settlement agreements, it is unfortunate that no detailed discussion is provided (as a guide) regarding the optimal manner in which to conclude a settlement agreement, perhaps with reference to one or two specific examples. The discussion of the various fora in which disputes are litigated or arbitrated is most helpful, as is the explanation of the previous and current jurisdictional status of the Labour Appeal Court and the Supreme Court of Appeal.

The choice of the forum in which to pursue a particular dispute offers insight that can only be helpful since this is an area of practice that can vex many a practitioner. Moreover, the discussion pertaining to agreements to arbitrate rather than adjudicate, as well as collateral issues, serves to enhance the valuable contribution the book offers (Chapter 5).

Conciliation and statutory arbitration are probably the two most significant aspects of dispute resolution that take place in either the Commission for Conciliation, Mediation and Arbitration (CCMA) or a bargaining council. The author addresses both these (Chapters 6 and 7 respectively) with in-depth analysis and explanation. For example, the significance of *res judicata* and the doctrine of *functus officio* is highlighted with reference to a number of cases. This is reinforced by reference to the number of cases taken on judicial review for lack of proper compliance by CCMA commissioners with their arbitral powers. The book pertinently acknowledges social justice as a phenomenon fulfilled by the CCMA in the labour sector, which promotes the concept of Ubuntu. This is seamlessly included in the discussion on statutory arbitration.

Inclusion of private arbitration and matters pertaining thereto (Chapter 8) is helpful since most practitioners involved with labour litigation will find themselves acting in this sphere. Thereafter, matters pertaining to the Labour Court are dealt with in four separate chapters. Referrals of matters to the Labour Court, which is the most pedestrian (but important) aspect of litigating in the Labour Court, is discussed in Chapter 10. A searching discussion of litigation – with reference to applications – appears in Chapter 11. In this regard, the 17 listed matters (although not an exhaustive *numerus clausus*) that may proceed by way of application (p. 317) will be of incalculable assistance to many users of the textbook.

The discussion of particular applications that may be litigated in the Labour Court (Chapter 12) offers a guide to general practice issues in the Labour Court. Helpful insight is offered into the most ubiquitous of matters in the Labour Court such as condonation, rescission applications and default judgments (Chapter 13).

The review of statutory arbitration awards is presented with a detailed discussion (Chapter 14). Various grounds of judicial review are discussed, particularly review applications in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). With reference to the review of executive powers (p. 425) some differentiation should have been made (albeit in a footnote) between the application of the principle of legality when reviewing executive action, and the application of PAJA when reviewing the decisions of administrators such as CCMA commissioners. Since the book concerns itself with not only labour litigation but also dispute resolution in the broader sense, fruitful insight is also provided regarding the review of private arbitration awards (Chapter 15).

A table of contents (pp 525–550), statutes (pp 551–562) and an index (pp 583–567) all serve as useful reference guides.

A significant attribute of the book is that each chapter sets out a list of topics that will be discussed. Only the essential merits of relevant cases are considered in contextualising important aspects of labour litigation and dispute resolution. In this way, the book successfully serves as an insightful and informative guide not only for fledgling practitioners or academics but also for more seasoned practitioners and academics seeking to gain enhanced and in-depth knowledge in what often presents itself as a 'tangled' area of labour law.

Labour Litigation and Dispute Resolution provides a comprehensive and replete understanding of the innumerable procedural aspects attendant to the practice of law in this discipline. The book is not cumbersome. It reads well and fluidly. The index, table of cases and the sub-headings of each chapter make this book a useful reference guide for practitioners and academics. It is also noteworthy that the book can be easily understood by lawyers and non-lawyers. Unequivocally, this edition achieves its purpose of serving 'as a map through the maze' of labour litigation and dispute resolution.

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Realising the Right to Basic Education: The Role of Courts and Civil Society
by Faranaaz Veriava. Juta. 2019

234 pages. Price: R326.00 (soft cover)

Nelson Mandela once said: 'No country can really develop unless its citizens are educated'. Protection and promotion of the right to basic education are therefore paramount in South Africa's development process, as well as to eradicate our unequal education system due to the legacy of apartheid. The book *Realising the Right to Basic Education* investigates the important roles of the courts and civil society in the development of the right to basic education in South Africa. The right to basic education, entrenched in section 29(1)*(a)* of the Constitution of the Republic of South Africa, 1996, is not subject to the same proviso as the other socio-economic rights guaranteed by the Constitution. The other socio-economic rights provide that their fulfilment is subject to 'progressive realisation' by the state within its 'available resources' (sections 26(2) and 27(2) of the Constitution). In the South African context, basic education is therefore an unqualified socio-economic right (pp. 1 and 3). The unqualified nature of the South African right to basic education may be attributed to the legacy of apartheid and the inferior education system that was implemented for the majority of South Africans during that time (p. 3). This means that the constitutional right to basic education in post-apartheid South Africa places a special duty on the state to ensure the *immediate* realisation of the right. Sadly, the government has not been consistent in its fulfilment of the right (p. 4). Transformative constitutionalism, which is the ultimate goal of the South African Constitution, therefore requires that the government must develop and implement measures to achieve its realisation (pp. 1–2). *Realising the Right to Basic Education* aims to explore the influence and interplay of civil society and the courts in the interpretation of the right to basic education and the implementation of possible remedies so as to identify 'a viable framework for a transformative constitutional narrative' regarding the right to basic education (p. 7).

The book is arranged in seven chapters. Chapter 1 introduces the right to basic education and provides background information on basic education within the context of transformative constitutionalism in South Africa. This chapter also provides an international law perspective on the right to basic education (pp. 2–11).

Chapter 2, titled 'An ailing and failing system of basic education: A review of government responses to the 'crisis' in South Africa's public schools', consists of two parts. The first part of the chapter provides a comprehensive background on the right to education in South Africa and the failing South African school system (pp. 13–16). This part also presents

an 'overview of educational outcomes in public schools' (pp. 16–35). In the second part of the chapter, the author discusses and analyses the legal framework surrounding the public education system and the effectiveness of the government's attempts at addressing transformative constitutionalism and equality in education (pp. 35–48). The author concludes that the government's omission to improve the quality of basic education in previously disadvantaged schools is the main reason for the failure of the South African public school system (pp. 48–49). This problem is further compounded by the government's failure to develop law and policy to give effect to the right to basic education and its neglect in directing resources to disadvantaged schools (p. 49). The author further finds that another factor contributing to the deficiencies of the public school system in South Africa is the government's approach to interpreting the right to basic education as a right that should be '*progressively* realised', instead of *immediately* realised (as provided by the Constitution) (p. 49).

Chapter 3, which is titled 'A 'transformative constitutionalist narrative' for the right to basic education', explores the transformation of the basic education system in South Africa by considering various theoretical approaches or frameworks that could be used to develop a unique framework that may be useful in the South African context. The following frameworks are considered: the school of juris generative politics (pp. 52–55), the doctrine of transformative constitutionalism (pp. 55–75), democratic experimentalism (p. 75), and the legal mobilisation theory (pp. 75–83). According to the author, the government's approach to basic education, as a socio-economic right which is subject to progressive realisation and 'reasonableness review', is flawed. The author then concludes that the government should adopt a more substantive approach regarding the realisation of the right to basic education (p. 83).

Chapter 4, which is titled 'The contribution of the courts to the transformative constitutionalist narrative for the right to basic education', considers various South African judgments on the right to basic education. The chapter provides a comprehensive overview (pp. 87–105) and investigation of the relevant case law. The author then points out various flaws in the courts' substantive approach to the right to basic education and presents some solutions to these inadequacies (pp. 105–117). The chapter finally examines the remedies applied in education jurisprudence through an experimentalist lens (pp. 118–127). The author concludes that the government's accountability regarding the realisation of the right to basic education would be vastly improved if a more experimentalist approach were to be adopted in cases dealing with the right to basic education, for example by implementing a two-phase process which would include a 'liability phase' and a 'remedial phase' (p. 128).

Chapter 5, 'The contribution of civil society to the transformative constitutional narrative', examines the legal mobilisation model implemented in the *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) case (pp. 134–140). The author then compares the legal mobilisation model to the approaches used by other civil rights organisations in litigation (for instance, see *Equal Education v Minister of Basic Education* (*ECB* case no 81/2012) and the Section27 case, *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA)) (pp. 140–150). The chapter then reflects on the impact that these civil organisations have on the reform of the South African basic education system. The author rightly remarks that the majority of the education cases do not follow the original model as implemented in the *TAC* case (pp. 151–159).

Chapter 6, which is titled 'The right to education in the United States, India and Brazil', investigates the right to education in three other jurisdictions – comparing their approaches to that of the South African courts and civil society. The author highlights the approaches implemented in these other states regarding transformative constitutionalism which could be useful in the South African context (pp. 162–163). In addition, the chapter studies the historical background and education jurisprudence of each jurisdiction, including the success of the remedies implemented in the education jurisprudence of these countries (pp. 164–191).

Chapter 7 is titled 'Conclusion: Towards a transformative constitutionalist narrative for the right to basic education'. Based on the conclusions of the previous chapters, the author offers a coherent South African model that may be used for interpreting the right to basic education. Potentially, this model could greatly contribute to our understanding of the constitutional right to basic education and the discourse surrounding the right within the context of the South African Constitution and its transformative goals (pp. 194–204).

Generally, the book, *Realising the Right to Basic Education*, achieves its goal – 'to identify and develop a coherent, progressive approach to interpreting the right to basic education, one that is capable of guiding South Africa towards adequate education provisioning and that serves to transform the quality of basic education in South Africa's historically disadvantaged schools' (p. ix). The book is succinct and simple, but without oversimplifying the challenges faced by the flawed South African education system. It offers the reader a sound framework and analysis of the main questions surrounding the right to basic education while proposing a workable approach in order to achieve the constitutional goal of transformation in

South Africa's basic education milieu. Academics, as well as practitioners, specialising in socio-economic rights litigation or education law, would do well to add this valuable addition to their bookshelves.

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The Law of Arbitration: South African and International Arbitration
by PAA Ramsden. Second edition. Juta. 2018
341 pages. Price: R815 (soft cover)

Advocate Peter Ramsden is an advocate of the High Court of South Africa and a professional engineer who is a member of the South African Institution of Civil Engineering and is on that institution's panel of arbitrators. Advocate Ramsden has advised and consulted to contractors, consultants, municipal and national governments and internal funding agencies, to name a few. Advocate Ramsden has published in local and international journals and is the revision author of the sixth and seventh editions of *McKenzie's Law of Building and Engineering Contracts and Arbitration* (Juta 2009 and 2014) and is the author of *A Guide to Intellectual Property Law* (Juta 2011).

The first edition of the *Law of Arbitration: South African and International Arbitration* by the author was published by Juta shortly after the Constitutional Court endorsed international best practice and held that consensual arbitration is not unconstitutional in the judgment of *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC) delivered on the 20 May 2009.

Following on the success of the first edition, the second edition of the book enunciates the South African common law, legislation and local and international case law applicable to each stage of the arbitration process. In addition, an overview of alternative dispute resolution approaches is provided as a contextual introduction.

The international component of the first edition was largely based on the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law (MAL), which had at that stage been adopted by numerous countries, excluding South Africa. The legislature subsequently adopted the International Arbitration Act 15 of 2017 in December 2017, which has fully incorporated MAL into South African law and has provided afresh for the recognition and enforcement of foreign arbitral awards. This important development clearly indicates that South Africa is a suitable location for international arbitration. The second edition, therefore, incorporates the International Arbitration Act 15 of 2017 and the MAL that it adopts together with current international case law.

This update is vital for law students, legal practitioners, arbitrators and anyone who is involved in this growing area of alternate dispute resolution. The author's practical experience is tangible in the ease with which he explains the process and concepts of arbitration. The author is to be commended for presenting complex concepts in a highly explicable manner.

The book follows a logical sequence and is well signposted with strategically placed subheadings throughout. It is divided into two parts. Part one – consisting of two chapters – places arbitration in the context of alternative dispute resolution approaches. The approaches to resolving disputes and the numerous alternative dispute resolution methods are briefly explored from a contextual perspective. Part two, which consists of eight chapters, is the main part of the book. It addresses the law as it pertains to domestic South African and international commercial arbitration as substantiated with reference to the common law, legislation and case law.

The Arbitration Act 42 of 1965, the Rules for the Conduct of Arbitrations (2018 Edition) of the Association of Arbitrators (Southern Africa), the International Arbitration Act 15 of 2017 together with its Schedules being – the UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Conciliation Rules, and the Convention on The Recognition and Enforcement of Foreign Arbitral awards are incorporated in the book.

Overall, *The Law of Arbitration* is a comprehensive work, which successfully and comprehensively addresses the alternate dispute resolution process known as arbitration in a South African context.

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Transformative Property Law: Festchrift in honour of AJ van der Walt
Edited by Gustav Muller, Jeannie van Wyk, Reghard Brits,
Bradley Virgill Slade, & GJ Pienaar. Juta. 2018
588 pages. Price: R933.00 (soft cover)

Andries Johannes van der Walt was born on 5 March 1956 in Postmasburg. He completed his primary education in Johannesburg and his secondary education at the Potchefstroom Gimnasium. He obtained a B Iur et Art degree in 1977, an Hons BA (Philosophy) (*cum laude*) in 1978, an LLB (*cum laude*) in 1980 and an LLD in 1985, all from Potchefstroom University. In 1986 he obtained an LLM (*cum laude*) from the University of the Witwatersrand. He taught law at the Potchefstroom Law Faculty from 1981 to 1986 and was subsequently appointed as a professor of Private Law at the University of South Africa.

In 2002, Professor Van der Walt became professor of public law at the University of Stellenbosch. During his brilliant career, two exceptional achievements can be highlighted. In 2002 he received an A1 rating[1] as researcher from the National Research Foundation. He was one of only five South African scholars researching in the fields of humanities and social sciences, and the only lawyer, to receive this rating. The rating was repeated in 2008 and 2013. His second outstanding achievement, indicating his international stature, was a Tier 1 South African Research Chair in Property Law (funded by the Department of Science and Technology and hosted by the University of Stellenbosch), which was awarded to him in 2008 for a ten-year period. He supervised more than 25 doctoral candidates and 13 LLM students who went to complete their postgraduate studies at the South African Research Chair in Property Law.

Transformative Property Law: Festchrift in honour of AJ van der Walt, an important volume of work, focuses on five themes that Professor Van der Walt and his students have undertaken for many years, namely: (a) the single system of law and subsidiarity principles; (b) the marginality principle; (c) the development of the common law; (d) constitutional property law; and (e) property theory. Scholarly essays totalling 20 give credence to this incredible body of work. They were authored and co-authored by 33 scholars, while an additional 40 specialists kindly acted as anonymous peer reviewers.

[1] The A1 rating category is awarded to a researcher who is recognised by all the reviewers (nationally and internationally) as an international leading scholar in his field and for the high quality and wide impact (beyond a narrow field of specialisation) of his recent research outputs.

Below I deal only with three of the essays. On my assessment, the three best demonstrate the essence of transformative property law. They also provide a succinct synopsis of this excellent body of work. Singling them out does not detract from the quality and scholarly nature of the remaining 17. Space does not permit that I deal with all 20.

In *Race and Property*,[2] Alexander examines Georgetown University, which owned African slaves – meaning it owned them the same way it owned its chairs and tables. The university, founded in 1789 by Jesuit priest John Carroll, owned slaves from its inception. The Jesuits first received the African slaves as 'gifts' in 1717, and they were made to work on several farms and plantations that the Jesuits owned throughout Maryland.

One critic calculated that the $110 000 that the university received in 1838 for the sale of its slaves is worth roughly $3.3 million in today's terms. Using that purchase as a baseline, at least $50 billion would be owed to the descendants of the 12 000 to 15 000 slaves that were owned by the university's Jesuit priests, this critic argues. The critic suggested that a more genuine step towards atonement would be the establishment of a $1,5 billion endowment for guaranteed admission, regardless of income, together with full scholarships, including housing and monthly stipends, in perpetuity to the descendants of enslaved people who laboured for Georgetown. In an interview with New York Times Magazine, Georgetown academic, Professor Michael Eric Dyson, suggested individual reparations in the form of individual reparations accounts, which would contribute to groups like the United Negro College Fund.

Alexander argues that as a property system, slavery affected not only the slaves themselves, but it also affected and corrupted many other forms of property. That was so because profits from the slave trade enabled slave owners to purchase land and more slaves. Slave owners also worked their way into the corporate system, similarly corrupting property held by large corporate firms. Even after slavery was abolished, Jim Crow 'laws' took hold and expanded the nexus in the tainting of property. This has become so widespread that it is practically impossible to determine whether any single piece of property has or has not been tainted by the legacies of slavery and Jim Crow.

To this apt diagnosis the proposed basic solution, which is still connected to property ownership, is contributions to the various institutions aimed at improving the lives of African Americans. These institutions range from the National Association for the Advancement of Colored People, the United Negro College to the Black Lives Matter movement.

[2] Gregory S. Alexander (chapter contribution).

Even though Alexander examines only Georgetown University and its slave ownership, other institutions also benefitted from the exploitation and sale of warm-bodied human beings. According to Sven Beckert, Katherine Stevens and the Students of the Harvard and Slavery Research Seminar (*Harvard and Slavery: Seeking a Forgotten History*), Harvard University benefitted directly and indirectly from the slave trade and slave ownership. This work tells stories of professors and students who owned slaves and of massive donations to the university by slave owners and wealthy people whose fortunes were closely tied to slave ownership.

In *Property in Law*,[3] Dhliwayo and Dyal-Chand extrapolate an important theoretical framework developed by Professor Van der Walt which explores the social context surrounding the development of property law in post-apartheid South Africa. It considers and agrees with Professor Van der Walt's statement that protection of property rights is a legitimate objective in the legal order, but relative to the primary norms that prescribe how we want to live in society, it ultimately serves a modest role in law. Said differently, once we really understand the great extent to which social context affects decision-making about property rights, we can recognise that, far from being absolute or superior among legal rights, property has, and should have, a more modest status. In the development of his theoretical trajectory, Professor Van der Walt also considered the implications of upholding sharing as a foundational norm in property law, which assumes that property ownership involves not only rights but also social obligations, including the obligation to share property in certain instances.

In *A Supervening Lack of Utility and the Judicial Shift Towards ex post Controls in South African Servitude Law: A Critical Analysis of Pickard v Stein 2015 (1) SA 439 (GJ)*,[4] Freedman demonstrates Professor Van der Walt's critical analysis of servitudes. Professor Van der Walt stated that, in order to protect the economically efficient use of the land and the unitary character of ownership, South Africa has developed a number of legal principles and rules aimed at controlling the creation and continued existence of servitudes. He refers to these principles and rules as anti-fragmentation strategies.

Pickard v Stein provides clear authority for the principle that utility is not only a constitutive requirement of a praedial servitude but also a continuing one in the sense that the servitude would be terminated where utility was no longer present. An important consequence of this judgment is that the principles governing a supervening lack of utility have been

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3 Priviledge Dliwayo & Rashmi Dyal-Chand (chapter contribution).

4 Warren Freedman (chapter contribution).

brought in line with those governing a supervening lack of praediality resulting from the merger of the dominant and servient tenements.

In conclusion, *Transformative Property Law* is the perfect homage to a giant of South African academia who is not only a legend because of his scholarly work, but also because he was a South African who has contributed to an integrated South Africa. The contributions in this book have summarised, in the most articulate fashion, the critical, progressive and pioneering work of Professor Andries van der Walt, which he leaves as a shining and great legacy for all of us.

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